

THE RULES OF PROFESSIONAL CONDUCT IN LEGAL MALPRACTICE LITIGATION

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The Rules of Professional Conduct (RPC) are ethical rules intended to guide lawyers in the practice of law and in the delivery of legal services to clients. A violation of these rules is one reason the disciplinary process might be invoked against a lawyer. Aside from disciplinary proceedings with the state bar, however, the rules are also used in legal malpractice cases, in an effort to paint the defendant attorney as unethical or utilized as evidence of a failure to maintain the appropriate standard of care. This article discusses some of the issues that arise when an attorney is accused of malpractice that includes violations of the RPC.

No Private Right of Action

Nevada's Rules of Professional Conduct track the ABA's Model Rules. Borrowing from the Scope section of the ABA's rules, Nevada's RPC 1.0A(d) provides, in part, that:

“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.”

Oftentimes, attorneys pursuing legal malpractice claims argue that a violation of a rule is a presumptive (or per se) basis for civil liability. The majority view, however, holds that no private right of action exists for a violation of a Rule of Professional Conduct and Nevada follows the majority view. In *Mainor v. Nault*, 101 P.3d 308, 321 (Nevada 2004), the Nevada Supreme Court carefully considered the other available approaches and adopted the majority view that a violation of a rule alone does not create a viable cause of action. If there was any doubt remaining, the Nevada Supreme Court reiterated the majority view a few years later. See *In re Jane Tiffany Living Trust 2001*, 177 P.3d 1060 (Nevada 2008) (Violations of the rules do not give rise to a private right of action).

Many of the RPCs provide simple statements related to an attorney's duty. For example, RPC 1.1 provides:

“A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.”

RPC 1.1's intent is simple and fairly easy for a jury to understand. However, as evidence of the standard of care, context and expert explanation are necessary in order to understand its application.

Defenses and Attorney Judgment Rule

The Rules of Professional Conduct are also available as a defense to legal malpractice claims. Lawyers frequently look to the rules as a justification for their litigation tactics, advice or strategy. RPC 2.1 provides:

“In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.”

Like RPC 1.1, RPC 2.1 is fairly simple and provides a straightforward statement of an attorney's duty to render advice based on a variety of factors. Based on this rule, lawyers usually argue that a legal malpractice claim is barred by the attorney judgment rule.

The attorney judgment rule provides that, absent an express agreement, attorneys are not guarantors of results. This rule creates a flexible doctrine that protects attorneys acting in good faith from claims brought with the benefit of hindsight. Stated differently, an attorney's good faith tactical decision, or a decision made on an unsettled point of law, is not actionable, even if the attorney later turns out to have been incorrect, or receives unfavorable results. The rule is well established and has been almost universally recognized. See e.g., *Savings Bank v. Ward*, 100 U.S. 195 (1879) (Attorney is not liable for every mistake that may occur in practice and may not be held

responsible for every error of judgment in the conduct of the case); *Woodruff v. Tomlin*, 616 F.2d 924, 930 (6th Cir. 1980) (“[T]here can be no liability for acts and omissions by an attorney in the conduct of litigation which are based on an honest exercise of professional judgment.” This is a sound rule.

Without the attorney judgment rule, all losing litigants would be able to sue their attorneys, as long as they could find other attorneys, who, with the advantage of hindsight, would be willing to second-guess the decisions of the original attorneys. *Smith v. McLaughlin*, 769 S.E.2d 7 (Virginia 2015) (Attorney not liable for malpractice challenging advice to settle where the advice based on an unsettled proposition of law); *Air Turbine Technology, Inc. v. Quarles & Brady*, 165 So.3d 816 (Florida 2015) (decision not to call an expert in federal court was good faith tactical decision protected by attorney judgment rule); *Clark County Fire District No.*

5 v. Bullivant Houser Bailey PC, 324 P.3d 723 (Washington 2014) (Rule recognized); *Blanks v. Seyfarth Shaw*, 171 Cal.App.4th 336 (California 2009) (Rule recognized); *Estate of Mitchell v. Dougherty*, 644 N.W.2d 391 (Michigan 2002) (Lawyer's decision not to pursue claims against one of several potential defendants protected under attorney judgment rule); *Cellucci v. Bronstein*, 649 A.2d 1333 (New Jersey 1994) (Attorney's decision not to pursue third party accident claim protected as a matter of attorney judgment); *Williams v. Beckham & McAliley*, 582 So.2d 1206 (Florida 1991) (Attorney not liable for legal malpractice in failing to pursue

underlying automobile negligence claim he determined was not viable); *Elliott v. Videan*, 791 P.2d 639 (Arizona 1989) (Rule recognized).

In *Kirsch v. Duryea*, 578 P.2d 935 (California 1978), a lawyer filed a medical malpractice claim on behalf of his

client. After several years, the lawyer determined the claim was not viable and advised his client that he would be withdrawing. The lawyer withdrew, and the client was unable to get the case to trial in the four months remaining before California's five-year rule expired. The client later sued the lawyer for malpractice, based on the failure to withdraw sooner, so that the client could have engaged successor counsel. The jury rendered a sizeable verdict against the attorney, who then appealed. On appeal, the lawyer argued that he was limited by ethical rules comparable to RPC 3.1, to pursue only claims warranted by existing law, or good faith argument for the extension, modification or reversal of existing law. The Supreme Court of California reversed and held that an attorney's judgment that a case lacks merit must be respected and cannot form a basis for legal malpractice:

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“To hold the attorney responsible in damages when in retrospect it appears he mistakenly sacrificed his client’s interests in favor of his public obligations (under ethical rules) would place an impossible burden upon the practice of law. Moreover, awarding damages against the attorney would violate sound public policy because an attorney frequently faced with the question whether vigorous advocacy in favor of a client should be curtailed in light of public obligation (under ethical rules) would tilt in favor of the client at the expense of our system of justice.”

The *Kirsch* decision is routinely cited in motions arguing in favor of the attorney judgment rule.

Experts

Several courts have recognized the necessity of expert witnesses to opine on standard of care issues involving the Rules of Professional Conduct. A majority of courts permit an expert’s reference to the rules in establishing standard of care. In *Mainor*, the Nevada Supreme Court specifically noted that an expert’s opinion could refer to the rules as evidence of the standard of care. Some courts even allow experts to recite the language of a rule, as evidence of the standard of care, without identifying the language as belonging to an ethical rule.

Discipline Proceedings and Legal Malpractice Cases

Unfortunately, sometimes lawyers are confronted with two-front attacks by former clients that include a discipline complaint and a legal malpractice lawsuit. Each tribunal applies a different standard

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of proof; defense strategies in each case may or may not coincide. In a state bar grievance action, a refusal to acknowledge the wrongful nature of conduct and an indifference to restitution are considered aggravating factors in determining proper discipline. In contrast, in a civil case, the lawyer will generally dispute liability and damages as a matter of practice.

It is not unusual for lawyers to mistakenly believe that a discipline case against them will not move forward until after a related civil case is resolved. A discipline case, however, is not dependent on a civil case. Nevada Supreme Court Rule 108 provides:

“Before or after a grievance file has been opened, processing of a grievance or complaint shall not be deferred or abated because of substantial similarity to the material allegations of pending criminal or civil litigation, unless authorized, for good cause, by a three-member screening panel appointed pursuant to Rule 105(1).”

Depending on the nature of the conduct at issue, a discipline case may or may not be deferred pending resolution of a civil case.

Finally, some lawyers think that settling a civil case with a claimant should include settlement of a related discipline case. Unfortunately, it doesn’t work that way. Nevada Supreme Court Rule 107 dictates that settlement of a civil case does not require the related discipline case to end. The settlement, however, is a factor that bar counsel may consider in determining whether the discipline case should abate. **NL**



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