



Ethical Rule Violations and Malpractice

A recent article¹ describes different approaches courts have taken in viewing the significance of an ethical rule violation in the context of proving an act of legal malpractice. All states have now adopted, with occasional variations, the ABA’s Model Rules of Professional Conduct—as well as the Preamble, which states the purpose and intent. Take, for instance, Arizona’s Rules of Professional Conduct,² where our ethical rules are found. Comment [20] to the Preamble, which is patterned after Paragraph 20 of the Model Rule’s version, is pretty clear on the point: “Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. ... [The Rules] are not designed to be the basis for civil liability.”

But the Comment also states, “Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct” (emphasis supplied).

The case most cited for the quoted language above is *Elliot v. Videman*,³ a 1989 Arizona Court of Appeals decision that stated a violation of the ethics rules does not establish an act of malpractice, but is “merely evidence” that the jury may consider in determining whether the lawyer committed malpractice. Although it was decided under the old Code of Professional Responsibility,⁴ it is still being cited, has not been judicially questioned in Arizona, and seems to be in accord with the general notion in a majority of jurisdictions that ethics rules can be considered in expert testimony to establish whether the lawyer met the standard of care in a legal malpractice case.⁵

Standard of care cases are those where a lawyer’s competence and diligence are usually at issue.⁶ What is not as clear is whether expert testimony is required to establish if the lawyer met the standard of *conduct*, as in where there are allegations against the lawyer for breaching fiduciary duties recognized under the common law, such as are covered in the confidentiality and conflict of interest rules.⁷ There, it would seem that a properly instructed jury is all that is needed to determine whether the lawyer complied with the common law standards of conduct required of a fiduciary, and there is Arizona authority that seems to agree.⁸

Finally, a recent case⁹ hasn’t made this issue any easier. There, the Court of Appeals found that because the lawyer involved had not complied with the fee-splitting requirements of ER 1.5(e), he not only was not allowed to enforce his oral agreement for dividing the fee with the referring lawyer,

but was denied his claim for *quantum meruit*, as well.¹⁰ Without requiring expert testimony and without so much as a mention of the relevant standard of care, the court effectively rescinded the lawyer’s oral contract with the forwarding lawyer, leaving

him with nothing to show for his efforts. What is most notable about the decision is the court’s finding that the rules governing the practice of law, as promulgated by the Arizona Supreme Court, have “the same force and effect” and are as “equally binding” as state statutes.¹¹ This would include Rule 42, which sets forth our professional conduct rules. The fact that Arizona has long held that violation of a statute may be considered to be negligence per se¹² was not discussed.

Whether the imprimatur given to our ethical rules by *Levine* will have any effect on the way legal malpractice cases are proved in Arizona remains to be seen. A Petition for Review was filed on March 13, 2018. Note that the case did not involve claims of malpractice, breaches of fiduciary duties or harm to a client. It was instead a disagreement between lawyers, where the alleged

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ethical violation was used defensively, not to establish liability.

In the meantime, the weight of authority is that to prove a case of legal malpractice, a plaintiff must show: (1) the existence of an attorney–client relationship that imposes a duty on the attorney to exercise that degree of skill, care and knowledge commonly exercised by members of the profession, (2) breach of that duty, (3) that such breach was a proximate cause of the resulting injury, and (4) the fact and extent of that injury.¹³ 

endnotes

1. Donald E. Campbell, *The Paragraph 20 Paradox: An Evaluation of the Enforcement of Ethical Rules As Substantive Law*, 8 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 251 (Vol. 2, 2018).
2. Rule 42, ARIZ.R.S.Ct.
3. 791 P.2d 639 (Ariz. Ct. App. 1989).
4. See discussion in *Arizona Legal Ethics Handbook* (4th Ed. 2016) at ¶ 0.1:260.
5. Campbell, *supra* note 1, at 292 et seq., and RESTATEMENT THIRD, THE LAW GOVERNING LAWYERS § 52, cmt. f.
6. ERs 1.1 (Competence) and 1.3 (Diligence).
7. ERs 1.6 (Confidentiality of Information); 1.7 (Conflict of Interest: Current Client); 1.8 (Conflict of Interest: Current Client: Specific Rules) and 1.9 (Duties to Former Clients).
8. *Cecala v. Newman*, 532 F. Supp. 2d 118, 1133-1135 (D. Ariz. 2007) (lawyer may be liable for departing from the applicable standard of care under the law of negligence; as fiduciary, lawyer may also be liable for breaching his common law duties of loyalty and confidentiality); for a general discussion on the differences between these two considerations, see GEOFFREY C. HAZARD, W. WILLIAM HODES, PETER R. JARVIS, *LAW OF LAWYERING* (4th Ed.), at § 5.07.
9. *Levine v. Haralson, Miller et al.*, Case No. 1 CA-CV 16-0590, Ariz. Ct. App. (Jan. 25, 2018); <https://caselaw.findlaw.com/az-court-of-appeals/1887077.html>
10. The attorney claimed to have spent 428.5 hours of work on the case.
11. *Levine*, 1 CA-CV 16-0590, at ¶ 10. The court cites *Valley National Bank of Arizona v. Meneghin*, 634 P.2d 570 (Ariz. 1981) (rules of civil procedure have same effect as statutes) and *Peterson v. Anderson*, 745 P.2d 166 (Ariz. 1987) (using predecessor to Arizona Supreme Court Rule 33(c) to deny unlicensed lawyer right to recover referral fees).
12. *Wolfe v. Ornelas*, 324 P.2d 999 (Ariz. 1958)
13. *Phillips v. Clancy*, 733 P.2d 300, 303 (Ariz. Ct. App. 1986).