

# TAKING RULES SERIOUSLY: THE RISE OF LAWYER RULES AS SUBSTANTIVE LAW AND THE PUBLIC POLICY EXCEPTION IN CONTRACT LAW

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*Are the Rules of Professional Conduct “law?” In disciplinary proceedings, there is no question that they are, but their impact beyond the disciplinary realm remains a matter of controversy. As the Restatement of the Law Governing Lawyers aptly states: “The legal effect of officially adopted lawyer codes is fundamental and diverse.”<sup>1</sup> Scholars have examined the non-disciplinary impact of the professional rules in a variety of areas, but this Article examines a largely unexplored question: the enforceability of certain agreements (e.g. lawyers splitting fees with non-lawyers) that are prohibited by the professional rules. If lawyers enter into these prohibited agreements, they are subject to discipline, but how, if at all, does the prohibition in the professional rules impact the enforceability of such agreements as a matter of substantive contract law?*

*Courts have increasingly relied on the rules as a source of substantive law and found that such agreements are unenforceable because they violate public policy, but a substantial minority of courts continues to reject the applicability of the professional rules to substantive contract disputes. Moreover, in accepting or rejecting the rules of professional conduct as a source of substantive law, courts almost uniformly engage in little discussion or analysis and instead simply decide in a conclusory manner that the professional rules either do or do not constitute public policy. This Article makes two primary contributions to scholarship. First, it examines the split among the courts considering the substantive impact of agreements made in violation of the professional rules. Second, it urges the courts to take the rules seriously as a source of law and provides the legal and public*

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<sup>1</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000).

*policy justifications for doing so, analysis that has been almost completely absent from the case law to date.*

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## INTRODUCTION

Jack Mancuso hired attorney William Ankerman to represent him in a dispute with his former girlfriend over ownership of a house.<sup>2</sup> During the course of the representation, Ankerman obtained a promissory note from Mancuso secured by a mortgage on that house in clear violation of the Connecticut Rules of Professional Conduct, which bar attorneys from taking a proprietary interest in the subject matter of litigation that the lawyer is conducting for a client.<sup>3</sup> When Ankerman brought suit to enforce the note and mortgage, the court found that he had violated the rules of professional conduct but concluded that the violation should not prevent him from enforcing the note and mortgage against his client.<sup>4</sup> In other words, the Connecticut court was willing to enforce an agreement even though the lawyer had entered into that agreement in clear violation of the professional rules.

This outcome is not an anomaly. The professional rules are the governing law in disciplinary proceedings, but, as the Restatement of the Law Governing Lawyers aptly puts it, their “legal effect” outside of such proceedings is “fundamental and diverse.”<sup>5</sup> Although the majority of courts have found that agreements made in violation of the rules are unenforceable, a distinct minority take the view that compliance with the professional rules is irrelevant outside of the disciplinary context. Moreover, courts generally offer little analysis or explanation whatever they decide and instead simply assert in a conclusory manner that the professional rules either do or do not constitute public policy.

Scholars have examined the non-disciplinary impact of the professional rules in a variety of areas, but this Article examines a largely unexplored question: the enforceability of certain agreements (other than lawyer-client fee agreements) that are prohibited by the professional rules. The professional rules bar lawyers from entering into certain specific kinds of agreements—what I refer to as “prohibited agreements”—even though those agreements would, in general, be lawful if two non-lawyers engaged in the same transactions:

- Rule 1.5(e) prohibits lawyers from splitting fees with other lawyers except under limited circumstances.<sup>6</sup>
- Rule 5.4(a) prohibits lawyers from splitting fees with non-lawyers.<sup>7</sup>

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<sup>2</sup> Ankerman v. Mancuso, 830 A.2d 388, 389 (Conn. App. Ct. 2003).

<sup>3</sup> *Id.*

<sup>4</sup> *Id.* at 393.

<sup>5</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000).

<sup>6</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e) (2011).

<sup>7</sup> *Id.* R. 5.4(a).

- Rule 1.8(a) prohibits lawyers from entering into a business transaction with a client except under limited circumstances.<sup>8</sup>
- Rule 1.8(c) prohibits lawyers from soliciting gifts from clients except under limited circumstances.<sup>9</sup>
- Rule 1.8(g) prohibits lawyers from entering into aggregate settlements unless they comply with strict criteria.<sup>10</sup>
- Rule 1.8(h) prohibits lawyers from prospectively settling a malpractice case except under limited circumstances.<sup>11</sup>
- Rule 1.8(i) prohibits lawyers from acquiring a proprietary interest in a client's cause of action except for a lien to secure the lawyer's fee or a contingent fee.<sup>12</sup>

If lawyers enter into these prohibited agreements, they are, of course, subject to discipline, but this Article addresses a different issue: If a lawyer enters into a prohibited agreement, is the agreement nevertheless enforceable as a matter of substantive contract law? Generally speaking, courts allow parties to “contract as they wish,” but “[s]ometimes . . . a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy.”<sup>13</sup> Do the professional rules constitute public policy such that an agreement made in violation of the rules is unenforceable under this public policy exception?

Scholars have not addressed this issue since the Model Rules of Professional Conduct were first adopted thirty years ago to replace the Model Code of Professional Responsibility.<sup>14</sup> While the Model Rules

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<sup>8</sup> *Id.* R. 1.8(a).

<sup>9</sup> *Id.* R. 1.8(c).

<sup>10</sup> *Id.* R. 1.8(g).

<sup>11</sup> *Id.* R. 1.8(h).

<sup>12</sup> *Id.* R. 1.8(i). The rules prohibit several other specific agreements, see *id.* R. 1.8(d) (prohibiting a lawyer from negotiating an agreement for the media rights to a case), and *id.* R. 1.8(e) (prohibiting a lawyer from providing financial assistance to clients except under limited circumstances), but courts have not had occasion to analyze the enforceability of agreements made in violation of these rules.

<sup>13</sup> RESTATEMENT (SECOND) OF CONTRACTS: UNENFORCEABILITY ON GROUNDS OF PUB. POLICY ch. 8, intro. note (1981).

<sup>14</sup> Although Professor Long examined the enforceability of certain professional rules concerning lawyer-client fee agreements, this Article's focus is different in two ways. First, the professional rules discussed in this Article are different than the ones that Professor Long addressed. Second, Professor Long's focus was on whether courts permit attorneys “at least some type of recovery” (on the contract, in quantum meruit, or for restitution) even if an attorney-client agreement violates the ethics rules. Alex B. Long, *Attorney-Client Fee Agreements that Offend Public Policy*, 61 S.C. L. REV. 287, 301 (2009). Professor Long's fascinating conclusion was that courts “permit[] lawyers to recover for the reasonable value of their services when traditional contract law would prohibit such recovery.” *Id.* at 334. This Article, by contrast, focuses on whether the professional rules constitute public policy such that contracts entered into in violation of the professional rules are in violation of public policy.

were being drafted, Professor Charles Wolfram wrote an influential Article arguing that the professional rules in general should play a greater role in the substantive law, describing them as “a largely unexploited resource.”<sup>15</sup> Professor Wolfram blamed this on the Code’s “very high level of generality in expressing its concepts”<sup>16</sup> and predicted that the new model rules would play a more significant role in the substantive law if the rules were redrafted in a “substantially more specific document.”<sup>17</sup>

This Article assesses Professor Wolfram’s thirty-four-year old prediction concerning the rules’ impact on the substantive law and concludes that he was largely correct. The Model Rules are much more specific than their precursor, and the courts have increasingly relied on them as a source of substantive law in deciding the enforceability of the prohibited agreements. That reliance is far from uniform, however, with a substantial minority of courts continuing to resist the applicability of the professional rules to substantive contract law.

This Article serves two primary purposes. First, it illustrates the split among the courts considering the substantive impact of agreements made in violation of the professional rules. Second, in urging more uniform and widespread use of the rules, it provides the legal and public policy justifications that are almost completely absent from the courts’ consideration of the issue. In short, the lawyer professional rules have now matured into “law,” and it is time for the courts to treat them as such.

Part I of this Article describes the vague legal status of the professional rules. Part II provides the necessary background on the public policy exception to the enforceability of contracts. Part III examines the split of authority among the courts that have considered whether the professional rules constitute public policy for purposes of substantive contract law. Part IV argues that the time has come for the courts to fully embrace the professional rules as a source of substantive contract law and provides the legal and public policy justifications that are missing from the jurisprudence. The first set of justifications derives from the text of the rules themselves. Although the rules used to be merely hortatory, they now resemble statutes in their language and in the process by which they are passed. The second set of justifications stems from contract law. Courts have generally found legislation (broadly defined) and the professional codes and customs of other professionals to be relevant in civil litigation, and there is no reason to treat lawyer codes differently. Third, other policy arguments justify

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<sup>15</sup> Charles Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281, 303 (1979).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 283.

greater use of the rules as substantive law. For example, the rules continue to be underenforced in the disciplinary context and their use in civil litigation can help achieve an acceptable level of attorney compliance.

#### I. THE VAGUE LEGAL STATUS OF THE RULES OF PROFESSIONAL CONDUCT

Are the Rules of Professional Conduct “law?” In disciplinary proceedings, there is no question that they are.<sup>18</sup> Indeed, as the Preamble to the Model Rules makes clear, the very purpose of the professional rules is to articulate prohibited conduct that can subject lawyers to discipline.<sup>19</sup> The impact of the professional rules beyond the disciplinary process, however, remains “a matter of controversy.”<sup>20</sup> The professional rules themselves largely disclaim any relationship to or influence on the substantive law.<sup>21</sup> The courts are emphatically divided with some courts describing the professional rules as having the “force of law”<sup>22</sup> in non-disciplinary matters, while others explicitly reject this

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<sup>18</sup> Geoffrey C. Hazard, *State Supreme Court Regulatory Authority Over the Legal Profession*, 72 NOTRE DAME L. REV. 1177, 1179 (1997) (“The Code and the Model Rules of Professional Conduct were adopted and have the force of law by action of the highest courts of the states.”); Symposium, *Twenty Years of Legal Ethics: Past, Present, and Future*, 20 GEO. J. LEGAL ETHICS 321, 329 (2007) (transcript of panel discussion at the Georgetown Journal of Legal Ethics 2006 Symposium, quoting Stephen Gillers) (“Any rule of legal ethics, a rule in the jurisdiction’s rules of professional conduct, is the law because the state can punish through discipline or civil liability for violation of the norms of the profession. So it’s law if what we mean by law is a state imposed duty whose violation carries a penalty.”).

<sup>19</sup> MODEL RULES OF PROF’L CONDUCT: PREAMBLE & SCOPE ¶ 19 (2011) (“Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000) (“Lawyer codes are promulgated and applied primarily for the purpose of establishing mandatory standards for the assessment of a lawyer’s conduct in the course of a professional discipline proceeding brought against the lawyer.”).

<sup>20</sup> Richard K. Greenstein, *Against Professionalism*, 22 GEO. J. LEGAL ETHICS 327, 348 n.129 (2009); see also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291, 302 (1992) (“As ethics codes assume the form of law, the profession and the courts increasingly treat them as law for some purposes. At least for purposes of professional discipline, they are an important source of authoritative law. Their relevance in contexts other than professional discipline, however, remains uncertain.”); Fred C. Zacharias, *Are Evidence-Related Ethics Provisions “Law”?*, 76 FORDHAM L. REV. 1315, 1315 (2007) (“One issue raised, but not resolved, by the recent Restatement of the Law Governing Lawyers is the extent to which state legal ethics codes are ‘law.’ The reporters for the Restatement refer to the codes as part of the construct of lawyer regulation. But that conceptualization does not answer the question of the extent to which courts should, and do, recognize the codes as having force in litigation.” (internal footnotes omitted)).

<sup>21</sup> MODEL RULES OF PROF’L CONDUCT: PREAMBLE & SCOPE ¶ 20 (2011).

<sup>22</sup> The following decisions explicitly recognize that the professional rules have the force of law or should be treated like statutes: *Cambron v. Canal Ins. Co.*, 269 S.E.2d 426, 430 (Ga. 1980) (asserting that the Georgia Code of Professional Responsibility has the effect of law); *In re Vrdolyak*, 560 N.E.2d 840, 845 (Ill. 1990) (stating that the Illinois Code of Professional

position.<sup>23</sup> Commentators have variously described the professional rules as:

- having “quasi-legal force;”<sup>24</sup>
- a “species of rules of law” with a “peculiar legal status;”<sup>25</sup> and
- “at best . . . a peculiar type of law that courts only sometimes deem effective.”<sup>26</sup>

Perhaps the Restatement of the Law Governing Lawyers best sums up the issue: “The legal effect of officially adopted lawyer codes is fundamental and diverse.”<sup>27</sup>

Scholars have examined the non-disciplinary impact of the professional rules in a variety of areas. Several Articles address the impact of the professional rules on aspects of the substantive criminal law.<sup>28</sup> In the civil area, abundant scholarship focuses on the use of the

Responsibility “operates with the force of law”); *In re Wallace*, 574 So. 2d 348, 350–51 (La. 1991) (affirming that the Louisiana Code of Professional Responsibility has “the force and effect of substantive law”); *Succession of Cloud*, 530 So. 2d 1146, 1150 (La. 1988) (“The standards in the Code of Professional Responsibility which govern the conduct of attorneys have the force and effect of substantive law.”); *Post v. Bregman*, 707 A.2d 806, 816 (Md. 1998) (stating that the Maryland Rules of Professional Conduct have “the force of law”); *Krischbaum v. Dillon*, 567 N.E.2d 1291, 1300 (Ohio 1991) (affirming that the Ohio Code of Professional Responsibility “has the force of law”); *State ex rel. Bryant v. Ellis*, 724 P.2d 811, 812 (Or. 1986) (“Disciplinary rules approved by this court have the status of law in Oregon.”); *O’Quinn v. State Bar of Tex.*, 763 S.W.2d 397, 399 (Tex. 1988) (asserting that the Texas Disciplinary Rules of Professional Responsibility “should be treated like statutes”).

<sup>23</sup> The following decisions explicitly assert that the professional rules do not have the force of law or count as something less than statutes: *Estates Theatres v. Columbia Pictures Indus.*, 345 F. Supp. 93, 95 n.1 (S.D.N.Y. 1972) (“While the Code does not have the force and effect of a statute, it is recognized by bench and bar as setting forth proper standards of professional conduct.”); *Gaylard v. Homemakers of Montgomery, Inc.*, 675 So. 2d 363, 367 (Ala. 1996); *Doan v. Comm’n on Judicial Performance*, 902 P.2d 272, 279 (Cal. 1995); *Pichon v. Benjamin*, 702 P.2d 890, 892 (Idaho Ct. App. 1985); *In re Dineen*, 380 A.2d 603, 604 (Me. 1977); *Niesig v. Team I*, 558 N.E.2d 1030 (N.Y. 1990) (“While unquestionably important, and respected by courts, the [Code of Professional Responsibility] does not have the force of law.”); *In re Weinstock*, 351 N.E.2d 647, 649 (N.Y. 1976); *Commonwealth v. Chmiel*, 738 A.2d 406, 415 (Pa. 1999) (“The rules that govern the ethical obligations of the legal profession (presently, the Rules of Professional Conduct) do not constitute substantive law.”). Some commentators have also described the professional rules in similar terms. Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. Rev. 1389, 1412 (1992) (“[F]ederal and state courts often state that the only instances in which they are bound to treat the [professional] rules as binding precepts are in disciplinary proceedings against lawyers.”); Zacharias, *supra* note 20, at 1333 (“Clearly, courts traditionally have not treated [code] provisions as law in the sense of being binding pronouncements that courts must enforce.”).

<sup>24</sup> Judith A. McMorrow, *Creating Norms of Attorney Conduct in International Tribunals: A Case Study of the ICTY*, 30 B.C. INT’L & COMP. L. REV. 139, 146 n.35 (2007).

<sup>25</sup> Daniel S. Reynolds, *Wrongful Discharge of Employed Counsel*, 1 GEO. J. LEGAL ETHICS 553, 567 (1988).

<sup>26</sup> Zacharias, *supra* note 20, at 1335.

<sup>27</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 (2000).

<sup>28</sup> Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 HOUS. L. REV. 1343, 1388–90 (2000) (discussing whether ethical standards for lawyers and

rules of professional conduct in two substantive areas: legal malpractice<sup>29</sup> and disqualification.<sup>30</sup> Other commentators have addressed the impact of the professional rules on the law of evidence<sup>31</sup>

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judges have “force of law”); Cramton & Udell, *supra* note 20 (discussing the application of professional rules concerning anti-contact and subpoena rules to criminal investigations); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327 (1998) (discussing the relationship between substantive criminal law and lawyer professional rules); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 *TEMP. L. REV.* 1323 (1988) (discussing the use of ethical rules in the criminal trials of lawyers and judges). The United States Supreme Court has also recognized the relevance of professional rules in deciding cases alleging ineffective assistance of counsel in criminal cases. See *Padilla v. Kentucky*, 559 U.S. 356, 366 (2010) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)); *Nix v. Whiteside*, 475 U.S. 157, 166–72 (1985) (relying on Model Rule 3.3’s prohibition on offering perjured testimony in support of conclusion that a criminal defense lawyer is not constitutionally ineffective for failing to cooperate in offering client’s perjured testimony); *Strickland v. Washington*, 466 U.S. at 688 (holding that “prevailing professional norms . . . as reflected in American Bar Association standards and the like” are the proper measure of attorney performance for purposes of ineffective assistance of counsel claims).

<sup>29</sup> RONALD E. MALLIN & JEFFREY M. SMITH, 2 *LEGAL MALPRACTICE* § 20:7 (2011 ed.); Robert Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 *OHIO N.U. L. REV.* 1, 3 (1982) (arguing that code provisions “may properly serve as evidence of the expected standard of attorney conduct” but not “to establish the very duty upon which negligence is predicated”); George L. Hampton IV, *Toward an Expanded Use of the Model Rules of Professional Conduct*, 4 *GEO. J. LEGAL ETHICS* 655 (1991); 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); John Leubsdorf, *Legal Malpractice and Professional Responsibility*, 48 *RUTGERS L. REV.* 101, 118 (1995); 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, 37 (1998) (arguing “in favor of establishing a position that state rules of professional conduct 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”); Douglas R. Richmond, *Why Legal Ethics Rules Are Relevant to Lawyer Liability*, 38 *ST. MARY’S L.J.* 929 (2007). In legal malpractice cases, the majority view is that a rule violation itself is not a basis for malpractice liability, but the rules may be considered in determining whether a lawyer has breached his standard of care. See *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* § 52(2)(c) (2000) (allowing rule violations to be considered in determining whether a lawyer has breached his standard of care). A “small minority of courts” reject the use of ethics rules in legal malpractice litigation. See Richmond, *supra*, at 942 (collecting cases).

<sup>30</sup> *Niesig v. Team I*, 558 N.E.2d 1030, 1032 (N.Y. 1990) (“In such instances, we are not constrained to read the rules literally or effectuate the intent of the drafters, but look to the rules as guidelines to be applied with due regard for the broad range of interests at stake.”); Bruce A. Green, *Conflicts of Interest in Litigation: The Judicial Role*, 65 *FORDHAM L. REV.* 71, 99 (1996) (arguing “the conflict rules should not serve as the appropriate standard for deciding disqualification motions”); Andrew Perlman, *The Parallel Law of Lawyering in Civil Litigation*, 79 *FORDHAM L. REV.* 1965, 1968–71 (2011); see also *S & S Hotel Ventures v. 777 S.H. Corp.*, 508 N.E.2d 647, 650 (N.Y. 1987) (holding that because the disqualification decision “involves the interests of clients and others” in addition to professional ethics, “the Code provisions cannot be applied as if they were controlling statutory or decisional law”).

<sup>31</sup> See Zacharias, *supra* note 20, at 1334 (“In the end, courts sometimes reject the codes’ pronouncements on evidence law, sometimes defer to them (usually through adoption of parallel common law), and sometimes agree with them but do not treat them as legal gospel. Does that make the codes law, quasi-law, law within their own sphere, or simply the distillation of ideas?”).



and in retaliatory discharge cases brought by attorneys.<sup>32</sup> Finally, Professor Alex Long has analyzed the enforceability of provisions in lawyer-client fee agreements that violate the professional rules, focusing in particular on Rule 1.5(a) prohibiting lawyers from charging unreasonable fees, Rule 1.5(d)(1) prohibiting lawyers from charging contingency fees in domestic relations cases, and Rule 1.5(c) requiring all contingency fee agreements to be in writing.<sup>33</sup> The impact of the professional rules on other areas of the substantive law, however, remains unexplored. This Article takes up one of those areas—the enforceability of agreements entered into in violation of Rules 1.5(e), 5.4(e), 1.8(a), 1.8(c), 1.8(g), 1.8(h), and 1.8(i)—as well as a more general discussion of the proper use of the lawyer rules in substantive law disputes.

## II. THE PUBLIC POLICY EXCEPTION TO THE ENFORCEMENT OF CONTRACTS

Understanding the proper impact of the professional rules on the substantive law of contracts requires a brief discussion of the public policy exception to the enforcement of contracts. As set forth below, courts generally will not enforce contracts that violate public policy and define public policy to include a broad category of “legislation” that includes statutes, constitutions, local ordinances, and administrative regulations. This Part sets up the central argument of this Article that the rules have matured into “law” and therefore should be treated as the equivalent of other legislation.

Although parties may generally “contract as they wish . . . [s]ometimes . . . a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy.”<sup>34</sup> Under this public policy exception, courts will generally not enforce an agreement if “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”<sup>35</sup> Under the Restatement, courts are to consider a variety of factors and take a flexible approach. In determining the “interest in the

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<sup>32</sup> Alex B. Long, *Retaliatory Discharge and the Ethical Rules Governing Attorneys*, 79 U. COLO. L. REV. 1043 (2008).

<sup>33</sup> Long, *supra* note 14, at 287.

<sup>34</sup> RESTATEMENT (SECOND) OF CONTRACTS: UNENFORCEABILITY ON GROUNDS OF PUB. POLICY ch. 8, topic 1, intro. note (1981).

<sup>35</sup> *Id.* The Restatement also provides that “an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable,” but even if the rules constitute “legislation” they do not explicitly say anything about whether the agreement is unenforceable; they simply prohibit the lawyer from engaging in the transactions. *Id.* § 178.

enforcement of a term,” the courts should consider “(a) the parties’ justified expectations, (b) any forfeiture that would result if enforcement were denied, and (c) any special public interest in the enforcement of the particular term.”<sup>36</sup> “In weighing a public policy against enforcement of a term,” the Restatement directs courts to consider:

- (a) the strength of that policy as manifested by legislation or judicial decisions,
- (b) the likelihood that a refusal to enforce the term will further that policy,
- (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and
- (d) the directness of the connection between that misconduct and the term.<sup>37</sup>

Further, Restatement Section 179 specifically notes that “[a] public policy against the enforcement of promises or other terms may be derived by the court from (a) legislation relevant to such a policy . . . .”<sup>38</sup>

Two central issues arise concerning the treatment of lawyer professional rules. First, the important threshold question is whether those rules are “legislation” within the meaning of Restatement Section 178(3) and Restatement Section 179 such that they articulate public policy for purposes of contract law. Second, even if they do constitute public policy, how should the courts determine whether agreements made in violation of the rules should nevertheless be enforced under the Restatement’s flexible approach? The primary focus of this Article is on the critical threshold issue of whether the rules are “legislation” within the meaning of Restatement Section 178(3). A detailed discussion of the subordinate question—determining whether and under what circumstances agreements made in violation of the rules of professional conduct should nevertheless be enforced under the Restatement’s “flexible” approach and/or whether attorneys should be able to recover in quantum meruit or restitution even if the agreement is held unenforceable—is beyond the scope of this Article.<sup>39</sup>

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<sup>36</sup> *Id.* § 178(2).

<sup>37</sup> *Id.* § 178(3).

<sup>38</sup> *Id.* § 179(a).

<sup>39</sup> Whether a court should enforce an agreement even though it was made in violation of public policy requires a highly fact specific inquiry. Although a comprehensive analysis of the myriad issues involved in undertaking this analysis is beyond the scope of this Article, I offer two thoughts on the issue. First, courts should consider the identity of the party who is seeking to declare an agreement unenforceable because it violates a professional rule. Courts should keep in mind that the rules were drafted by lawyers and only lawyers are subject to them. See *Ballow, Brasted O’Brien & Rusin P.C. v. Logan*, 435 F.3d 235, 243 (2d Cir. 2006) (noting the absurdity of lawyers seeking “to avoid on ‘ethical’ grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits” (internal quotation marks omitted)); *Potter v. Peirce*, 688 A.2d 894, 897 (Del. 1997) (“As a matter of public policy, this

With respect to the first issue, the Restatement broadly defines the term legislation to include “not only statutes, but constitutions and local ordinances, as well as administrative regulations issued pursuant to them,”<sup>40</sup> though the comments to the Restatement caution that not every piece of legislation articulates a public policy substantial enough to outweigh other considerations, particularly “in the case of minor administrative regulations or local ordinances that may not be indicative of the general welfare.”<sup>41</sup> The Restatement’s broad definition of legislation would seem to include the lawyer professional rules,<sup>42</sup> though the Restatement does not explicitly name them.

The Restatement of the Law Governing Lawyers also does not definitively answer the question. It states that “[l]awyer-code provisions *may* also be relevant as an expression of the public policy of the jurisdiction with respect to such issues as the enforceability of transactions entered into in violation of them,”<sup>43</sup> and then goes on to address the issue on a case-by-case basis. In the case of fee-splitting arrangements among lawyers, for example, the Restatement of the Law Governing Lawyers states that lawyers generally cannot enforce an

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Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers’ Rule of Conduct 1.5(e) by using it to avoid a contractual obligation. To hold otherwise would encourage non-compliance with the Rule and create incentives for malfeasance among Delaware lawyers at the expense of unwary out-of-state lawyers.”); *Division Among Lawyers*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA): FEES, 2013, § 41:708 (These courts are “offended by the notion that a lawyer would try to manipulate the ethics rules to keep a larger cut of the fee. They allow the plaintiff lawyer to use estoppel to prevent the defendant lawyer from invoking the possible ethical invalidity of the fee-splitting contract as a defense to payment.”).

Second, this second step of the analysis offers courts the opportunity to weigh the importance of the public policy at issue. While all of the rules should be considered public policy for the reasons discussed below, the rules (including the rules discussed in this Article) serve different public policy interests, and the courts should consider the importance of those public policy interests in deciding whether to enforce an agreement that violates the professional rules. For example, most would agree that avoiding undue influence is a particularly important public policy and, therefore, courts should in most cases enforce that policy by holding that agreements entered into in violation of rules that protect against undue influence, such as Rule 1.8(a), are unenforceable.

<sup>40</sup> RESTATEMENT (SECOND) OF CONTRACTS: UNENFORCEABILITY ON GROUNDS OF PUB. POLICY § 178 cmt. a (1981).

<sup>41</sup> *Id.* § 178 cmt. c.

<sup>42</sup> Long, *supra* note 14, at 300 (“Under the Restatement (Second) of Contracts’ approach, the ethical rules governing lawyers should qualify as ‘legislation’ capable of articulating public policy. Because the rules are adopted by a state’s highest court pursuant to its authority to regulate the legal profession, they should ordinarily qualify as a source of public policy.” (internal footnote omitted)); Munneke & Davis, *supra* note 29, at 71 (“It follows that rules created and enforced through such state action are sufficiently like legislative enactments, ordinances and administrative regulations to be treated in the same way for purposes of the civil law. If the ethical rule was intended by the court to create a standard of conduct which protects a particular class of persons from a particular type of harm, then the standard should be relevant to the standard of care expected of lawyers regulated by the rule.”).

<sup>43</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 1 cmt. b (2000) (emphasis added).

arrangement that violates the rules,<sup>44</sup> but in the case of other prohibited transactions, such as the ban on lawyers agreeing to take media rights in a case, the Restatement is silent.<sup>45</sup>

Further complicating the issue is the Preamble section of the Model Rules of Professional Conduct, which largely disclaims any relationship to or influence on the substantive law:

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 . . . . The Rules 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.<sup>46</sup>

Thus, the Restatement of Contracts and the Restatement of the Law Governing Lawyers suggest that the professional rules should be considered "legislation" within the meaning of the Restatement, even though the drafters of the rules of professional conduct largely reject any role for them in the substantive law.

### III. THE COURTS ARE DIVIDED CONCERNING THE IMPACT OF THE PROFESSIONAL RULES ON THE SUBSTANTIVE LAW

Having described the traditional contract rules concerning agreements that offend public policy, this Part examines the split of authority over whether the lawyer professional rules constitute public policy. On this issue, the courts are sharply divided.<sup>47</sup> This Part canvasses that split in two different ways. First, it uses Pennsylvania as a

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<sup>44</sup> *Id.* § 47 cmt. i.

<sup>45</sup> *Id.* § 36.

<sup>46</sup> MODEL RULES OF PROF'L CONDUCT: PREAMBLE & SCOPE ¶ 20 (2011). Having made this lengthy disclaimer, the last sentence of the paragraph does concede that "[n]evertheless, since the Rules do establish standards of conduct . . . a lawyer's violation of a Rule may be evidence of [a] breach of the applicable standard of conduct." *Id.*

<sup>47</sup> Long, *supra* note 14, at 299 ("Courts have sometimes differed in their conclusions as to which sources are capable of articulating public policy for purposes of contract law."). Compare 23 WILLISTON ON CONTRACTS § 62:5 (4th ed. 2012) ("Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the agreements satisfy both the general requirements for contracts and the special requirements of professional ethics."), with 17A AM. JUR. 2D *Contracts* § 241 (1964) ("It has been held that the rules of professional conduct governing attorneys are not statements of public policy that may be employed to void contracts.").

case study of the confusion among courts—even those courts in the same state—about the appropriate impact of the professional rules on the substantive law.<sup>48</sup> Second, subpart B canvasses the split of authority on seven different prohibited agreements contained in the rules of professional conduct.

#### A. *The Pennsylvania Courts Are Confused*

The Pennsylvania courts have taken wildly different views on the impact that the professional rules should have on the substantive law and provide an illustration of the confusion engendered by the issue. This subpart describes those views chronologically.

In two cases from the 1970s involving disqualification motions, the Pennsylvania Supreme Court weighed in definitively: “In Pennsylvania, the Canons of the Code of Professional Responsibility have the force of statutory rules of conduct for attorneys.”<sup>49</sup> In both cases, the court went on to determine that the attorneys had violated the professional rules and therefore should be disqualified.<sup>50</sup>

Just six years later, however, the Pennsylvania Supreme Court backpedaled dramatically from this position and stated, albeit in a different context, that the “Code of Professional Conduct . . . does not have the force of substantive law.”<sup>51</sup> In that case, a lawyer had drawn a deathbed will for his client naming himself and his brother as beneficiaries in clear violation of the professional rules.<sup>52</sup> The court recognized that the lawyer’s conduct violated the rules but declined to invalidate the will on that basis: “We have not . . . heretofore used such misconduct as a basis for altering the rules of law, including evidentiary rules, presumptions and burdens of proof, which would otherwise apply to a case. We decline to do so here.”<sup>53</sup>

The Pennsylvania Supreme Court offered no justification for its reasoning other than a citation to the Preamble to the code then in force, which contained the typical disclaimer “nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or

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<sup>48</sup> I chose Pennsylvania as a case study because the Pennsylvania courts’ struggle with this issue provides a useful illustration of the confusion this issue has wrought in the courts.

<sup>49</sup> *Am. Dredging Co. v. City of Phila.*, 389 A.2d 568, 571 (Pa. 1978); *see also Slater v. Rimar*, 338 A.2d 584, 587 (Pa. 1975) (“There is no doubt that under both the Code of Professional Responsibility (hereinafter the ‘Code’) and its predecessor, the Canons of Professional Ethics (hereinafter the ‘Canons’) . . . have the force of statutory rules of conduct for lawyers.” (internal footnote omitted)).

<sup>50</sup> *Am. Dredging Co.*, 389 A.2d at 574; *Slater*, 338 A.2d 584 at 591.

<sup>51</sup> *In re Estate of Pedrick*, 482 A.2d 215, 217 (Pa. 1984).

<sup>52</sup> *Id.* at 217.

<sup>53</sup> *Id.* at 221.

the extra-disciplinary consequences of violating such [a] duty.”<sup>54</sup> In distinguishing its earlier decisions concerning disqualification, the court said:

[W]hile it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility by disqualifying counsel or otherwise restraining his participation or conduct in litigation before them in order to protect the rights of litigants to a fair trial, we are not inclined to extend that enforcement power and allow our trial courts themselves to use the Canons to alter substantive law or to punish attorney misconduct.<sup>55</sup>

In a final twist, however, the court, after going out of its way to disclaim reliance on the professional rules, went on to hold that the will was invalid based on common law doctrines that were, in essence, the same as the professional rule.<sup>56</sup> This prompted a dissenting justice to comment: “The practical, but unintended, effect of the majority’s opinion is that the Appellant is permitted to accomplish through a circuitous route what the Court expressly disdains—enforcing the Code of Professional Responsibility by affecting the substantive rights of an attorney-beneficiary during litigation of the contestant’s claim.”<sup>57</sup>

Five years later, however, the Pennsylvania Supreme Court shifted its position concerning the impact of the rules on the substantive law yet again. In that legal malpractice case, the court fully embraced the professional rules as a basis for establishing the applicable standard of care.<sup>58</sup>

But just three years later, in the well-known case of *Maritrans G.P., Inc. v. Pepper, Hamilton & Scheetz*,<sup>59</sup> the Pennsylvania Supreme Court shifted gears yet again, taking a confusing and equivocal view of the rules. In opining about the plaintiff’s breach-of-fiduciary-duty claim, the court observed that “simply because a lawyer’s conduct may violate the rules of ethics does not mean that the conduct is actionable, in damages

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<sup>54</sup> *ABA Model Rules of Professional Conduct (Pre-2002)*, CORNELL UNIVERSITY LAW SCHOOL, LEGAL INFORMATION INSTITUTE ¶ 18, [http://www.law.cornell.edu/ethics/aba/2001/ABA\\_CODE.HTM#Preface](http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Preface) (last visited Sept. 6, 2013); see also *Pedrick*, 482 A.2d at 221–22 (internal quotation marks omitted).

<sup>55</sup> *Pedrick*, 482 A.2d at 221.

<sup>56</sup> *Id.* at 221–22.

<sup>57</sup> *Id.* at 227 (Zappala, J., dissenting).

<sup>58</sup> *Rizzo v. Haines*, 555 A.2d 58, 67 (Pa. 1989) (“We further believe that expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client, since these obligations are established by law, the Code of Professional Responsibility, and the Model Rules of Professional Conduct.”); see also *Selko v. Home Ins. Co.*, No. 95–7653, 1996 WL 397483, at \*4 n.5 (E.D. Pa. July 10, 1996) (“[D]espite the wording in the Scope section of the Rules of Professional Conduct, Pennsylvania courts do recognize that the Rules of Professional Conduct impose duties on lawyers practicing within this state.” (emphasis in original)).

<sup>59</sup> 602 A.2d 1277 (Pa. 1992).

or for injunctive relief.”<sup>60</sup> At the same time, however, the court emphasized that the ethics rules are not entirely irrelevant and chastised the lower court for concluding that “the trial judge’s reference to violations of the rules of ethics somehow negated or precluded the existence of a breach of legal duty by the Pepper firm to its former client.”<sup>61</sup> Rather, the Supreme Court said, since the lawyer’s fiduciary duties predate and form the basis of the ethics rules, a lawyer’s misconduct can violate the ethics rules and form a basis for a lawsuit by a client.<sup>62</sup>

Thus, in a series of four decisions, the Pennsylvania Supreme Court took no consistent view on the impact of the professional rules on the substantive law. While these cases arose in different contexts, the court failed to articulate any guiding principles for determining the relevance (or irrelevance) of the professional rules outside the disciplinary context.<sup>63</sup> Not surprisingly, the confused pronouncements from the state’s highest court have led to decidedly mixed results in lower court cases. One trial court relied directly on the professional rules in concluding that an agreement to split fees that violated the rules of professional conduct was “void and unenforceable on public policy grounds.”<sup>64</sup> Similarly, a federal bankruptcy court, interpreting Pennsylvania law, held that the attorney’s acquisition of his client’s property was actionable because it violated the professional rules.<sup>65</sup> The court noted that: “[V]iolations of disciplinary rules which are consistent with independent substantial law *may* serve as the basis for substantive legal conclusions” even while acknowledging the Pennsylvania

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<sup>60</sup> *Id.* at 1284.

<sup>61</sup> *Id.* (The Superior Court “stood this correct analysis on its head. That court held that the trial judge’s reference to violations of the rules of ethics somehow negated or precluded the existence of a breach of legal duty by the Pepper firm to its former client. The court also held that the presumption of misuse of a former client’s confidences, developed in the law of disqualification, is inapplicable because the present case involves an injunction. Both of these propositions involve serious confusion in the law governing lawyers.”)

<sup>62</sup> *Id.* at 1284–85.

<sup>63</sup> See also Munneke & Davis, *supra* note 29, at 36 (describing the Pennsylvania courts’ “uneasiness” with the relevance of the professional rules).

<sup>64</sup> Buntz v. Peperno, No. 06 CV 5473, 2008 WL 693590 (Pa. Ct. Com. Pl. Feb. 8, 2008); see also Flowers v. Shein & Brookman, P.A., No. 3572, 1983 WL 265400, at \*152 (Pa. Ct. Com. Pl. Mar. 17, 1983) (“Since public policy concerning the conduct of lawyers finds expression through the Code of Professional Responsibility, we conclude that a promise to compensate [plaintiff] out of professional fees earned by defendant law firm would clearly contravene public policy and could not serve as consideration for the alleged contract.”).

<sup>65</sup> *In re* Tigie, 82 B.R. 724, 734 (Bankr. E.D. Pa. 1988) (enforcing violations of DR 5-103(A) and DR 5-104(A)); see also *In re* Mushroom Transp. Co., 70 B.R. 416, 418 (Bankr. E.D. Pa. 1987) (enforcing violation of Code of Professional Responsibility DR-7-109(C)); Pritts v. Wendy’s of Greater Pittsburgh, No. GD97-3173, 1998 WL 1004930, at \*163 (Pa. Ct. Com. Pl. June 23, 1998) (expressing willingness to enforce prohibiting plaintiff from contacting defendant’s employees under Rule 4.2 because the court “has the power to regulate the conduct of attorneys practicing before it in order to insure that the parties receive a fair trial”).

Supreme Court's previous admonition that the "Code of Professional Responsibility does not have the force of establishing independent substantive law."<sup>66</sup> In another case, the Pennsylvania Superior Court refused to enforce a fee-sharing agreement between a lawyer and non-lawyer because it violated Pennsylvania Rule of Conduct 5.4.<sup>67</sup>

In the two most recent pronouncements from the Pennsylvania appellate courts, however, the superior court reiterated the view that the rules do not have the effect of substantive law. In one case, the court refused to set aside a lawyer's action to foreclose on his client's house, despite the client's claim that the mortgage violated Rule 1.8.<sup>68</sup> The court said:

The Rules of Professional Conduct address the grounds for disciplinary actions against attorneys. Those rules are not substantive law. Thus, even assuming, *arguendo*, that the [clients] can show [their lawyer] engaged in unethical behavior, the most they would establish is a basis for a disciplinary proceeding against him, not a substantive basis to invalidate the mortgage.<sup>69</sup>

In the second case, the superior court rejected any reliance on the professional rules' prohibition on charging excessive fees.<sup>70</sup> Similarly, a Pennsylvania ethics opinion provides: "Any ethical violation of RPC 1.4 relating to the duty to communicate, or any other rule, is irrelevant to [a] contract claim. The Pennsylvania Supreme Court has consistently held that the Rules of Professional Conduct do not have the force of substantive law."<sup>71</sup>

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<sup>66</sup> *Tigue*, 82 B.R. at 734 (emphasis in original).

<sup>67</sup> *Wishniefsky v. Riley & Fanelli P.C.*, 799 A.2d 827, 829–31 (Pa. Super. Ct. 2002).

<sup>68</sup> *Donald J. Weiss & Assoc. v. Tulloch*, 961 A.2d 862, 864 (Pa. Super. Ct. 2008).

<sup>69</sup> *Id.* at 863 (internal citations omitted). Subsequently, a Pennsylvania trial court considering an ineffective assistance of counsel claim cited *Tulloch* in declining to consider the applicability of the Pennsylvania Rules of Professional Conduct. *Commonwealth v. Russin*, No. 3905-2005, 2009 WL 5248868, at \*351 (Pa. Ct. Com. Pl. June 10, 2009).

<sup>70</sup> *In re Adoption of M.M.H.*, 981 A.2d 261, 272 (Pa. Super. Ct. 2009) ("[T]he Supreme Court has held that the Rules of Professional Conduct do not have the effect of substantive law but, instead, are to be employed in disciplinary proceedings.").

<sup>71</sup> Pa. Bar Ass'n Comm. on Legal Ethics & Prof'l Responsibility, *Informal Op.* 2001-10 (2001) (italics removed). Pennsylvania's courts are not the only ones making inconsistent statements concerning the impact of the professional rules on the substantive law. In *Dardas v. Fleming, Hovenkamp & Grayson, P.C.*, 194 S.W.3d 603, 613 (Tex. Ct. App. 2006), the Texas appellate court made the following confounding statement:

The Texas Disciplinary Rules of Professional Conduct do not define standards for civil liability and do not give rise to private claims. Nonetheless, a court may deem these rules to be an expression of public policy, so that a contract violating them is unenforceable as against public policy. Although courts may, and often have, used these rules as a measure of public policy, they are not required to do so. However, the Fleming Firm relied upon former Rule 1.04 in its motion, and we presume, without deciding, that this version of the rule expresses public policy regarding the February 1998 contract. (internal citations omitted).



B. *The Courts Are Divided Concerning the Substantive Impact of Seven Rules of Professional Conduct*

This Part surveys the courts' treatment of agreements entered into in violation of seven different professional rules that prohibit or limit lawyers' ability to enter into agreements that would otherwise be lawful if two non-lawyers engaged in the same transaction: Rules 1.5(e) (division of fees between lawyers from different firms), 5.4(e) (fee splitting between lawyer and non-lawyer), 1.8(a) (business transactions with clients), 1.8(c) (soliciting gifts from clients), 1.8(g) (aggregate settlements), 1.8(h) (prospective settlement of malpractice cases), and 1.8(i) (acquiring a proprietary interest in a client's cause of action). As set forth below, the majority position is that agreements made in violation of the rules are unenforceable, but there is a distinct minority of cases that takes the other view.<sup>72</sup> Moreover, there is a great deal of variety in the approaches taken by the courts.<sup>73</sup> This Part also describes the rationales that the courts offer for their positions, to the extent that the courts offer any at all. Most courts simply say that the professional rules do or do not constitute public policy without providing any explanation.<sup>74</sup>

1. Rule 1.5(e): Division of Fees Between Lawyers Who Are Not in the Same Firm

Under Model Rule 1.5(e) and its state counterparts, if lawyers are not in the same firm, they may divide a fee only if "the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation," and "the client agrees to the arrangement."<sup>75</sup> The comment explains the policy behind these limitations: "Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the

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<sup>72</sup> See also Long, *supra* note 14, at 290 ("[A]lthough the majority of courts are likely to hold that a fee agreement that fails to comply with an ethical rule is void as against public policy, a significant minority of courts have demonstrated a reluctance to do so in certain situations.").

<sup>73</sup> As but one example, courts sometimes will enforce agreements that violate the professional rules if the noncompliance is minor. See 7A C.J.S. *Attorney & Client* § 381 (2013) (Although "[a]ttorney fee agreements which violate the rules of professional conduct are against public policy and will not be enforced by [the] courts. . . . fee agreements which are otherwise reasonable will not be ignored because of minor noncompliance with the Model Rules of Professional Conduct.").

<sup>74</sup> Long, *supra* note 14, at 332 (criticizing courts for their failure to "explain their decisions to depart from the standard presumption against recovery when a contract offends public policy").

<sup>75</sup> MODEL RULES OF PROF'L CONDUCT R. 1.5(e)(1)–(2) (2011). Moreover, as with all fees, the total fee must be reasonable. *Id.* R. 1.5(e)(3).

lawyers were associated in a partnership.”<sup>76</sup> If lawyers enter into an agreement that violates this provision, will the courts nevertheless enforce it? The courts are divided.<sup>77</sup>

The Restatement of the Law Governing Lawyers and a significant majority of the courts who have looked at the issue conclude that such agreements are unenforceable.<sup>78</sup> The Restatement provides: “This is

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<sup>76</sup> *Id.* R. 1.5 cmt. 7.

<sup>77</sup> *Division Among Lawyers*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA): FEES, 2013, § 41:701 (collecting cases); 1 ROBERT L. ROSSI, ATTORNEYS’ FEES § 3:33 (3d ed. 2012) (“Where the wrongful conduct involves an improper fee-sharing arrangement, the decisions are not uniform with respect to whether the impropriety renders the fee-sharing arrangement unenforceable, and if so, whether a quantum meruit recover may nevertheless be permitted.”); see also Carol J. Miller, Annotation, *Validity and Enforceability of Referral Fee Agreement Between Attorneys*, 28 A.L.R. 4th 665 (1984) (collecting cases).

<sup>78</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 cmt. i (2000) (“[A] lawyer who has violated a regulatory rule or statute by entering into an improper fee-splitting arrangement should not obtain a tribunal’s aid to enforce that arrangement, unless the other lawyer is the one responsible for the impropriety.”); Douglas R. Richmond, *Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle*, 98 KY. L. J. 461, 511 (2010); see *Christensen v. Eggen*, 577 N.W.2d 221, 225 (Minn. 1998) (client was never informed and never gave written consent to dual representation); *Neilson v. McCloskey*, 186 S.W.3d 285, 287 (Mo. Ct. App. 2005) (“[A]n agreement to share attorney fees that does not comply with [Missouri] Rule 4-1.5(e) is unenforceable. Clearly the rules of professional conduct have the force and effect of judicial decision.” (internal citations omitted)); *Buntz v. Peperno*, No. 06 CV 5473, 2008 WL 693590 (Pa. Ct. Com. Pl. Feb. 8, 2008); see also *Eng v. Cummings, McClovy, Davis, & Acho, PLC*, 611 F.3d 428, 435 (8th Cir. 2010) (“[W]e hold that any fee-splitting agreement between Acho and Eng did not comply with Rule 4-1.5(e). As such, the agreement is unenforceable as a matter of law.”); *Baer v. First Options of Chi., Inc.*, 72 F.3d 1294, 1302 (7th Cir. 1995) (“The Illinois Supreme Court has made clear that its standards of professional behavior, currently embodied in the Illinois Rules of Professional Conduct, bind the courts as a matter of law.” (internal footnote omitted)); *Judge v. McCay*, 500 F. Supp. 2d 521, 527 (E.D. Pa. 2007) (“New Jersey has elected not to enforce contracts that violate the state’s Rules of Professional Conduct and Court Rules, as the alleged oral agreement here does.”); *Marcus v. Garland, Samuel, & Loeb, P.C.*, 441 F. Supp. 2d 1227, 1230 (S.D. Fla. 2006) (“Contracts that fail to adhere to the ethical rules that require written fee agreements are against public policy and are not enforceable.”); *Dragelevich v. Kohn, Milstein, Cohen & Hausfeld*, 755 F. Supp. 189, 193 (N.D. Ohio 1990) (“This Court concludes that Ohio courts would accept what appears to be the majority view, that DR 2-107(A) precludes enforcement of the agreement alleged in this case.”); *Matter of Estate of Katchatag*, 907 P.2d 458, 463 (Alaska 1995) (“Bar Rules operate with the force of law.”); *Chambers v. Kay*, 56 P.3d 645 (Cal. 2002) (The parties’ failure to comply with the Rules of Professional Conduct, Rule 2-200 (requirement that fee division agreement be disclosed to client and client’s written consent obtained), barred plaintiff from sharing a contingency fee pursuant to the parties’ fee-sharing agreement.); *Brown v. Grimes*, 120 Cal. Rptr. 3d 893 (Ct. App. 2011) (fee sharing agreement illegal and unenforceable under both California and Texas law); *Scolinos v. Kolts*, 44 Cal. Rptr. 2d 31, 34 (Ct. App. 1995); *Norris v. Silver*, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997); *Eichholz Law Firm, P.C. v. Tate Law Group, LLC*, 714 S.E.2d 413, 415 (Ga. Ct. App. 2011) (fee agreement cannot be enforced because it violates rules of professional conduct); *Paul B. Episcopo, Ltd. v. Law Offices of Campbell & Di Vincenzo*, 869 N.E.2d 784, 791 (Ill. App. Ct. 2007) (refusing to enforce a fee sharing agreement that violated Illinois Rule 1.5(f)(2) and (3) because it failed to set forth the basis of the fee division and the responsibilities to be assumed by the parties as to the performance of legal services); *Albert Brooks Friedman, Ltd. v. Malevitis*, 710 N.E.2d 843, 849 (Ill. App. Ct. 1999) (“Accordingly, Friedman’s agreement to share a portion of Malevitis’ contingent fee violates public policy and is unenforceable.”); *Holstein v. Grossman*, 616 N.E.2d 1224, 1234 (Ill. App.

consistent with the view that ethics rules express public policy, such that a contract violating them is unenforceable as against public policy,”<sup>79</sup> but the Restatement does not explain why the professional rules should be treated as public policy, nor do most of the courts that have considered the issue. One justification that a few courts have offered is that “[i]t would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement.”<sup>80</sup>

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Ct. 1993) (“In this case, we are faced with an intra-attorney fee-sharing agreement primarily based on a client referral to which no referred client ever consented in writing. We believe that the signed writing requirement’s significant public policy roots require a holding in this case that plaintiff is entitled to no referral fee.”); *Evans & Luptak, PLC v. Lizza*, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002): (“[C]ontracts that violate our ethical rules violate our public policy and therefore are unenforceable.”); *Law Offices of Gary Green, P.C. v. Morrissey*, 210 S.W.3d 421, 425 (Mo. Ct. App. 2006) (“The rules of professional conduct have the force and effect of judicial decision. Accordingly, Rule 4-1.5 has the force and effect of law in Missouri. Agreements between attorneys from different law firms to divide a fee on a case are acceptable only if based on a sharing of services or responsibility.” (internal citation and quotation marks omitted)); *Londoff v. Vuylsteke*, 996 S.W.2d 553, 557 (Mo. Ct. App. 1999) (“The rules of professional conduct have the force and effect of judicial decision. Accordingly, Rule 4-1.5 has the force and effect of law in Missouri.” (internal citation omitted)); *Kalled v. Albee*, 712 A.2d 616, 617–18 (N.H. 1998) (“[I]f the contract has not been performed in accordance with the requisites set forth in the disciplinary rules, performance may be excused as against public policy.” (internal quotation marks omitted)); *Gorman v. Grodensky*, 498 N.Y.S.2d 249, 252 (Sup. Ct. 1985) (“Although the provisions of the Code of Professional Responsibility do not enjoy the status of decisional or statutory law, they are an explicit expression of the public policy of the State. An agreement made in violation of a code provision, ought not be sanctioned by the court, as would be the case if the court were to permit plaintiff to sue on the contract. The court will refuse to aid either party to enforce this alleged contract.” (internal citations omitted)); *Flowers v. Shein & Brookman, P.A.*, 9 Phila. Co. Rptr. 145, 152 (Pa. Ct. Com. Pl. 1983) (“Since public policy concerning the conduct of lawyers finds expression through the Code of Professional Responsibility, we conclude that a promise to compensate [plaintiff] out of professional fees earned by defendant law firm would clearly contravene public policy and could not serve as consideration for the alleged contract.”); *Cruse v. O’Quinn*, 273 S.W.3d 766 (Tex. App. 2008) (contract was illegal and void as against public policy as expressed in the disciplinary rules of professional conduct); *Hovenkamp & Grayson, P.C.*, 194 S.W.3d 603, 613 (Tex. App. 2006) (“[P]resume[ing], without deciding, that this . . . rule expresses public policy . . . .”); *Bond v. Crill*, 906 S.W.2d 103, 106 (Tex. App. 1995) (agreement violated Rule 1.04 and was therefore unenforceable); *Fleming v. Campbell*, 537 S.W.2d 118, 210 (Tex. Civ. App. 1976) (“We hold that the referral fee contract . . . is as a matter of law against the public policy expressed in Disciplinary Rule 2-107 that no attorney’s fees shall be divided unless the client’s consent is obtained after full disclosure. Fleming’s claimed referral fee contract being violative of our public policy is void and unenforceable.”); *Belli v. Shaw*, 657 P.2d 315, 319 (Wash. 1983) (“The forwarding fee agreement violated CPR DR 2-107 and is therefore against public policy. Such an arrangement will not be enforced by the courts.” (internal citation omitted)).

<sup>79</sup> *Richmond, Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle*, *supra* note 78, at 511.

<sup>80</sup> *Scolinos*, 44 Cal. Rptr. 2d at 34; *Lizza*, 650 N.W.2d at 370 (citing the same language); see also *Margolin v. Shemaria*, 102 Cal. Rptr. 2d 502, 511 (Ct. App. 2000) (“[T]he policy considerations which caused rule 2-200 to be enacted for the benefit of the public also require that the fee-sharing agreement between plaintiffs and Shemaria not be enforced by a court of law.” (emphasis removed)); *Malevitis*, 304 Ill. App. 3d at 985 (“The client-centered focus of

The decisions are hardly uniform, however. A substantial minority of courts have insisted on enforcing agreements even though the agreements violate the jurisdiction's professional rules concerning fee splitting or otherwise stated that a violation of the rules is irrelevant to the issue of contract enforcement.<sup>81</sup> In other cases, courts have enforced agreements where the rule violation was not "substantial."<sup>82</sup> Again, these courts rarely offer much explanation for their conclusions, though they sometimes rely on the language of the Preamble to the Rules of Professional Conduct,<sup>83</sup> which, as noted earlier, largely disclaims any relationship to or influence on the substantive law.<sup>84</sup> These courts fail to explain, however, why this disclaimer—which was written by lawyers to protect lawyers—is authoritative on the issue. The only other explanation offered by courts is the absurdity of lawyers seeking "to

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Rule 1.5 is the most recent expression of the long-standing public policy of this state. The rule's historical antecedents demonstrate that the client's rights rather than the lawyer's remedies have always been this state's greatest concern.").

<sup>81</sup> *Ballow Brasted O'Brien & Rusin P.C. v. Logan*, 435 F.3d 235, 242–43 (2d Cir. 2006) (enforcing agreement even though it violated New York Disciplinary Rule 2-107); *Freeman v. Mayer*, 95 F.3d 569, 575–76 (7th Cir. 1996) (interpreting Indiana law); *Daynard v. Ness, Motley, Loadholt, Richardson & Poole*, 188 F. Supp. 2d 115 (D. Mass. 2002) (holding that fee agreement between lawyer and law professor for consulting services that violated Mass. 1.5(e) and N.Y. DR 2-107(A) was nevertheless enforceable); *Poole v. Prince*, 61 So. 3d 258, 282 (Ala. 2010) ("[T]he sole remedy for a violation of Rule 1.5(e) is disciplinary in nature; therefore, the trial court lacked the authority to declare the parties' agreement unenforceable as violative of Rule 1.5(e)."); *Potter v. Peirce*, 688 A.2d 894 (Del. 1997) (Delaware lawyer could not use Delaware rule to avoid splitting fee with Pennsylvania lawyer who was not subject to a similar rule); *Corvette Shop & Supplies v. Coggins*, 779 So. 2d 529, 531 (Fla. Dist. Ct. App. 2000) ("[T]he rule is intended to protect the client and is not intended to shield a nonprevailing party from the payment of attorney's fees. Therefore, the award of attorney's fees in the present case was correct." (internal citation omitted)); *Frost v. Lotspeich*, 30 P.3d 1185, 1198 (Or. Ct. App. 2001) ("[U]nder Oregon law a violation of [California RPC] rule 2-200(A) would not preclude enforcement of the fee-division agreement."); *Danzig v. Danzig*, 904 P.2d 312 (Wash. Ct. App. 1995) (holding that split of fees with non-lawyer violated Washington barratry statute and RPC 7.2(c)); *Watson v. Pietranton*, 364 S.E.2d 812, 816 (W. Va. 1987) ("We agree with the reasoning of both the ABA Committee and the *Shapiro* court that a violation of a Disciplinary Rule, alone, will not defeat a contract between lawyers. A lawyer or law firm which enters into and honors a fee-splitting agreement with another lawyer may not later raise DR2-107 of the West Virginia Code of Professional Responsibility as a bar to enforcement of the agreement." (internal footnote omitted)).

<sup>82</sup> *Davies v. Grauer*, 684 N.E.2d, 924, 928 (Ill. App. Ct. 1997) (enforcing fee-sharing agreement because oral consent by client constituted "substantial compliance"); *Phillips v. Joyce*, 523 N.E.2d 933, 939 (Ill. App. Ct. 1988) ("We believe, however, that a standard of substantial compliance is preferable because it comports with practical realities."); *Fox v. Heisler*, 2003-1964 (La. App. 4 Cir. 5/12/04); 874 So. 2d 932, 939 (La. Ct. App. 2004) ("[W]e hold that the oral contract was valid and should be enforced as agree [sic] upon.").

<sup>83</sup> *Freeman* 95 F.3d at 575–76 (interpreting Indiana law) ("As something designed to provide 'guidance,' but not to be a basis for civil liability, our best prediction is that the Indiana Supreme Court would not permit one of its attorneys to invoke Rule 1.5(e) as a shield against living up to a substantively unobjectionable contractual arrangement with an out-of-state lawyer."); see also *Poole*, 61 So. 3d at 280.

<sup>84</sup> MODEL RULES OF PROF'L CONDUCT: PREAMBLE & SCOPE ¶ 20 (2011).

avoid on ‘ethical’ grounds the obligations of an agreement to which they freely assented and from which they reaped the benefits.”<sup>85</sup>

Finally, the Maryland courts take a unique, middle-ground approach: Agreements made in violation of Rule 1.5(e) *may* be unenforceable.

We highlight the word “may” for a reason. Although a fee-sharing agreement in violation of Rule 1.5(e) may be held unenforceable, the Rule is not a *per se* defense, rendering invalid or unenforceable otherwise valid fee-sharing agreements because of rule violations that are merely technical, incidental, or insubstantial or when it would be manifestly unfair and inequitable not to enforce the agreement.<sup>86</sup>

Under the Maryland approach, courts should look to a variety of factors in determining how to handle allegations that an agreement is unenforceable because it violated Rule 1.5(e):

When presented with a defense resting on Rule 1.5(e), the court must look to all of the circumstances—whether the rule was, in fact, violated, and, if violated (1) the nature of the alleged violation, (2) how the violation came about, (3) the extent to which the parties acted in good faith, (4) whether the lawyer raising the defense is at least equally culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation, (5) whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement, (6) whether the client, in particular,

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<sup>85</sup> *Logan*, 435 F.3d at 243 (internal quotation marks omitted); *Division Among Lawyers*, LAW. MAN. ON PROF. CONDUCT (ABA/BNA): FEES, 2013, § 41:708 (These courts are “offended by the notion that a lawyer would try to manipulate the ethics rules to keep a larger cut of the fee. They allow the plaintiff lawyer to use estoppel to prevent the defendant lawyer from invoking the possible ethical invalidity of the fee-splitting contract as a defense to payment.”); *see also Potter*, 688 A.2d at 897 (“As a matter of public policy, this Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers’ Rule of Conduct 1.5(e) by using it to avoid a contractual obligation. To hold otherwise would encourage non-compliance with the Rule and create incentives for malfeasance among Delaware lawyers at the expense of unwary out-of-state lawyers.”); ABA Comm. on Prof’l Ethics, Informal Op. 870 (1965) (“This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other.”). In a slightly different context, a Florida appellate court rejected an argument by a referring lawyer that he should be able to escape malpractice liability in a suit brought by the client because the lawyers had, in violation of the rules, not obtained the client’s written consent to the fee-splitting arrangement. To hold otherwise, the court said, “would allow attorneys to thwart their responsibility to a client by intentionally disregarding the Rules Regulating the Florida Bar.” *Noris v. Silver*, 701 So. 2d 1238, 1240 (Fla. Dist. Ct. App. 1997); *see also Barnes, Crosby, Fitzgerald & Zeman, LLP v. Ringler*, 151 Cal. Rptr. 3d 134, 136, (Ct. App. 2012) (“In this case, we hold that an attorney may be equitably estopped from claiming that a fee-sharing contract is unenforceable due to noncompliance with rule 2-200 or rule 3.769, where that attorney is responsible for such noncompliance and has unfairly prevented another lawyer from complying with the rules’ mandates.”); *Pietranton*, 364 S.E.2d at 816.

<sup>86</sup> *Post v. Bregman*, 707 A.2d 806, 819 (Md. 1998).

would be harmed by enforcing the agreement, and, in that regard, if the agreement is found to be so violative of the Rule as to be unenforceable, whether all or any part of the disputed amount should be returned to the client on the ground that, to that extent, the fee is unreasonable, and (7) any other relevant considerations. We view a violation of Rule 1.5(e), whether regarded as an external defense or as incorporated into the contract itself, as being in the nature of an equitable defense, and principles of equity ought to be applied.<sup>87</sup>

The Maryland Court of Appeals has made it clear that a court retains the power to order enforcement of a contract even if it violates the ethical rules: “If a court, in the exercise of its equitable discretion, orders an attorney to abide by a contractual obligation that violates the MLRPC, the order is valid and the ethical matter rests among the attorney, the client, and the disciplinary authority.”<sup>88</sup>

## 2. Rule 5.4(a): Fee Splitting Between Lawyer and Non-Lawyer

Under Model Rule 5.4(a) and its state counterparts, a “lawyer or law firm shall not share legal fees with a nonlawyer” except under limited circumstances.<sup>89</sup> The comment to the rule explains that “[t]hese limitations are to protect the lawyer’s professional independence of judgment.”<sup>90</sup> Again, the courts are divided on the enforceability of agreements entered into in violation of the rule.

The Restatement and the majority of courts hold that agreements made in violation of this rule should not be enforceable because such agreements violate public policy<sup>91</sup> but provide little explanation for this

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<sup>87</sup> *Id.* (internal footnote omitted); see also *Goldman, Skeen & Wadler, P.A. v. Cooper, Beckman & Tuerk, L.L.P.*, 712 A.2d 1 (Md. Ct. Spec. App. 1998) (remanding for examination of these factors).

<sup>88</sup> *Goldman, Skeen & Wadler, P.A.*, 712 A.2d at 8–9. While other courts have said that minor breaches of the fee-splitting rules should not render a contract unenforceable, none have looked to the variety of factors that the Maryland courts do.

<sup>89</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2011). In addition to the professional rules, some states also have statutes barring fee sharing with non-lawyers. See, e.g., *Infante v. Gottesman*, 558 A.2d 1338, 1341 (N.J. Super. Ct. App. Div. 1989).

<sup>90</sup> MODEL RULES OF PROF’L CONDUCT R. 5.4(a) cmt. 1 (2011).

<sup>91</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 (2000); *Gallagher v. Weiner*, Civ. A. No. 92-1303, 1993 WL 460101, at \*2–3 (D.N.J. Oct. 29, 1993); *Holmes v. Crowe*, 304 B.R. 292, 297 (Bankr. N.D. Miss. 2004); *Peterson v. Anderson*, 745 P.2d 166, 169 (Ariz. Ct. App. 1987) (same); *McIntosh v. Mills*, 17 Cal. Rptr. 3d 66 (Ct. App. 2004); *Chandris, S.A. v. Yanakakis*, 668 So. 2d 180, 181 (Fla. 1996) (“[W]e find that Florida contingent fee agreements entered by attorneys not subject to our professional regulations are unauthorized legal services and are void as against public policy. Florida contingent fee agreements entered into by attorneys subject to our regulations but which do not comply with the regulations are likewise void as against the public interest.”); *Morrison v. West*, 30 So. 3d 561 (Fla. Dist. Ct. App. 2010) (out-of state attorney not entitled to recover any fee for his services); *Brandon v. Newman*, 532 S.E.2d 743 (Ga. Ct. App. 2000) (court invalidated attorney’s assertion of lien for fees because of lawyer’s unethical fee-splitting contract); *Fisher v. Carron*, No. 289687, 2010

conclusion.<sup>92</sup> One policy argument that would seem to be relevant is the identity of the parties involved. Unlike agreements made in violation of Rule 1.5(e), which involve two lawyers, agreements made in violation of Rule 5.4(a) involve a lawyer who is subject to the professional rules and a non-lawyer who may not know the rules and is not, in any event, subject to the rules. But most courts that consider this issue conclude that it does not matter that a lawyer may be taking advantage of a non-lawyer.<sup>93</sup> Similarly, these courts are not moved by the fact that if a lawyer enters into an agreement with a non-lawyer and then the non-lawyer cannot enforce the agreement, the lawyer is unjustly enriched.<sup>94</sup> As one court so colorfully articulated this idea: “It does not matter whose ox is gored. The courts will not enforce an agreement when it is found to be against public policy.”<sup>95</sup>

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Mich. App. LEXIS 508, at \*3 (Mich. Ct. App. Mar. 16, 2010) (“A contract that calls for violating the Michigan Rules of Professional Conduct is an unethical one, and ‘unethical contracts violate our public policy and, therefore, are unenforceable.’”); *Morris & Doherty, P.C. v. Lockwood*, 672 N.W.2d 884 (Mich. Ct. App. 2003); *Infante*, 558 A.2d 1338; *Bonilla v. Rotter*, 829 N.Y.S.2d 52, 53, (App. Div. 2007) (“[T]he agreement is illegal and plaintiff is foreclosed from seeking the assistance of the courts in enforcing it.”); *Ungar v. Matarazzo Blumberg & Assoc.*, 688 N.Y.S.2d 588, 590 (App. Div. 1999) (“A party may not seek the assistance of the courts in enforcing an illegal contract.”); *Wishnefsky v. Riley & Fanelli PC*, 799 A.2d 827, 828–31 (Pa. Super. Ct. 2002) (holding firm’s agreement to pay “forwarding fee” to non-lawyer was unenforceable); *Plumlee v. Paddock*, 832 S.W.2d 757, 759 (Tex. App. 1992).

<sup>92</sup> *Holmes*, 304 B.R. at 297 (“[F]ee-splitting arrangements with non-lawyers are contrary to public policy and are generally not allowable.”); *Morris & Doherty, P.C.*, 672 N.W.2d at 895 (“[C]ontracts containing performance requirements that would violate the MRPC are not enforceable because such contracts contradict Michigan’s public policy.”); *Infante*, 558 A.2d at 1344 (“Although contracts for investigative and paralegal services are ordinarily legal and enforceable, defendant cannot, by fractionalizing the illegal agreement, circumvent the statutory proscription and public policy against agreements of this nature.”); *Plumlee*, 832 S.W.2d at 758 (“Ordinarily, a contract between an attorney and one not an attorney, providing that the latter shall procure the employment of the former by a third person for the prosecution of suits to be commenced in consideration of a fee to be procured or collected therein, is void as against public policy . . .”).

<sup>93</sup> *McIntosh*, 17 Cal. Rptr. 3d at 75 (“[T]he doctrine of illegality considers whether the object of the contract is illegal. It does not turn on whether the illegality applies to the party seeking to enforce the agreement.” (emphasis removed)).

<sup>94</sup> *Infante*, 558 A.2d at 1344 (“While we recognize that our decision may unjustly enrich defendant to the extent that he has received the benefit of any investigative and paralegal services performed by plaintiff, the pervasive proscriptions against such agreements require that we not render any assistance to these parties.”).

<sup>95</sup> *Schniederjon v. Krupa*, 514 N.E.2d 1200, 1202 (Ill. App. Ct. 1987); see also *Fisher v. Carron*, No. 289687, 2010 Mich. App. LEXIS 508, at \*4 (Mich. Ct. App. Mar. 16, 2010) (“[T]o the extent that plaintiff elected to do business with a lawyer, plaintiff thereby exposed herself to the machinations of the rules that govern that profession. Because MRPC 5.4(a) prevents defendant from making payments in accord with an agreement to share a fee with a nonlawyer, that rule prevents plaintiff from collecting that share by way of an enforcement action.”). Some courts that refuse to enforce the agreement still permit the non-lawyer to recover on unjust enrichment or quantum meruit grounds. *“We the People” Paralegal Servs. L.L.C. v. Watley*, 33, 480 (La. App. 2 Cir. 8/25/00); 766 So. 2d 744, 747 (La. Ct. App. 2000) (permitting recovery on unjust enrichment grounds even though agreement is “illegal and null”).

Other courts, however, insist on enforcing an agreement to split fees between a lawyer and non-lawyer even though the agreement violates the rules of professional conduct.<sup>96</sup> Although these decisions generally lack extensive analysis to support this conclusion, the most common rationale that these courts offer is that the disciplinary rules are for lawyer discipline and not for other purposes. As one court put it:

We decline to treat the disciplinary rules as equivalents of criminal statutes in this context. . . . The disciplinary rules as invoked here govern attorney behavior, not the behavior of all citizens. Though entry into a fee-splitting agreement might subject [the lawyer] to professional discipline, the agreement itself is not invalid solely because it violates his professional duties.<sup>97</sup>

Another court reasoned that it would be perverse if an attorney were “permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement.”<sup>98</sup> As at least one court noted, this argument has particular force when a lawyer who is charged with knowledge of the professional rules is trying to take advantage of a non-lawyer who is not.<sup>99</sup>

### 3. Rule 1.8(a): Business Transactions with Clients

Concerned about the possibility of lawyer “overreaching,”<sup>100</sup> Model Rule 1.8(a) and its state equivalents provide that a lawyer can only “enter into a business transaction with a client or knowingly acquire an ownership . . . interest adverse to a client” if three conditions are met: (1) the terms of the transaction are “fair and reasonable” and “fully disclosed . . . in writing”; (2) “the client is advised in writing of the desirability of seeking” independent legal advice; and (3) “the client gives [written] informed consent.”<sup>101</sup>

The issues that arise concerning business transactions with clients are a little different than those that stem from fee disputes. While some

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<sup>96</sup> *Patterson v. Law Office of Lauri J. Goldstein*, 980 So. 2d 1234 (Fla. Dist. Ct. App. 2008); *Shimrak v. Garcia-Mendoza*, 912 P.2d 822 (Nev. 1996); *Atkins v. Tinning*, 865 S.W.2d 533 (Tex. App. 1993); *Danzig v. Danzig*, 904 P.2d 312 (Wash. Ct. App. 1995).

<sup>97</sup> *Atkins*, 865 S.W.2d at 537.

<sup>98</sup> *Patterson*, 980 So. 2d at 1238; *see also Shimrak*, 912 P.2d at 825 (“[I]t would not be fair under the circumstances of this case to adopt a double standard and allow attorneys to receive free investigative services simply because of their claim that the other party to the contract was ‘*in pari delicto*’ with them.”).

<sup>99</sup> *Danzig*, 904 P.2d at 314 (agreement is enforceable by non-lawyer because non-lawyer is not subject to the rules of professional conduct and therefore not “*in pari delicto*” with the lawyer).

<sup>100</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8 cmt. 1 (2011).

<sup>101</sup> *Id.* R. 1.8(a).



of the business transaction cases deal with the enforceability of agreements that violate the professional rule, in other cases, clients are trying to assert a separate cause of action (*e.g.*, for breach of fiduciary duty) against their attorneys for entering into a contract in violation of the rules. Again, the courts' treatment of the effect of a violation of the professional rule on the substantive law is decidedly mixed. Some courts have said that a contract entered in violation of 1.8(a) is unenforceable because it violates public policy,<sup>102</sup> though they have offered little else in the way of explanation.

By contrast, several courts have reached the opposite conclusion.<sup>103</sup> Again, some courts reach this conclusion by relying on the language in the Preamble.<sup>104</sup> Using similar reasoning, another court simply declared that the professional rules "are not substantive law" and therefore held that allegations that the attorney breached them would at "most . . . establish . . . a basis for a disciplinary proceeding against him, not a substantive basis to invalidate the mortgage."<sup>105</sup> Several other courts drew a contrast between illegal fee splitting agreements, which the courts said are never enforceable, with business transactions

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<sup>102</sup> *Valley/50th Ave., L.L.C., v. Stewart*, 153 P.3d 186, 189 (Wash. 2007) (en banc) ("Attorney fee agreements that violate the RPCs are against public policy and unenforceable."); *LK Operating, LLC v. Collection Group, LLC*, 279 P.3d 448, 458 (Wash. Ct. App. 2012), *amended on reconsideration*, 287 P.3d 628 (Wash. Ct. App. 2012), *granting review*, 301 P.3d 1048 (Wash. 2013) ("We then conclude that RPC 1.8 provides an alternative basis to rescind the agreement because it was against public policy."); *In re Corporate Dissolution*, 132 Wash App. 903, 912–13 (Wash. Ct. App. 2006) (The agreement "appears to be void as against public policy because it violated the attorney ethical rules against self-dealing."); *Holmes v. Loveless*, 94 P.3d 338 (Wash. Ct. App. 2004) (enforcement of agreement violates 1.8(a) and therefore unenforceable); *Cotton v. Kronenberg*, 44 P.3d 878, 884 (Wash. Ct. App. 2002) ("Attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are unenforceable."); *Jahnz v. Stover*, 2003 WI App 225, ¶ 37, 671 N.W.2d 717 (Wis. Ct. App. 2003) ("When Wisconsin adopted the MODEL RULES, it presumably did so in an effort to delineate the boundaries of and regulate the relationships between attorneys and their clients. Rule 1.8 . . . prohibits business transactions between attorneys and their clients unless certain safeguards are satisfied. To enforce a contract that violates this rule would be against public policy, and accordingly, the agreement between Stover and Jahnz is void on these grounds.")

<sup>103</sup> *Day v. Meyer*, No. 99CIV.10708(HB), 2000 WL 1357499, at \*10 (S.D.N.Y. Sept. 19, 2000) (interpreting California Rule 3-300, the equivalent of Model Rule 1.8(a)); *BGJ Associates, LLC v. Wilson*, 7 Cal. Rptr. 3d 140, 147 (Ct. App. 2003) (The fact that the agreement violates the professional rule "does not determine the enforceability of the alleged oral contract."); *Murdock v. Nalbandian*, No. 218-2008-CV-1062, 2010 N.H. Super. LEXIS 21, at \*8 (N.H. Super. Ct. Oct. 26 2010) ("Thus, to the extent that the contracts violate the Rules of Professional Conduct, they may well be voidable, but they are not void, and to the extent the affirmative defense seeks a declaration that they are void, the counterclaim must be stricken."); *Guest v. Allstate Ins. Co.*, 2009-NMCA-037, ¶ 21, 205 P.3d 844, 853 (N.M. Ct. App. 2009), *aff'd in part, rev'd in part*, 2010-NMSC-047, 244 P.3d 342 (N.M. 2010) ("The Rules of Professional Conduct have limited application outside the disciplinary process."); *Garcia v. Garza*, 311 S.W.3d 28, 44 (Tex. App. 2010) ("[T]he Garcias do not direct us to any cases holding agreements violating DR 5-103 and DR 5-104 were unenforceable and void as against public policy, and we have found none.")

<sup>104</sup> *Guest*, 2010-NMSC-047, ¶¶ 21–22, 145 N.M. at 807; *Garcia*, 311 S.W.3d at 43.

<sup>105</sup> *Donald J. Weiss & Assoc. v. Tulloch*, 961 A.2d 862, 863 (Pa. Super. Ct. 2008).

between lawyers and clients, which are not absolutely forbidden under the rules.<sup>106</sup> These courts said such transactions may be void, though refused to void the particular transactions at issue for reasons that are not entirely apparent.<sup>107</sup> Another court reached the similar conclusion that business transactions made in violation of the professional rules are voidable but not void.<sup>108</sup>

Finally, most courts refuse to allow clients to assert an independent claim based on a violation of Rule 1.8(a).<sup>109</sup> Generally speaking, courts reach this conclusion by citing to the Preamble to the rules, which, as noted earlier, provides that the rules do not have application outside of the disciplinary process.<sup>110</sup> Although clients may sue for breach of common law duties, these courts hold that the rules of professional conduct do not create an independent cause of action.

#### 4. Rule 1.8(c): Soliciting Gifts from Clients

Rule 1.8(c) and its state equivalents prohibit lawyers from “solicit[ing] any substantial gift from a client, including a testamentary gift, or prepar[ing] on behalf of a client an instrument giving the lawyer or a person related to the lawyer any substantial gift unless the lawyer or other recipient of the gift is related to the client.”<sup>111</sup> The obvious concern with such gifts is “overreaching” by the lawyer.<sup>112</sup>

There are few reported cases concerning the enforceability of such gifts, but there is a split of authority in those cases, and, again, the courts offer little in the way of explanation for their positions. In one Louisiana case,<sup>113</sup> the lawyer prepared a will in which he would receive his client’s cash, bank accounts and 85% of her real estate.<sup>114</sup> The will also said that if any of the bequests made to the attorney were prohibited, the bequest would go to his wife.<sup>115</sup> The Louisiana Court of Appeals voided the gifts

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<sup>106</sup> *Day*, 2000 WL 1357499, at \*10 (describing fee splitting agreements as “inherently illegal”); *Murdock*, 2010 N.H. Super. LEXIS 21, at \*8–10.

<sup>107</sup> *Day*, 2000 WL 1357499, at \*10; *Murdock*, 2010 N.H. Super. LEXIS 21, at \*8–10.

<sup>108</sup> *Murdock*, 2010 N.H. Super. LEXIS 21, at \*8.

<sup>109</sup> *R.S. Silver Enter. Co., v. Pascarella*, No. FSTCV065002499S, 2010 WL 3259869, at \*27 (Conn. Super. Ct. July 14, 2010); *Liggett v. Young*, 877 N.E.2d 178, 182–83 (Ind. 2007); *Mazur v. Kammer*, No. 275298, 2008 WL 1989659, at \*5 (Mich. Ct. App. May 8, 2008).

<sup>110</sup> *R.S. Silver Enter. Co.*, 2010 WL 3259869 at \*26; *Liggett*, 877 N.E.2d at 183 (The rules of professional conduct “do not purport to create or describe any civil liability.”); *Mazur*, 2008 WL 1989659 at \*5 (“[P]laintiffs cannot bring a cause of action before the circuit court alleging that they suffered harm solely because defendants breached the MRPC.”).

<sup>111</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(c) (2011).

<sup>112</sup> *Id.* R. 1.8 cmt. 6.

<sup>113</sup> *In re Succession of Parham*, 98-1660 (La. App. 1 Cir. 9/24/99); 755 So. 2d 265 (La. Ct. App. 1999).

<sup>114</sup> *Id.* at p. 4, 268.

<sup>115</sup> *Id.*

reasoning that “[t]he Louisiana Rules of Professional Conduct (formerly the Code of Professional Responsibility) have the force and effect of substantive law,” but provided no further explanation.<sup>116</sup> A Texas court came to the same conclusion.<sup>117</sup>

By contrast, as noted earlier, the Pennsylvania Supreme Court rejected the applicability of the professional rules in a similar case.<sup>118</sup> In that case, the lawyer drafted a deathbed will for his client naming himself and his brother as beneficiaries.<sup>119</sup> Citing to the Preamble, the court declined to look at the professional rules: “The Code of Professional Conduct to which members of appellee’s profession were held at the time he did this ‘unconscionable’ act does not have the force of substantive law. . . . Thus, appellee’s failure to live up to that Code, standing alone, would not invalidate this will.”<sup>120</sup>

## 5. Rule 1.8(g): Aggregate Settlements

Rule 1.8(g) and its state equivalents provide that “[a] lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client . . . unless each client gives informed consent, in a writing signed by the client.”<sup>121</sup> This rule ensures that each client gets to have “the final say in deciding whether to accept or reject an offer of settlement” as required by Rule 1.2(a).<sup>122</sup>

There are few reported cases discussing the enforceability of agreements made in violation of this rule, but the majority of those have voided settlement agreements that do not comply with it. Again, these courts simply characterize the professional rules as “public policy” with little further explanation. The Texas Supreme Court, for example, rejected an aggregate settlement because it did not comply with the professional rules, which it described as the “public policy” of this state, and the court therefore held that “the release and settlement of the [plaintiffs’] cause of action [was] void and unenforceable.”<sup>123</sup> The court did not explain why professional rules should be employed in private

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<sup>116</sup> *Id.* at p. 7, 270.

<sup>117</sup> *Shields v. Texas Scottish Rite Hosp. for Crippled Children*, 11 S.W.3d 457, 459 (Tex. App. 2000) (gift in will was void because it violated the rules of professional conduct and public policy).

<sup>118</sup> *In re Pedrick*, 482 A.2d 215, 220–22 (Pa. 1984) (interpreting Pennsylvania Code of Professional Responsibility 5-5).

<sup>119</sup> *Id.* at 216.

<sup>120</sup> *Id.* at 217.

<sup>121</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2011).

<sup>122</sup> *Id.* R. 1.8 cmt. 13.

<sup>123</sup> *Quintero v. Jim Walter Homes, Inc.*, 709 S.W.2d 225, 229–30 (Tex. App. 1986) (interpreting Texas Disciplinary Rule 5-106).

law cases, but instead emphasized the importance of the policy underlying this rule: “The policy expressed in [the rule] is clearly to ensure that people such as the [plaintiffs] do not give up their rights except with full knowledge of the other settlements involved.”<sup>124</sup> A federal district court in Colorado<sup>125</sup> reached a similar conclusion, holding that the representation agreement, which enabled counsel to enter into a settlement that would bind all claims with the consent of only the plaintiffs’ steering committee, violated the aggregate settlement rule and was therefore unenforceable: “[A]ny provision of an attorney-client agreement which deprives a client of the right to control their case is void as against public policy.”<sup>126</sup> The court offered no explanation for why the rules constitute public policy.<sup>127</sup>

By contrast, several courts have upheld settlements even though those settlements were made in violation of the rule.<sup>128</sup> None of these courts offered any explanation for treating the rules as something less than “law,” but instead decided to uphold the settlements in light of what the courts considered to be relatively minor violations of the professional rule.<sup>129</sup>

## 6. Rule 1.8(h): Prospective Settlement of Malpractice Claims

Rule 1.8(h)(1) and its state equivalents prohibit a lawyer from making “an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.”<sup>130</sup> According to the comments, such agreements “are likely to undermine [the lawyer’s] competent and diligent representation” of the client and are difficult for clients to evaluate.<sup>131</sup> Two separate substantive law issues arise with respect to this provision. First, is an agreement that contains such a provision

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<sup>124</sup> *Id.* at 229; *see also* *Burrow v. Arce*, 997 S.W.2d 229 (Tex. 1999) (violation of Texas Disciplinary Rules of Professional Conduct meant disgorgement of fees even without requirement that plaintiff prove any damages).

<sup>125</sup> *Abbott v. Kidder Peabody & Co.*, 42 F. Supp. 2d 1046 (D. Colo. 1999).

<sup>126</sup> *Id.* at 1051.

<sup>127</sup> *Id.*; *see also* *Tax Auth., Inc. v. Jackson Hewitt, Inc.*, 898 A.2d 512, 522–23 (N.J. 2006) (holding that settlements made in violation of the rule are unenforceable but applying its ruling only prospectively).

<sup>128</sup> *In re* *Petition of Mal de Mer Fisheries, Inc.*, 884 F. Supp. 635, 639–40 (D. Mass. 1995); *Acheson v. White*, 487 A.2d 197, 199–200 (Conn. 1985); *Scamardella v. Illiano*, 727 A.2d 421, 425 (Md. Ct. Spec. App. 1999).

<sup>129</sup> *Mal de Mer Fisheries*, 884 F. Supp. at 639–40 (upholding settlement even though fact of aggregate settlement was not disclosed); *Acheson*, 487 A.2d at 199–200 (upholding settlement despite lack of complete disclosure); *Scamardella*, 727 A.2d at 425 (disclosure was adequate even though not complete as required by letter of 1.8(g)).

<sup>130</sup> MODEL RULES OF PROF’L CONDUCT R. 1.8(h)(1) (2011).

<sup>131</sup> *Id.* R. 1.8 cmt. 14.

enforceable, and, second, can a client state a separate cause of action against an attorney for violating this rule? Again, the few courts that have considered the substantive impact of this professional rule are divided.

Concerning enforceability, the Restatement unequivocally provides that “[a]n agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”<sup>132</sup> The comment explains that “[s]uch an agreement is against public policy because it tends to undermine competent and diligent legal representation.”<sup>133</sup> Some courts that have looked at this issue have taken a similar view. For example, the New York Appellate Division held that a clause in a retention agreement could not serve as defense to a malpractice action because the clause violated the professional rules: “While a violation of a disciplinary rule ‘does not, in itself, generate a cause of action,’ a release obtained in violation of a disciplinary rule should not serve to shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined.”<sup>134</sup>

But a few courts have refused to treat the rule as having any impact on the substantive law. The Michigan Court of Appeals held that a provision in a retainer agreement requiring arbitration of any claims arising out of the attorney-client relationship was enforceable even though the client had not had the opportunity to retain independent counsel to review this provision, in violation of Michigan Rule 1.8(h).<sup>135</sup> “[T]hrough failure to comply with the requirements of MRPC 1.8(h) may provide a basis for invoking the disciplinary process, such failure does not give rise to a cause of action for enforcement of the rule or for damages caused by failure to comply with the rule.”<sup>136</sup> Similarly, a Texas appellate court found that a violation of 1.8(h)(1) “does not necessarily establish a cause of action, nor does it void an otherwise valid contract executed outside of the attorney-client relationship.”<sup>137</sup> The Texas court relied primarily on the Preamble to the rules in reaching this conclusion.<sup>138</sup>

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<sup>132</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (2000).

<sup>133</sup> *Id.* § 54 cmt. b.

<sup>134</sup> *Swift v. Choe*, 674 N.Y.S.2d 17, 20 (App. Div. 1998) (internal citations omitted); *see also* *Hickey v. Scott*, 738 F. Supp. 2d 55, 62 (D.D.C. 2010) (finding an agreement to prospectively limit liability in violation of D.C. Rule of Professional Conduct 1.8(g)(1) violates public policy and is therefore unenforceable).

<sup>135</sup> *Watts v. Polaczyk*, 619 N.W.2d 714, 717–19 (Mich. Ct. App. 2000). Retainer agreements requiring arbitration of fee disputes are enforceable under the current version of Model Rule 1.8(h) as long as “the client is fully informed of the scope and effect of the agreement.” MODEL RULES OF PROF’L CONDUCT R. 1.8 cmt. 14 (2011).

<sup>136</sup> *Watts*, 619 N.W.2d at 718 n.1.

<sup>137</sup> *Wright v. Sydow*, 173 S.W.3d 534, 549 (Tex. App. 2004).

<sup>138</sup> *Id.*

#### 7. Rule 1.8(i): Proprietary Interest in a Client's Cause of Action

Under Rule 1.8(i) and its state counterparts, a lawyer “shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client,” with two exceptions: A lien to secure the lawyer’s fee and a contingent fee arrangement.<sup>139</sup> The comment explains that the rule is designed to “avoid giving the lawyer too great an interest in the representation. In addition, when the lawyer acquires an ownership interest in the subject of the representation, it will be difficult for a client to discharge the lawyer if the client so desires.”<sup>140</sup>

There are few reported cases that consider the enforceability of an agreement made in violation of the rule, but in three such cases, the courts held that the agreements were enforceable despite the rule violation. In one Texas case, the court relied on the preamble to the Texas rules to find the rules violations irrelevant: “[T]he Garcias do not direct us to any cases holding agreements violating DR 5-103 and DR 5-104 were unenforceable and void as against public policy, and we have found none.”<sup>141</sup> A Connecticut court used the same reasoning: “Although we do not condone violations of the ethical rules governing attorneys, after reviewing *Noble* and the preamble of the Rules of Professional Conduct, and in light of the factual findings of the court, we hold that the violation of Rule 1.8(j) does not bar enforcement of the note.”<sup>142</sup>

A review of the case law involving the impact of these seven professional rules on the substantive law leads to two principal conclusions. First, the courts are sharply divided on the impact that the rules should have on the substantive law. Second, the courts largely fail to articulate any basis for their conclusion that the rules do (or do not) constitute public policy.

#### IV. THE COURTS SHOULD MAKE GREATER USE OF THE RULES

This Part encourages the courts to take the rules seriously as a source of substantive law and articulates the legal and public policy justifications for that position. These justifications derive from the text of the rules themselves, contract law, and public policy.

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<sup>139</sup> MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (2011).

<sup>140</sup> *Id.* R. 1.8 cmt. 16.

<sup>141</sup> *Garcia v. Garza*, 311 S.W.3d 28, 44 (Tex. App. 2010).

<sup>142</sup> *Ankerman v. Mancuso*, 830 A.2d 388, 393 (Conn. App. Ct. 2003).

A. *Arguments from the Text of the Rules Themselves*

1. The Lawyer Rules Have Matured into “Law”

Numerous scholars have described the “legalization” of the rules of professional conduct.<sup>143</sup> Ethics codes have matured from the status of “fraternal norms issuing from an autonomous professional society” to “a body of judicially enforced regulations.”<sup>144</sup> In the last eighty years, “with accelerating speed since 1970, ethical codes have developed into law.”<sup>145</sup>

The 1908 Canon of Professional Ethics represented the American Bar Association’s first attempt at establishing definitive written guidelines for legal ethics. These Canons of Ethics had “a certain Victorian charm” but whatever they were “they were not law in any ordinary sense of the term.”<sup>146</sup> Rather, as others have recognized, they were “hortatory and aspirational in character. ‘Ethics’ was above and largely outside of ‘law.’”<sup>147</sup> Further, they were “too vague and general to afford guidance”<sup>148</sup> and therefore were not used as a “basis for discipline.”<sup>149</sup> Beyond these vague rules, the system of lawyer discipline

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<sup>143</sup> Geoffrey C. Hazard Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1241–42 (1991); see also Mary C. Daly, *The Dichotomy Between Standards and Rules: A New Way of Understanding the Differences in Perceptions of Lawyer Codes of Conduct by U.S. and Foreign Lawyers*, 32 VAND. J. TRANSNAT’L L. 1117, 1124–34 (1999); Bruce A. Green, *Doe v. Grievance Committee: On the Interpretation of Ethical Rules*, 55 BROOK. L. REV. 485, 531–32 (1989); Samuel J. Levine, *Taking Ethics Codes Seriously: Broad Ethics Provisions and Unenumerated Ethical Obligations in a Comparative Hermeneutic Framework*, 77 TUL. L. REV. 527, 530–38 (2003); Richard W. Painter, *Rules Lawyers Play By*, 76 N.Y.U. L. REV. 665, 668–69 (2001); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1323, 1324 (1988) (describing the “gradual transition from informal words passed via lectures to actual codified rules”); Tanina Rostain, *Ethics Lost: Limitations of Current Approaches to Lawyer Regulation*, 71 S. CAL. L. REV. 1273, 1279–80, 1288–99 (1988); Irma S. Russell, *The Evolving Regulation of the Legal Profession: The Costs of Indeterminacy and Certainty*, 2008 J. PROF. LAWYER 137, 145–49 (2008); Murray L. Schwartz, *The Death and Regeneration of Ethics*, 1980 AM. B. FOUND. RES. J. 953, 954–55; Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 IOWA L. REV. 901, 905–10 (1995); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 U. CHI. L. SCH. ROUNDTABLE 469 (2001); Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—II The Modern Era*, 15 GEO. J. LEGAL ETHICS 205 (2002); Fred C. Zacharias, *Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics*, 69 NOTRE DAME L. REV. 223, 225–27, nn.7–10 (1993).

<sup>144</sup> Hazard, *supra* note 143, at 1249; see also Zacharias, *supra* note 143, at 223 (“Over time, the professional codes governing lawyer behavior have become statutory in form.”).

<sup>145</sup> Cramton & Udell, *supra* note 20, at 300; Hazard, *supra* note 143, 1251.

<sup>146</sup> Reynolds, *supra* note 25, at 566.

<sup>147</sup> Cramton & Udell, *supra* note 20, at 299.

<sup>148</sup> CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 55 (1986).

<sup>149</sup> Strassberg, *supra* note 143, at 908; see also Cramton & Udell, *supra* note 20, at 299 (“Even in judicial review of disciplinary proceedings, the binding legal standards often came from well-established rules of agency, fiduciary, and criminal law.”); Ellen S. Podgor, *Criminal*

itself was a “clubby and fraternal process.”<sup>150</sup> Over time, however, “it became a more elaborate process by which the state, through the judicial system and organs operating under its auspices, exercised formal legal authority,” and, as the process became more formal, courts “more frequently referred to ethical prohibitions . . . in disciplinary proceedings.”<sup>151</sup>

This development led to a call for more specific disciplinary rules that would distinguish “between mandatory legal requirements and purely ethical (and nonbinding) guidelines.”<sup>152</sup> The 1969 Model Code of Professional Responsibility was the result. It “distinguished sharply between Ethical Considerations (designed to ‘point the way to the aspiring’) and the Disciplinary Rules (designed to ‘judge the transgressor’).”<sup>153</sup> Professor Geoffrey Hazard described the Model Code as the “crucial step” in the legalization of ethics regulation.<sup>154</sup>

This legalization of the rules culminated in the drafting and adoption of the Model Rules of Professional Conduct in 1983. The drafting process was “quasi-legislative” because of the way in which it “mirrored that of public lawmaking.”<sup>155</sup> “The Model Rules more nearly resemble a statutory code of conduct in which imperatives, cast in the terms of ‘shall’ or ‘shall not,’ define conduct for purposes of professional discipline.”<sup>156</sup> As Robert Kutak, the chair of the ABA commission that drafted the Rules, explained: “the format of black-letter rules accompanied by explanatory comments . . . replicates the familiar, time-tested approach of the American Law Institute’s restatements of the law and modern model legislation.”<sup>157</sup> Consequently, a member of the Consultative Group for the Restatement of the Law Governing Lawyers, wrote that the “regulations are rules of law and not merely admonitions of the legal profession to its members. . . . [T]he Code and the Rules, as

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*Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 TEMP. L. REV. 1325, 1335, n.84 (1988).

<sup>150</sup> Cramton & Udell, *supra* note 20, at 300.

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*; see also Daniel S. Reynolds, *supra* note 25, at 566 (“The advent of the 1969 Model Code of Professional Responsibility worked a major transformation in its attempt to separate enforceable rules for attorney discipline from other, more transcendental ethical considerations.”).

<sup>153</sup> Cramton & Udell, *supra* note 20, at 300. Levine, *supra* note 143, at 531 (“Significantly, in contrast to the general nature of the Canons, the Model Code include[d] ‘blackletter law’ through specific Disciplinary Rules that the Code describe[d] as ‘mandatory in character . . .’”).

<sup>154</sup> Hazard, *supra* note 143, at 1251.

<sup>155</sup> Hazard, *supra* note 143, at 1253. Professor Ted Schneyer described the adoption of the Model Rules as “the most sustained and democratic debate about professional ethics in the history of the American bar.” Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 LAW & SOC. INQUIRY 677, 678 (1989).

<sup>156</sup> Cramton & Udell, *supra* note 20, at 301; see also Hazard, *supra* note 143, at 1254 (“[T]he Rules were rendered in statutory language.”).

<sup>157</sup> Robert J. Kutak, *Evaluating the Proposed Model Rules of Professional Conduct*, 5 AM. B. FOUND. RES. J. 1016, 1016–17 (1980).



adopted in various states, are a form of legislation with attendant authoritative significance.”<sup>158</sup>

This history should encourage courts to fully embrace the professional rules as a source of law. In most respects, the rules closely resemble other legislation and therefore should be considered “public policy” just like other legislation.<sup>159</sup> First, the rules have gone through a process quite similar to the process that other legislation goes through. Second, the rules are cast in imperatives—“shall” and “shall not”—just like statutes. Third, the rules are quite specific, particularly the provisions concerning the prohibited agreements at issue here.<sup>160</sup>

## 2. The Current Preamble Recognizes the Growing Role of the Lawyer Rules in Substantive Law

As noted in Part III, one of the principle objections to the use of the rules outside of the disciplinary context is that such use violates the intent of the rulemakers as expressed in the Preamble to the Model Rules.<sup>161</sup> Specifically, the Preamble provides:

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

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<sup>158</sup> Lawrence J. Latta, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 726 (1998); see also Levine, *supra* note 143, at 533 (“In addition to their legislative form, ethics regulations have evolved to acquire the status of legal authority similar to that of legislation.”); Lawrence K. Hellman, *When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions*, 10 GEO. J. LEGAL ETHICS 317, 321 (1997) (“[W]hen a state supreme court issues an order officially adopting a set of rules of professional conduct, it is establishing legally binding standards of conduct just as a state legislature does when it passes a law proscribing bank robbery.”).

<sup>159</sup> See *infra* Part IV.B.1.

<sup>160</sup> Cf. Dahlquist, *supra* note 29, at 15 (criticizing the use of the professional rules in legal malpractice cases because “the standards of the Code itself are just as broad and ambiguous” as the common law standards).

<sup>161</sup> MALLEN & SMITH, *supra* note 29, § 20:7 (“The disclaimers are appropriate in several respects. First, the ABA Model Code and Model Rules, the authors did not discuss the ramifications of ethical principles in civil litigation, nor did the ABA design the ethical standards to achieve civil objectives. Thus, the drafters did not promulgate the ethical standards to be used in civil litigation.”).

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.<sup>162</sup>

Thus, the Preamble disclaims almost any role for the rules outside of the disciplinary process except for the last sentence which acknowledges that a violation of the rules "may be evidence of breach of the applicable standard of conduct."<sup>163</sup> This last sentence actually represents a retreat on the issue by the rulemakers. The old Preamble, which is still followed in a number of states, precluded any reliance on the rules whatsoever and concluded with the following sentence: "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."<sup>164</sup>

Rather than looking at the Preamble as an expression of the rulemakers' intent to limit the use of the rules in substantive law disputes, this change suggests that the rulemakers actually envision a greater role for the rules outside of the disciplinary context. Indeed, by making this change the rulemakers have arguably accepted the "growing body of authority that looks to the Rules of Professional Conduct as articulating duties and responsibilities relevant to the question of whether a lawyer has violated the applicable standard of care for civil liability purposes."<sup>165</sup>

Even if one concludes that the rulemakers' intent has not changed, however, this disclaimer is best ignored. Professor Hazard famously described this language in the Preamble as "futile . . . if not fatuous."<sup>166</sup> The rulemakers drafted the rules (and the courts have adopted them) to distinguish between appropriate and inappropriate lawyer conduct. If conduct is wrong in one context and subjects the lawyer to discipline, it is illogical to say that we should ignore that rule violation in judging the lawyer's conduct in the context of civil litigation. Arguments to the contrary represent the worst kind of lawyer protectionism.<sup>167</sup>

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<sup>162</sup> MODEL RULES OF PROF'L CONDUCT: PREAMBLE & SCOPE ¶ 20 (2011).

<sup>163</sup> *Id.* ¶ 20.

<sup>164</sup> ABA *Model Rules of Professional Conduct (Pre-2002)*, *supra* note 54, ¶ 18.

<sup>165</sup> Donald R. Lundberg & Charles M. Kidd, *You Say You Want an Evolution? An Overview of the Ethics 2000 Amendments to the Indiana Rules of Professional Conduct*, 38 IND. L. REV. 1255, 1259 (2005).

<sup>166</sup> Geoffrey C. Hazard, Jr., *Lawyers and Client Fraud: They Still Don't Get It*, 6 GEO. J. LEGAL ETHICS 701, 718 (1993); Munneke & Davis, *supra* note 29, at 41 (describing disclaimers as "virtually meaningless").

<sup>167</sup> Cramton & Udell, *supra* note 20, 302-03 ("The bar has generally taken an internally inconsistent and result-oriented position on this subject. Typically, the bar argues a restrictive view concerning the ethics rules as a source of authoritative law. This is especially so when the civil or criminal liability of a lawyer is involved." (internal footnote omitted)).

B. *Arguments from Contract Law*

1. Lawyer Rules as Legislation

Courts make broad use of statutes in civil litigation.<sup>168</sup> This use extends beyond just criminal statutes.<sup>169</sup>

Common modern illustrations of this expansive treatment are cases in which statutory or administrative regulations of businesses or other groups or of activities such as operating a motor vehicle are employed to create or define rights of action for recovery of damages in behalf of persons for whose benefit the regulations were formulated.<sup>170</sup>

Such reliance “rests on the view that the fundamental policy choices reflected in the statute should also be relied upon by courts in assessing the alleged offender’s liability for damages or other civil relief.”<sup>171</sup> If one governmental body “has branded certain conduct as inappropriate, consistency demands that other organs of government pay heed when making judgments about the same conduct.”<sup>172</sup>

In this case, the same body (the judiciary) has enacted the rules of professional conduct and should enforce those rules in litigation. As noted in Part III, the policy choice reflected in the rules is largely client protection. In enacting the rules, the courts have chosen to protect clients, and they should make the same choice in deciding civil cases. It makes little sense for the courts to say that lawyers will face discipline if they enter into a certain agreement but then turn around and enforce such agreements without regard to the fact that the agreement violates the professional rules.<sup>173</sup>

Professors Rotunda and Dzienkowski make a similar point in the context of disqualification motions where “courts have consistently

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<sup>168</sup> Wolfram, *supra* note 15, at 286 (“In civil suits, courts everywhere now receive as evidence of the violator’s failure to employ due care proof of a violation of a criminal statute if the injured party is within the statute’s intended area of protection.”).

<sup>169</sup> GEOFFREY C. HAZARD, JR., W. WILLIAM HODES, & PETER R. JARVIS *THE LAW OF LAWYERING* § 4.1, 4-7 (3d ed. Supp. 2013) (Courts frequently develop “tort standards from penal or regulatory strictures.”).

<sup>170</sup> Wolfram, *supra* note 15, at 287 (internal footnotes omitted).

<sup>171</sup> *Id.* at 286.

<sup>172</sup> HAZARD & HODES, *supra* note 169, §§ 4.1, 4-7.

<sup>173</sup> See Fred C. Zacharias, *The Myth of Self-Regulation*, 93 MINN. L. REV. 1147, 1176 (2009) (“Courts implementing the [substantive law] sometimes look to the professional codes for guidance but also often treat the codes as irrelevant, thus leading to inconsistent behavioral requirements for lawyers. Because the state supreme courts have the power to review lower courts’ decisions, they are in a unique position to harmonize the decisions with the professional codes or to explain when divergence from the codes is justified.” (internal footnote omitted)).

relied on ethics codes to establish standards for ruling on claimed conflicts of interest.”<sup>174</sup> As they point out, such reliance is logical since

[t]he rules of ethics are judicially imposed court rules. It is more than a little inconsistent for a court to promulgate a rule that states that a lawyer cannot represent a particular client because to do so would violate Rule 1.6 (governing confidences and secrets) of a former client, and then allow the lawyer to appear before the court in blatant violation of the Rule—particularly when the purpose of that Rule is to protect that former client.<sup>175</sup>

Now that the drafting process for the rules and the style of the rules closely resemble legislation, the courts should treat them like legislation.<sup>176</sup> If conduct is wrong and therefore subjects the lawyer to discipline, it is illogical to say that we should ignore that rule violation in the context of civil litigation.

## 2. Lawyer Rules as Professional Custom

Courts have generally found the codes and customs of other professionals to be relevant in civil litigation.<sup>177</sup> For example, courts frequently look to the American Medical Association’s Code of Medical Ethics in considering whether a doctor has violated his standard of care.<sup>178</sup> Similarly, the Tenth Circuit has held that the professional code of engineers was properly admitted into evidence in a suit against unlicensed engineers because “the codes provide some guidance in determining what conduct is appropriate for unlicensed engineers.”<sup>179</sup>

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<sup>174</sup> RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, *LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* §§ 1–9, 55 (2006–2007); *see also* Munneke & Davis, *supra* note 29, at 46 (“[T]he courts cite the ethical rules with regularity to support their decisions applying the substantial relationship test.”).

<sup>175</sup> ROTUNDA & DZIENKOWSKI, *supra* note 174, at 56; *see also* Munneke & Davis, *supra* note 29, at 46. Munneke and Davis make the same point in the legal malpractice context: “The key to determining whether a rule is susceptible to application in a civil action ought to be whether the specific rule was intended to protect a class of persons of which the plaintiff is a member against the type of harm that eventuated.” Munneke & Davis, *supra* note 29, at 37.

<sup>176</sup> *See supra* Part IV.A.1.

<sup>177</sup> Hazard, *supra* note 166, at 718–19 (“Norms stated as obligatory standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation.”); Richmond, *supra* note 29, at 950 (“[C]ourts typically hold other professional ethics codes to be relevant to the standard of care in civil litigation.”); Criton A. Constantinides, Note, *Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions*, 25 GA. L. REV. 1327 (1991) (collecting cases concerning the use of various professional ethics codes and advocating for the expansion of their use).

<sup>178</sup> Nicholas P. Terry, *Fear of Facebook: Private Ordering of Social Media Risks Incurred by Healthcare Providers*, 90 NEB. L. REV. 703, 715, n.88 (2012) (collecting cases).

<sup>179</sup> *Post Office v. Portec, Inc.*, 913 F.2d 802, 807 (10th Cir. 1990), *vacated* *Portec, Inc. v. Post Office*, 499 U.S. 915 (1991); *vacating as moot Post Office v. Portec, Inc.*, 935 F.2d 1105 (10th Cir. 1991) *see also* *John T. Jones Constr. Co. v. Hoot Gen. Constr.*, 543 F. Supp. 2d 982, 1010

In another case, the Iowa Supreme Court has held that a violation of the Code of Realtor Ethics is evidence of negligence by a realtor.<sup>180</sup> Likewise, the Tennessee Supreme Court has said that the rules and standards promulgated by the board of pharmacy “do not necessarily establish the duty of care owed by the pharmacy in this case, [but] they are relevant to the issue and may provide guidance in determining if there is a duty of care under the circumstances.”<sup>181</sup> Courts also look to the accountants’ code of professional conduct as the relevant standard of care in claims against accountants.<sup>182</sup> Finally, the clear majority view in legal malpractice cases is that while a rule violation itself is not a basis for malpractice liability, the rules may be considered in determining whether a lawyer has breached his standard of care.<sup>183</sup> The courts’ reliance on other professional codes, as well as the use of the professional rules in legal malpractice cases, counsels in favor of greater use of the professional rules in contract law cases.

### 3. Lawyer Rules as Codification of Common Law Duties

Finally, courts should embrace the use of the professional rules in private law disputes because the rules really do not impose any substantial new duties on lawyers. To the contrary, the ethics rules derive from common law duties.<sup>184</sup> Indeed, “[t]he [Model] Rules are firmly rooted in positive law. . . . [and] were carefully crafted to track generally accepted principles of agency law.”<sup>185</sup> Given this overlap, the codified rules are undeniably “germane to the question of professional standards in civil actions.”<sup>186</sup>

Of course, if the professional rules add nothing new to the substantive law, then what purpose is served by the courts’ reliance on them? One advantage is that the professional rules on the whole are clearer, more specific, and more accessible than the common law of

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(S.D. Iowa 2008) (“A violation of professional ethical standards is some evidence of negligence.”).

<sup>180</sup> See *Menzel v. Morse*, 362 N.W.2d 465 (Iowa 1985).

<sup>181</sup> *Pittman v. Upjohn Co.*, 890 S.W.2d 425, 435 (Tenn. 1994).

<sup>182</sup> *Constantinides*, *supra* note 177, at 1363 (collecting cases).

<sup>183</sup> See *supra* note 29 and accompanying text.

<sup>184</sup> HAZARD & HODES, *supra* note 169, § 4.1, 4-8 (“In addition, overlap between ‘other law’ and code norms is inevitable, given their developmental histories. Many professional rules of conduct were derived from decisional law arising in nondisciplinary contexts, such as legal malpractice or disqualification from representation, and some areas of decisional law have been heavily influenced by the professional codes.”); *Richmond*, *supra* note 29, at 957; *Zacharias*, *supra* note 173, at 1176 (“Standards in the professional codes often cover the same conduct as other legal standards governing lawyers, including civil law and judge-made supervisory decisions.”).

<sup>185</sup> *Munneke & Davis*, *supra* note 29, at 42.

<sup>186</sup> *Id.*

agency. For example, Rule 1.8(c) prohibiting lawyers from soliciting gifts from their clients (with limited exceptions) is a concrete example of the more general common law duty of loyalty that the lawyer owes to his client. If a lawyer improperly solicits a gift from a client in violation of 1.8(c), a court can rely on the clear prohibition in the rule rather than researching the potentially indeterminate common law on the subject.

There is a danger of courts relying too heavily on the rules.<sup>187</sup> Lawyers and the courts passing judgment on their conduct should be mindful that merely adhering to the letter of the professional rules is not always sufficient because lawyers still owe their clients fiduciary duties under the common law. In other words, lawyer conduct can pass muster under the rules but still be a violation of a lawyer's fiduciary duty to his client.<sup>188</sup> Despite this danger, courts should treat the rules as a source of law for the multitude of reasons discussed in this Part.

### C. Arguments from Public Policy

#### 1. The Lawyer Rules are Underenforced by the Bar

Commentators have long criticized the disciplinary system for failing to adequately police the profession.<sup>189</sup> Bar authorities tend to be "understaffed" and "underfinanced," and they are, of course, dominated by the group that they regulate.<sup>190</sup> Moreover, studies consistently show that judges fail to do their part in reporting lawyer misconduct.<sup>191</sup> These and other factors leave the disciplinary rules woefully under-enforced.<sup>192</sup>

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<sup>187</sup> Russell, *supra* note 143, at 159 ("[T]he apparent certainty of rules carries the potential cost of misleading those who rely on them.")

<sup>188</sup> *Id.* ("Accordingly, the Rules of Professional Conduct must exist as a supplement to the common law rather than a force for displacing it.")

<sup>189</sup> Leslie C. Levin, *The Emperor's Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions*, 48 AM. U. L. REV. 1, 5-6 (1998) ("[T]he lack of well-defined standards, the tendency to impose non-public sanctions on lawyers, the failure to publicize the 'public' sanctions, and the amount of recidivism that seems to occur, also raise serious questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession." (internal footnote omitted)).

<sup>190</sup> Hampton, *supra* note 29, at 657.

<sup>191</sup> Arthur F. Greenbaum, *Judicial Reporting of Lawyer Misconduct*, 77 UMKC L. REV. 537, 541 (2009) (collecting studies).

<sup>192</sup> Laurel Fedder, *Obstacles to Maintaining the Integrity of the Profession: Rule 8.3's Ambiguity and Disciplinary Board Complacency*, 23 GEO. J. LEGAL ETHICS 571 (2010); see also Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics*, 79 GEO. WASH. L. REV. 700, 708 (2011) (describing the underenforcement of Rule 1.8(g) governing aggregate settlements); Cramton & Udell, *supra* note 20, at 304 (arguing that prosecutors are "extremely unlikely" to be disciplined for violation of the anti-contact rule); Debra Moss Curtis, *Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics*, 35 J. LEGAL. PROF. 209 (2011) (providing disciplinary statistics from every state);

One recent study concluded that more than seventy-five percent of the bar complaints in Texas were dismissed without any investigation.<sup>193</sup>

If the bar authorities are not enforcing the rules (and the important norms underlying the rules) through the disciplinary process, the courts can fill that gap. The increased use of the rules in civil litigation “may be necessary to achieve an acceptable level of attorney compliance” with the professional rules.<sup>194</sup> Lawyers might be more likely to comply with the rules if they know that there will be economic consequences if they do not.<sup>195</sup> Further, aggrieved parties arguably have a greater incentive than the bar to enforce violations of the rules.<sup>196</sup>

One potential objection to an increased use of the professional rules in civil litigation is that it might lead to a flood of litigation. But this Article does not advocate for a separate cause of action based on a violation of the rules; rather, the rules should be used to help decide an extant lawsuit, most likely for breach of contract. For example, if a lawyer and non-lawyer enter into an agreement to split fees in violation of Rule 5.4(a), the parties to the agreement (or the client) would not be able to state a separate cause of action against the lawyer for violating the professional rule; rather, the party resisting enforcement of the agreement would be able to argue that the agreement is unenforceable because it violates public policy.

## 2. Lawyers Write the Rules

Another argument in favor of applying the rules beyond the disciplinary process is that lawyers develop and draft the professional rules. As Professor Wolfram argued, “[s]urely the class of persons who would be disadvantaged in private litigation by imposition of Code duties—lawyers—cannot claim that the Code has been drafted without sufficient consideration of its interests. Attorneys, through the

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Long, *supra* note 14, at 330 (“Professional discipline is, in general, a relatively uncommon occurrence. Discipline related to fee agreements is rarer still.” (internal footnote omitted)).

<sup>193</sup> Fedder, *supra* note 192, at 580.

<sup>194</sup> Wolfram, *supra* note 15, at 288; *see also* Leubsdorf, *supra* note 29, at 102; Manuel R. Ramos, *Legal Malpractice: Reforming Lawyers and Law Professors*, 70 TUL. L. REV. 2583 (1996) (arguing for increased use of rules in legal malpractice cases because the bar rules are underenforced).

<sup>195</sup> Long, *supra* note 14, at 331 (“[T]he loss of an expected fee is more likely to be a deterrent to lawyer misconduct than is professional discipline.”); Douglas R. Richmond, *For A Few Dollars More: The Perplexing Problems of Unethical Billing Practices by Lawyers*, 60 S.C. L. REV. 63, 79 (2008) (“[P]otential civil liability often deters lawyer misconduct more effectively than does the threat of professional discipline.”).

<sup>196</sup> Wolfram, *supra* note 15, at 291 (“Spurred by the outrage of injury and the need for compensation, the person directly injured by an attorney violation can be expected to respond more readily with a damage action than the attorney disciplinary agency can with effective enforcement proceedings.”).

organized bar, have played a very dominant role in the development of the Code.”<sup>197</sup>

Nor would the imposition of lawyers’ professional rules as substantive law in civil cases step on the legislature’s toes since, under the “inherent powers doctrine,” the legislature (in theory) plays no role in the regulation of the bar.<sup>198</sup> Under this doctrine, courts claim the exclusive authority to regulate the practice of law based on constitutional separation-of-powers grounds.<sup>199</sup> In other words, state supreme courts have long taken the sole legislative role when it comes to the legal profession.<sup>200</sup>

One potential objection to the use of the rules in private law disputes is that the rules are too biased in favor of lawyers. In other words, it would be unfair to non-lawyers involved in litigation with lawyers to use the biased lawyer rules as the substantive basis for decisions, particularly when the general public has not been involved in the drafting of the rules.<sup>201</sup> At least in the case of the prohibited agreements at issue in this Article, there would not necessarily be any prejudice to non-lawyers. If an agreement is made in violation of the rule, the court should consider the agreement to be made in violation of public policy, but, as discussed earlier, just because the agreement violates public policy does not mean that it is unenforceable. Courts exercise great flexibility and consider a variety of factors in deciding whether to enforce an agreement that violates public policy.<sup>202</sup> In the event that a lawyer seeks to get out of an agreement with a non-lawyer on the ground that the agreement violates public policy, the court could

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<sup>197</sup> Wolfram, *supra* note 15, at 287–88. As Professor Wolfram wrote elsewhere: “Lawyers entirely control the process by which lawyer rules of conduct are written and adopted. In drafting disciplinary rules, every state to a greater (usually) or lesser (infrequently) extent follows the lead of the American Bar Association. Often states follow that lead slavishly. And only a lawyer would think that many of the departures are truly significant. The ABA calls the major shots and most of the minor ones.” Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 16 (1989); *see also* Cramton & Udell, *supra* note 20, at 318 (expressing concern that the “drafting and interpretation of ethics rules may be too influenced by the legal profession’s self-interest”); Deborah L. Rhode, *Why the ABA Bothers: A Functional Perspective on Professional Codes*, 59 TEX. L. REV. 689, 692 (1981) (Ethics codes “consistently resolved conflicts between professional and societal objectives in favor of those doing the resolving.”); Richmond, *supra* note 29, at 954 (“Lawyers dominate the development and drafting of ethics rules; therefore, it cannot reasonably be argued that the rules ignore their special concerns or that they will somehow suffer a disadvantage if ethics rules play a limited role in litigation against them.”).

<sup>198</sup> Wolfram, *supra* note 15, at 288.

<sup>199</sup> Benjamin J. Barton, *An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation—Courts, Legislatures, or the Market*, 37 GA. L. REV. 1167, 1173 (2003).

<sup>200</sup> *Id.* at 1171; Wolfram, *supra* note 15, at 288 (“Judicial initiative in enlarging attorney liability to bring it into agreement with the dictates of the [disciplinary codes], then, can in no manner be thought an illegitimate usurpation of legislative prerogatives.”).

<sup>201</sup> Cramton & Udell, *supra* note 20, at 310 (expressing the concern that “public interests may not be well represented in the rule formulation process”).

<sup>202</sup> *See supra* note 36–37 and accompanying text.



nevertheless decide to hold the lawyer to the agreement because it would be perverse if an attorney, for example, were “permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement.”<sup>203</sup>

#### CONCLUSION

This Article has addressed the largely unexplored issue of whether agreements entered into in violation of the professional rules are nevertheless enforceable as a matter of substantive contract law. In addressing this question, this Article accomplished two principal tasks. First, it examined the split among the courts considering the substantive impact of agreements made in violation of the professional rules. Courts are sharply divided and have taken a variety of approaches in dealing with this issue, but, whatever their conclusion, their analysis has been lacking.

Second, in urging more uniform and widespread use of the rules in substantive contract disputes, it provided the legal and public policy justifications that have been almost completely absent from the case law. These arguments derive from the text of the rules themselves, contract law, and public policy. The theme that runs through these arguments is that it is time for the courts to take the professional rules seriously as a source of law. Although the rules used to be merely hortatory, they now resemble statutes in their language and in the process by which they are passed. Courts have generally found legislation (broadly defined) and the professional codes and customs of other professionals to be relevant in civil litigation, and there is no reason to treat lawyer codes differently. Broader use of the rules in civil litigation may also help solve the problem of the rules’ under-enforcement in the disciplinary context.

Although this Article focused on the courts’ treatment of certain prohibited agreements, the argument in favor of greater use of the professional rules has broader application. The lawyer professional rules have now matured into “law,” and it is time for the courts to treat them as such.

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<sup>203</sup> *Patterson v. Law Office of Lauri J. Goldstein*, 980 So. 2d 1234, 1238 (Fla. Dist. Ct. App. 2008).