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Charles W. Wolfram
University of Minnesota Law School

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THE CODE OF PROFESSIONAL RESPONSIBILITY AS A MEASURE OF ATTORNEY LIABILITY IN CIVIL LITIGATION

CHARLES W. WOLFRAM*

TABLE OF CONTENTS

I.	INTRODUCTION	281
II.	THE CODE OF PROFESSIONAL RESPONSIBILITY	283
III.	JUSTIFICATION FOR EXPANSIVE USE OF THE CODE IN PRIVATE LITIGATION	286
IV.	OBJECTIONS TO EXTENSIVE USE OF THE CODE IN PRIVATE LITIGATION	295
V.	ILLUSTRATIVE USES OF THE CODE	303
	A. <i>Conflicts of Interest</i>	304
	1. Dual Representation.	304
	2. Attorney's Business Dealings with a Client	305
	B. <i>Client Confidences and Secrets</i>	307
	C. <i>Communication with Adverse Party</i>	309
	D. <i>Prosecution of Frivolous Litigation</i>	310
	E. <i>Litigation over Fees</i>	314
	F. <i>Fee Splitting</i>	318
VI.	CONCLUSION	319

I. INTRODUCTION

A legal savant has been quoted as saying that the lawyer obtains as much precise direction from his guide to professional responsibility as a heart surgeon could usefully derive from examination of a valentine.¹ It is not quite as bad as that — but almost. The point has been made many times that the lawyers' Code of Professional Responsibility² does not suffer from overprecision.³

* Professor of Law, University of Minnesota Law School. A.B., University of Notre Dame, 1959; J.D., University of Texas, 1962. Patrice Halbach, 1980 candidate for the J.D. Degree at the University of Minnesota, rendered valuable research assistance. Work on this article was assisted by a grant from the Goodrich Professional Responsibility Fund at the University of Minnesota Law School.

1. Letter from Professor Anthony G. Amsterdam to the Grievance Committee of the District of Columbia, *quoted in Time*, May 13, 1966, at 81.

2. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976) [hereinafter cited as ABA CODE].

3. See, e.g., Levy, *Time to Review the Code*, 62 A.B.A.J. 225 (1976); Wolfram, *Client*

Whether the matter be an emerging controversial issue such as the duty of corporate counsel to inform a client's outside auditors of the existence of possible contingent liabilities⁴ or an ancient debate over the responsibilities of an attorney when confronted with the opportunity to score an advantage in litigation by advising a cooperative witness of the relevant legal background against which needed testimony might be modeled,⁵ on too many such issues the Code that purports to regulate the professional lives of lawyers is either altogether silent or very opaque. Pressures are mounting for a thorough reconsideration and redrafting of the Code of Professional Responsibility.⁶

Of what value then could the Code of Professional Responsibility be in extracting meaning from the reasonable person standard in legal malpractice and other similar types of private party litigation in which an attorney's duties are in issue? Help, if available from the Code, would be extremely useful, for the reasonable person norm itself is a largely indeterminate standard that must depend for meaning on a case-by-case process of judicial and jury elaboration in the absence of any more generalized and authoritative guidance. It will be seen that to date the Code has actually not served as a very important source of assistance

Perjury, 50 S. CAL. L. REV. 809, 870 (1977); Barnett, Book Review, 90 HARV. L. REV. 648, 651 n.13 (1977). Courts have generally rejected void-for-vagueness constitutional attacks on the Code, holding that despite its generality it is sufficiently definite for the purposes of disciplining members of a specialized profession. See, e.g., *In re Keiler*, 80 A.2d 119 (D.C. 1977); *In re Rook*, 276 Or. 695, 556 P.2d 1351 (1976). But cf. *Chicago Council of Lawyers v. Bauer*, 522 F.2d 242 (7th Cir. 1975), cert. denied, 427 U.S. 912 (1976) (Disciplinary Rules of ABA CODE pertaining to lawyer comments on pending litigation unconstitutional in part on void-for-vagueness grounds).

4. *ABA Statement of Policy Regarding Lawyers' Responses to Auditors' Requests for Information*, 32 BUS. LAW. 177 (1976); Hinsey, *Auditors' Inquiries and Lawyers' Responses*, 62 A.B.A.J. 1572 (1976); *Opinion and Comment: Responses to Auditors' Requests*, 62 A.B.A.J. 493 (1976); Note, *Attorney Responses to Audit Letters: The Problem of Disclosing Loss Contingencies Arising from Litigation and Unasserted Claims*, 51 N.Y.U.L. REV. 838 (1976).

5. See, e.g., M. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 59-77 (1975); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1488 (1966). Compare Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1478-80 (1966).

6. Partly in response to criticism concerning its vagueness, a special committee of the American Bar Association has recently been appointed to consider changes to the ABA Code. See *Committee on Evaluation of Professional Standards Seeks Advice and Counsel of Members*, 64 A.B.A.J. 143 (1978). For comments by some of the more outspoken critics of the Code as presently drafted, see J. LIEBERMAN, *CRISIS AT THE BAR: LAWYERS' UNETHICAL ETHICS AND WHAT TO DO ABOUT IT* (1978); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Schnapper, *The Myth of Legal Ethics*, 64 A.B.A.J. 202 (1978).

to courts in private litigation. In part this is attributable to the lack of clarity in the Code itself. But, as will be demonstrated, several provisions of the existing Code could be made to yield much more helpful guidance than courts thus far have seemed willing to admit. Particularly if current moves to redraft the Code result in a substantially more specific document, the principle that attorney violations of the Code may serve as some indication of entitlement to damages or other private suit relief may become of truly widespread significance.

This essay will first examine the question of the legitimacy of employing provisions of the Code as the measure of a lawyer's responsibilities in tort, contract, and similar litigation. It will then attempt, illustratively but not exhaustively, to identify provisions of the Code that may be of potential utility in private party litigation against, or by, attorneys. The examples chosen have emerged serendipitously from an avid reading of advance sheets dealing with emerging problems of professional responsibility. The focus will be primarily on theories of recovery in legal malpractice actions against attorneys by former clients and third parties, including actions based both on negligence and intentional act theories of recovery. This illustrative catalogue of theories also looks at conflicts of interest, business dealings with a client, client confidences and secrets, communication with an adverse party, frivolous litigation, attorneys' fees, and fee splitting.

II. THE CODE OF PROFESSIONAL RESPONSIBILITY

Before proceeding, a brief discussion of the substance and structure of the regulatory norms that will be examined in this article may be useful. Provisions known in every state but California as the "Code of Professional Responsibility" (the Code) have been authoritatively adopted as rules to govern the professional lives of lawyers,⁷ and California's "Rules of Professional Conduct" are modeled at many important points upon the Code.⁸ The text of the Code was generated by the American Bar Association in 1969 and traces its ancestry to the ABA Canons of Ethics, first adopted in 1908. The 1908 Canons were very general in their statement and seem not have been employed to any significant

7. See Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, 62 MINN. L. REV. 619, 632 nn. 51 & 52 (1978).

8. *Id.* at n.52.

extent in private litigation.⁹ The 1969 Code is an improvement on the older Canons but, as mentioned,¹⁰ has apparently failed to satisfy the demand for clearly stated rules on many important regulatory questions confronting members of the legal profession.

The Code is composed of three types of stated standards. At the greatest level of generality are nine Canons that are defined in the Code itself as “axiomatic norms.”¹¹ The Canons are very vague — for example, “A lawyer should avoid even the appearance of professional impropriety.”¹² They have understandably not figured prominently even in attorney discipline cases, and in the Code they serve as little more than titles to chapters. The much more extensive Ethical Considerations of the Code are “aspirational in character and represent the objectives toward which every member of the profession should strive.”¹³ As such, they serve the largely heuristic function of giving moral advice to attorneys about preferred but not mandatory behavior. Only the Disciplinary Rules are “mandatory in character” in the sense that any violation of them may lead to disciplinary action.¹⁴ The Disciplinary Rules (DRs) cover the familiar terrain of advertising and solicitation — “the petty details of form and manners,” which in 1934 Mr. Justice Stone found to be the main burden of the older Canons of Ethics.¹⁵ Also covered are such subjects as client confidences and secrets, conflicts of interest, competent representation, and the matters of zeal and restraint in the representation of a client.

In most jurisdictions the Code has been authoritatively promulgated by state action — normally court action, but in isolated instances through legislative enactment¹⁶ — as the binding rules of conduct for attorneys. In a few states the Code has been adopted by action of the state bar associations with implicit or explicit judicial affirmation of its binding effect.¹⁷ The constraints

9. See Rottman & Stern, *The Risk of Attorney Professional Liability*, 28 J. Mo. B. 127, 127-28 (1972).

10. See text at notes 1-6 *supra*.

11. See *Preliminary Statement*, ABA CODE.

12. ABA CODE, CANON 9.

13. *Preliminary Statement*, ABA CODE.

14. *Id.*

15. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 10 (1934).

16. See authorities cited in Wolfram, *supra* note 7, at 632 nn. 51 & 52 (1978). In most jurisdictions the Code has been adopted by court order or legislation. In a few, its adoption has taken the form of bar association approval. See *Report of the Special Committee to Secure Adoption of the Code of Professional Responsibility*, 97 A.B.A. REP. 268 (1972).

17. A notable example is California where, in addition to the adoption of Rules of

of the Code are enforced in every jurisdiction through official attorney disciplinary agencies.¹⁸ Ultimate authority to pass upon violations and sanctions is vested in the appellate courts of the jurisdiction.¹⁹

The picture that emerges from examination of the Code and its present level of enforcement in most states is that in several areas of practice a lawyer is not free to choose a personal course of conduct without risk.²⁰ For these areas, Code rules explicitly provide for the sanction of professional discipline if violated. Some courts nonetheless insist that at least some violations of the Code by attorneys are to be dealt with exclusively through the sanction of professional discipline; a violation of the Code cannot be relied upon as the basis for a civil recovery by a person injured as a result of the violation.²¹ But if violation of the Code could lead to discipline of the offending attorney, what reason can be given for refusing to hold the same attorney to the same standard in a private civil action for recovery of damages? The conclusions that should be reached are that the justifications for the broadened use of the Code in such private litigation are strong and that the objections to this use are not sufficiently weighty to cause rejection of the common-sense notion that the Code of Professional Responsibility should serve as a measure both of professional discipline and of civil liability sanctions.

Professional Conduct for lawyers by the State's Supreme Court, *see* 14 Cal. 3d 1 (1975), many local California bar associations have adopted the ABA's Code as part of their bylaws, *E.g.*, LOS ANGELES COUNTY BAR ASSOCIATION BYLAWS art. 13 (1976); SAN DIEGO COUNTY BAR ASSOCIATION AMENDED BYLAWS art. 14 (1976). California courts have freely referred to the ABA Code for authoritative guidance. *See, e.g.*, *City of Los Angeles v. Decker*, 18 Cal. 3d 860, 871, 558 P.2d 545, 551, 135 Cal. Rptr. 647, 653 (1977). An example of another model is Maine, where the Code is adopted, amended, and enforced through agencies of the Maine State Bar Association, a nonintegrated bar. But the Maine court has held that all Maine attorneys are bound to follow the ABA Code, which will be followed by the Maine courts "as a source of guidance in disciplinary matters." *In re Dineen*, 380 A.2d 603, 604 (Me. 1977).

18. *See generally* ABA JOINT COMMITTEE ON PROFESSIONAL DISCIPLINE STANDARDS FOR LAWYER DISCIPLINARY AND DISABILITY PROCEEDINGS (Tent. Draft 1978) [hereinafter cited as ABA DISCIPLINE STANDARDS]. The standards were endorsed at the February 1979 meeting of the ABA. *See* 47 U.S.L.W. 2524 (1979).

19. *Id.* at 4-5. *See also* text accompanying note 33 *infra*.

20. Since the Code's adoption in the early 1970's there has been an intensification of lawyer disciplinary agency activity, as measured by such things as the number of reported disbarments. *See, Lawscope: Tighter Discipline Shown by Statistics*, 63 A.B.A.J. 24 (1977) (76% increase between 1973 and 1975 in number of disbarments and even higher rate of increase in suspensions and public reprimands). It remains to be seen whether the increased enforcement continues well beyond such concomitant spurs to attorney discipline as those generated by the Watergate crisis.

21. *See, e.g.*, authorities cited and discussed at note 124 and accompanying text *infra*.

III. JUSTIFICATIONS FOR EXPANSIVE USE OF THE CODE IN PRIVATE LITIGATION

The affirmative case for increased judicial resort to the Code of Professional Responsibility as a source of the legal norms to be applied to attorneys in private civil litigation is basically composed of analogies to similar areas of the law in which normally extraneous source materials are now readily accepted by courts as premises for judicial reasoning. The first analogy is to the courts' uses of criminal statutes and similar enactments as authoritative guides in damage litigation. The second is to acceptance of custom or work practices as an appropriate measure of the liability of actors subject in the extra-judicial world to the workings of those customs or practices.

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.²² Indeed, many jurisdictions treat the statutory violations as producing liability per se.²³ In the end the rationale for looking to a criminal statute as a definition of the civil law responsibilities of an alleged offender 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.²⁴ In the courts' role as the cooperative effectuators of legislative policy and in the exercise of their common-law power to define the occasions on which civil liability will be imposed even though not explicitly created by legislation, the courts may appropriately create a right of action for private relief to advance the policy objectives of the legislation — at least when doing so will neither unwisely deter the range of choice that should be available to citizens²⁵ nor bring

22. *New Amsterdam Cas. Co. v. Novick Transfer Co.*, 274 F.2d 916 (4th Cir. 1960); *Gard v. United States*, 420 F. Supp. 300 (N.D. Cal. 1976); *Franco v. Bunyard*, 547 S.W.2d 91 (Ark.), cert. denied, 434 U.S. 835 (1977); *Perry v. Medeiros*, 343 N.W.2d 859 (Mass. 1976).

23. See, e.g., *Kauffman v. Schroeder*, 116 Ariz. 104, 568 P.2d 411 (1977); *Martin v. Herzog*, 228 N.Y. 164, 126 N.E. 814 (1920) (Cardozo, J.); *Shearer v. DeShon*, 240 S.C. 472, 126 S.E.2d 514 (1962); *White v. Gore*, 201 Va. 239, 110 S.E.2d 228 (1959); RESTATEMENT (SECOND) OF TORTS § 288B(1) (1965).

24. 2 F. HARPER & F. JAMES, *THE LAW OF TORTS* § 17.6 (1st ed. 1956); R. KEETON, *VENTURING TO DO JUSTICE* 94 (1969); Morris, *The Relation of Criminal Statutes to Tort Liability*, 46 HARV. L. REV. 453 (1933); Thayer, *Public Wrong and Private Action*, 27 HARV. L. REV. 317, 322 (1913).

25. See generally *Cort v. Ash*, 422 U.S. 66 (1975); *Wilson v. First Houston Inv. Corp.*, 566 F.2d 1235, 1243 (5th Cir. 1978); Association of Data Processing Serv. Organizations

in its wake other evils that may counsel leaving effectuation of the policy to the only remedies that have been explicitly recognized in the statute.²⁶ In modern times, of course, the same rationale has been employed by courts on numerous occasions to create private rights of action under other than criminal statutes. Common modern illustrations of this expansive treatment are cases in which statutory or administrative regulations of businesses or other groups²⁷ or of activities such as operating a motor vehicle²⁸ are employed to create or define rights of action for recovery of damages in behalf of persons for whose benefit the regulations were formulated.

A similar rationale should lead courts in future cases to employ the Code of Professional Responsibility more creatively and expansively to define the civil liability of lawyers. Just as with legislative enactment of criminal statutes, business regulations, or safe driving requirements, promulgation of the Code within a state is meant to affect the conduct of persons subject to its terms. And as with criminal and similar sanctions, the disciplinary sanctions for violations of the Code (disbarment, suspension, or reprimand) are occasionally very drastic punishment. But, both to complement the Code's deterrent aims and to make whole persons who suffer harm because of attorney violations of it, testing an attorney's civil liability by resort to the Code is both fair and appropriate.

To be sure, the Code itself states that it does not "undertake to define standards for civil liability of lawyers for professional conduct,"²⁹ but this should be read as Code neutrality, not hostility. Nothing in the Code suggests it would be inappropriate for a court to examine the Code as a possible source of guidance in a civil case. Surely 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

v. Federal Home Loan Bank Bd., 568 F.2d 478, 483 (6th Cir. 1977); *Drake v. Detroit Edison Co.*, 443 F. Supp. 833, 837 (W.D. Mich. 1978).

26. Objections to the proposed expanded use of the Code as a source of private right are considered, *infra* at 295-303.

27. Note, *Implied Rights of Action to Enforce Civil Rights: The Case for a Sympathetic View*, 87 YALE L.J. 1378 (1978); see, e.g., *Franco v. Bunyard*, 547 S.W.2d 91 (Ark.), cert. denied, 434 U.S. 835 (1977) (violation of Federal Gun Control Act by legitimate gun dealer who sold pistol to escaped convict gives rise to right of action arising out of foreseeable harm done by convict through use of pistol).

28. *James, Statutory Standards and Negligence in Accident Cases*, 11 LA. L. REV. 95 (1950); 7 AM. JUR. 2d *Automobiles & Highway Traffic* §§ 364-68 (1963).

29. *Preliminary Statement*, ABA CODE.

consideration of its interests. Attorneys, through the organized bar, have played a very dominant role in the development of the Code.³⁰ Thus, there should be no concern that the Code has been shaped with insufficient regard for their special needs and concerns and foisted upon lawyers.

Similarly, the occasional reluctance of courts to employ criminal or similar statutes as measures of civil liability because of a belief that the legislative silence on the subject of civil remedies should be regarded as legislative hostility to them³¹ is simply not relevant in the context of the Code. The courts of every jurisdiction have ultimate responsibility for shaping the Code of Professional Responsibility. In most jurisdictions the Code is not effective unless adopted by the highest court of the jurisdiction.³² The courts also play a relatively unrestrained role in interpreting the Code in attorney discipline and similar types of litigation. Indeed, the great majority of courts today would probably take the position under the "inherent powers" doctrine³³ that it is beyond the legislative competence, and solely within that of the judicial branch, to modify the Code. Thus, the Code is within the peculiar care and custody of the courts in ways that enactments of the state legislature are not. Judicial initiative in enlarging attorney liability to bring it into agreement with the dictates of the Code, then, can in no manner be thought an illegitimate usurpation of legislative prerogatives.

Moreover, judicial expansion of recoveries for professional civil liability may be necessary to achieve an acceptable level of attorney compliance with the Code. There seems to be abroad in much of the land a new sense of impatience with incompetent attorneys and with the historic failure of courts, the organized bar, legal education institutions, and other agencies to deal effectively with a perceived problem of incompetent³⁴ and unethical³⁵

30. See generally Wolfram, *supra* note 7, at 634-35 (1978).

31. See generally, e.g., *Cort v. Ash*, 422 U.S. 66, 78 (1975); *Redington v. Touche Ross & Co.*, [1978 Transfer Binder] FED. SEC. L. REP. (CCH) ¶ 96,404 (2d Cir. April 21, 1978), *cert. granted*, 99 S.Ct. 563 (1978).

32. See Wolfram, *supra* note 7, at 636-40.

33. See H. DRINKER, *LEGAL ETHICS* 41-42 (1953); L. PATTERSON & E. CHEATHAM, *THE PROFESSION OF LAW* 33-36 (1971); Wolfram, *supra* note 7, at 636-41; Note, *The Inherent Power of the Judiciary to Regulate the Practice of Law — A Proposed Delineation*, 60 MINN. L. REV. 783 (1976); Note, *Admission to the Bar and the Separation of Powers*, 7 UTAH L. REV. 82 (1960); Comment, *Separation of Powers: Who Should Control the Bar?*, 47 J. URB. L. 715 (1969).

34. It has become almost an article of faith for many contemporary reformers of the legal profession that there is widespread incompetence among attorneys. But a commentator whose own credentials as a reformer of the legal profession are entirely in order has

legal representation. The bar particularly, with some exceptions, has been said to have done little to ensure a higher level of attorney competence.³⁶ Evidently, many courts now share this impatience — at least if the present rate of increase in legal malpractice recoveries is any indication of judicial sentiment. The increasing incidence of recoveries against attorneys for legal malpractice may now be fairly said to be taking on the proportions of a legal revolution. From the very occasional case of some decades ago, most often concerning flagrant carelessness in a clear recovery case, the category of recoverable claims for legal malpractice in recent years has been expanded by courts to include both new theories of liability³⁷ and new plaintiffs.³⁸ Despite some localized evidence of persisting judicial hostility,³⁹ judges generally have

recently suggested that the problem of attorney incompetence has been seriously exaggerated. Frankel, *Curing Lawyers' Incompetence: Primum Non Nocere*, 10 CREIGHTON L. REV. 613 (1977).

35. *E.g.*, A. STRICK, INJUSTICE FOR ALL (1977); Auerbach, *The Legal Profession After Watergate*, 22 WAYNE L. REV. 1287 (1976); N.Y. Times, May 5, 1978, at 1, col. 5 (report of President Carter's speech to the Los Angeles Bar Association).

36. *E.g.*, Note, *Legal Specialization and Certification*, 61 VA. L. REV. 434, 451 (1975).

37. Very significant among the new theories in several jurisdictions has been the extension to legal malpractice cases of the "discovery" rule for tolling the statute of limitations. See Note, *A Modern Approach to the Legal Malpractice Tort*, 52 IND. L.J. 689, 690 (1977). The leading case is *Heyer v. Flaig*, 70 Cal. 2d 223, 449 P.2d 161, 74 Cal. Rptr. 225 (1969).

Suggestions for a heightened standard of care for legal specialists are also of great potential significance. *E.g.*, *Wright v. Williams*, 47 Cal. App. 3d 802, 121 Cal. Rptr. 194 (1975) (admiralty lawyer); *Schmidman & Salzler, The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 CIN. L. REV. 541 (1976); Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771, 785-89 (1968); Comment, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408, 411-14 (1977).

38. A pair of California cases has breached the "privity" wall to recovery by nonclient third parties against a negligent attorney. *Lucas v. Hamm*, 56 Cal. 2d 583, 364 P.2d 685, 15 Cal. Rptr. 821 (1961), *cert. denied*, 368 U.S. 987 (1962) (recovery against attorney by intended beneficiaries of will that failed because of attorney's negligence); *Biakanja v. Irving*, 49 Cal. 2d 647, 320 P.2d 16 (1958) (notary acting as attorney in drafting defective will liable to intended beneficiary who did not take by intestacy).

39. Some opinions suggest a plain judicial refusal to believe that an attorney-defendant would have done anything as unprofessional as what was charged by the plaintiff. *E.g.*, *Ziegler v. Cray*, 148 Minn. 447, 182 N.W. 616 (1921) (client's testimony that his attorney had advised him erroneously on a matter of bankruptcy law did not foreclose directed verdict against client; the plaintiff's testimony was inherently unbelievable because "such is not the law and defendant has been too long at the bar and in active practice not to be perfectly familiar with the point . . ."). Of the same ilk are some of the cases in which attorneys are protected by courts against client claims on the rationale that the attorney was at most guilty of a "mere error of judgment." Under this white-heart-but-empty-head doctrine, a "mere innocent error" by the attorney will not constitute negligence so long as the attorney has acted in good faith and with the client's best

apparently begun to shed past reluctance to visit the financial burdens of expanded malpractice liability upon brother or sister lawyers⁴⁰ and their legal malpractice insurance carriers.⁴¹

It seems certain that reliance upon the attorney disciplinary process alone will not achieve adequate levels of attorney competence and ethical behavior. When one looks specifically at attorney incompetence, while discipline of the negligent attorney seems clearly called for under the text of the Code,⁴² convincing evidence exists that some lawyer disciplinary agencies as a matter of policy are avoiding cases that concern a single instance of carelessness.⁴³ The reasons for this are endemic and irradicable in

interests as the objective. Perhaps the leading case is *In re Watts*, 190 U.S. 1 (1903). Among the scattering of recent cases, see, e.g., *Allred v. Rabon*, 572 P.2d 979, 981 (Okla. 1977).

40. E.g., Schnidman & Salzer, *supra* note 37; Comment, *New Developments in Legal Malpractice*, *supra* note 37. Others besides doctors have noticed the disparity of treatment that medical and legal defendants traditionally have received at the hands of courts. E.g., Haughey, *Lawyers' Malpractice: A Comparative Appraisal*, 48 NOTRE DAME LAW. 888 (1973).

41. Hutcheson, *Lawyers, How Is Your Malpractice?*, 30 INS. COUNSEL J. 423 (1963); *Lawscope: Legal Malpractice Expert Sees Roller-Coaster Future*, 64 A.B.A.J. 325 (1978); Levit, *The Legal Malpractice Crisis*, [1977] INS. L.J. 609; Hill, *The Bar at Bay: Malpractice Woes Hit Attorneys as Lawsuits Against Them Increase*, Wall St. J., February 3, 1976, at 1, col. 1.

42. ABA CODE, DISCIPLINARY RULE [hereinafter cited as DR] 6-101(A):

A lawyer shall not:

- (1) Handle a legal matter which he knows or should know that he is not competent to handle, without associating with him a lawyer who is competent to handle it.
- (2) Handle a legal matter without preparation adequate in the circumstances.
- (3) Neglect a legal matter entrusted to him.

Some jurisdictions have rejected the wording of DR 6-101 and permit much more careless or persistent conduct before an attorney is subject to discipline. See, e.g., CAL. R. PROFESSIONAL CONDUCT 6-101 (attorney carelessness proscribed only if committed "willfully or habitually" and "good faith" of attorney is always to be considered); *Hoppe v. Ranzini*, 158 N.J. Super. 158, 385 A.2d 913 (1978) (New Jersey version of DR 6-101 proscribes only "gross negligence" or "pattern" of negligence in handling legal matters).

43. See, e.g., *Committee on Legal Ethics v. Mullins*, 226 S.E.2d 427 (W. Va. 1976); *State v. Soderberg*, 215 Wis. 571, 255 N.W. 906 (1934); Mutnick, *The Nexus Between Professional Discipline and Legal Malpractice*, 2 BRIEF/CASE 8 (Summer 1976); Note, *Negligence or Incompetence of an Attorney as Grounds for Disbarment or Suspension*, 30 NOTRE DAME LAW. 273, 276-76, 283 (1955). Occasional examples of discipline for single instances of incompetence exist, e.g., *In re Crane*, 400 Mich. 484, 255 N.W.2d 624 (1977), but almost always there is some aggravating circumstance, see, e.g., *In re Grinchis*, 75 N.J. 495, 384 A.2d 137 (1978) (severe reprimand for single instance of malpractice when attorney had failed to communicate with client or successor counsel over long period of time).

This policy of restraint might be grounded in the notion that it would be inappropriate for the agency to become involved in a matter that might be the subject of civil litigation. Fears of possible res judicata implications of agency action may be one concern. See text accompanying notes 69-78 *infra*. Or it may be considered unduly burdensome for the attorney to be required to defend before two different tribunals for the same alleged

the disciplinary process. As presently constituted the process struggles against serious and perhaps inescapable structural limitations in its effort to control incompetent and otherwise unethical attorneys. Among other problems, disciplinary agencies are typically understaffed, underfinanced, and too often so dominated by the group they regulate that they are incapable of significantly expanding disciplinary control.⁴⁴

Because of the different institutional and economic settings in which legal malpractice and similar civil liability adjudications occur, however, the adversarial forum offers the prospect of a significant increase in deterrence of attorney wrongdoing that is also tortious or otherwise civilly actionable. 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. The contingent fee often provides adequate economic incentives to see the civil litigation through,⁴⁵ so that staffing⁴⁶ and financing present

offense. See note 75 *infra*. Also, it may be felt that the pendency of the civil litigation (whatever its outcome) will supply some measure of deterrence to future acts of malpractice. Or, client complaints may be viewed as unimportant. *Cf.*, e.g., *Foot v. Hughes*, 92 Mont. 53, 10 P.2d 584 (1932) (attorney should not be required in bar discipline case to turn over funds wrongfully withheld from client because this would make the court a collection agency).

While some of these notions have appeal, they in no way support a general policy of refusing to proceed in any single-instance legal malpractice case. They also, of course, do not support a refusal to proceed when a malpractice case, although a theoretical possibility, is not pending and is not likely.

44. On the staffing and budgetary problems of lawyer disciplinary agencies, see ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT (1970). On the matter of lawyer dominance of lawyer disciplinary agencies, see Wolfram, *supra* note 7, at 630, 634, 641-42.

45. See F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 5 (1964); L. PATTERSON & E. CHEATHAM, *supra* note 33, at 274; Corboy, *Contingent Fees: The Individual's Key to the Courthouse Door*, LITIGATION, Summer 1976, at 27; *cf.* Clermont & Currihan, *Improving on the Contingent Fee*, 63 CORNELL L. REV. 529 (1978) (contingent fee as presently employed may in some instances provide opposite incentives).

46. Until relatively recently, in most communities there were probably strong informal pressures against acceptance of a legal malpractice claim by a claimant's attorney. See, e.g., Drinker, *Canons 28 and 29 — An Appraisal*, 12 VAND. L. REV. 779, 781 (1959); ABA COMM. ON PROFESSIONAL ETHICS, FORMAL OPINIONS, No. 144 (1935) (there should be no custom of attorneys refusing to testify or proceed against other attorneys for malpractice or misconduct).

Specialization in legal malpractice work now seems to be emerging as an acceptable function within the legal community, see TIME, Jan. 12, 1976, at 53; Wall St. J., February 3, 1976, at 1, col. 1, although perhaps the situation is unchanged in small communities remote from large pools of lawyers, *cf.* R. MALLIN v. V. LEVIT, LEGAL MALPRACTICE 179 (1977) (extreme reluctance among local practitioners in small communities to testify against fellow attorney in malpractice litigation).

less of a problem. In comparison with the difficult burden of proof that customarily confronts the prosecutor in an attorney disciplinary proceeding,⁴⁷ a more favorable burden of proof will favor the claimant against an attorney in a civil suit. In addition, a jury of nonlawyers determines the question of liability in the civil suit,⁴⁸ whereas in a disciplinary proceeding lawyers, who are also the professional colleagues of the accused attorney, compose all or most⁴⁹ of the panel confronted.⁵⁰ The resulting liberalization and increase in damage awards will itself supply a significant measure of deterrence and create incentives for improved office management and increased attention to governing standards such as the Code of Professional Responsibility.⁵¹ In addition, the indirect regulatory efforts of legal malpractice insurers will create their own pressures on attorneys to adopt procedures and heed norms that will tend to keep them free from personal civil litigation.⁵² Means such as these will produce a vehicle for discipline free of many of the constraints that have hobbled the efforts of attorney disciplinary agencies. This judicial enhancement of the civil liability sanction through a greater readiness to impose liability for

47. While the typical civil suit burden of proof is a preponderance of the evidence, in attorney disciplinary proceedings the widely employed burden of proof is the stricter "clear and convincing evidence" standard. See ABA DISCIPLINE STANDARDS, *supra* note 18, at 65; ABA STANDING COMMITTEE ON PROFESSIONAL DISCIPLINE, SUGGESTED GUIDELINES FOR DISCIPLINARY ENFORCEMENT 15 n.12 (1975). A few states, however, employ the more easily satisfied "preponderance of the evidence" standard in attorney discipline cases. See, e.g., *In re Robson*, 575 P.2d 771 (Alaska 1978); *In re Crane*, 400 Mich. 484, 255 N.W.2d 624 (1977).

48. In some jurisdictions, see note 39 *supra*, judges may go to unusual lengths in legal malpractice cases to protect brother or sister lawyers against liability, but this attitude seems to be waning. See text accompanying notes 37-41 *supra*.

49. Several jurisdictions have recently supplemented the previously all-lawyer membership of attorney disciplinary agencies with a minority of nonlawyer members. Wolfram, *supra* note 7, at 642 n.89.

50. As with the related problem of an historic unwillingness of attorneys to sue one another in legal malpractice cases, see note 46 *supra*, lawyers' collegial instincts probably make many lawyer-members of disciplinary agencies reluctant to find Code violations, see note 74 *infra*. The transgressions of lawyers in marginal areas of law practice are, according to some observers, pursued more vigorously. E.g., J. CARLIN, *LAWYERS' ETHICS: A SURVEY OF THE NEW YORK CITY BAR* 165-77 (1966); Schuchman, *Ethics and Legal Ethics: The Propriety of the Canons as a Group Moral Code*, 37 GEO. WASH. L. REV. 244, 255-56 (1968).

51. E.g., Mutnick, *The Nexus Between Professional Discipline and Legal Malpractice*, 2 BRIEF/CASE 8 (Summer 1976); Steinberg, *The Disciplinary Rules and Competence of Counsel: A Proposed Alternative*, 11 GONZAGA L. REV. 133 (1975).

52. Legal malpractice insurers, as a loss prevention measure, may insist on the maintenance of bookkeeping and calendaring in an insured law office as a condition to the malpractice liability insurance protection. See Pfeffer, *Lawyers' Legal Liability Insurance*, 16 JUDGES' JOURNAL 27, 32 (1977).

Code violations may thus deter future acts of legal malpractice and other types of serious attorney wrongdoing that are not now effectively controlled.

The second general argument in favor of increased resort to the Code for a definition of a lawyer's civil responsibilities is the analogy to the doctrine that custom or work practices may be used in negligence litigation to define the relevant standard of care. This is best illustrated in the context of a legal malpractice action against an attorney, but a similar analysis may support the use of the Code as custom or work practice in other areas such as contract litigation over legal fees⁵³ or tort litigation not involving negligence.⁵⁴ The customary judicial description in legal malpractice cases of an attorney's duty of care starts with the assertion that the attorney owes the client the duty to exercise "ordinary care" in handling the client's work.⁵⁵ This standard is said to obligate the attorney to use the knowledge, skill, and ability ordinarily possessed and exercised by members of the legal profession in similar circumstances.⁵⁶ Normally the meaning of the legal

53. See, e.g., ABA CODE, ETHICAL CONSIDERATION [hereinafter cited as EC] 2-18 ("Commendable and long-standing tradition of the bar" that "special consideration" be given in the setting of a fee for another lawyer or a member of the family of another lawyer); EC 2-19 (it is "usually beneficial" to reduce terms of the attorney-client contract to writing, particularly when the fee is to be contingent). Presumably the more forceful argument for the relevance of a Disciplinary Rule in contract litigation would be on the basis of "legality" rather than mere custom. Accordingly, only Ethical Considerations (because of their nonbinding, hortatory nature, see text accompanying note 13 *supra*) would often be introduced into contract litigation as custom. On the general question of the relevance of custom to contract issues, see 3 A. CORBIN, CONTRACTS §§ 556-57 (2d ed. 1960).

54. *E.g.*, Adler, Barish, Daniels, Levin & Creskoff v. Epstein, 393 A.2d 1195 (Pa. 1978) (Code prohibition against in-person solicitation is significant in evaluating whether ex-associate's contacts with former firm's clients constituted "improper" interference with existing contractual relationship under RESTATEMENT (SECOND) OF TORTS § 766 (Tent. Draft No. 23, 1977)).

55. *E.g.*, Leighton v. New York S. & W.R.R., 303 F. Supp. 599, (S.D.N.Y. 1969); Smith v. Lewis, 13 Cal. 3d 349, 530 P.2d 589, 118 Cal. Rptr. 621 (1975); Wade v. Arnold, 52 Wash. 2d 581, 328 P.2d 164 (1958). The norm, however, is not the "average" lawyer because, presumably, if the standard were taken literally it would render incompetent the half of the number of practicing lawyers who are less competent than the average lawyer. Hansen v. Wightman, 14 Wash. App. 78, 538 P.2d 1238 (1975). There is obviously little specific assistance in the "ordinary care" standard, and it has been criticized for its inability to assist courts in the resolution of individual cases. *E.g.*, R. MALLIN v. V. LEVIT, *supra* note 46, at 164 (1977); Heffernan, *Professional Malpractice Insurance: Let the Attorney Beware*, 48 CONN. B.J. 347, 348 (1975).

56. See, e.g., Savings Bank v. Ward, 100 U.S. 195, 198 (1879); Smith v. Lewis, 13 Cal. 3d 349, 356, 530 P.2d 589, 593, 118 Cal. Rptr. 621, 625 (1975); Kurtenbach v. TeKippe, 260 N.W.2d 53, 56 (Iowa 1977); Hodges v. Carter, 239 N.C. 517, 519, 80 S.E.2d 144, 145-46 (1954). See generally RESTATEMENT (SECOND) OF TORTS § 299A (1965); W. PROSSER,

malpractice standard of care in any individual case can be determined by the factfinder only with the assistance of expert testimony that describes the standard of care that is ordinarily exercised by other attorneys.⁵⁷

This habitual deference to the testimony of lawyers as expert witnesses to define the standard of care for other lawyers reflects a pervasive and enduring theme in tort law. Tort standards of care generally attempt to measure the conduct of a defendant by reference to the common practices of the members of the community in which the defendant has habitually functioned. Considerations of fairness, a judicial desire to further efficiency by encouraging adherence to readily observable standards, and an instinct to defer to the demonstrated general proclivities of the group have uniformly persuaded courts to admit evidence of custom and habit as bearing on the question of due care.⁵⁸ It would be fully within this tradition of deference for courts to rely upon provisions of the Code of Professional Responsibility, or to have members of juries do so, when the question of an attorney's competence is raised.

Very rarely, if ever, will the Code of Professional Responsibility serve as an adequate substitute for all expert testimony in a legal malpractice case. Because of its imprecision, the present Code would often be open to differing interpretations (which, presumably, would be the subject of expert professional testimony). For example, the prohibitions in DR 5-105(A) against accepting a client if the matter will result in an impairment of the lawyer's "independent professional judgment" or "in [his] representing differing interests" are simply too indeterminate to

HANDBOOK OF THE LAW OF TORTS 932 at 164 (4th ed. 1971); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755, 762-65 (1959).

57. See, e.g., *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966); *Rhine v. Haley*, 238 Ark. 72, 378 S.W.2d 655 (1964); *House v. Maddox*, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1977); *Sanders v. Smith*, 83 N.M. 706, 496 P.2d 1102 (1972). The normal requirement of expert testimony may be dispensed with in instances in which the attorney's failure is so palpable that a jury can adequately determine lack of conformance to the "ordinary practitioner" standard with the use of only common knowledge and lay comprehension of legal matters. E.g., *Transamerica Ins. Co. v. Keown*, 451 F. Supp. 397, 402 (D.N.J. 1978); *Butts v. Watts*, 290 S.W.2d 777, 779 (Ky. 1956); *Hill v. Okay Constr. Co.*, 252 N.W.2d 107, 116 (Minn. 1977).

58. See generally 2 F. HARPER & F. JAMES, *supra* note 24, § 17.3 at 977; 2 J. WIGMORE, A TREATISE ON ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 461 (3d ed. 1940); James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 709-10 (1952); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147 (1942). For cases dealing with the work rules of defendant employers, see generally 2 F. HARPER & F. JAMES, *supra*, at 981; C. MORRIS, *TORTS* 119-20 (1956).

serve as useful guides to a lay factfinder in any but the most blatant cases unless accompanied by clarifying expert testimony. Yet, as courts thrash out difficult interpretative questions that arise under the general language of the Code in other contexts, such as attorney discipline cases, it seems entirely appropriate to sharpen the delineation of an attorney's duties for civil liability purposes and to limit the permissible range of interpretative expert testimony.

IV. OBJECTIONS TO EXTENSIVE USE OF THE CODE IN PRIVATE LITIGATION

While common sense and theoretical justifications strongly impel generous use of the Code in civil litigation, several objections that have not yet been addressed might be marshalled against it. These objections relate to concerns, generally, about undue harrassment of attorneys, about inappropriate interference with the disciplinary process, and about overprotection of attorney interests. These objections taken together are not of sufficient weight to cause rejection of the basic argument, but do serve to provide some important limitations on the underlying notion.

The first objection that might be raised against permitting every allegation of an attorney violation of the Code to survive a motion to dismiss in a subsequent damage action against that attorney is that this would result in unneeded litigation against attorneys. The objection could take several forms. One, the weakest, is a floodgates argument that, although attorney violations of the Code are widespread and cause substantial injury,⁵⁹ courts, because they are already overloaded with more meritorious litigation, should not be employed for policing lawyer misconduct outside the established attorney discipline procedures. This version of the floodgates argument is readily refutable. In comparison with the volume of litigation that courts have permitted to beset other professionals such as physicians, no one can assert that lawyers are less worthy objects of civil litigation or that their clients and others alleging harm produced by attorney violations of the Code are less worthy petitioners for civil redress. If, on the other hand, attorney violations of the Code are minimal, then one may be comforted that the ordinary procedures for ferreting out specious claims should suffice to protect attorneys and courts

59. See *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 904, 136 Cal. Rptr. 321, 328 (1977) (dissenting opinion).

against a flood of cases.

Another form of the unneeded litigation argument focuses on the realities of the practice of law, particularly in heatedly contested cases. It asserts the likelihood that specious tort actions alleging breach of the Code would be employed maliciously by opposing counsel in an attempt to hobble the defendant-attorney in his or her representation of the opposing party.⁶⁰ The objection is a serious one, if well founded; but one may wonder whether the predicted abuse of the legal process would actually be widespread. After all, DR 7-102(A)(1) already condemns the filing of an action merely to harass or maliciously injure another.⁶¹ The normal interest of trial courts in keeping the litigation process uncluttered with ill-founded collateral disputes that spin off main actions⁶² can be trusted to keep such diversions to a minimum. Moreover, in many communities the collegial instincts of most attorneys not to burden a brother or sister attorney with specious personal claims can be relied upon to restrain many groundless claims.⁶³

Concern that the threat of civil liability not be employed in a widespread way to harass attorneys unduly can also be guarded against by limiting these actions, at least in instances that are not

60. Cf. *Harmatz v. Allstate Ins. Co.*, 170 F. Supp. 511, 513 (S.D.N.Y. 1959) ("If every time a lawyer is annoyed or disturbed by the unethical conduct of his opponent he may bring a lawsuit for damages against his opponent, the courts of this country would be unable to handle the flood of litigation that would ensue."). Presumably the force of the objection would extend to suits by the represented party as well, since it would be a relatively simple matter in most instances for an attorney to encourage the client to permit the use of the client's name as the plaintiff against the opposing attorney.

61. *In re Sullivan*, 283 Ala. 514, 219 So. 2d 346 (1969); *In re Hoover*, 46 Ariz. 24, 46 P.2d 647 (1935); *Snyder v. State Bar of California*, 18 Cal. 3d 286, 555 P.2d 1104, 133 Cal. Rptr. 864 (1976); *Meagher v. Kavli*, 356 Minn. 54, 97 N.W.2d 370 (1959); *In re Malloy*, 248 N.W.2d 43 (N.D. 1976). Attorneys have also been assessed costs by courts for instituting harassing litigation, see *Chesa Int'l, Ltd. v. Fashion Assoc., Inc.*, 425 F. Supp. 234 (S.D.N.Y. 1977); *Monk v. Roadway Express, Inc.*, 73 F.R.D. 411 (W.D. La. 1977); *Harrell v. Joffron*, 73 F.R.D. 267 (W.D. La. 1976); *Shapiro v. Freeman*, 38 F.R.D. 308 (S.D.N.Y. 1965).

62. This judicial interest is expressed in numerous doctrines making it difficult to sustain an action that charges the defendant with abuse of judicial process. The civil remedies for malicious prosecution and abuse of process are hedged about with strict procedural and substantive requirements that make these remedies unavailable to all but rare litigants. See 1 F. HARPER & F. JAMES, *supra* note 24, § 4.11 at 343-44; W. PROSSER, *HANDBOOK OF THE LAW OF TORTS* § 119 (4th ed. 1971); 5 C. WRIGHT & A. MILLER, *FEDERAL PRACTICE & PROCEDURE* § 1246 (1969). Libel and slander actions arising out of testimony or other statements in litigation are almost universally unsuccessful because of an absolute immunity afforded to participants in litigation. See F. HARPER & F. JAMES, *supra*, § 5.22; W. PROSSER, *supra*, § 114.

63. See text accompanying note 46 *supra*.

actionable on a general damages basis under otherwise applicable law, to instances in which specific injury is pleaded and proved.⁶⁴ Thus, unspecific claims for mental distress and the like would not be allowed to proceed. In suits for nondamages relief, the customary equitable requirements of demonstration of the inadequacy of legal remedies⁶⁵ and the threat of future continuation of the offending conduct⁶⁶ could be employed to screen the meaningful from the petty. As long as these requirements can be met, however, the sheer prospect of litigation seems no reason to provide attorneys with special protection against the imposition of private law sanctions for violations of mandatory professional norms.

A second objection to viewing attorney violations of the Code as occasions for the imposition of civil liability is based on a fear that in the practical realm dissonance would exist between the actual operations of the disciplinary and private law enforcement systems. Specifically, this expansive view of the consequences of Code violations arguably could cause attorney disciplinary bodies to avoid finding a violation for fear that in a future damage action the finding could be employed in a way that would substantially affect the financial interests of lawyers. This would come about presumably through operation of the doctrine of issue preclusion (collateral estoppel).⁶⁷ Under issue preclusion, the fact of a violation would be established conclusively by the administrative finding and the attorney would be prevented in the subsequent suit from relitigating whether the violation had occurred. Hence, only issues of causation and quantum of damages would remain for resolution.⁶⁸

64. Compare, e.g., *Carey v. Phipps*, 98 U.S. 1042 (1978) (recovery under 42 U.S.C. § 1983 limited to special damages; mental pain and suffering are not compensable). See also *Quezada v. Hart*, 67 Cal. App. 3d 754, 136 Cal. Rptr. 815 (1977) (no recovery of mental suffering damages in legal malpractice action in absence of bad faith).

65. D. DOBBS, *REMEDIES* § 2.5 (1st ed. 1973).

66. *Id.* § 2.10.

67. See generally *RESTATEMENT (SECOND) OF JUDGMENTS* § 68 (Tent. Draft No. 4, 1977). The traditional terminology for the doctrine that prevented relitigation of discrete issues that had already been adjudicated was "collateral estoppel." That phrase is receding in favor of the more descriptive "issue preclusion." F. JAMES & G. HAZARD, *CIVIL PROCEDURE* 532 (2d ed. 1977).

68. See generally *RESTATEMENT*, *supra* note 67, at § 68.1. In many jurisdictions, however, issue preclusion would not prevent the attorney from litigating the question of whether or not a Code violation had occurred because of the absence of "mutuality," that is, the party opposing the attorney in the private suit was not a party to the attorney disciplinary proceeding. See generally F. JAMES & G. HAZARD, *supra* note 67, at 77-78, 580. A fair number of jurisdictions reject the mutuality requirement, however, at least in some common situations. See *id.* 578-80.

Research has not revealed any reported case directly addressing the question whether a finding of a lawyer disciplinary agency is preclusive in subsequent civil litigation.⁶⁹ Under a rationale that at one time gained acceptance in one federal court, preclusion might be denied on the ground that a right of jury trial in the subsequent civil litigation would be unduly compromised by giving preclusive effect to the prior administrative disciplinary proceeding in which no jury played a part.⁷⁰ Aside from this, however, there seems little reason to deny preclusion because of any perceived defect in the adjudicatory process that leads to discipline.⁷¹ Special procedural protections are commonly afforded to accused attorneys in professional disciplinary proceedings.⁷² In subsequent civil litigation these protections normally should afford courts full confidence that the findings of the disciplinary agency were the product of a full and fair hearing on the issue.⁷³

69. Cf. *Howell v. Thomas*, 566 F.2d 469 (5th Cir. 1978) (attorney's contempt conviction not collaterally estopped because of subsequent favorable jury verdict in disbarment proceeding); *Taylor v. New York City Transit Authority*, 433 F.2d 665, 671 (2d Cir. 1970) (dicta) (no collateral attack in federal civil rights action on adverse finding by state employee disciplinary agency); *In re Estate of Gould*, 547 S.W.2d 863 (Mo. App. 1977) (a prior disbarment decision of the state's supreme court, in which an attorney was found to have violated the Code of Professional Responsibility in numerous respects in the administration of an estate, creates collateral estoppel in subsequent litigation by beneficiaries of the estate to deny the attorney any fee because of his wrongdoing).

The statement in *H. Drinker, Legal Ethics* 37 (1953), that *res judicata* does not apply to disciplinary proceedings should not be taken broadly. In the only authority cited, *In re Bruener*, 178 Wash. 165, 34 P.2d 437 (1934), the court simply held that its original disbarment order does not preclude a disciplinary agency's consideration of subsequent circumstances and conduct when the disbarred attorney presents it with a petition for reinstatement.

70. See *Rachal v. Hill*, 435 F.2d 59 (5th Cir. 1970), *cert. denied*, 403 U.S. 904 (1971). *Rachal* has been denounced by some academic commentators. See e.g., Shapiro and Coquillette, *The Fetish of Jury Trial in Civil Cases: A Comment on Rachal v. Hill*, 85 HARV. L. REV. 442 (1971). Comment, *The Effect of SEC Injunctions in Subsequent Private Damage Actions*, 71 COLUM. L. REV. 1329 (1971). For a tentative rejoinder, see Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 648 n.33 (1973). The Supreme Court has recently rejected the *Rachal* jury trial argument against collateral estoppel. *Parklane Hosiery Co. v. Shore*, 99 S.Ct. 645 (1979).

71. A generally recognized exception to the normal application of the rules of collateral estoppel applies when the first adjudication of the factual issue occurred under circumstances in which the person against whom the fact was found was handicapped in adjudicating the issue. See generally, RESTATEMENT (SECOND) OF JUDGMENTS § 68.1, Comment j (Tent. Draft No. 4, 1977).

72. Most jurisdictions require that the disciplinary prosecutor prove the violation by clear and convincing evidence and that the disciplinary hearing agency accord the accused attorney full procedural protections such as counsel, cross-examination, discovery, and subpoena powers. See generally, ABA DISCIPLINE STANDARDS, *supra* note 18, at 62-68.

73. Courts generally have not hesitated to give collateral estoppel effect to adminis-

Such an issue preclusion effect would, however, strengthen the objection that civil-suit utilization of the Code to measure attorney responsibility may discourage bar disciplinary agencies from dealing expeditiously and fully with attorney defaults. There could then be a real fear that threatened or pending civil litigation may cause the professional disciplinary panel to fail to find a violation when the facts warrant it.⁷⁴ Or the disciplinary body may be reluctant to proceed with its determination if it felt it would be unduly burdensome for the attorney to be required to defend before two different tribunals⁷⁵ for the same alleged offending conduct.⁷⁶

These concerns are not inconsequential. If the prospect of future issue preclusion would seriously deter disciplinary proceedings, then one might well fear that a more explicit judicial acceptance of provisions of the Code as measures of civil liability

trative agency determinations as long as the precluded party had an opportunity to litigate the disputed matter in a way similar to that provided by litigation before a court. *See generally*, *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394 (1966); *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381 (1940); *H.L. Robertson & Assoc., Inc. v. Plumbers Local No. 519*, 429 F.2d 520, 521 (5th Cir. 1970) (agency determination creates preclusion in subsequent private damage action).

74. An underlying assumption is that attorney disciplinary panels traditionally have been reluctant to visit even discipline, much less civil liability, on fellow or sister attorneys, particularly in instances that could be regarded as private disputes between the attorney and client. *See* ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, PROBLEMS AND RECOMMENDATIONS IN DISCIPLINARY ENFORCEMENT 97-100 (1970).

75. Indeed, for this and related reasons the Clark Committee recommended that courts adopt a general policy of deferring disciplinary proceedings until pending civil (or criminal) litigation against the attorney is determined. *See* ABA SPECIAL COMMITTEE ON EVALUATION OF DISCIPLINARY ENFORCEMENT, *supra* note 73, at 82-85. Some states have formally adopted the recommendation. *E.g.*, Wyo. S. Ct. DISCIPLINARY CODE, RULE VIII (Supp. 1977). But at least one state has rejected the suggestion when only a civil case is pending against the attorney. *Committee on Legal Ethics v. Pence*, 240 S.E.2d 668, 674 (W. Va. 1978). In an analogous area, courts have shown some disposition not to attempt to resolve in disciplinary proceedings doubtful legal issues that are the subject of a pending civil suit between the attorney's client and another person. *See, e.g.*, *In re Dineen*, 380 A.2d 603, 605 (Me. 1977).

76. While these objections may not suffice to make the Code irrelevant in private litigation, they may serve as persuasive arguments for a unitary approach to the sanctions of discipline and restitution. Indeed, in some instances courts have combined discipline and private relief and have ordered attorneys to make restitution to clients in disciplinary cases. *See, e.g.*, *In re Marine*, 82 Wis. 2d 602, 264 N.W.2d 285 (1978); *Office of Disciplinary Counsel v. Walker*, 469 Pa. 432, 366 A.2d 563 (1976). *See generally* Annot., 75 A.L.R.3d 307 (1977). The Model Code of Disciplinary Procedure, promulgated for possible adoption by local federal courts, provides that an attorney disbarred from federal court for defalcation of a client's funds must take steps to make restitution as a condition to reinstatement. *See* 64 A.B.A.J. 25, 27 (1978). *See also* ABA DISCIPLINE STANDARDS, *supra* note 18, at § 6.12.

would be counter productive. Considerations exist, however, that militate against accepting these concerns as persuasive reasons for ignoring the provisions of the lawyers' Code in civil litigation. First, there are reasons to believe that the sanction of civil damage recovery may be a more, or at least equally, effective mode of deterring attorneys from violations of the Code than disciplinary proceedings have proved to be.⁷⁷ Code enforcement through civil litigation could, therefore, usefully be expanded even at the cost of some decrease in enforcement through attorney disciplinary actions. Second, it is by no means clear that the perceived dampening effect will occur. For example, attorney disciplinary agencies would probably hesitate to proceed only in cases in which the applicability of the Code is seriously in doubt or the injury to the complaining party or to the public is perceived to be slight.⁷⁸

In the end, courts will be required to speculate on the relative costs and benefits of these varying approaches to encouraging attorney compliance with the Code and the likelihood of serious impingement upon the disciplinary process from expansion of the role of civil suits. My judgment is that substantial expansion of civil-suit utilization of the Code could occur without impairing the present effectiveness of the attorney disciplinary system in most states.

A third objection to use of the Code of Professional Responsibility in the way proposed is that the Code may be too biased in favor of the interests of lawyers and thus may inadequately protect the interests of nonlawyers participating in civil litigation against lawyers. Many critics have charged⁷⁹ that the Code is actually overly protective of the interests of lawyers at the expense of clients or others who may be disadvantaged by this overprotectiveness.

Generally, one might attempt to introduce a provision of the Code into litigation concerning a lawyer's civil liability for one of two different reasons — either to demonstrate that the attorney's conduct fell short of that professional requirement or, by the defendant-lawyer, to demonstrate that the conduct in issue met

77. See text accompanying notes 34-52 *supra*.

78. At another extreme, rare instances may arise in which a private suit litigant attempts to obtain an issue preclusion advantage in the civil suit for damages by means of influence on a bar disciplinary agency. But courts and the agencies themselves may be relied upon to frustrate attempts to employ the disciplinary machinery corruptly.

79. See the authorities collected at note 6 *supra*.

an acceptable level of performance as authoritatively defined. The two instances entail different problems.

When a plaintiff relies on the Code to demonstrate that a defendant-attorney's conduct is actionable, courts have little reason to resist the effort. As developed above,⁸⁰ the plaintiff's attempt is similar to instances in which claimants in other areas have been permitted to demonstrate that the defendant's conduct departed from an articulated and generally accepted standard, as with a criminal statute, business regulation, or custom or habit within a group.

In any case in which the Code of Professional Responsibility is put forward by an attorney to defend an action taken in the attorney's former representation of a client, however, the court should carefully analyze the Code provision before employing it as the measure of the attorney's responsibilities. The principal source of concern is the process by which the Code and its amendments usually come into existence. The process, from the generation of suggested wording to the final adoption of Code language in local jurisdictions, is currently controlled almost exclusively by lawyers.⁸¹ As a result, one must entertain at least an initial concern that the wording of the Code might have been inserted by lawyers for self protection or for similar narrow reasons rather than as the result of a proper, or at least disinterested, assessment of the perhaps competing needs of lawyer, client, and public. The situation is analogous to instances in which industries were at one time permitted in some courts to set their own tort standards by the device of promulgating loose work rules.⁸² The dominant view in courts today, however, is that no industry-established standard of care is conclusive against the claims of outsiders for a higher standard.⁸³

80. See text, section III *supra*.

81. See Wolfram, *Barriers to Effective Public Participation in Regulation of the Legal Profession*, *supra* note 7, at 634-36 (1978).

82. *E.g.*, *Shadford v. Ann Arbor St. Ry.*, 111 Mich. 390, 69 N.W. 661 (1897); *Kilbride v. Carbon Dioxide and Magnesia Co.*, 201 Pa. 552, 51 A. 347 (1902).

Courts have occasionally refused to be bound to a standard of care accepted by a profession, as in cases in which medical procedures that were accepted as elective by physicians have been permitted to be imposed as mandatory through tort recoveries. *E.g.*, *Helling v. Carey*, 83 Wash. 2d 514, 519 P.2d 981 (1974), *criticized in King, In Search of a Standard of Care for the Medical Profession: The "Accepted Practice" Formula*, 28 VAND. L. REV. 1213, 1250 (1975). The Washington legislature subsequently reversed the *Helling* rule. See WASH. REV. CODE ANN. § 4.24.290 (West Supp. 1977).

83. See, *e.g.*, 2 F. HARPER & F. JAMES, *supra* note 24, § 17.3 at 977-79; James & Sigerson, *Particularizing Standards of Conduct in Negligence Trials*, 5 VAND. L. REV. 697, 710 (1952); Morris, *Custom and Negligence*, 42 COLUM. L. REV. 1147, 1153-54 (1942).

Thus, while an attorney should be permitted to offer proof that his or her challenged conduct conformed to the requirements of the Code, the plaintiff usually should not be precluded from offering proof and arguing to the factfinder that custom, habit, sound policy, or common sense requires a standard more protective of the interests of clients or other persons. In some cases, however, the plaintiff's argument may so far trench upon Code values that are clearly based upon broad public interests that the argument should be precluded as a matter of law.

A case in point is the California Supreme Court's recent decision in *Kirsch v. Duryea*.⁸⁴ The defendant-attorney had represented the client in a medical malpractice action that was facing a mandatory trial date. The attorney determined that trial of the client's claim was not justified by the facts. Upon the client's insistence that the case nonetheless be tried, the attorney informed the client that substitute counsel should be found so that the attorney could withdraw. After a period of time during which the client obtained no substitute counsel, the attorney withdrew from the case, two months short of the mandatory last date for trial. The client's action was subsequently dismissed for lack of prosecution. At the ensuing legal malpractice trial an attorney was permitted to testify for the client that a prudent attorney should immediately withdraw without the client's consent upon determining that a case is without merit. Reversing a judgment against the defendant-attorney, the California Supreme Court held that this testimony should not have been allowed because the course of action it proposed would have violated the California Rules of Professional Conduct and the ABA Code.⁸⁵

The *Kirsch* decision is clearly a correct assessment of the relative interests of lawyers, clients, and the public. The relevant rules permit an attorney to withdraw from a case only after taking "reasonable steps to avoid foreseeable prejudice to the rights of his client."⁸⁶ The testimony offered on behalf of the client at the legal malpractice trial, if accepted, effectively imposed on the attorney a duty to withdraw without regard to consequences such

84. 21 Cal. 3d 303, 578 P.2d 935, 146 Cal. Rptr. 182, (1978); cf. *Chicago Title Ins. Co. v. Holt*, 244 S.E.2d 177, 182 (N.C. App. 1978) (malpractice plaintiff cannot rely solely on allegation of defendant-attorney's conflict of interests; he must also allege attorney's inability to represent conflicting interests and failure to obtain consent of all clients, for otherwise DR 5-105(C) would permit representation of conflicting interests).

85. 21 Cal. 3d at 311, 578 P.2d at 940, 146 Cal. Rptr. at 223.

86. CAL. R. PROFESSIONAL CONDUCT 2-111(A)(2); ABA CODE DR 2-110(A)(2) (both provisions are identical in wording).

as impairment of the client's ability to settle because of the signals that would be transmitted to the opposing party by a non-consensual withdrawal.⁸⁷ Thus, solid reasons unrelated to the attorney's self-interest support the rule that justified the attorney's action, and the California court quite reasonably permitted the attorney to defend his conduct (as a matter of law) by resort to it. Had the court concluded otherwise, finding that nothing supported a rule of delayed withdrawal other than attorney self-interest, it presumably would have permitted argument against the reasonableness of the rule or, indeed, may have refused to permit the attorney to justify his conduct by reliance on the rule.

V. ILLUSTRATIVE USAGES OF THE CODE

The theoretical justification for the general use of the Code in civil litigation, if persuasive, might lead one to assume that courts have actually employed the Code extensively in this fashion. Yet, at least as measured by reported decisions, the Code seems to remain a largely unexploited resource.⁸⁸ In part its relative underutilization in civil cases may reflect its very high level of generality in expressing its concepts. In part, however, this state of affairs may reflect a failure on the part of courts and lawyers to thresh the Code of Professional Responsibility carefully to glean from it the worth that it can claim. In the following pages I will illustrate ways in which courts have employed the Code creatively — or have inexplicably passed up opportunities to do so — in malpractice and similar kinds of private liability litigation in which attorneys have been parties.

87. 21 Cal. 3d at 311, 578 P.2d at 940, 146 Cal. Rptr. at 223. A case similar to *Kirsch*, although not cited in it, is *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). The court in that case rejected the notion that it should impose on attorneys an absolute duty to withdraw from a representation upon the discovery of a conflict of interests. The court cited the Canons for the proposition that, as long as the attorney has made full disclosure and obtained the full consent of the client, the attorney may proceed despite the conflict. While the *Lysick* court's resolution would seem on the surface to protect attorneys by permitting them to proceed with lucrative representations despite a conflict, it can also readily be defended on a broader, public interest ground permitting the fully informed client to consent to the representation in order to avoid the additional costs of obtaining substitute counsel. Cf. Morgan, *The Emerging Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977) (conflict of interest rules are in attorneys' self interest because they create need for involvement of more attorneys in a matter).

88. A useful recent listing of Code provisions that have been involved in legal malpractice litigation may be found in R. MALLIN & V. LEVIT, *supra* note 46, at 629-30.

A. *Conflicts of Interests*

A potentially important area in which the Code could be employed to define the civil liability of attorneys is that of conflicts of interest, both in situations in which an attorney has represented two or more clients with conflicting interests⁸⁹ and those in which the attorney's own interests have conflicted with those of the client.⁹⁰

1. *Dual Representation*.—Consider first the problem presented by simultaneous representation of clients with conflicting interests. Illustrative is the leading California case of *Ishmael v. Millington*.⁹¹ The defendant-attorney had for some years represented a man in his business dealings. The man arranged for the attorney to represent him and his wife in a divorce action. It was agreed that she would file the divorce action as plaintiff and that it would be uncontested. The attorney drew up a property settlement agreement based on materials that the husband supplied him. The wife signed the agreement, relying on her husband's false representations that it fairly represented a fifty-fifty division of their common property. The attorney met the wife for the first time at the courthouse, where he escorted her through a perfunctory ex parte divorce action that resulted in judicial approval of the property settlement. The wife thereafter discovered that she would receive only \$8,807 for surrendering her rights to community assets worth ten times that much. She sued the attorney for malpractice, alleging that he had negligently permitted her to be duped by her husband.

The California court held that the complaint stated an actionable claim.⁹² It rejected the attorney's argument that the action should be barred by the wife's admission that she had not

89. *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968); *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966); *Crest Inv. Trust, Inc. v. Comstock*, 23 Md. App. 280, 327 A.2d 891 (1974); *Hill v. Okay Constr. Co.*, 252 N.W.2d 107 (Minn. 1977); *Annot.*, 28 A.L.R.3d 389 (1969); see *Wooddy v. Mudd*, 258 Md. 234, 240-44, 265 A.2d 458, 464-66 (1970). The client must, of course, allege injury as a result of the attorney's impermissible joint representation. See *Brosie v. Stockton*, 105 Ariz. 574, 468 P.2d 933 (1970). Occasionally the Code's rules on conflict of interests have been successfully employed in defending a damage suit. See *Adams v. Chenowith*, 349 So. 2d 230 (Fla. App. 1977) (because Code would not permit attorney to represent both buyer and seller of real estate, in the absence of explicit misrepresentations buyer's attorney could not have been misled into thinking that attorney was protecting his interests).

90. See text accompanying notes 101-13 *infra*.

91. 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966).

92. *Id.* at 529, 50 Cal. Rptr. at 597.

relied on the attorney for advice.⁹³ Explicitly invoking the California Code of Professional Conduct and the ABA Canons of Ethics,⁹⁴ the court held that an attorney attempting to represent both parties in a divorce action is under an affirmative duty to make a full disclosure to both parties of the conflicting interests between them,⁹⁵ to advise them of the desirability of separate counsel,⁹⁶ and, if the dual representation is nonetheless accepted, to take affirmative steps to protect the interests of both parties.⁹⁷

Holdings such as that in *Ishmael* make an important contribution to what would otherwise be the state of the law. Under general negligence doctrine, the definition of the standard of care of the attorney in *Ishmael* would have been established at trial by reference to general concepts of reasonableness.⁹⁸ In the absence of the authoritative delineation of an attorney's responsibilities contained in the lawyers' Code, it presumably would have been permissible for the defendant-attorney to have introduced expert testimony that the normally careful attorney in California would have proceeded as he did.⁹⁹ In effect, then, the court's explicit reliance on the lawyers' Code delineated the attorney's tort duties in a way that precluded application of a lesser standard.¹⁰⁰

2. *Attorney's Business Dealings with a Client.*—A variant on the conflict of interest problem is presented when an attorney enters into business transactions with a client. It is universally recognized that an attorney, both during the attorney-client relationship and for a period of time after it ends, is governed by a fiduciary-like standard in business dealings with a client.¹⁰¹ The attorney's responsibilities in this respect are broadly analogous to the fiduciary duties that attach to trustees under an express

93. *Id.* at 530, 50 Cal. Rptr. at 598.

94. *Id.* at 526-28 nn. 2-4, 50 Cal. Rptr. at 596-97 nn. 2-4. The court, at footnote 3, seemingly rejected a less burdensome provision of the then California Rules of Professional Conduct in favor of ABA Canon 6, which required "full disclosure of the facts" before dual representation could be undertaken.

95. 241 Cal. App. 2d at 526-28, 50 Cal. Rptr. at 596-97.

96. *Id.* at 526 n.3, 50 Cal. Rptr. at 596 n.3.

97. *Id.* at 529, 50 Cal. Rptr. at 598.

98. *E.g.*, Estate of Kruger, 130 Cal. 621, 626, 63 P. 31, 33 (1900); Moser v. Western Harness Racing Ass'n, 89 Cal. App. 2d 1, 7, 200 P.2d 7, 10 (1948).

99. *E.g.*, Mazer v. Security Ins. Group, 368 F. Supp. 418, 422 (E.D. Pa. 1973), *aff'd*, 507 F.2d 1338 (2d Cir. 1975).

100. For a more detailed discussion of conflict of interest problems in divorce actions, see Crystal, *Ethical Problems in Marital Practice*, 30 S.C.L. Rev. 321, 325-338 (1979).

101. *E.g.*, Delano v. Kitch, 542 F.2d 550 (10th Cir. 1976); People v. Schermerhorn, 567 P.2d 799 (Colo. 1977); Sherman v. Klopfer, 32 Ill. App. 3d 519, 336 N.E.2d 219 (1975).

trust,¹⁰² officers of a corporation,¹⁰³ and partners.¹⁰⁴ The most frequent application of this duty for attorneys takes the form of awards of rescission, damages, or other relief to a former client because the attorney has gained an unfair advantage in a business dealing with the client¹⁰⁵ or has taken personal advantage of a business opportunity that by right should have been for the benefit of the client.¹⁰⁶

In private litigation against attorneys courts generally have accorded full sweep to the Code requirements severely restricting business dealings with a client.¹⁰⁷ Occasionally, however, one encounters instances in which courts may have been insufficiently attentive to the Code's relevance in resolving disputes in non-disciplinary litigation. A case in point is *Ruth v. Crane*.¹⁰⁸ A federal district court in *Ruth* granted an attorney specific performance of his client's contract to convey land to him at a favorable price. The court, after determining that the contract was "fair and reasonable in light of the fact that one of the purchasers was the defendant's attorney,"¹⁰⁹ stated that it was not passing upon whether there had been a violation of the Code, but referred the matter to the state's disciplinary agency for further proceedings.¹¹⁰ From intimations in the opinion it appears that the court may have been concerned that the attorney might not have com-

102. *E.g.*, *Miller v. Craig*, 27 Ariz. App. 789, 558 P.2d 984 (1977); *Main v. Merrill Lynch, Pierce, Fenner & Smith*, 67 Cal. App. 3d 19, 31, 136 Cal. Rptr. 378, 385 (1977).

103. *E.g.*, *Katz Corp. v. T.H. Canty & Co.*, 168 Conn. 201, 362 A.2d 975 (1975); *Murphy v. Country House, Inc.*, 307 Minn. 344, 240 N.W.2d 507 (1976).

104. *E.g.*, *Skone v. Quanco Farms*, 261 Cal. App. 2d 273, 68 Cal. Rptr. 26 (1968); *Few v. Few*, 239 S.C. 321, 122 S.E.2d 829 (1961).

105. *E.g.*, *Hicks v. Clayton*, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512 (1977); *Goldman v. Kane*, 329 N.E.2d 770 (Mass. App. 1975); *Colstad v. Levine*, 243 Minn. 279, 67 N.W.2d 648 (1954); *Flanagan v. DeLapp*, 533 S.W.2d 592 (Mo. 1976). Taking unfair advantage of a client in a business transaction is also, of course, a ground for the imposition of professional discipline. *E.g.*, *In re Geyler*, 114 Ariz. 321, 560 P.2d 1228 (1977); *In re May*, 96 Idaho 858, 538 P.2d 787 (1975); *In re Belser*, 269 S.C. 682, 239 S.E.2d 492 (1977).

106. *Healy v. Gray*, 184 Iowa 111, 168 N.W. 222 (1918); *Petraborg v. Zontelli*, 217 Minn. 536, 15 N.W.2d 174 (1944) (permissible representation, however, when full disclosure is made); *In re Hurd*, 69 N.J. 316, 354 A.2d 78 (1976) (use of information of potential benefit to client to enrich attorney's close relative); *cf. Alexander v. Russo*, 1 Kan. App. 2d 546, 571 P.2d 350 (1977) (attorney's urging client to tell police whereabouts of stolen property with motive of claiming award was conflict of interest violation and precluded attorney from recovering award).

107. DR 5-104. *See, e.g.*, *Hicks v. Clayton*, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512, (1977); *Sherman v. Klopfer*, 32 Ill. App. 519, 336 N.E.2d 219 (1975); *Peaslee v. Pedco, Inc.*, 388 A.2d 103 (Me. 1978).

108. 392 F. Supp. 724 (E.D. Pa. 1975).

109. *Id.* at 731.

110. *Id.* at 731, 732.

plied with the requirement of DR 5-104(A) that he make a full disclosure to the client before entering into a business deal with the client.¹¹¹ If this is a fair reading of *Ruth*, then the court in effect has held that the attorney is under no legally enforceable duty to comply with the disclosure requirements. Yet it would seem that performance of this professionally mandated duty is important to the presumptively less informed client,¹¹² and, on the facts of the case,¹¹³ might have had an important causative influence on the client's willingness to sell at an unfavorable price. Under such circumstances there seems little reason to hesitate to enforce the full disclosure duties of the Code in the civil litigation itself.

B. Client Confidences and Secrets

Another area of potential significance concerns the obligation of the attorney not to disclose confidential information about the client. In some cases, breach of this obligation has led to an award of damages.¹¹⁴ For example, an attorney who revealed to the taxing authorities that his client had not paid taxes was held to have violated his fiduciary obligation to the client; this violation warranted relief in a private action between the parties.¹¹⁵ Often dis-

111. The attorney had disclosed that he and his law partner, together with other investors, would be the purchasers of the property and had stated that his feelings would not be hurt if the client retained separate counsel, 392 F. Supp. at 728. This would seem to fall substantially short of the "full disclosure" requirements frequently mentioned in the cases: a full explanation of the disadvantages of doing business with one's own attorney and advice to the client of the desirability of retaining separate counsel. *See, e.g.*, *Hicks v. Clayton*, 67 Cal. App. 3d 251, 136 Cal. Rptr. 512 (1977); *Peaslee v. Pedco, Inc.*, 388 A.2d 103 (Me. 1978).

112. The chief danger presented by attorney-client business dealings is that the client will not receive the same kind of advice to protect his or her interests as would be received if the other party to the transaction were a stranger to the attorney. Because of this, many courts have created a presumption of undue influence in such instances of attorney-client business dealings. *E.g.*, *Reeder v. Lund*, 213 Iowa 300, 236 N.W. 40 (1931); *Meara v. Hewitt*, 455 Pa. 132, 314 A.2d 263 (1974).

113. The defendant-attorney's expert witness testified that the fair market value of the property was \$95,000. The plaintiff-client's expert put the value at \$211,000. The contract price was \$85,000. 392 F. Supp. at 729-30. It seems unlikely that independent counsel would not have attempted more vigorously to obtain competing offers. *See id.* at 727 (attorney contacted only someone with whom he shared an office, who in turn found investors). The defendant-attorney knew from a client disclosure that she was anxious to sell because of financial reverses that had made it difficult to meet the mortgage payments on the property. *Id.*

114. *See* authorities collected in *R. MALLIN & V. LEVITT*, *supra* note 46, at 135-36. *See also* the leading English case of *Taylor v. Blacklow*, 3 Bing. (N.C.) 235, 132 Eng. Rep. 401 (Common Pleas 1836).

115. *Sherman v. Klopfer*, 32 Ill. App. 3d 519, 336 N.E.2d 219 (1975). Apparently the

closure of such information would violate the attorney-client privilege protected by statute or court rule in most jurisdictions.

The protection of clients afforded by the Disciplinary Rules of the Code goes much further than the statutory privileges, however. It includes, in addition, most knowledge about the client that the attorney may possess, even if the matter is not protected against disclosure by the testimonial privilege.¹¹⁶ Thus, an unconsented attorney disclosure of any “secrets” of a client may be equally actionable. For example, if an attorney reveals in a book information about a client that was not subject to the attorney-client privilege but did come within the “secrets” definition of DR 4-101(A), one could make a persuasive argument that the client should have a recovery of profits or other damages against the attorney.¹¹⁷ Another possible application of this ground of liability might arise in situations in which an attorney, without the informed consent of a client, invests in publicly traded shares of a corporation because of “secret” information obtained in the representation. Perhaps only in situations in which the purchase works to the disadvantage of the client (tipping off, for example, a client’s planned takeover of the corporation), but perhaps in all instances, courts may hold that the attorney’s unauthorized use of the secret for the attorney’s own advantage creates a right of action in the client.¹¹⁸

court relied upon its finding of breach of fiduciary obligation through the report to the Internal Revenue Service to validate the client’s cessation of payments otherwise due the attorney as well as to support an award of other relief relating to a complicated business arrangement into which the client and attorney had entered. *Id.*

116. The Code defines as a “secret”—and thus subject to strict rules against disclosure—“other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.” DR 4-101(A). These non-disclosable “secrets” include many matters that would not be protected by the attorney-client privilege. For example, information learned from a person other than the client or information learned from the client but not in a confidential setting would also be protected from unconsented disclosure. *See* DR 4-101(B)(1).

117. This does not address, of course, possible constitutional and other defenses that the attorney could assert if the client, for example, is a public figure. The attorney could not, however, ordinarily defend a suit for damages relying on a contract with the client permitting publication rights to the attorney. Such contracts are outlawed by DR 5-104(B) if entered into prior to the end of the representation.

118. *See* DR 4-101(B): “[A] lawyer shall not knowingly . . . (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.”

C. *Communication With Adverse Party*

Murmurings can be found in some cases of possible attorney liability for damages for breach of the duty of DR 7-104(A)(1), which forbids direct or indirect communication with a party represented by counsel without the consent of that other counsel.¹¹⁹ A clear case calling for a literal application of the Code prohibition against contact with a represented party is an instance in which a disadvantageous settlement is negotiated with the opposing party without the knowledge of the opposing party's attorney.¹²⁰

Courts have been reluctant in these cases, however, to give relief to the client who has entered into the unadvised settlement.¹²¹ The normal rationale has been that in the absence of fraud or similar deception the parties were free to enter into an arms' length settlement.¹²² While such concepts may reflect an acceptable accommodation of conflicting policies in litigation between the settling client and the offending attorney's client, there is no reason to extend the same rationale to the offending attorney. The attorney, unlike the client, clearly functions under special strictures imposed by the Code of Professional Responsibility. Thus, the opposing party who has entered into an improvident settlement because of the attorney's unconsented contact with that party in the absence of counsel should be permitted to recover from the offending attorney damages measured by the

119. *Harmatz v. Allstate Ins. Co.*, 170 F. Supp. 511, 512 (S.D.N.Y. 1959) (dicta) (client, but not attorney in the absence of an allegation of special damages, may be able to recover); cf. *Noble v. Sears, Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973) (no recovery on theory of intrusion into attorney-client relationship, but possible recovery—although of narrower scope—for “unreasonably intrusive” breach of privacy in view of alleged fact that contact was surreptitious and occurred in client's hospital room).

120. Courts in similar instances have permitted the attorney for the settling party to recover damages against the offending party (at least when it is an insurance company), measured by the difference in size between the fee that the attorney received from the settling client and the fee that would have been received in a well-counseled settlement. *E.g.*, *Lewis v. S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976); *State Farm Mut. Ins. Co. v. St. Joseph's Hosp.*, 107 Ariz. 498, 489 P.2d 837 (1971); *Skelly v. Richman*, 10 Cal. App. 3d 844, 89 Cal. Rptr. 556 (1970); cf. *Jackson v. Travelers Ins. Co.*, 403 F. Supp. 986 (M.D. Tenn. 1975) (similar theory of recovery, but less generous measure of damages). Courts have also permitted the non-consenting attorney to enforce a charging lien against the party who caused the uncounseled settlement to be made. *E.g.*, *Siciliano v. Fireman's Fund Ins. Co.*, 62 Cal. App. 3d 745, 133 Cal. Rptr. 376 (1976); *Downs v. Hodge*, 413 S.W.2d 519 (Mo. App. 1967).

121. *E.g.*, *Raabe v. Universe Tankerships*, 263 F. Supp. 786 (S.D.N.Y. 1966).

122. *Lewis v. S.S. Baune*, 534 F.2d 1115 (5th Cir. 1976); *Raabe v. Universe Tankerships*, 263 F. Supp. 786 (S.D.N.Y. 1966); cf. *Jackson v. Travelers Ins. Co.*, 403 F. Supp. 986 (M.D. Tenn. 1975) (recovery permitted where fraud shown).

difference between the settlement figure and the amount that would have been forthcoming in a counseled negotiation.

D. Prosecution of Frivolous Litigation

Several courts in recent years have dealt with cases in which physicians have attempted to recover damages against the attorney who had filed an unsuccessful medical malpractice action on behalf of a client against the physician.¹²³ While several theories of recovery have been advanced and rejected in these cases,¹²⁴ at least some of the opinions suggest that a theory of an implied right of recovery because of an attorney's violation of the Code of Professional Responsibility may be viable.¹²⁵ In any event, the courts' treatment to date of this Code theory permits consideration of the manner in which the courts have treated private recovery claims based on violations of the Code in general. Discussion may be particularly appropriate because litigation of the liability question has only arisen in recent years and the question is unsettled in many jurisdictions.

The Code provision that attorneys in these cases are alleged to have violated is DR 7-102(A)(1), which states that an attorney shall not "file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."¹²⁶ The plaintiffs' theory in

123. See generally Mallen & Roberts, *The Liability of a Litigation Attorney to a Party Opponent*, 14 WILLAMETTE L.J. 387 (1978); Comment, *Attorney Liability for Malicious Prosecution and Legal Malpractice: Do They Overlap?*, 8 PAC. L.J. 897 (1977); Annot., 84 A.L.R.3d 555 (1978).

124. A simple negligence theory of recovery has sometimes been rejected because of the absence of privity between the injured party and the attorney. *E.g.*, *Bickel v. Mackie*, 447 F. Supp. 1376, 1381-82 (N.D. Iowa 1978); *Brody v. Ruby*, 267 N.W.2d 902, 906-07 (Iowa 1978). The theory of malicious prosecution of civil action has been difficult to employ against attorneys because of the rule, followed in many jurisdictions, that the plaintiff must demonstrate some special injury beyond those commonly associated with defending litigation. See *Ammerman v. Newman*, 384 A.2d 637 (D.C. 1978); *Berlin v. Nathan*, 381 N.E.2d 1367, 1373 (Ill. App. 1978); *Brody v. Ruby*, 267 N.W.2d at 904-05 (Iowa 1978); *O'Toole v. Franklin*, 279 Or. 513, 518 n.3, 569 P.2d 561, 564 n.3 (1977); *Moel v. Sandlin*, 571 S.W.2d 567, 570-71 (Tex. Ct. App. 1978). The plaintiff is also precluded from commencing the malicious prosecution action until after successful termination of the original action in the plaintiff's favor. *E.g.*, *Babb v. Superior Court*, 3 Cal. 3d 841, 479 P.3d 379, 92 Cal. Rptr. 179 (1971); *Gasis v. Schwartz*, 80 Mich. App. 600, 264 N.W.2d 76 (1978).

125. See authorities collected at note 128 *infra*.

126. See also *Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978) (DR 6-101(A)(2) on handling a legal matter "without preparation adequate in the circumstances" and FED. R. Civ. P. 11 on attorney's certificate that there is good ground to support complaint filed); *Spencer v. Burglass*, 337 So. 2d 596, 600 (La. App. 1976) (ABA CANONS

these suits against the opposing attorney is that the attorney's violation of the Disciplinary Rule and the plaintiff's consequent reputational and other injuries should be sufficient to demonstrate liability. The reception given this theory by the courts has been mixed, with some rejecting the theory outright and apparently without qualification,¹²⁷ although one major court has stated that in a stronger case it would be prepared to entertain such a claim.¹²⁸

The principal argument of the courts that have rejected the Code theory outright is that recognition of it would offend a public policy favoring free resort to the courts.¹²⁹ This policy, which also finds expression in restrictive doctrines limiting malicious prosecution and abuse of process recoveries, attempts to assure all litigants a virtually absolute immunity from subsequent damage actions even when they present groundless disputes to a court for resolution.¹³⁰ The policy also protects the attorney for the

OF PROFESSIONAL ETHICS NO. 30 (1908), the predecessor to DR 7-102(A)(1), in effect at the time of the medical malpractice suit); *O'Toole v. Franklin*, 279 Or. 513, 522-23, 569 P.2d 561, 566 (1977) (state statutory provisions similar in import to Disciplinary Rules on frivolous claims).

127. See *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Spencer v. Burglass*, 337 So. 2d 596 (La. App. 1976).

128. *O'Toole v. Franklin*, 279 Or. 513, 569 P.2d 561 (1977) (per Linde, J.); *accord*, *Norton v. Hines*, 49 Cal. App. 3d 917, 925, 123 Cal. Rptr. 237, 24 (1975) (dicta) (attorney may be held liable for malicious prosecution by client's adversary when attorney prosecutes "a claim which a reasonable lawyer would not regard as tenable or by unreasonably neglecting to investigate the facts and law in making his determination to proceed . . ."); *Tool Research & Eng'r Corp. v. Henigson*, 46 Cal. App. 3d 675, 684, 120 Cal. Rptr. 291, 297 (1975) (dicta); *cf. Ammerman v. Newman*, 384 A.2d 637 (D.C. App. 1978) (no sufficient pleading of malicious prosecution case against attorney on facts here, but no mention of general immunity of attorneys from such suits); *Cooper v. Public Fin. Corp.*, 246 S.E.2d 684, 689-90 (Ga. App. 1978) (no liability for breach of DR 7-102 for lack of showing by plaintiff that law was clearly adverse to attorney for opposing party at time of the original litigation). *Berlin v. Nathan*, 381 N.E.2d 1367, 1372, 1376 (Ill. App. 1978), affirms that an attorney may be liable for damages for malicious prosecution of an action in behalf of a client and holds that DR 7-102(A)(1) merely covers the same ground as malicious prosecution. In *Friedman v. Dorzorc*, 268 N.W.2d 673 (Mich. App. 1978), the court rejected a negligence theory based on DR 7-102(A), but held that a cause of action against the attorneys for malicious prosecution of a civil action had been adequately pleaded. The court did suggest that the "probable cause" issue in malicious prosecution might be informed by the Code provisions on zealous advocacy. *See id.* at 679.

129. *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Spencer v. Burglass*, 337 So. 2d 596 (La. App. 1976); *see Berlin v. Nathan*, 381 N.E.2d 1367, 1371-72 (Ill. App. 1978); *Friedman v. Dorzorc*, 268 N.W.2d 673, 675 (Mich. App. 1978); *O'Toole v. Franklin*, 279 Or. 513, 519, 569 P.2d 561, 564-65 (1977) ("freedom of resort" as rationale in support of "special injury" rule in malicious prosecution suit by physician against attorney).

130. *See W. PROSSER, THE LAW OF TORTS* § 120, at 851 (4th ed. 1971).

plaintiff because without the assistance of an attorney the plaintiff would be hard put to take advantage of the dispute-resolving machinery of the judicial system.¹³¹

The difficulty with the “free resort” argument as applied to the attorney who knowingly prosecutes a frivolous case is that this precise chilling effect is the intended, or at least the accepted, effect of DR 7-102(A)(1). Attorneys have been subjected to formal sanctions by attorney disciplinary agencies for frivolous or harassing litigation.¹³² And other sanctions, such as the imposition of court costs or the obligation to pay the prevailing party’s attorney fees,¹³³ have been imposed upon attorneys in similar circumstances. As in instances in which courts have permitted injured parties to assert claims founded upon criminal or regulatory statutes that the defendant is alleged to have violated, the recognition of a Code theory of recovery for frivolous litigation would simply acknowledge that the provision of sanctions such as professional discipline does not adequately respond to the need of the injured party for compensation.¹³⁴ It would also recognize the legitimate

131. The court’s additional rationale in *Spencer v. Burglass*, 337 So. 2d 596, 601 (La. App. 1976), that upon discovering the weakness of the client’s case the plaintiff’s attorney owes no duty to the physician being sued because former Canon 30 makes withdrawal from representation only permissive, not mandatory in such circumstances, would presumably not obtain under the present DR 2-110(B)(1). In effect, DR 2-110(B)(1) now makes withdrawal mandatory in situations in which DR 7-102(A)(1) applies.

132. *E.g.*, *In re Wetzel*, 118 Ariz. 33, 574 P.2d 826 (1978); *Snyder v. State Bar*, 18 Cal. 3d 286, 555 P.2d 1104, 133 Cal. Rptr. 864 (1976). To be sure, there may be differences in the relative threats posed by a private litigant suing the opposing attorney for damages as opposed to the prosecutor for the attorney disciplinary agency prosecuting the attorney who has filed the frivolous suit. The disciplinary agency prosecutor will invariably be another attorney and thus might appreciate better the unpredictability of clients and the legal process and will not have been embroiled with the charged attorney in the previous litigation. Arguably, these differences mean that the attorney disciplinary process for the enforcement of DR 7-102(A)(1) presents much less of a chilling effect than would a suit against the attorney for damages. But the same cannot be said of the various party-initiated sanctions for frivolous litigation that are employed by courts. See note 133 *infra*.

133. *See, e.g.*, *Acevedox v. Immigration & Naturalization Serv.*, 538 F.2d 918 (2d Cir. 1976); *Chesa Int’l, Ltd. v. Fashion Assoc., Inc.*, 425 F. Supp. 234 (S.D.N.Y. 1977), *aff’d*, 573 F.2d 1288 (2d Cir. 1977); *Harrell v. Joffrion*, 73 F.R.D. 267 (W.D. La.), *aff’d*, 545 F.2d 167 (5th Cir. 1976) (*per curiam*) (reprimand and personal assessment of court costs against medical malpractice plaintiff’s attorney for pursuit of “totally frivolous” suit). *See generally* Note, *Sanctions Imposed by Courts on Attorneys Who Abuse the Judicial Process*, 44 U. CHI. L. REV. 619 (1977).

134. A similar response seems to dispose adequately of the argument that the Code provisions on frivolous litigation do not expressly create a private cause of action in favor of a party injured by such litigation. *See Bickel v. Mackie*, 447 F. Supp. 1376, 1383 (N.D. Iowa 1978). It is almost never the case that express provisions or civil recovery are mentioned in criminal and regulatory statutes that often have been adopted by courts as the measure of conduct in private damage actions. *See* text accompanying notes 22-28 *supra*.

place of the action for damages in the scheme of enforcement and deterrence machinery to obtain compliance with the Code of Professional Responsibility.¹³⁵

Some courts appear disposed to favor adoption of a Code theory of recovery in frivolous litigations cases. The Oregon Supreme Court in *O'Toole v. Franklin*¹³⁶ seemed prepared to acknowledge the existence of an attorney's tort of "pursuit of an action *known* to be wrongful and unjust."¹³⁷ But the court found that the theory had not been pleaded in the case; the suing physician had relied totally on theories of malicious prosecution and negligence. If such a cause of action were acknowledged to exist, it would, of course, be entirely consistent and appropriate to insist that the plaintiff have had the previous vexatious litigation terminated favorably as a precondition to suit.¹³⁸ But, with this qualification and the further condition that the plaintiff demonstrate some specific reputational, financial, or personal harm,¹³⁹ it would seem entirely consistent with a policy of encouraging free resort to the courts to impose liability upon an attorney for knowingly¹⁷⁰ participating in the prosecution of an utterly groundless

135. See text accompanying notes 34-52 *supra*.

136. 279 Or. 513, 569 P.2d 561 (1977).

137. *Id.* at 523, 569 P.2d at 566. The court analogized the right of action under the attorney's Code to the Supreme Court's creation of a private right of action from the duty expressed in the Securities Exchange Act in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976). See 279 Or. at 523, 569 P.2d at 566-67.

138. See *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978) (failure to plead successful outcome of malpractice suit would bar suit based on theory of violation of DR 7-102(A)(1), even if court were disposed to recognize it). Compare *Babb v. Superior Court*, 3 Cal. 3d 841, 479 P.2d 379, 92 Cal. Rptr. 179 (1971) (requirement of successful termination as predicate to malicious prosecution suit by physician against attorney).

139. The personal harm could include intentional infliction of emotional distress under aggravated circumstances, at least in jurisdictions that recognize this as a general tort. See *Kinnamon v. Staiman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977) (cause of action stated for intentional infliction of emotional distress by violation of lawyers' Code prohibition against threat of criminal prosecution as a means of obtaining advantage in civil litigation); *Jones v. Nissenbaum, Rudolph & Seidner*, 368 A.2d 770, 774-75 n.1 (Pa. Super. Ct. 1976) (dissenting opinion) (violation of DR 7-102(A)(1) and (2) as basis of action for intentional infliction of emotional distress).

140. The court in *O'Toole v. Franklin*, 279 Or. 513, 523, 569 P.2d 561, 566 (1977), would apparently limit the tort to an attorney's "pursuit of an action *known* to be wrongful and unjust." *Id.* (emphasis in original). This suggests that the court would not recognize a right to recover in instances in which the groundlessness of the case was unknown because of the attorney's negligent failure to know the facts or applicable law. See also *Berlin v. Nathan*, 381 N.E.2d 1367, 1376 (Ill. App. 1978). In this respect the right of recovery might be narrower than the conduct apparently prohibited by DR 7-102(A)(1), which may extend as well to situations in which "it is obvious" that the suit is intended by the client merely to harass or maliciously injure another. Compare *Friedman v. Dorszor*, 268 N.W.2d 673, 679 (Mich. App. 1978) (successful pleading of malicious prosecution

suit with foreseeable harm resulting. In outline, the cause of action would very closely resemble the action for malicious prosecution of a civil action recognized in some states as the civil side cognate to the traditional action for malicious prosecution of a criminal case.¹⁴¹ An important difference, which I would urge upon courts that have acknowledged the malicious prosecution claim against an attorney but have rejected the Code theory,¹⁴² is that the courts should examine the Code more closely for guidance that it might afford in determining such questions as whether the attorney lacked probable cause for prosecuting the original action.¹⁴³

E. Litigation Over Fees

A sometimes litigated¹⁴⁴ area of attorney-client dispute is over the size of the fee charged by the attorney. While it is generally accepted that the size of the fee is subject to contractual, arms-length negotiation between the parties,¹⁴⁵ courts have always shown a willingness to intervene in the bargaining process

action against attorney on allegation that attorney had no "probable cause to proceed with the suit initially or to continue it thereafter.").

141. *See, e.g.*, *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Ammerman v. Newman*, 384 A.2d 637 (D.C. App. 1978); *Lyddon v. Shaw*, 56 Ill. App. 3d 815, 372 N.E.2d 685 (1978); *Friedman v. Dorzorc*, 268 N.W.2d 673 (Mich. App. 1978); *Moel v. Sandlin*, 571 S.W.2d 567 (Tex. Ct. App. 1978).

142. *E.g.*, *Berlin v. Nathan*, 381 N.E.2d 1367 (Ill. App. 1978); *Friedman v. Dorzorc*, 268 N.W.2d 673, 674-75, 677-79 (Mich. App. 1978); *cf. Moel v. Sandlin*, 571 S.W.2d 567, 571 (Tex. Ct. App. 1978) (rejection of cause of action based on violation of criminal statute against barratry).

143. *Cf. Friedman v. Dorzorc*, 268 N.W.2d 673, 679 (Mich. App. 1978) (use of ABA CODE, EC 7-1 and DR 7-101(A)(1), to determine standards for taking a client's case).

144. EC 2-23 provides that a lawyer "should not sue a client for a fee unless necessary to prevent fraud or gross imposition by the client." Lawyers have been disciplined for burdensome fee litigations with clients. *See, e.g., In re Wetzels*, 118 Ariz. 33, 574 P.2d 826 (1978).

145. *See, e.g., Baron v. Sarlot*, 47 Cal. App. 3d 304, 120 Cal. Rptr. 675 (1975); *Potter v. Daily*, 220 Ind. 43, 40 N.E.2d 339 (1942); *Burns v. Valene*, 298 Minn. 257, 214 N.W.2d 686 (1974); *Higgins v. Beaty*, 242 N.C. 479, 88 S.E.2d 80 (1955). Most courts, however, will scrutinize more strictly a fee arrangement that is made or altered after the parties have entered into the attorney-client relationship. *See, e.g., Knapp v. McFarland*, 457 F.2d 881 (2d Cir.), *cert. denied*, 409 U.S. 850 (1972); *Spilker v. Hankin*, 188 F.2d 35 (D.C. Cir. 1951); *Rock v. Ballou*, 286 N.C. 99, 209 S.E.2d 476 (1974); *Archer v. Griffith*, 390 S.W.2d 735 (Tex. 1964). *Contra, e.g., Renegar v. Staples*, 388 P.2d 867 (Okla. 1963) (client has burden of proving unreasonableness of post-relationship fee agreement by clear and convincing evidence). In the absence of an express agreement on fees, courts will apply familiar rules of *quantum meruit* to determine the reasonable value of the legal services actually rendered. *E.g., Dailey v. Testone*, 72 Wash. 2d 662, 435 P.2d 24 (1967); *In re Marine*, 82 Wis. 2d 602, 264 N.W.2d 285 (1978).

in favor of the client when the client demonstrates¹⁴⁶ that the bargained-for fee is unreasonable.¹⁴⁷

Occasionally, courts find support for such an intrusion into the private world of contracting in the Code of Professional Responsibility. The Code directs that a lawyer should not charge a "clearly excessive" fee.¹⁴⁸ Under DR 2-106(B) this occurs when "a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee."¹⁴⁹ Employing this standard, courts have refused to enforce fee contracts that have been determined to be unreasonable.¹⁵⁰ The common remedy has been to award the attorney a recovery of only a reasonable fee regardless of the parties' prior agreement for a greater

146. On occasion, when a client raises a substantial question about the reasonableness of the attorney's fee, courts have placed the burden of proof of reasonableness on the attorney. *See, e.g., Continental Cas. Co. v. Knowlton*, 305 Minn. 201, 232 N.W.2d 789 (1975) (court will closely scrutinize fees that seem to be more than ordinarily charged); *Herro, McAndrews & Porter v. Gerhardt*, 62 Wis. 2d 179, 214 N.W.2d 401 (1974).

147. *See, e.g., Coffelt v. Shell*, 577 F.2d 30, 32 (8th Cir. 1978); *Magana v. Platzer Shipyard, Inc.*, 74 F.R.D. 61 (S.D. Tex. 1977); *Handleman v. Keehn*, 4 [1977] FAM. L. REP. (BNA) ¶ 2142 (N.Y. Sup. Ct. 1977); *Wade v. Clemmons*, 84 Misc. 2d 822, 377 N.Y.S.2d 415 (Sup. Ct. 1975); *Harmon v. Pugh*, 248 S.E.2d 421 (N.C. App. 1978). *See generally*, Project Note, *Recent Developments in Attorneys' Fees*, 29 VAND. L. REV. 685, 710-18 (1976) (recent litigation concerning court-imposed maximum contingent fee schedules). In addition to reduction of fees in litigation with clients, an attorney may be subjected to formal discipline for charging an unreasonable fee. *E.g., In re Rappaport*, 558 F.2d 87 (2d Cir. 1977); *Florida Bar v. Moriber*, 314 So. 2d 145 (Fla. 1975); *In re Kuzman*, 335 N.E.2d 210, 214 (Ind. 1975); *Westchester County Bar Ass'n v. St. John*, 43 App. Div. 2d 218, 350 N.Y.S.2d 737 (1974); *Oklahoma Bar Ass'n v. Moss*, 577 P.2d 1317 (Okla. 1978); *In re Clarkson*, 244 S.E.2d 512 (S.C. 1978). Occasionally courts find that relief for the client and discipline for the attorney require restitution of an unreasonable fee to the client as a condition of reinstatement to practice after a period of disbarment. *E.g., In re Hansen*, 586 P.2d 413, 417 (Utah 1978).

148. DR 2-106(A).

149. The phrase "lawyer of ordinary prudence" in DR 2-106(B) apparently refers to the normal judicial practice of admitting expert testimony by lawyers concerning the reasonableness of the fee charged. *See generally City of Detroit v. Grinnell Corp.*, 495 F.2d 448, 472 (2d Cir. 1974); *Ruwitich v. First National Bank*, 327 So. 2d 833 (Fla. App. 1976); *Parish v. Denato*, 262 N.W.2d 281, 285 (Iowa 1978); *Jones v. Bryant*, 283 So. 2d 307, 310 (La. App. 1973); *In re Estate of Coffin*, 7 Wash. App. 256, 267, 499 P.2d 223, 229 (1972). The statement in the Disciplinary Rule does have the unfortunate possible connotation that only lawyers are suited to be judges of the reasonableness of fees. This meaning, of course, ignores the fact that in many circumstances the final question of reasonableness will be submitted to a jury of nonlawyers as a question of fact. *See, e.g., Carlson, Collins, Gordon & Bold v. Banducci*, 257 Cal. App. 2d 212, 233, 64 Cal. Rptr. 915, 920 (1967); *Taylor v. Barnhill*, 470 P.2d 902, 905 (Colo. Ct. App. 1970); *Perkins v. Blake*, 332 N.E.2d 396, 399 (Mass. App. 1975). The statement in DR 2-106(B) that unreasonableness is to be tested on a "definite and firm conviction" standard may be quite different from the normal statement of the burden of proof in nondisciplinary actions. *See note 140 supra*.

150. *See authorities cited in note 147 supra*.

sum.¹⁵¹ In particularly aggravated cases the court may refuse to award any fee despite the completion of substantial work by the attorney.¹⁵² When fees are awarded, courts have frequently looked to the Code¹⁵³ for a delineation of the factors to be taken into account in determining whether a fee is reasonable.¹⁵⁴ Private litigation clearly reflects the significant role the Code plays in regulating this most important economic relationship between attorneys and clients.

Room remains, however, for further growth in the law under the stimulus of the Code even as presently drafted. A prominent candidate for change in the law is the doctrine that has been applied by some courts that in a suit by an indemnitee against an indemnitor for a contractually promised payment of attorney fees, the court will not inquire into the reasonableness of the charge for fees. A common illustration is when the parties to a note have agreed to a specific (and often very high) figure for attorneys' fees if the holder of the note must bring suit for collection. Some courts, but not all,¹⁵⁵ take the position that the amount of the attorneys' fee is a matter of private contract and the court will not re-examine it absent an allegation of fraud,

151. *E.g.*, *Wade v. Clemmons*, 84 Misc. 2d 822, 377 N.Y.S.2d 415, (Sup. Ct. 1975); *Herro, McAndrews & Porter v. Gerhardt*, 62 Wis. 2d 179, 184, 214 N.W.2d 401, 404 (1974).

152. Courts have threatened a complete refusal of fees in cases in which the attorney pressing the fee claim has allegedly committed a violation of the Code of Professional Responsibility or the Canons of Ethics, as by representing conflicting interests, *De Korwin v. First Nat'l Bank*, 155 F. Supp. 302, 306-07 (N.D. Ill. 1957); *American-Canadian Oil & Drilling Corp. v. Aldridge & Stroud, Inc.*, 237 Ark. 407, 373 S.W.2d 148 (1963); *Rolfstad, Winkjer, Suess, McKennelt & Kaiser v. Hanson*, 221 N.W.2d 734, 737 (N.D. 1974); *In re Hansen*, 586 P.2d 413, 417 (Utah 1978), by abandoning the client's case without good cause, *Borup v. National Airlines, Inc.*, 159 F. Supp. 808, 810 (S.D.N.Y. 1958); *Schwartz v. Jones*, 58 Misc. 2d 998, 999, 297 N.Y.S.2d 275, 276 (Sup. Ct. 1969), or by misconduct in the administration of fiduciary funds, *In re Estate of Gould*, 547 S.W.2d 863 (Mo. App. 1977). The resulting forfeiture by the attorney of any fee, even a reasonable one considering the actual value of the services performed, is similar to the result reached in other instances in which a fiduciary in the course of providing valuable services commits a serious breach of fiduciary duties. *See, e.g.*, 5 W. FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS § 2145 (Rev. Perm. Ed. 1976); RESTATEMENT (SECOND) OF AGENCY § 469, Comment e (1957).

153. *See* DR 2-106(B).

154. *E.g.*, *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714, 719 (5th Cir. 1974); *Parker v. Matthews*, 411 F. Supp. 1059, 1067-68 (D.D.C. 1976); *Kay v. Cascade Packing Co.*, 19 Wash. App. 579, 585, 576 P.2d 929, 933 (1978); *Herro, McAndrews & Porter v. Gerhardt*, 62 Wisc. 2d 179, 184, 214 N.W.2d 401, 404 (1974).

155. *E.g.*, *Waterman v. Sullivan*, 156 Colo. 195, 397 P.2d 739 (1964); *Coley v. Coley*, 94 S.C. 383, 77 S.E. 49 (1913); *Richardson v. Breeding*, 167 Va. 30, 187 S.E. 454 (1936); *National Bank v. Myers*, 75 Wash. 2d 287, 450 P.2d 477 (1969).

duress, illegality, or the like.¹⁵⁶ The result is unfortunate and could lead to absurd consequences. If the attorney actually is the recipient of an unreasonably high fee, he or she is needlessly enriched at the expense of the notemaker. The premium represented by the unreasonably high fee often cannot be defended as an *in terrorem* device to prevent defaults on notes, because usury laws and similar regulations already prohibit forfeiture penalties in these transactions. If the attorney is not paid anything more than a reasonable fee, then the lender is permitted to recover more than the outstanding value of the note, with similar needless enrichment at the expense of the maker. In either event the exaction from the maker is taken because of an unreasonably high fee — a result that does little to stimulate public confidence in the setting of attorneys' fees.¹⁵⁷ A better approach would be to limit the amount of the recovery for attorneys' fees to a reasonable sum in every case. So long as the measure of a "reasonable" fee permits the lender to be assured of quality legal representation in the collection action, imposing the Code measure of reasonability on the transaction would seem preferable. This would prevent needless enrichment of attorneys or lenders and may assist to increase public confidence in the price of legal representation.

F. Fee Splitting

An area in which the regulatory norms of the Code are clear is that of fee splitting among lawyers.¹⁵⁸ According to DR 2-

156. See *Mortgage Investors v. Citizens Bank & Trust Co.*, 278 Md. 505, 366 A.2d 47 (1976) (particularly note the dissent, 366 A.2d at 51).

157. A recent study prepared for the National Center for State Courts indicated that the public may view high legal fees as a very serious problem affecting the judicial system. YANKELOVICH, SKELLY & WHITE, INC., *THE PUBLIC IMAGE OF COURTS: HIGHLIGHTS OF A NATIONAL SURVEY OF THE GENERAL PUBLIC, JUDGES, LAWYERS AND COMMUNITY LEADERS* 28, 38 (1978).

158. See, e.g., *Mason v. Levy & Van Bourg*, 77 Cal. App. 3d 60, 65 n.1, 143 Cal. Rptr. 389, 391 n.1 (1978) (public policy behind prohibition against fee splitting precludes forwarding attorney's negligence action against second attorneys who allegedly failed to file action within limitation period); *In re Diamond*, 72 N.J. 139, 368 A.2d 353 (1976) (discipline case); *Schroeder v. Schaefer*, 258 Or. 444, 477 P.2d 720 (1970) (forwarding attorneys could not recover under fee contract with clients for failure to inform clients of their interest in fee sharing arrangement with firm in another state to which clients knew they were forwarding case); *Fleming v. Campbell*, 537 S.W.2d 118 (Tex. Ct. App. 1976) (fee splitting contract among lawyers is void and unenforceable because of Code prohibition).

The broad sweep of the prohibition against fee splitting in the Code has been criticized on the ground that it discourages an attorney from releasing a case to another attorney who may be much more competent in the matter. See *THE ROSCOE*

107(A)(1), a lawyer may divide a fee with another lawyer who is not a partner or associate¹⁵⁹ only after full disclosure to the client and free client consent. Even with consent, the total fee must be reasonable¹⁶⁰ and its division must be made in proportion to the services actually performed by both attorneys.¹⁶¹

Assume a case in which attorneys secretly split a fee in violation of the rule. The “forwarding” attorney receives a one-third share of the fee without performing significant legal work. The total fee is otherwise reasonable. May the client in a later suit recover the unearned portion of the fee retained by the forwarding attorney? No court seems to have ruled directly on the issue.¹⁶² Should the client be prevented from recovering because of the assumed reasonability of the total fee — and, hence, the client’s lack of proximate injury from the attorney’s violation of the Disciplinary Rule?

Courts, influenced by the policy goals of the Code, should permit recovery in such a case. First, giving a damage recovery to the client may tend to enforce better a rule that is probably widely violated.¹⁶³ Second, most clients would have considerable difficulty overcoming the assumption that the fee is “reasonable” in size. Under present law clients have considerable difficulty showing that any fee is unreasonable. The factors that are said to be relevant in a consideration of the reasonableness of a fee are so many and so indeterminate¹⁶⁴ that even very high fees can be

POUND—AMERICAN TRIAL LAWYERS FOUNDATION, *ETHICS AND ADVOCACY* 17 (1978); Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702, 741-42 (1977); Stokey, *Personal Viewpoint: Let’s Re-examine Fee Splitting*, 61 A.B.A.J. 1253 (1975).

159. DR 2-107(A); *Koehler v. Wales*, 16 Wash. App. 304, 556 P.2d 233 (1976) (attorney hired to cover for attorney taking fourteen-month leave of absence from sole practice could permissibly split fees with attorney on leave).

160. DR 2-107(A)(3).

161. DR 2-107(A)(2). See *Prandini v. National Tea Co.*, 557 F.2d 1015, 1019 (3d Cir. 1977); *Palmer v. Breyfogle*, 217 Kan. 128, 535 P.2d 955 (1975).

162. *State v. O’Connell*, 83 Wash. 2d 797, 523 P.2d 872 (1974), comes close. A divided court in that case affirmed a jury verdict against governmental clients in a case rather similar to the problem posed in the text. The majority did not explicitly rule on the existence of a right of recovery, but expressed doubt that recovery could be had by the client in the absence of proof of damages. Damages, the court intimated, might be absent when the total fee was reasonable. *Id.* at 843, 523 P.2d at 899-900.

163. See D. ROSENTHAL, *LAWYER AND CLIENT: WHO’S IN CHARGE?* 99-100 (1974); Hall & Levy, *Intra-Attorney Fee Sharing Arrangements*, 11 VAL. U.L. REV. 1, 25 (1976); Note, *Division of Fees Between Attorneys*, 3 J. LEG. PROF. 179, 188-92 (1978).

164. See Berger, *Court Awarded Attorneys’ Fees: What Is “Reasonable”?*, 126 U. PA. L. REV. 281, 285-87 (1977).

defended as "reasonable."¹⁶⁵ The client therefore should not be required to show that the total split fee was excessive before being able to recover the forwarding attorney's share of the fee. Moreover, if the attorneys had been as fully candid about the fee as they should have been, the client would have been in a position to bargain or shop for a lower fee.¹⁶⁶

CONCLUSION

As the preceding sections have attempted to demonstrate, misalignments exist between the scope of an attorney's responsibilities under the Code of Professional Responsibility and the attorney's more limited liability under private law. The judicial expansion of attorney liability proposed in this article is hardly gratuitous, but is impelled by both strong theoretical considerations and the vital practical goal of enhancing enforcement of the Code of Professional Responsibility. To date, the judicial response to opportunities for this kind of enhanced enforcement of the Code has been, frankly, too grudging. And the Code itself could be made much more explicit in defining and in some instances making more rigorous the responsibilities of the attorney in several areas that may result in civil litigation. The potential use of more specific standards in civil litigation will doubtless create pressures against their adoption because of the narrow, pocketbook concerns of attorneys. But it is believed that pressures from the public and from within the legal profession for higher standards, better articulated and more effectively enforced, may well prevail.

165. In any event, in the common instance of splitting a one-third contingent fee, the total fee might be unassailably reasonable in size.

166. See *Schroeder v. Schaefer*, 258 Or. 444, 477 P.2d 720 (1970).

