LAWYER RULES AS SUBSTANTIVE LAW

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ABSTRACT

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

Courts have increasingly relied on the rules as a source of substantive law and found that such agreements are unenforceable because they violate public policy, but a substantial minority of courts continues to reject the applicability of the professional rules to substantive contract disputes. Moreover, in accepting or rejecting the rules of professional conduct as a source of substantive law, courts almost uniformly engage in little discussion or analysis and instead simply decide in a conclusory manner that the professional rules either do or do not constitute public policy. This Article serves two primary purposes. First, it illustrates the split among the courts considering the substantive impact of agreements made in violation of the professional rules. Second, in urging more uniform and widespread use of the rules in substantive contract disputes, it provides the theoretical and public policy justifications that have been almost completely absent from the case law.
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INTRODUCTION

Are the Rules of Professional Conduct “law?” In disciplinary proceedings, there is no question that they are.\(^1\) Indeed, as the Preamble to the Model Rules makes clear, the very purpose of the professional rules is to articulate prohibited conduct that can subject lawyers to discipline.\(^2\) The impact of the professional rules beyond the disciplinary process, however, remains “a matter of controversy.”\(^3\) The professional rules themselves largely disclaim any relationship to or influence on the substantive law.\(^4\) The courts are emphatically divided with some courts describing the professional rules as having the “force of law”\(^5\) in non-disciplinary matters.

\(^1\) 2006 Symposium Transcript, 20 GEO. J. LEGAL ETHICS 321, 329 (2007) (Comments of Stephen Gillers) (“Any rule of legal ethics, a rule in the jurisdiction’s rules of professional conduct, is the law because the state can punish through discipline or civil liability for violation of the norms of the profession. So it’s law if what we mean by a law is a state imposed duty whose violation carries a penalty.”); Geoffrey C. Hazard, State Supreme Court Regulatory Authority Over the Legal Profession, 72 NOTRE DAME L. REV. 1177 (1997) (“The Code and the Model Rules of Professional Conduct were adopted and have the force of law by action of the highest courts of the states.”).

\(^2\) MODEL RULES OF PROF’L CONDUCT SCOPE ¶ 19 (2011) (“Failure to comply with an obligation or prohibition imposed by a Rule is a basis for invoking the disciplinary process.”). See also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS: REGULATION OF LAWYERS-IN GENERAL § 1 cmt. b (2000) (“Lawyer codes are promulgated and applied primarily for the purpose of establishing mandatory standards for the assessment of a lawyer’s conduct in the course of a professional-discipline proceeding brought against the lawyer.”).

\(^3\) Richard K. Greenstein, Against Professionalism, 22 GEO. J. LEGAL ETHICS 327, 348 n.129 (2009). See also Fred C. Zacharias, Are Evidence-Related Ethics Provisions ‘Law’, 76 FORDHAM L. REV. 1315 (2007) (“One issue raised, but not resolved, by the recent Restatement of the Law Governing Lawyers is the extent to which state legal ethics codes are “law.” The reporters for the Restatement refer to the codes as part of the construct of lawyer regulation. But that conceptualization does not answer the question of the extent to which courts should, and do, recognize the codes as having force in litigation.”); Roger C. Cramton & Lisa K. Udell, State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules, 53 U. PITT. L. REV. 291, 302 (1992) (“As ethics codes assume the form of law, the profession and the courts increasingly treat them as law for some purposes. At least for purposes of professional discipline, they are an important source of authoritative law. Their relevance in contexts other than professional discipline, however, remains uncertain.”).

\(^4\) MODEL RULES OF PROF’L CONDUCT PREAMBLE ¶ 20 (2011).

\(^5\) The following decisions explicitly recognize that the professional rules have the force of law or should be treated like statutes: Cambron v. Canal Ins. Co., 269 S.E.2d 426, 430 (Ga. 1980) (asserting that the Georgia Code of Professional Responsibility has the effect of law); In re Vrdolyak, 560 N.E.2d 840, 845 (Ill. 1990) (stating that the Illinois Code of Professional Responsibility “operates with the force of law”); In re Wallace, 574 So. 2d 348, 350-51 (La. 1991) (affirming that the Louisiana Code of Professional Responsibility has the “force and effect of substantive law”); Succession of Cloud, 530
while others explicitly reject this position. Commentators have variously described the professional rules as

- having “quasi-legal force;”
- a “species of rules of law” with a “peculiar legal status;” and
- “at best … a peculiar type of law that courts only sometimes deem effective.”

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

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

The following decisions explicitly assert that the professional rules do not have the force of law or count as something less than statutes: Estates Theatres v. Columbia Pictures Indus., 345 F. Supp. 93 (S.D.N.Y. 1972) (“While the Code does not have the force and effect of a statute, it is recognized by bench and bar as setting forth proper standards of professional conduct.”); Gaylard v. Homemakers of Montgomery, Inc., 675 So. 2d 363, 367 (Ala. 1996); Doan v. Comm’n on Judicial Performance, 902 P.2d 272, 279 (Cal. 1995); Pichon v. Benjamin, 702 P.2d 890, 892 (Idaho Ct. App. 1985); In re Dineen, 380 A.2d 603, 604 (Me. 1977); Niesig v. Team I, 558 N.E.2d 1030 (N.Y. 1990) (“While unquestionably important, and respected by courts, the [Code of Professional Responsibility] does not have the force of law.”); In re Weinstock, 351 N.E.2d 647, 649 (N.Y. 1976); Commonwealth v. Chmiel, 738 A.2d 406, 415 (Pa. 1999) (“The rules that govern the ethical obligations of the legal profession (presently, the Rules of Professional Conduct) do not constitute substantive law.”). Some commentators have also described the professional rules in similar terms. Zacharias, supra note 3, at 1333 (“Clearly, courts traditionally have not treated [code] provisions as law in the sense of being binding pronouncements that courts must enforce.”). Susan P. Koniak, THE LAW BETWEEN THE BAR AND THE STATE, 70 N.C. L. Rev. 1389, 1427-47 (1992) (“[F]ederal and state courts often state that the only instances in which they are bound to treat the [professional] rules as binding precepts are in disciplinary proceedings against lawyers.”).


Zacharias, supra note 3, at 1335.

Scholars have examined the non-disciplinary impact of the professional rules in a variety of areas. Several articles address the impact of the professional rules on aspects of the substantive criminal law. In the civil area, abundant scholarship focuses on the use of the rules of professional conduct in two areas: legal malpractice and disqualification. Other

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11 Leslie W. Abramson, *The Judicial Ethics of Ex Parte and Other Communications*, 37 Hous. L. Rev. 1343, 1388-90 (2000) (discussing whether ethical standards for lawyers and judges have “force of law”); Cramton & Udell, *supra* note 3 (discussing the application of professional rules concerning anti-contact and subpoena rules to criminal investigations); Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327 (1998) (discussing the relationship between substantive criminal law and lawyer professional rules); Ellen S. Podgor, *Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession*, 61 Temp. L. Rev. 1323 (1988) (discussing the use of ethical rules in the criminal trials of lawyers and judges); The United States Supreme Court has also recognized the relevance of professional rules in deciding cases alleging ineffective assistance of counsel in criminal cases. *See* Strickland v. Washington, 466 U.S. 668, 688 (1984) (holding that “prevailing professional norms... as reflected in American Bar Association standards and the like” are the proper measure of attorney performance for purposes of ineffective assistance of counsel claims); Nix v. Whiteside, 475 U.S. 157, 166-72 (1985) (relying on Model Rule 3.3’s prohibition on offering perjured testimony in support of conclusion that a criminal defense lawyer is not constitutionally ineffective for failing to cooperate in offering client’s perjured testimony); Padilla v. Kentucky, 130 S. Ct. 1473 (2010) (citing Strickland).


commentators have addressed the impact of the professional rules on the law of evidence \(^{14}\) and in retaliatory discharge cases brought by attorneys.\(^{15}\) Finally, Professor Alex Long has analyzed the enforceability of provisions in lawyer-client fee agreements that violate the professional rules, focusing in particular on Rule 1.5(a) prohibiting lawyers from charging unreasonable fees, Rule 1.5(d)(1) prohibiting lawyers from charging contingency fees in domestic relations cases, and Rule 1.5(c) requiring all contingency fee agreements to be in writing.\(^{16}\) The non-disciplinary impact of the professional rules on other areas of the substantive law, however, remains unexplored.

This Article takes up one of those areas: the enforceability of certain agreements (other than lawyer-client fee agreements) that are prohibited by the professional rules. The professional rules bar lawyers from entering into certain specific kinds of agreements – what I refer to as “prohibited agreements” – even though those agreements would, in general, be lawful if two non-lawyers engaged in the same transactions:

- Rule 1.5(e) prohibits lawyers from splitting fees with other lawyers except under limited circumstances.\(^{17}\)
- Rule 5.4(a) prohibits lawyers from splitting fees with non-lawyers.\(^{18}\)
- Rule 1.8(a) prohibits lawyers from entering into a business transaction with a client except under limited circumstances.\(^{19}\)
- Rule 1.8(c) prohibits lawyers from soliciting gifts from clients

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\(^{14}\) See Zacharias, supra note 3, at 1315 (“In the end, courts sometimes reject the codes' pronouncements on evidence law, sometimes defer to them (usually through adoption of parallel common law), and sometimes agree with them but do not treat them as legal gospel. Does that make the codes law, quasi-law, law within their own sphere, or simply the distillation of ideas?”).  


\(^{16}\) Alex B. Long, Attorney-Client Fee Agreements That Offend Public Policy, 61 S.C. L. REV., 287 (2009).  

\(^{17}\) MODEL RULES OF PROF’L CONDUCT R. 1.5(e) (2011).  

\(^{18}\) Id. R. 5.4(a).  

\(^{19}\) Id. R. 1.8(a).
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except under limited circumstances.\(^{20}\)

- Rule 1.8(g) prohibits lawyers from entering into aggregate settlements unless they comply with strict criteria.\(^{21}\)
- Rule 1.8(h) prohibits lawyers from prospectively settling a malpractice case except under limited circumstances.\(^{22}\)
- Rule 1.8(i) prohibits lawyers from acquiring a proprietary interest in a client’s cause of action except for a lien to secure the lawyer’s fee or a contingent fee.\(^{23}\)

If lawyers enter into these prohibited agreements, they are, of course subject to discipline, but this Article addresses a different issue: if a lawyer enters into a prohibited agreement, is the agreement nevertheless enforceable as a matter of substantive contract law? Specifically, do the professional rules constitute public policy such that an agreement made in violation of the rules is unenforceable under the public policy exception to the enforceability of contracts?

This issue has not been addressed since the Model Rules of Professional Conduct were first adopted thirty years ago to replace the Model Code of Professional Responsibility.\(^{24}\) While the Model Rules were being drafted, Professor Charles Wolfram wrote an influential article arguing that the professional rules in general should play a greater role in the substantive law, describing them as “a largely unexploited resource.”\(^{25}\)

\(^{20}\) \textit{Id.} R. 1.8(c).

\(^{21}\) \textit{Id.} R. 1.8(g).

\(^{22}\) \textit{Id.} R. 1.8(h).

\(^{23}\) \textit{Id.} R. 1.8(i). The rules prohibit several other specific agreements, see \textit{id.} R. 1.8(d) (prohibiting a lawyer from negotiating an agreement for the media rights to a case), and \textit{id.} R. 1.8(e) (prohibiting a lawyer from providing financial assistance to clients except under limited circumstances), but courts have not had occasion to analyze the enforceability of agreements made in violation of these rules.

\(^{24}\) Although Professor Long examined the enforceability of certain professional rules concerning lawyer-client fee agreements, this Article’s focus is different in two ways. First, it discusses a variety different professional rules than Professor Long did. Second, Professor Long’s focus was on whether courts permit attorneys “at least some type of recovery” (on the contract, in quantum meruit, or for restitution) even if an attorney-client agreement violates the ethics rules. Alex B. Long, \textit{Attorney-Client Fee Agreements That Offend Public Policy}, 61 S.C. L. REV., 287, 301 (2009). Professor Long’s fascinating conclusion was that courts “permit[] lawyers to recover for the reasonable value of their services when traditional contract law would prohibit such recovery.” \textit{Id.} at 334. This Article, by contrast, focuses on whether the professional rules constitute public policy such that contracts entered into in violation of the professional rules are in violation of public policy.

Wolfram blamed this on the Code’s “very high level of generality in expressing its concepts” and predicted that the new model rules would play a more significant role in the substantive law if the rules were redrafted in a “substantially more specific document.”

This Article assesses Professor Wolfram’s 33-year old prediction concerning the rules’ impact on the substantive law and concludes that Professor Wolfram was largely correct. The Model Rules are much more specific than their predecessor, and the courts have increasingly relied on them as a source of substantive law in deciding the enforceability of the prohibited agreements. That reliance, however, is far from uniform; a substantial minority of courts continues to reject the applicability of the professional rules to substantive contract law. Moreover, in accepting or rejecting the rules of professional conduct as a source of substantive law, courts almost uniformly engage in little discussion or analysis and instead simply decide in a conclusory manner that the professional rules either do or do not constitute public policy without providing any reasons why the courts should or should not rely on the professional rules. This Article serves two primary purposes. First, it illustrates the split among the courts considering the substantive impact of agreements made in violation of the professional rules. Second, in urging more uniform and widespread use of the rules, it provides the theoretical and public policy justifications that are almost completely absent from the courts’ consideration of the issue.

Part I of this Article provides the necessary background on the public policy exception to the enforceability of contracts. Part II reviews the split of authority among the courts that have considered whether the professional rules constitute “public policy” for purposes of substantive contract law. Part III argues that the courts should embrace the professional rules as a source of substantive contract law and provides the theoretical and public policy justifications that are missing from the jurisprudence. First, the rules now resemble other legislation and should be treated like other legislation. Second and relatedly, courts generally make broad use of statutes in civil litigation. Third, courts have generally found the codes and customs of other professionals to be relevant in civil litigation, and there is no reason to

26 Id.
27 Cf. Long, supra note 16, at 332 (criticizing courts for their failure to “explain their decisions to depart from the standard presumption against recovery when a contract offends public policy”).
28 See Part III.B.1 infra.
29 See Part III.B.2 infra.
treat lawyer codes differently.\textsuperscript{30} Fourth, lawyers – the persons who are most likely to be disadvantaged by the use of the rules in substantive contract disputes – play a dominant role in drafting the rules and therefore should not be heard to complain about their use in civil litigation.\textsuperscript{31} Fifth, the rules are underenforced by the bar, and their use in civil litigation can help achieve an acceptable level of attorney compliance.\textsuperscript{32} Sixth, the professional rules derive from common law duties and therefore do not impose any added burden on lawyers.\textsuperscript{33} Finally, the primary argument advanced by courts that reject the use of the professional rules as substantive law – the language in the Preamble to the rules which largely disclaims any influence on or relationship to the substantive law – is weak.\textsuperscript{34} The rulemakers drafted the rules to distinguish between appropriate and inappropriate lawyer conduct. If conduct is wrong and therefore subjects the lawyer to discipline, it is illogical to say that we should ignore that rule violation in the context of civil litigation.

I. THE PUBLIC POLICY EXCEPTION

Although parties may generally “contract as they wish … sometimes … a court will decide that the interest in freedom of contract is outweighed by some overriding interest of society and will refuse to enforce a promise or other term on grounds of public policy.”\textsuperscript{35} Under this public policy exception, courts will generally not enforce an agreement if “the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”\textsuperscript{36} Under the Restatement, courts are to consider a variety of factors and take a flexible approach. In determining the “interest in enforcement of a term,” the courts should consider “the parties’ justified expectations, any forfeiture that would result if enforcement were denied, and any special public interest in the enforcement of the particular term.”\textsuperscript{37} In “weighing a public policy against enforcement of a term,” the Restatement directs courts to consider:

\textsuperscript{30} See Part III.B.3 infra.
\textsuperscript{31} See Part III.B.4 infra.
\textsuperscript{32} See Part III.B.5 infra.
\textsuperscript{33} See Part III.B.6 infra.
\textsuperscript{34} See Part III.B.7 infra.
\textsuperscript{35} Restatement (Second) of Contracts: Unenforceability on Grounds of Public Policy ch. 8 (2012).
\textsuperscript{36} Id. The Restatement also provides that an “agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable,” but even if the rules constitute “legislation” they do not explicitly say anything about whether the agreement is unenforceable; they simply prohibit the lawyer from engaging in the transactions.
\textsuperscript{37} Id. § 178(2).
(a) the strength of that policy as manifested by legislation or judicial decisions,  
(b) the likelihood that a refusal to enforce the term will further that policy,  
(c) the seriousness of any misconduct involved and the extent to which it was deliberate, and  
(d) the directness of the connection between that misconduct and the term.  

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

Two central issues arise with respect to the treatment of lawyer professional rules. First, are those rules “legislation” within the meaning of Restatement Section 178(3) and Restatement Section 179 such that they articulate public policy for purposes of contract law? Second, even if they do constitute public policy, how should the courts determine whether agreements made in violation of the rules should nevertheless be enforced under the Restatement’s flexible approach?  

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

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38 Id. § 178(3).  
39 Id. § 179(a).  
40 Id. § 178 cmt. a.  
41 Restatement Section 178, comment c.  
42 Alex B. Long, Attorney-Client Fee Agreements That Offend Public Policy, 61 S.C. L. REV., 287, 300 (2009) (“Under the Restatement (Second) of Contracts’ approach, the ethical rules governing lawyers should qualify as ‘legislation’ capable of articulating public policy. Because the rules are adopted by a state’s highest court pursuant to its authority to regulate the legal profession, they should ordinarily qualify as a source of public policy.”); Gary A. Munneke & Anthony E. Davis, The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?, 22 J. LEGAL. PROF. 33, 71 (1998) (“It follows that rules created and enforced through such state action are sufficiently like
name them. The Restatement of the Law Governing Lawyers also does not definitively answer the question. It states that “[l]awyer-code provisions may also be relevant as an expression of the public policy of the jurisdiction with respect to such issues as the enforceability of transactions entered into in violation of them,” and then goes on to address the issue on a case-by-case basis. In the case of fee-splitting arrangements among lawyers, for example, the Restatement of the Law Governing Lawyers states that lawyers generally cannot enforce an arrangement that violates the rules, but in the case of other prohibited transactions, such as the ban on lawyers taking media rights, the Restatement is silent.

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

Violation of a rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy... The Rules ... are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule.

Thus, the Restatement of Contracts and the Restatement of the Law Governing Lawyers suggest that the professional rules should be considered “legislation” within the meaning of the Restatement, even though the rule legislative enactments, ordinances and administrative regulations to be treated in the same way for purposes of the civil law. If the ethical rule was intended by the court to create a standard of conduct which protects a particular class of persons from a particular type of harm, then the standard should be relevant to the standard of care expected of lawyers regulated by the state.

44 Id. § 47 cmt. i.
45 Id. § 36.
46 Model Rules of Prof’l Conduct Preamble ¶ 20 (2011). Having made this lengthy disclaimer, the last sentence of the paragraph does concede that “Nevertheless, since the Rules establish standards of conduct a lawyer’s violation of a Rule may be evidence of a breach of the applicable standard of conduct.” Id.
drafters largely reject any role for them in the substantive law.

The primary focus of this Article is on the first issue: for the reasons discussed in Part III, courts should put the professional rules on equal footing with statutes and treat them as “public policy” for purposes of contract law. A detailed discussion of the second issue – determining whether and under what circumstances agreements made in violation of the rules of professional conduct should nevertheless be enforced under the Restatement’s “flexible” approach and/or whether attorneys should be able to recover in quantum meruit or restitution even if the agreement is held unenforceable – is beyond the scope of this Article.

II. SURVEY OF LAW

Having described the traditional contract rules concerning agreements that offend public policy, this Part examines the split of authority over whether the lawyer professional rules constitute public policy. On this issue, the courts are sharply divided. This Part canvasses that split in two different ways. First, it uses Pennsylvania as a case study of the confusion among courts – even those courts in the same state – about the appropriate impact of the professional rules on the substantive law. Second, Subsection B canvasses the split of authority on the different prohibited agreements contained in the rules of professional conduct.

A. Pennsylvania: A Case Study

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

47 Alex B. Long, Attorney-Client Fee Agreements That Offend Public Policy, 61 S.C. L. REV., 287 (2009) (“Courts have sometimes differed in their conclusions as to which sources are capable of articulating public policy for purposes of contract law.”). Compare 23 WILLISTON ON CONTRACTS § 62:5 (4th ed 2012) (“Agreements between attorneys and clients concerning the client-lawyer relationship generally are enforceable, provided the agreements satisfy both the general requirements for contracts and the specific requirements of professional ethics.”), with 17A AM. JUR. 2D Contracts § 241 (2011) (“It has been held that the rules of professional conduct governing attorneys are not statements of public policy that may be employed to void contracts.”).

48 I chose Pennsylvania as a case study because in surveying the case law discussing the impact of the professional rules on the substantive law, Pennsylvania law stood out as particularly muddled.
In two cases from the 1970s involving disqualification motions, the Pennsylvania Supreme Court weighed in definitively: “In Pennsylvania, the Canons of the Code of Professional Responsibility have the force of statutory rules of conduct for attorneys.” In both cases, the Court went on to determine that the attorneys had violated the professional rules and therefore should be disqualified.

Just six years later, however, the Pennsylvania Supreme Court backpedaled dramatically from this position and stated, albeit in a different context, that the “Code of Professional Conduct … does not have the force of substantive law.” In that case, a lawyer had drawn a deathbed will for his client naming himself and his brother as beneficiaries in clear violation of the professional rules. The court recognized that the lawyer’s conduct violated the rules but declined to invalidate the will on that basis: “We have not … heretofore used such misconduct as a basis for altering the rules of law, including evidentiary rules, presumptions and burdens of proof, which would otherwise apply to a case. We decline to do so here.” The Pennsylvania Supreme Court offered no justification for its reasoning other than a citation to the Preamble to the code then in force which contained the typical disclaimer ‘‘nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such duty.’’ In distinguishing its earlier decisions concerning disqualification, the Court said: “[W]hile it may be appropriate under certain circumstances for trial courts to enforce the Code of Professional Responsibility by disqualifying counsel or otherwise restraining his participation or conduct in litigation before them in order to protect the rights of litigants to a fair trial, we are not inclined to extend that enforcement power and allow our trial courts themselves to use the Canons to alter substantive law or to punish attorney misconduct.”

In a final twist, however, the Court, after going out of its way to disclaim reliance on the professional rules, went on to hold that the will was invalid based on common law doctrines that were, in essence, the same as the professional rule. This prompted a dissenting justice to comment:

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52 Id.
53 Id.
54 Id.
55 Id.
56 Id.
"The practical, but unintended, effect of the majority's opinion is that the Appellant is permitted to accomplish through a circuitous route what the Court expressly disdains – enforcing the Code of Professional Responsibility by affecting the substantive rights of an attorney – beneficiary during litigation of the contestant’s claim."  

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

But just three years later, in the well-known case of Maritrans G.P., Inc. v. Pepper Hamilton & Scheetz, the Pennsylvania Supreme Court shifted gears yet again taking a confusing and equivocal view of the rules. In opining about the plaintiff’s breach-of-fiduciary-duty claim, the court observed that “simply because a lawyer's conduct may violate the rules of ethics does not mean that the conduct is actionable, in damages or for injunctive relief.” At the same time, however, the court emphasized that the ethics rules are not entirely irrelevant and chastised the lower court for concluding that “the trial judge's reference to violations of the rules of ethics somehow negated or precluded the existence of a breach of legal duty by the Pepper firm to its former client.” Rather, the Supreme Court said, since the lawyer’s fiduciary duties predate and form the basis of the ethics rules, a lawyer’s misconduct can violate the ethics rules and form a basis for a lawsuit by a client.

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57 Id. at 554.
58 Rizzo v. Haines, 555 A.2d 58, 67-68 (Pa. 1989) (“We further believe that expert testimony was not needed to detail the fiduciary obligations of an attorney who engages in financial transactions with his client, since these obligations are established by law, the Code of Professional Responsibility, and the Model Rules of Professional Conduct.”). See also Selko v. Home Ins. Co., 1996 WL 397483, at *4 n. 5 (E.D. Pa. 1996) (“[D]espite the wording in the Scope section of the Rules of Professional Conduct, Pennsylvania courts do recognize that the Rules of Professional Conduct impose duties on lawyers practicing within this state.”).
60 Id. at 1284.
61 Id. (The Superior Court “stood this correct analysis on its head. That court held that the trial judge's reference to violations of the rules of ethics somehow negated or precluded the existence of a breach of legal duty by the Pepper firm to its former client. The court also held that the presumption of misuse of a former client's confidences, developed in the law of disqualification, is inapplicable because the present case involves an injunction. Both of these propositions involve serious confusion in the law governing lawyers.”)
62 Id.
Thus, in a series of four decisions, the Pennsylvania Supreme Court took no consistent view on the impact of the professional rules on the substantive law. While these cases arose in different contexts, the court failed to articulate any guiding principles for determining the relevance (or irrelevance) of the professional rules outside the disciplinary context. Not surprisingly, the confused pronouncements from the state’s highest court have led to decidedly mixed results in lower court cases. One trial court relied directly on the professional rules in concluding that an agreement to split fees that violated the rules of professional conduct was “void and unenforceable on public policy grounds.” Similarly, a federal bankruptcy court, interpreting Pennsylvania law, held that the attorney’s acquisition of his client’s property was actionable because it violated the professional rules. The court noted that: “Violations of disciplinary rules which are consistent with independent substantial law may serve as the basis for substantive legal conclusions” even while acknowledging the Pennsylvania Supreme Court’s previous admonition that the “Code of Professional Responsibility does not have the force of establishing independent substantive law.” In another case, the Pennsylvania Superior Court refused to enforce a fee-sharing agreement between a lawyer and non-lawyer because it violated Pennsylvania Rule of Conduct 5.4.

In the two most recent pronouncements from the Pennsylvania appellate courts, however, the Superior Court reiterated the view that the rules do not have the effect of substantive law. In one case, the court refused to set aside a lawyer’s action to foreclose on his client’s house, despite the client’s claim that the mortgage violated Rule 1.8. The court

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63 See also Munneke & Davis, supra note 12, at ___ (describing the Pennsylvania courts’ “uneasiness” with the relevance of the professional rules).
66 82 B.R. at 732-33.
said: “The Rules of Professional Conduct address the grounds for disciplinary actions against attorneys… Those rules are not substantive law.…. Thus, even assuming, arguendo, that the [clients] can show [their lawyer] engaged in unethical behavior, the most they would establish is a basis for a disciplinary proceeding against him, not a substantive basis to invalidate the mortgage.”69 In the second case, the Superior Court rejected any reliance on the professional rules’ prohibition on charging excessive fees.70 Similarly, a Pennsylvania ethics opinion provides: “Any ethical violation of RPC 1.4 relating to the duty to communicate, or any other rule, is irrelevant to [a] contract claim. The Pennsylvania Supreme Court has consistently held that the Rules of Professional Conduct do not have the force of substantive law.”71

B. Survey by rule

This Part surveys the courts’ treatment of agreements entered into in violation of the professional rules. As set forth below, the majority position is that agreements made in violation of the rules are unenforceable, but there is a distinct minority of cases that take the other view.72 Moreover, there is a great deal of variety in the approaches taken by the courts.73 This


70 In re Adoption of M.M.H., 2009 Pa. Super. 177 (Pa. Super. Ct. 2009) (“[T]he Supreme Court has held that the Rules of Professional Conduct do not have the effect of substantive law but, instead, are to be employed in disciplinary proceedings.”)


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

72 Alex B. Long, Attorney-Client Fee Agreements That Offend Public Policy, 61 S.C. L. REV., 287, 290 (2009) (“Although the majority of courts are likely to hold that a fee agreement that fails to comply with an ethical rule is void as against public policy, a significant minority of courts have demonstrated a reluctance to do so in certain situations.”).

73 As but one example, courts sometimes will enforce agreements that violate the
Part also describes the rationales that the courts offer for their positions, to the extent that the courts offer any justification at all. Most courts simply say that the professional rules do or do not constitute public policy without providing any explanation.  

1. Rule 1.5(e): Division of fees between lawyers who are not in the same firm

Under Model Rule 1.5(e) and its state counterparts, if lawyers are not in the same firm, they may divide a fee only if the “division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation,” and “the client agrees to the arrangement.” The comment explains the policy behind these limitations: “Joint responsibility for the representation entails financial and ethical responsibility for the representation as if the lawyers were associated in a partnership.” If lawyers enter into an agreement that violates this provision, will the courts nevertheless enforce it? The courts are divided.

The Restatement of the Law Governing Lawyers and a significant majority of the courts who have looked at the issue conclude that such agreements are unenforceable. The Restatement provides: “This is professional rules if the noncompliance is minor. See 7A C.J.S. Attorney & Client Section 381 (Although “[a]ttorney fee agreements which violate the rules of professional conduct are against public policy and will not be enforced by the courts … fee agreements which are otherwise reasonable will not be ignored because of minor noncompliance with the Model Rules of Professional Conduct.”).

Long, supra note 16, at 332 (criticizing courts for their failure to “explain their decisions to depart from the standard presumption against recovery when a contract offends public policy”).

MODEL RULES OF PROF’L CONDUCT R. 1.5(e)(1) (2011). Moreover, as with all fees, the total fee must be reasonable. Id. at 1.5(e)(3).

Id. at 1.5 cmt. 7.

ABA, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL § 41:701 (2012) (collecting cases); ROBERT L. ROSSI, 1 ATTORNEYS’ FEES § 3:33 (3d ed. 2012) (“Where the wrongful conduct involves an improper fee-sharing agreement, the decisions are not uniform with respect to whether the impropriety renders the fee-sharing arrangement unenforceable, and if so, whether a quantum meruit recover may nevertheless be permitted.”). See also Caroll J. Miller, Annotation, Validity and enforceability of referral fee agreement between attorneys, 28 A.L.R. 4th 665 (1984) (collecting cases).

RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 (2000). (“[A] lawyer who has violated a regulatory rule or statute by entering into an improper fee-splitting arrangement should not obtain a tribunal’s aid to enforce that arrangement, unless the other lawyer is the one responsible for the impropriety.”); Douglas R. Richmond, Professional Responsibilities of Co-Counsel: Joint Venturers or Scorpions in a Bottle, 98
See Christensen v. Eggen, 577 N.W.2d 221, 225 (Minn. 1998) ([A]n agreement to share attorney fees that does not comply with [Missouri] Rule 4-1.5(e) is unenforceable....Clearly the rules of professional conduct have the force and effect of judicial decision.); Buntz v. Peperno, 2008 WL 693590 (Pa. Com. Pl. Feb. 8, 2008). See also Eng. v. Cummings, McCloy, Davis, & Acho, PLLC, 611 F.3d 428 (8th Cir. Mo. 2010) ([W]e hold that any fee-splitting agreement between Acho and Eng did not comply with Rule 4-1.5(e). As such, the agreement is unenforceable as a matter of law.); Baer v. First Options of Chicago, 72 F.3d 1294 (7th Cir. 1995) (“The Illinois Supreme Court has made clear that its standards of professional behavior, currently embodied in the Illinois Rules of Professional Conduct, bind the courts as a matter of law.”); Judge v. McCay, 500 F. Supp. 2d 521, 527 (E.D. Pa. 2007) (“New Jersey has elected not to enforce contracts that violate the state's Rules of Professional Conduct and Court Rules, as the alleged oral agreement here does.”); Marcus v. Garland, Samuel, & Loeb, P.C., 441 F. Supp. 2d 1227 (S.D. Fla. 2006) (“Contracts that fail to adhere to the ethical rules that require written fee agreements are against public policy and are not enforceable.”); Dragelevich v. Kohn, Milstein, Cohen & Hausfeld, 755 F. Supp. 189, 193 (N.D. Ohio 1990) (“This Court concludes that Ohio courts would accept what appears to be the majority view, that DR 2-107(A) precludes enforcement of the agreement alleged in this case.”); Matter of Katchatag, 907 P.2d 458 (Alaska 1995) (“Bar Rules operate with the force of law.”); Scolinos v. Kolts, 37 Cal. App. 4th 635, 640 (Cal. Ct. App. 1995) (“It would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement.”); Chambers v. Kay, 56 P.3d 645 (Cal. 2002) (“[T]he parties’ failure to comply with Rules Prof. Conduct, rule 2-200 (requirement that fee division agreement be disclosed to client and client's written consent obtained), barred plaintiff from sharing a contingency fee pursuant to the parties’ fee-sharing agreement.”); Brown v. Grimes, 120 Cal. Rptr. 3d 893 (Cal. Ct. App. 2011) (fee sharing agreement illegal and unenforceable under both California and Texas law); Norris v. Silver, 701 So.2d 1238 (Fla. Dist. Ct. App. 1997); Eichholz Law Firm, P.C. v. Tate Law Group, LLC, 310 Ga. App. 848, 851 (Ga. Ct. App. 2011) (fee agreement cannot be enforced because it violates rules of professional conduct); Paul B. Episcope, Ltd. v. Law Offices of Campbell & Di Vincenzo, 869 N.E.2d 784, 791 (Ill. App. Ct. 2007) (refusing to enforce a fee sharing agreement that violated Illinois Rule 1.5(f)(2) and (3) because it failed to set forth the basis of the fee division and the responsibilities to be assumed by the parties as to the performance of legal services); Albert Brooks Friedman, Ltd. v. Malevitis, 304 Ill. App. 3d 979, 987 (Ill. App. Ct. 1999) (“Accordingly, Friedman’s agreement to share a portion of Malveit’s contingent fee violates public policy and is unenforceable.”); Holstein v. Grossman, 246 Ill. App. 3d 719, 732 (Ill. App. Ct. 1993) (“In this case, we are faced with an intra-attorney fee-sharing agreement primarily based on a client referral to which no referred client ever consented in writing. We believe that the signed writing requirement's significant public policy roots require a holding in this case that plaintiff is entitled to no referral fee.”); Flowers v. Shein & Brookman, P.A., 9 Phila. Co. Rptr. 145, 152 (Pa. 1983) (“Since public policy concerning the conduct of lawyers find expression through the Code of Professional Responsibility, we conclude that a promise to compensate plaintiff out of professional fees earned by defendant’s law firm would clearly contravene public policy and could not serve as consideration for the alleged contract.”); Evans & Luptak, PLC v. Lizza, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002) (contracts that violate our ethical rules violate our public policy and therefore are unenforceable.”); Law Offices of Gary Green, P.C. v. Morrissey,
consistent with the view that ethics rules express public policy, such that a contract violating them is unenforceable as against public policy,” but the Restatement does not explain why the professional rules should be treated as public policy. Nor do most of the courts that have considered the issue. One justification that a few courts have offered is that “It would be absurd if an attorney were allowed to enforce an unethical fee agreement through court action, even though the attorney potentially is subject to professional discipline for entering into the agreement."

The decisions are hardly uniform, however. A substantial minority of

210 S.W.3d 421, 425 (Mo. Ct. App. 2006) (“The rules of professional conduct have the force and effect of judicial decision. Accordingly, Rule 4–1.5 has the force and effect of law in Missouri…. Agreements between attorneys from different law firms to divide a fee on a case are acceptable only if based on a sharing of services or responsibility.”); Londoff v. Vuylsteke, 996 S.W. 2d 553 (Mo. Ct. App. 1999) (“The rules of professional conduct have the force and effect of judicial decision… Accordingly, Rule 4–1.5 has the force and effect of law in Missouri.”); Kalled v. Albee, 712 A.2d 616, 617 (N.H. 1998) (“[I]f the contract has not been performed in accordance with the requisites set forth in the disciplinary rules, performance may be excused as against public policy.”); Gorman v. Grodensky, 498 N.Y.S.2d 249 (N.Y. 1985) (“Although the provisions of the Code of Professional Responsibility do not enjoy the status of decisional or statutory law, they are an explicit expression of the public policy of the State. An agreement made in violation of a code provision ought not be sanctioned by the court, as would be the case if the court were to permit plaintiff to sue on the contract. The court will refuse to aid either party to enforce this alleged contract.”); Cruse v. O’Quinn 273 S.W.3d 766 (Tx. Ct. App. 2008) (contract was illegal and void as against public policy as expressed in the disciplinary); Hovenkamp & Grayson, P.C., 194 S.W.3d 603, 613 (Tex. Ct. App. 2006) (“[P]romise[ing], without deciding, that … the rule expresses public policy”); Bond v. Crill, 906 S.W.2d 103, 106 (Tex. Ct. App. 1995) (agreement violated 1.04 and was therefore unenforceable); Dardas v. Fleming, Fleming v. Campbell, 537 S.W.2d 118 (Tex. Ct. App., 1976) (“We hold that the referral fee contract … is as a matter of law against the public policy expressed in Disciplinary Rule 2—107 that no attorney's fees shall be divided unless the client's consent is obtained after full disclosure. Fleming's claimed referral fee contract being violative of our public policy is void and unenforceable.”); Belli v. Shaw, 657 P.2d 315, 319 (Wash. 1983) (“The forwarding fee agreement violated CPR DR 2-107 and is therefore against public policy…. Such an arrangement will not be enforced by the courts”).


80 Margolin, 85 Cal. App. 4th 891 (Cal. Ct. App. 2000) ("[T]he policy considerations which caused rule 2-200 to be enacted for the benefit of the public also require that the fee-sharing agreement between plaintiffs and Shemaria not be enforced by a court of law."); Scolinos, 37 Cal. App. 4th 635, 640 (Cal. Ct. App. 1995); Evans & Luptak, PLC, 650 N.W.2d 364, 370 (Mich. Ct. App. 2002) (same); Albert Brooks Friedman, Ltd., 304 Ill. App. 3d 979, 987 (Ill. App. Ct. 1999) (“The client-centered focus of Rule 1.5 is the most recent expression of the long-standing public policy of this state. The rule's historical antecedents demonstrate that the client's rights rather than the lawyer's remedies have always been this state's greatest concern.”)
courts have insisted on enforcing agreements even though the agreements violate the jurisdiction’s professional rules concerning fee splitting or otherwise stated that a violation of the rules is irrelevant to the issue of contract enforcement. In other cases, courts have enforced agreements where the rules violation was not “substantial.” Again, these courts rarely offer much explanation for their conclusions, though they sometimes rely on the language of the Preamble to the Rules of Professional Conduct, which largely disclaims any relationship to or influence on the substantive law. These courts fail to explain, however, why this disclaimer – which was written by lawyers to protect lawyers – is authoritative on the issue. The only other explanation offered by courts is the absurdity of lawyers

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81 Ballow Brasted O’Brien & Rusin P.C. v. Logan, 435 F.3d 235, 242-43 (2d Cir. 2006) (enforcing agreement even though it violated New York Disciplinary Rule 2-107); Freeman v. Mayer, 95 F.3d 569, 575-76 (7th Cir. 1996) (interpreting Indiana law); Daynard v. Ness, Motley, Loadholt, Richardson & Poole, 188 F. Supp. 2d 115 (D. Mass. 2002): (court held that fee agreement between lawyer and law professor for consulting services that violated Mass. 1.5(e) and N.Y. DR 2-107(A) was nevertheless enforceable); Poole v. Prince, 61 So. 3d 258, 282 (Ala. 2010) (The “sole remedy for a violation of Rule 1.5(e) is disciplinary in nature; therefore, the trial court lacked the authority to declare the parties' agreement unenforceable as violative of Rule 1.5(e).); Potter v. Peirce, 688 A.2d 894 (Del. 1997) (Delaware lawyer could not use Delaware rule to avoid splitting fee with Pennsylvania lawyer who was not subject to a similar rule); Corvette Shop & Supplies v. Coggins, 779 So. 2d 529, 531 (Fla. Dist. Ct. App. 2000) (“[T]he rule is intended to protect the client and is not intended to shield a non-prevailing party from the payment of attorney's fees. Therefore, the award of attorney's fees in the present case was correct.”); Frost v. Lotsperch, 30 P.3d 1185 (Ore. Ct. App. 2001) (“[U]nder Oregon law a violation of rule [California RPC] 2-200(A) would not preclude enforcement of the fee-division agreement.”); Watson v. Pietranton, 801 S.E.2d 812, 814 (Va. 1987) (“We agree with the reasoning of both the ABA Committee and the Shapiro court that a violation of a Disciplinary Rule, alone, will not defeat a contract between lawyers.”); Danzig v. Danzig, 904 P.2d 312 (Wash. Ct. App. 1995): (split of fees with non-lawyer violated Washington barratry statute and RPC 7.2(c)).


83 Freeman v. Mayer, 95 F.3d 569, 575-76 (7th Cir. 1996) (interpreting Indiana law). (“As something designed to provide ‘guidance,’ but not to be a basis for civil liability, our best prediction is that the Indiana Supreme Court would not permit one of its attorneys to invoke Rule 1.5(e) as a shield against living up to a substantively unobjectionable contractual arrangement with an out-of-state lawyer.”); Poole, 61 So. 3d 258, 280 (Ala. 2010)

seeking “‘to avoid on ‘ethical’ grounds the obligations of an agreement to which they freely assented and [from] which they reaped the benefits.’”

Finally, the Maryland courts take a unique, middle-ground approach: agreements made in violation of Rule 1.5(e) may be unenforceable. “We highlight the word “may” for a reason. Although a fee-sharing agreement in violation of Rule 1.5(e) may be held unenforceable, the Rule is not a per se defense, rendering invalid or unenforceable otherwise valid fee-sharing agreements because of rule violations that are merely technical, incidental, or insubstantial or when it would be manifestly unfair and inequitable not to enforce the agreement.”

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

When presented with a defense resting on Rule 1.5(e), the court must look to all of the circumstances – whether the rule was, in fact, violated, and if violated (1) the nature of the alleged violation, (2) how the violation came about, (3) the extent to which the parties acted in good faith, (4) whether the lawyer raising the defense is at least equally

85 Ballow Brasted O'Brien & Rusin P.C., 435 F.3d 235, 242-43 (2d Cir. 2006); ABA, ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL § 41:701 (2012) (These courts are “offended by the notion that a lawyer would try to manipulate the ethics rules to keep a larger cut of the fee. They allow the plaintiff lawyer to use estoppel to prevent the defendant lawyer from invoking the possible ethical invalidity of the fee-splitting contract as a defense to payment.”); see also ABA Comm. On Prof'l Ethics, Informal Op. 870 (1965) (“This matter of ethics should have been recognized and adhered to by the attorneys before they entered into the agreement. When two lawyers have participated in an unethical agreement one of them should not, where no one else is involved, set up the unethical agreement against the other.”). Potter, 688 A.2d 894 (Del. 1997) (“As a matter of public policy, this Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers' Rule of Conduct 1.5(e) by using it to avoid a contractual obligation. To hold otherwise would encourage non-compliance with the Rule and create incentives for malfeasance among Delaware lawyers at the expense of unwary out-of-state lawyers.”). In a slightly different context, a Florida appellate court rejected an argument by a referring lawyer that he should be able to escape malpractice liability in a suit brought by the client because the lawyers had not obtained the client’s written consent to the fee-splitting arrangement in violation of the rules. To hold otherwise, the court said, “would allow attorneys to thwart their responsibility to a client by intentionally disregarding the Rules Regulating the Florida Bar.” Noris, 701 So. 2d 1238 (Fla. Dist. Ct. App. 1997); Watson v. Pietranton, 364 S.E.2d 812, 814 (W. Va. 1987) (We agree with the reasoning of both the ABA Committee and the Shapiro court that a violation of a Disciplinary Rule, alone, will not defeat a contract between lawyers.FN6 A lawyer or law firm which enters into and honors a fee-splitting agreement with another lawyer may not later raise DR2-107 of the West Virginia Code of Professional Responsibility as a bar to enforcement of the agreement.”).

culpable as the lawyer against whom the defense is raised and whether the defense is being raised simply to escape an otherwise valid contractual obligation, (5) whether the violation has some particular public importance, such that there is a public interest in not enforcing the agreement, (6) whether the client, in particular, would be harmed by enforcing the agreement, and, in that regard, if the agreement is found to be so violative of the Rule as to be unenforceable, whether all or any part of the disputed amount should be returned to the client on the ground that, to that extent, the fee is unreasonable, and (7) any other relevant considerations. We view a violation of Rule 1.5(e), whether regarded as an external defense or as incorporated into the contract itself as being in the nature of an equitable defense, and principles of equity ought to be applied.\(^{87}\)

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

2. Rule 5.4(a): Fee splitting between lawyer and non-lawyer

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

The Restatement and the majority of courts hold that agreements made in violation of this rule should not be enforceable because such agreements violate public policy,\(^{91}\) but most provide little explanation for this

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\(^{87}\) Id. See also Goldman, Sken, & Wadler, P.A. v. Cooper, Beckman, & Tuerk 712 A.2d 1 (Md. Ct. Spec. App. 1998) (remanding for examination of these factors).
\(^{88}\) 712 A.2d at 9. While other courts have said that minor breaches of the fee-splitting rules should not render a contract unenforceable, none have looked to the variety of factors that the Maryland courts do.
\(^{89}\) MODEL RULES OF PROF’L CONDUCT R. 5.4(a) (2011). In addition to the professional rules, some states also have statutes barring fee sharing with non-lawyers. See e.g. Infante v. Gottesman, 558 A.2d 1338 (N.J. Super. Ct. App. Div. 1989).
\(^{90}\) MODEL RULES OF PROF’L CONDUCT R. 5.4(a) cmt. (2011).
\(^{91}\) RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 47 (2000); Gallagher
One policy argument that would seem to be relevant is the identity of the parties involved. Unlike agreements made in violation of Rule 1.5(e), which involve two lawyers, agreements made in violation of Rule 5.4(a) involve a lawyer who is subject to the professional rules and a non-lawyer who may not know the rules and is not, in any event, subject to the rules. But most courts who consider this issue conclude that it does not matter that a lawyer may be taking advantage of a non-lawyer. Similarly, these courts are not moved by the fact that if a lawyer enters into an agreement with a non-lawyer and then the non-lawyer cannot enforce the agreement, the lawyer is unjustly enriched. As one court so colorfully


93 McIntosh, 17 Cal. Rptr. 3d 66 (Cal. Ct. App. 2004) (“[T]he doctrine of illegality considers whether the object of the contract is illegal. It does not turn on whether the illegality applies to the party seeking to enforce the agreement.”).

94 Infante, 558 A.2d at 1338 (“While we recognize that our decision may unjustly
articulated this idea: “It does not matter whose ox is gored. The courts will not enforce an agreement when it is found to be against public policy.”

Other courts, however, insist on enforcing an agreement to split fees between a lawyer and non-lawyer even though the agreement violates the rules of professional conduct. Although these decisions generally lack extensive analysis to support this conclusion, the most common rationale that these courts offer is that the disciplinary rules are for lawyer discipline and not for other purposes. As one court put it: “We decline to treat the disciplinary rules as equivalents of criminal statutes in this context... The disciplinary rules as invoked here govern attorney behavior, not the behavior of all citizens. Though entry into a fee-splitting agreement might subject [the lawyer] to professional discipline, the agreement itself is not invalid solely because it violates his professional duties.” Another court reasoned that it would be perverse if an attorney were “permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement.” As at least one court noted, this argument has particular force when a lawyer who is charged with knowledge of the professional rules is trying to take advantage of a nonlawyer who is not.

enrich defendant to the extent that he has received the benefit of any investigative and paralegal services performed by plaintiff, the pervasive proscriptions against such agreements require that we not render any assistance to these parties.”).


Atkins, 865 S.W.2d at 537.

Patterson, 980 So.2d at 1234; Shimrak, 912 P. 2d at 822 (“[I]t would not be fair under the circumstances of this case to adopt a double standard and allow attorneys to receive free investigative services simply because of their claim that the other party to the contract was in pari delicto” with them.”).

Danzig, 904 P.2d at 312 (agreement is enforceable by nonlawyer because nonlawyer is not subject to the rules of professional conduct and therefore not “in pari delicto” with the lawyer).
3. Rule 1.8(a): Business transactions with clients

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

The issues that arise concerning business transactions with clients are a little different than those that stem from fee disputes. While some of the business transaction cases deal with the enforceability of agreements that violate the professional rule, in other cases, clients are trying to assert a separate cause of action (e.g. for breach of fiduciary duty) against their attorneys for entering into a contract in violation of the rules. Again, the courts’ treatment of the effect of a violation of the professional rule on the substantive law is decidedly mixed. Some courts have said that a contract entered in violation of 1.8(a) is unenforceable because it violates public policy, though they have offered little else in the way of explanation.

By contrast, several courts have reached the opposite conclusion.

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100 Model Rules of Prof'l Conduct R. 1.8 cmt. (2011).
101 Id. at R. 1.8(a).
102 Valley/50th Ave, LLC v. Stewart, 153 P. 3d 186 (Wash. 2007) (“Attorney fee agreements that violate the RPCs are against public policy and unenforceable.”); In re Corporate Dissolution, 132 Wash App. 903, 912 (Wash. Ct. App. 2006) (The agreement “appears to be void as against public policy because it violated the attorney ethical rules against self-dealing.”); Holmes v. Loveless, 94 P.3d 338 (Wash. Ct. App. 2004) (enforcement of agreement violates 1.8(a) and therefore unenforceable); Cotton v. Kronenberg, 44 P.3d 878, 884 (Wash. Ct. App. 2002) (“Attorney fee agreements that violate the Rules of Professional Conduct (RPC) are against public policy and are unenforceable”); Jahnz v. Stover, 671 N.W.2d 717 (Wis. Ct. App. 2003) (“When Wisconsin adopted the Model Rules, it presumably did so in an effort to delineate the boundaries of and regulate the relationships between attorneys and their clients. Rule 1.8 … prohibits business transactions between attorneys and their clients unless certain safeguards are satisfied. To enforce a contract that violates this rule would be against public policy, and accordingly, the agreement between Stover and Jahnz is void on these grounds.”).
Again, some courts reach this conclusion by relying on the language in the Preamble.\textsuperscript{104} Using similar reasoning, another court simply declared that the professional rules “are not substantive law” and therefore held that allegations that the attorney breached them would at “most … establish … a basis for a disciplinary proceeding against him, not a substantive basis to invalidate the mortgage.”\textsuperscript{105} Several other courts drew a contrast between an illegal fee splitting agreement, which the courts said are never enforceable, with business transactions between lawyers and clients which are not absolutely forbidden under the rules.\textsuperscript{106} These courts said such transactions may be void, though refused to void the particular transactions at issue for reasons that are not entirely apparent.\textsuperscript{107} Another court reached the similar conclusion that business transactions made in violation of the professional rules are voidable but not void.\textsuperscript{108}

Finally, most courts refuse to allow clients to assert an independent claim based on a violation of Rule 1.8(a).\textsuperscript{109} Generally speaking, courts

\textsuperscript{104} Guest, 145 N.M. at 806; Garcia v. Garza, 311 S.W.3d at 43. (Tex. App. San Antonio 2010)


\textsuperscript{106} Day v. Meyer, No. 99CIV.10708(HB), 2000 WL 1357499, at *10 (S.D.N.Y. Sept. 19, 2000) (describing fee splitting agreements as “inherently illegal”); Murdock v. Nalbandian, No. 218-2008-CV-1062, 2010 N.H. Super. LEXIS 21 (N.H. Super. Oct. 26 2010) (“Thus, to the extent that the contracts violate the Rules of Professional Conduct, they may well be voidable, but they are not void, and to the extent the affirmative defense seeks a declaration that they are void, the counterclaim must be stricken.”); Guest v. Allstate Ins. Co., 149 244 P.3d 342 (N.M. 2010); Garcia v. Garza, 311 S.W.3d 28, 37 (Tex. Ct. App. 2010) (“[T]he Garcias do not direct us to any cases holding agreements violating DR 5-103 and DR 5-104 were unenforceable and void as against public policy, and we have found none.”).


\textsuperscript{108} Murdock v. Nalbandian, No. 218-2008-CV-1062, 2010 N.H. Super. LEXIS 21, at *8 (N.H. Super. Oct. 26 2010) (“Thus, to the extent that the contracts violate the Rules of Professional Conduct, they may well be voidable, but they are not void, and to the extent the affirmative defense seeks a declaration that they are void, the counterclaim must be stricken.”).

reach this conclusion by citing to the Preamble to the rules which, as noted earlier, provides that the rules do not have application outside of the disciplinary process. Although these clients may sue for breach of common law duties, these courts hold that the rules of professional conduct do not create an independent cause of action.

4. Rule 1.8(c): Soliciting gifts from clients

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

There are few reported cases concerning the enforceability of such gifts, but there is a split of authority in those cases, and, again, the courts offer little in the way of explanation for their positions. In one Louisiana case, the lawyer prepared a will in which he would receive his client’s cash, bank accounts and 85% of her real estate. The will also said that if any of the bequests made to the attorney were prohibited, the bequest would go to his wife. The Louisiana Court of Appeals voided the gifts reasoning that “The Louisiana Rules of Professional Conduct (formerly the Code of Professional Responsibility) have the force and effect of substantive law” but provided no further explanation. A Texas court came to the same conclusion.

By contrast, as noted earlier, the Pennsylvania Supreme Court rejected the applicability of the professional rules in a similar case. In that case,

MODEL RULES OF PROF'L CONDUCT R. 1.8(c) (2011).
Id. at R. 1.8(c) cmt. 6.
Id.

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

the lawyer drafted a deathbed will for his client naming himself and his brother as beneficiaries. Citing to the Preamble, the court declined to look at the professional rules: “The Code of Professional Conduct, to which members of appellee’s profession were held at the time he did this ‘unconscionable’ act does not have the force of substantive law.... Thus, appellee’s failure to live up to that Code, standing alone, would not invalidate this will.”117

5. Rule 1.8(g): Aggregate settlements

Rule 1.8(g) and its state equivalents provide that a “lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the client … unless each client gives informed consent, in a writing signed by the client.”118 This rule ensures that each client gets to have the “final say in deciding whether to accept or reject an offer of settlement” as required by Rule 1.2(a).119

There are few reported cases discussing the enforceability of agreements made in violation of this rule, but the majority of those have voided settlement agreements that do not comply with it. Again, these courts simply characterize the professional rules as “public policy” with little further explanation. The Texas Supreme Court, for example, rejected an aggregate settlement because it did not comply with the professional rules, which it described as the “public policy” of this state, and the court therefore held that “the release and settlement of the Quinteros’ cause of action [was] void and unenforceable.” 120 The court did not explain why professional rules should be employed in private law cases but instead emphasized the importance of the policy underlying this rule. “The policy expressed in [the rule] is clearly to ensure that people such as the Quinteros do not give up their rights except with full knowledge of the other settlements involved.”121 A federal district court in Colorado122 reached a similar conclusion, holding that the representation agreement, which enabled counsel to enter into a settlement that would bind all claims with the consent of only the plaintiffs’ steering committee, violated the aggregate settlement rule and was therefore unenforceable: “any provision of an

117 Id.
118 MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2011).
119 Id. at R. 1.8 cmt. 13.
121 Id. See also Burrow v. Arce, 997 S.W.2d 229 (Tex. 1999) (violation of 1.8(g) meant disgorgement of fees even without requirement that plaintiff prove any damages).
attorney-client agreement which deprives a client of the right to control their case is void as against public policy.\textsuperscript{123} The court offered no explanation for why the rules constitute public policy.\textsuperscript{124}

By contrast, several courts have upheld settlements even though those settlements were made in violation of the rule.\textsuperscript{125} None of these courts offered any explanation for treating the rules as something less than “law,” but instead decided to uphold the settlements in light of what the courts considered to be relatively minor violations of the rule.\textsuperscript{126}

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

Rule 1.8(h)(1) and its state equivalents prohibit a lawyer from making “an agreement prospectively limiting the lawyer’s liability to a client for malpractice unless the client is independently represented in making the agreement.”\textsuperscript{127} According to the comments, such agreements “are likely to undermine [the lawyer’s] competent and diligent representation” of the client and are difficult for clients to evaluate.\textsuperscript{128} Two separate substantive law issues arise with respect to this provision. First, is an agreement that contains such a provision enforceable, and, second, can a client state a separate cause of action against an attorney for violating this rule? Again, the few courts that have considered the substantive impact of this professional rule are divided.

Concerning enforceability, the Restatement unequivocally provides that “[a]n agreement prospectively limiting a lawyer’s liability to a client for malpractice is unenforceable.”\textsuperscript{129} The comment explains that “[s]uch an agreement is against public policy because it tends to undermine competent and diligent legal representation.”\textsuperscript{130} Some courts that have looked at this

\textsuperscript{123} Id.
\textsuperscript{124} See also Tax Authority, Inc. v. Jackson Hewitt, Inc., 898 A.2d 512 (N.J. 2006) (holding that settlements made in violation of the rule are unenforceable but applying its ruling only prospectively).
\textsuperscript{126} 884 F.Supp. at 639–40 (upholding settlement even though fact of aggregate settlement was not disclosed); 126 Md. App. at 85-86 (disclosure was adequate even though not complete as required by letter of 1.8(g)); 487 A.2d at 199–200 (upholding settlement despite lack of complete disclosure).
\textsuperscript{127} MODEL RULES OF PROF'L CONDUCT R. 1.8(h)(1) (2011).
\textsuperscript{128} Id. at R. 1.8(h)(1) cmt 14.
\textsuperscript{129} RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 54(2) (2000).
\textsuperscript{130} Id., comment 2.
issue have taken a similar view. For example, the New York Appellate Division held that a clause in the retention agreement could not serve as defense to a malpractice action because the clause violated the professional rules: “While a violation of a disciplinary rule ‘does not, in itself, generate a cause of action … a release obtained in violation of a disciplinary rule should not serve to shield a lawyer from liability before the facts and circumstances surrounding the execution of the document are fully examined.”

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

7. **Rule 1.8(i): Proprietary interest in a client’s cause of action:**

Under Rule 1.8(i) and its state counterparts, a lawyer’s “shall not acquire a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client” with two exceptions: a lien to secure the lawyer’s fee and a contingent fee arrangement. The comment explains that the rule is designed to “avoid giving the lawyer too

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133 Watts, 619 N.W.2d at 719 n.1.
135 Id.
136 MODEL RULES OF PROF’L CONDUCT R. 1.8(j) (2011)
great an interest in the representation. In addition, when the lawyer acquires
an ownership interest in the representation, it will be difficult for a client to
discharge the lawyer if the client so desires.”

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

III. THE COURTS SHOULD MAKE GREATER USE OF THE RULES.

As the preceding survey reveals, the courts are divided on the effect that
the professional rules have on substantive contract law, and, whatever side
they take on the issue, their analysis is largely conclusory. This Part
envisions a greater role for the rules in substantive contract law. Subpart A
discusses the proper doctrinal role for the rules, and Subpart B sets forth the
theoretical and public policy justifications in favor of greater use on the
rules as a source of substantive law.

A. The professional rules’ proper doctrinal role

As set forth in Part II, courts typically resolve the question of the rules’
impact by simply declaring that the rules do or do not constitute public
policy in the state. As noted above in Part I, however, the proper analysis is
much more involved. Courts take a “flexible” approach in determining
whether a contract that violates a legislative pronouncement should
nevertheless be enforced. For an agreement to be unenforceable on public
policy grounds, the interest in enforcing the agreement must be “clearly
outweighed” by a public policy against enforcement. Moreover, even if a
contract is declared unenforceable on public policy grounds, courts
sometimes provide recovery under a theory of quantum meruit or

137 Id. at R. 1.8 cmt. 16.
In other words, declaring that the professional rules constitute public policy is just the first step, and the court then needs to decide whether or not to enforce an agreement made in violation of that public policy. In determining the weight to give to the public policy, the Restatement directs courts to consider: “(a) the strength of that policy as manifested by legislation or judicial decisions, (b) the likelihood that a refusal to enforce the term will further that policy, (c) the seriousness of any misconduct involved and the extent to which it was deliberate, and (d) the directness of the connection between that misconduct and the term.”

This is a highly fact specific inquiry.

The primary focus of this article is to advance this first step of the analysis and urge courts to recognize that the professional rules are a strong expression of public policy and should be treated as the equivalent of legislation. A comprehensive analysis of the myriad issues involved in undertaking the second part of the analysis – whether an agreement that violates public policy should nevertheless be enforced – is beyond the scope of this Article. There are simply too many different factual scenarios. That being said, I offer two thoughts on the issue that courts should consider in undertaking this second part of the analysis. First, courts should consider the identity of the party who is seeking to declare an agreement unenforceable because it violates a professional rule. Courts should keep in mind that the rules were drafted by lawyers and only lawyers are subject to them. Thus, the courts should be more willing to declare an agreement unenforceable because of a professional rules violation when a non-lawyer is advancing that argument than when a lawyer is making it. Several courts have noted the absurdity of lawyers seeking “‘to avoid on ‘ethical’ grounds the obligations of an agreement to which they freely assented and [from] which they reaped the benefits.”

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140 ROBERT L. ROSSI, 1 ATTORNEYS’ FEES § 3:33 (3d ed. 2012) ("Where the wrongful conduct involves an improper fee-sharing agreement, the decisions are not uniform with respect to whether the impropriety renders the fee-sharing arrangement unenforceable, and if so, whether a quantum meruit recover may nevertheless be permitted.").


142 Ballow, Brasted, O’Brien, & Rusin P.C. v. Logan, 435 F.3d 235, 242-43 (2d Cir. 2006). See also Potter v. Peirce, 688 A.2d 894 (Del. Supr. 1997) (“As a matter of public policy, this Court will not allow a Delaware lawyer to be rewarded for violating Delaware Lawyers’ Rule of Conduct 1.5(e) by using it to avoid a contractual obligation. To hold otherwise would encourage non-compliance with the Rule and create incentives for malfeasance among Delaware lawyers at the expense of unwary out-of-state lawyers.”); ABA, ABA/BNA LAWYER’S MANUAL ON PROFESSIONAL CONDUCT REFERENCE MANUAL § 41:701 (2012) (These courts are “offended by the notion that a lawyer would try to manipulate the ethics rules to keep a larger cut of the fee. They allow the plaintiff lawyer to use estoppel to prevent the defendant lawyer from invoking the possible ethical
Second, this second step of the analysis offers courts the opportunity to weigh the importance of the public policy at issue. While all of the rules should be considered public policy for the reasons discussed below, the rules (including the rules discussed in this Article) serve different public policy interests, and the courts should consider the importance of those public policy interests in deciding whether to enforce an agreement that violates the professional rules. For example, most would agree that avoiding undue influence is a particularly important public policy and, therefore, courts should in most cases enforce that policy by holding that agreements entered into in violation of rules that protect against undue influence, such as Rule 1.8(a), are unenforceable.

B. Theoretical and public policy justifications for greater use of the rules

1. The “legalization” of the professional rules

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

The 1908 Canon of Professional Ethics represented the American Bar Association’s first attempt at establishing definitive written guidelines for legal ethics. These Canons of Ethics had “a certain Victorian charm” but whatever they were “they were not law in any ordinary sense of the term.” 146 Rather, as others have recognized, they were “hortatory and aspirational in character. ‘Ethics’ was above and largely outside of ‘law.’” 147 Further, they were “too vague and general to afford guidance” 148 and therefore were not used as a “basis for discipline.” 149 Beyond these vague rules, the system of lawyer discipline itself was a “clubby and fraternal process.” 150 Over time, however, “it became a more elaborate process by which the state, through the judicial system and organs operating under its auspices, exercised formal legal authority.” As the process became more formal, courts “more frequently referred to ethical prohibitions in disciplinary proceedings.” 151

This development led to a call for more specific disciplinary rules that would distinguish “between mandatory legal requirements and purely ethical (and nonbinding) guidelines.” 152 The 1969 Model Code of Professional Responsibility was the result. It “distinguished sharply between Ethical Considerations (designed to ‘point the way to the aspiring’) and the Disciplinary Rules (designed to ‘judge the transgressor’).” 153

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144 See also Fred C. Zacharias, Specificity in Professional Responsibility Codes: Theory, Practice, and the Paradigm of Prosecutorial Ethics, 69 NOTRE DAME L. REV. 223, 223 (1993) (“Over time, the professional codes governing lawyer behavior have become statutory in form.”).
145 Cramton & Udell, supra note 3, at 300. Hazard, supra note 135.
146 Hazard, supra.
147 Cramton & Udell, supra note 3, at 299.
148 Wolfram, supra note 135, at 55.
149 Strassberg, supra note 135, at 908. See also Ellen S. Podgor, Criminal Misconduct: Ethical Rule Usage Leads to Regulation of the Legal Profession, 61 TEMP. L. REV. 1325, 1335, n. 84 (1988); Cramton & Udell, supra note 3, at 299 (“Even in judicial review of disciplinary proceedings, the binding legal standards often came from well-established rules of agency, fiduciary, and criminal law.”).
150 Cramton & Udell, supra note 3, at 300.
151 Id.
152 Id. See also Daniel S. Reynolds, Wrongful Discharge of Employed Counsel, 1 GEO. J. LEG. ETH. 553, 566-67 (1988) (“The advent of the 1969 Model Code of Professional Responsibility worked a major transformation in its attempt to separate enforceable rules for attorney discipline from other, more transcendentinal ethical considerations.”).
153 Cramton & Udell, supra note 3, at 300. Levine, supra note 135, at 531 (Significantly, in contrast to the general nature of the Canons, the Model Code include[d]}
Professor Hazard described the Model Code as the “crucial step” in the legalization of ethics regulation.\(^{154}\)

This legalization of the rules culminated in the drafting and adoption of the Model Rules of Professional Conduct in 1983. The drafting process was “quasi legislative” because of the way in which it “mirrored that of public lawmaking.”\(^{155}\) “The Model Rules more nearly resemble a statutory code of conduct in which imperatives, cast in the terms of ‘shall’ or ‘shall not,’ define conduct for purposes of professional discipline.”\(^{156}\) As Robert Kutak, the chair of the ABA commission that drafted the Rules, explained: the “format of black-letter rules accompanied by explanatory comments … replicates the familiar, time-tested approach of the American Law Institute’s restatements of the law and modern legislation.”\(^{157}\) Consequently, in the Foreword to the Restatement of the Law Governing Lawyers, Professor Hazard wrote that the “regulations are rules of law and not merely admonitions of the legal profession to its members…. [T]he Code and the Rules, as adopted in various states, are a form of legislation with attendant authoritative significance.”\(^{158}\)

This history should encourage courts to fully embrace the professional rules as a source of law. In most respects, the rules closely resemble other legislation and therefore should be considered “public policy” just like other legislation. First, the rules have gone through a process quite similar to the process that other legislation goes through. Second, the rules are cast in

\(^{154}\) Hazard, supra note 137, at 1251.


\(^{156}\) Cramton & Udell, supra note 3, at 301. Hazard, supra note 137, at 1253 (the Rules were rendered in statutory language”).


\(^{158}\) Restatement (Third) of the Law Governing Lawyers: Regulation of Lawyers-In General Foreward (2000). Levine, supra note 135, at 533 (“In addition to their legislative form, ethics regulations have evolved to acquire the status of legal authority similar to that of legislation.”). See also Lawrence K. Hellman, When “Ethics Rules” Don’t Mean What They Say: The Implications of Strained ABA Ethics Opinions, 10 GEO. J. LEGAL ETHICS 317, 321 (1997) (“when a state supreme court issues an order officially adopting a set of rules of professional conduct, it is establishing legally binding standards of conduct just as a state legislature does when it passes a law proscribing bank robbery.”).
imperatives – “shall” and “shall not” – just like statutes. Third, the rules are quite specific, particularly the provisions concerning the prohibited agreements at issue here.159

2. Courts’ use of statutes

Courts make broad use of statutes in civil litigation.160 This use extends beyond just criminal statutes.161 “Common modern illustrations of this expansive treatment are cases in which statutory or administrative regulations of businesses or other groups or of activities such as operating a motor vehicle are employed to create or define rights of action for recovery of damages on behalf of persons for whose benefit the regulations were formulated.”162 Such reliance “rests on the view that the fundamental policy choices reflected in the statute should also be relied upon by courts in assessing the alleged offender’s liability for damages or other civil relief.”163 If one governmental body “has branded certain conduct as inappropriate, consistency demands that other organs of government pay heed when making judgments about the same conduct.”164

In this case, the same body (the judiciary) has enacted the rules of professional conduct and should enforce those rules in litigation. As noted in Part II, the policy choice reflected in the rules is largely client protection. In enacting the rules, the courts have chosen to protect clients and they should make the same choice in deciding civil cases. It makes little sense for the courts to say that lawyers will face discipline if they enter into a certain agreement but then turn around and enforce such agreements without regard to the fact that the agreement violates the professional rules.165

159 C.f. Dahlquist, supra note 12, at 15 (criticizing the use of the professional rules in legal malpractice cases because “the standards of the Code itself are just as broad and ambiguous” as the common law standards).
160 Wolfram, supra note 26, at 286 (“In civil suits, courts everywhere now receive as evidence of the violator’s failure to employ due care proof of a violation of a criminal statute if the injured party is within the statute’s intended area of protection.”).
162 Wolfram, supra note 26, at 287.
163 Id. at 286.
164 HAZARD & HODES, supra note 160, § 4.1, 4-7.
165 See Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147, 1176 (2009) (“Courts implementing the [substantive law] sometimes look to the professional codes for guidance but also treat the codes as irrelevant, thus leading to inconsistent behavioral requirements for lawyers. Because the state supreme courts have the power to
Professors Rotunda and Dzienkowski make a similar point in the context of disqualification motions where “courts have consistently relied on ethics codes to establish standards for ruling on claimed conflicts of interest.” As they point out, such reliance is logical since “[t]he rules of ethics are judicially imposed court rules. It is more than a little inconsistent for a court to promulgate a rule that states that a lawyer cannot represent a particular client because to do so would violate Rule 1.6 (governing confidences and secrets of a former client) and then allow the lawyer to appear before the court in blatant violation of the rule – particularly where the purpose of the Rule is to protect the former client.”

3. Courts’ use of other professionals’ codes and customs

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

review lower courts’ decisions, they are in a unique position to harmonize the decisions with the professional codes or to explain when divergence from the codes is justified.”

166 RONALD D. ROTUNDA & JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY §§ 1-9, 53-55 (2006-2007). See also Munneke & Davis, supra note 12, at 46 (“the courts cite the ethical rules with regularity to support their decisions applying the substantial relationship test”).

167 Id. See also Munneke & Davis, supra note 12 at 46 (“the courts cite the ethical rules with regularity to support their decisions applying the substantial relationship test”). Munneke and Davis make the same point in the legal malpractice context: “The key to determining whether a rule is susceptible to application in a civil action ought to be whether the specific rule was intended to protect a class of persons of which the plaintiff is a member against the type of harm that eventuated.” Id.

168 Criton A. Constantinides, Note, Professional Ethics Codes in Court: Redefining the Social Contract Between the Public and the Professions, 25 GA. L. REV. 1327 (1991) (collecting cases concerning the use of various professional ethics codes and advocating for the expansion of their use) Geoffrey C. Hazard, Jr., Lawyers and Client Fraud: They Still Don't Get It, 6 GEO. J. LEGAL ETHICS 701, 718-19 (1993) (“Norms stated as obligatory standards of a vocation are generally held to be evidence of the legal standard of care in practicing that vocation”); Richmond, supra note 12, at 950 (“Courts typically hold other professional ethics codes to be relevant to the standard of care in civil litigation.”).

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

4. Lawyers write the rules

Another argument in favor of applying the rules beyond the disciplinary process is that lawyers develop and draft the professional rules. As Professor Wolfram argued, “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 consideration of its interests. Attorneys, through the organized bar, have played a very dominant role in the development of the Code.”

171 See Menzel v. Morse, 362 N.W.2d 465 (Iowa 1985).
172 Pittman v. Upjohn Co., 890 S.W.2d 425, 435 (Tenn. 1994).
173 Constantinides, supra note 153, at 1363 (collecting cases).
174 See supra note __
175 Wolfram, supra note 135, at 287-88. As Professor Wolfram wrote elsewhere: “Lawyers entirely control the process by which lawyer rules of conduct are written and adopted. In drafting disciplinary rules, every state to a greater (usually) or lesser (infrequently) extent follows the lead of the American Bar Association. Often states follow that lead slavishly. And only a lawyer would think that many of the departures are truly significant. The ABA calls the major shots and most of the minor ones.” Charles W. Wolfram, Lawyer Turf and Lawyer Regulation – The Role of the Inherent-Powers Doctrine, 12 U. ARK. LITTLE ROCK L. REV. X 1, 16 (1989). See also Deborah L. Rhode, Why the ABA Bothers: A Functional Perspective on Professional Codes, 59 TEX. L. REV. 689, 692 (1981) (ethics codes “consistently resolve conflicts between professional and societal objectives in favor of those doing the resolving”); Cramton & Udell, supra note 3, at 318 (expressing concern that the “drafting and interpretation of ethics rules may be too influenced by the legal profession’s self-interest”); Richmond, supra note 12, at 954
Nor would the imposition of lawyers’ professional rules as substantive law in civil cases step on the legislature’s toes since, under the “inherent powers” doctrine, the legislature (in theory) plays no role in the regulation of the bar. Under this doctrine, courts claim the exclusive authority to regulate the practice of law based on constitutional separation-of-powers grounds. In other words, state supreme courts have long taken the sole legislative role when it comes to the legal profession.

One potential objection to the use of the rules in private law disputes is that the rules are too biased in favor of lawyers. In other words, it would be unfair to nonlawyers involved in litigation with lawyers to use the biased lawyer rules as the substantive basis for decision, particularly when the general public has not been involved in the drafting of the rules. At least in the case of the prohibited agreements at issue in this article, there would not necessarily be any prejudice to non-lawyers. If an agreement is made in violation of the rule, the court should consider the agreement to be made in violation of public policy, but as discussed earlier, just because the agreement violates public policy does not mean that it is unenforceable. Courts exercise great flexibility and consider a variety of factors in deciding whether to enforce an agreement that violates public policy. In the event that a lawyer seeks to get out of an agreement with a non-lawyer on the ground that the agreement violates public policy, the court could nevertheless decide to hold the lawyer to the agreement because it would be perverse if an attorney, for example, were “permitted to promise a bonus arrangement that violates the fee-sharing rule, and then invoke the Rules as a shield from liability under that arrangement.”

(“Because lawyers dominate the development and drafting of ethics rules; therefore, it cannot reasonably be argued that the rules ignore their special concerns or that they will somehow suffer a disadvantage if ethics rules play a limited role in litigation against them.”).

176 Wolfram, supra note 135, at 288.
178 Id. at 1174; Wolfram, supra note 135, at 288 (“judicial initiative in enlarging attorney liability to bring it within the dictates of the [disciplinary codes] can in no manner be thought an illegitimate usurpation of legislative prerogative.”).
179 Cramton & Udell, supra note 3, at 310 (expressing the concern that “public interests may not be well represented in the rule formation process”).
180 Supra note , at ____
5. Underenforcement by the Bar

Commentators have long criticized the disciplinary system for failing to adequately police the profession. Bar authorities tend to be understaffed and underfinanced, and they are, of course, dominated by the group that they regulate. Moreover, studies consistently show that judges fail to do their part in reporting lawyer misconduct. These and other factors leave the disciplinary rules woefully underenforced. One recent study concluded that more than 75% of the bar complaints in Texas were dismissed without any investigation.

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

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182 Leslie C. Levin, The Emperor’s Clothes and Other Tales About the Standards for Imposing Lawyer Discipline Sanctions, 48 AM. U. L. REV. 1 (1998) ("the lack of well-defined standards, the tendency to impose non-public sanctions on lawyers, the failure to publicize the 'public sanctions,' and the amount of recidivism that seems to occur, also raise serious questions about how well the sanctions imposed on lawyers achieve the basic goals of lawyer discipline: protection of the public, protection of the administration of justice and preservation of confidence in the legal profession.").

183 Wolfram, supra note, at ___.


185 Laurel Fedder, Obstacles to Maintaining the Integrity of the Profession: Rule 8.3’s Ambiguity and Disciplinary Board Complacency, 23 GEO. J. LEG. ETHICS 571 (2010) (citation omitted). See also Lester Brickman, Anatomy of an Aggregate Settlement: The Triumph of Temptation Over Ethics, 79 GEO. WASH. L. REV. 700, 708 (Feb. 2011) (describing the underenforcement of Rule 1.8(g) governing aggregate settlements). See also Cramton & Udell, supra note 3, at 304 (arguing that prosecutors are “extremely unlikely” to be disciplined for violation of the anti-contact rule); Debra Moss Curtis, Attorney Discipline Nationwide: A Comparative Analysis of Process and Statistics, 35 J. LEGAL PROF. 209 (providing disciplinary statistics from every state); Long, supra note 16, at 330 (“Professional discipline is, in general, a relatively uncommon occurrence. Discipline related to fee agreements is rarer still.”)

186 Fedder, supra note 179, at ___.

187 Wolfram, supra note 135, at 288. See also Manuel R. Ramos, Legal Malpractice: Reforming Lawyers and Law Professors, 70 TUL. L. REV. 2583 (1996) (arguing for increased use of rules in legal malpractice cases because the bar rules are underenforced); Leubsdorf too?.

188 Long, supra note 16, at 331 (“the loss of an expected fee is more likely to be a deterrent to lawyer misconduct than is professional discipline”); Richmond, supra note, at
bar to enforce violations of the rules. 189

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

6. The professional rules derive from common law duties

Finally, courts should embrace the use of the professional rules in private law disputes because the rules really do not impose any substantial new duties on lawyers. To the contrary, the ethics rules derive from common law duties. 190 Indeed, “[t]he [Model] Rules are firmly rooted in positive law [and] were carefully crafted to track generally accepted principles of agency law…. 191 Given this overlap, the codified rules are undeniably “germane to the question of professional standards in civil actions.” 192

Of course, if the professional rules add nothing new to the substantive law, then what purpose is served by the courts relying on them? One advantage is that the professional rules on the whole are clearer, more

79 (“[P]otential civil liability often deters lawyer misconduct more effectively than does the threat of professional discipline.”).

189 Wolfram, supra note 135, at 291 (“Spurred by the outrage of injury and the need for compensation, the person directly injured by an attorney violation can be expected to respond more readily with a damage action than the attorney disciplinary agency can with effective enforcement proceedings.”).

190 Richmond, supra note 12, at 957; GEOFFREY C. HAZARD, JR. & W. WILLIAM HO ODES, THE LAW OF LAWYERING § 4.1 4-7 (3d ed. Supp. 2000) (“overlap between ‘other’ law and code norms is inevitable, given their developmental histories. Many professional rules of conduct were derived from decisional law arising in nondisciplinary contexts, such as legal malpractice or disqualification from representation, and some areas of decisional law have been heavily influenced by the professional codes.”); Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147, 1176 (2009) (“Standards in the professional codes often cover the same conduct as other legal standards governing lawyers, including civil law and judge-made supervisory decisions.”).

191 Munneke & Davis, supra note 12, at 42.

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

There is a danger of courts relying too heavily on the rules. Lawyers and the courts passing judgment on their conduct should be mindful that merely adhering to the letter of the professional rules is not always sufficient because lawyers still owe their clients fiduciary duties under the common law. Lawyer conduct can pass muster under the rules but still be a violation of a lawyer’s fiduciary duty to his client.

7. The language in the Preamble

I have already discussed several potential objections to any increased use of the professional rules in civil litigation, but one other merits discussion. Some have argued that the use of the rules outside the disciplinary context violates the intent of the rulemakers as expressed in the Preamble to the Model Rules. Specifically, the Preamble provides:

Violation of a Rule should not itself give rise to a cause of action against a lawyer nor should it create any presumption in such a case that a legal duty has been breached. In addition, violation of a Rule does not necessarily warrant any other nondisciplinary remedy, such as disqualification of a lawyer in pending litigation. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s

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194 Id. (“Accordingly, the Rules of Professional Conduct must exist as a supplement to the common law rather than a force for displacing it.”).
195 RONALD E. MALLEN & JEFFREY M. SMITH, 2 LEGAL MALPRACTICE § 20:7 (2012 ed.) (“The disclaimers are appropriate in several respects. First, the ABA Model Code and Model Rules, the authors did not discuss the ramifications of ethical principles in civil litigation, nor did the ABA design the ethical standards to achieve civil objectives. Thus, the drafters did not promulgate the ethical standards to be used in civil litigation.”).
self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Nevertheless, since the Rules do establish standards of conduct by lawyers, a lawyer’s violation of a Rule may be evidence of breach of the applicable standard of conduct.\textsuperscript{196}

Thus, the Preamble disclaims almost any impact outside of the disciplinary process except for the last sentence which acknowledges that a violation of the rules “may be evidence of breach of the applicable standard of conduct.” This last sentence actually represents a retreat on the issue. The old preface to the Model Rules, which is still followed in a number of states, precluded any reliance on the rules whatsoever and concluded with the following sentence: “Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extra-disciplinary consequences of violating such a duty.”\textsuperscript{197}

As an initial matter, this change could be viewed as a change in the drafters’ intent.\textsuperscript{198} Even if one concludes that the rulemakers’ intent has not changed, however, this disclaimer is best ignored. Professor Hazard famously described this language in the Preamble as “futile … if not fatuous.”\textsuperscript{199} The rulemakers drafted the rules (and the courts have adopted them) to distinguish between appropriate lawyer conduct and inappropriate lawyer conduct. If conduct is wrong in one context and subjects the lawyer to discipline, it is illogical to say that we should ignore that rule violation in judging the lawyer’s conduct in the context of civil litigation. Arguments to the contrary represent the worst kind of lawyer protectionism.\textsuperscript{200}

\begin{footnotes}
\item[196] \textit{MODEL RULES OF PROF’L CONDUCT} Preface (2011).
\item[197] ABA, \textit{ABA Model Rules of Professional Conduct (Pre-2002)}, CORNELL UNIVERSITY LAW SCHOOL, LEGAL INFORMATION INSTITUTE, \url{http://www.law.cornell.edu/ethics/aba/2001/ABA_CODE.HTM#Preface}.
\item[199] Geoffrey C. Hazard, Jr., \textit{Lawyers and Client Fraud: They Still Don’t Get It}, 6 GEO. J. LEGAL ETHICS 701, 718 (1993); Munneke & Davis, \textit{supra} note 12, at 41 (describing disclaimers as “virtually meaningless”).
\item[200] Cramton & Udell, \textit{supra} note 3, 302-03 (1992) (“The bar has generally taken an internally inconsistent and results-oriented position on this subject. Typically, the bar argues a restrictive view concerning the ethics rules as a source of authoritative law. This is especially so when the civil or criminal liability of a lawyer is involved.”).
\end{footnotes}
IV. CONCLUSION

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

Second, in urging more uniform and widespread use of the rules in substantive contract disputes, it provided the theoretical and public policy justifications that have been almost completely absent from the case law. First, the rules now resemble other legislation and should be treated like other legislation. Second and relatedly, courts generally make broad use of statutes in civil litigation. Third, courts have generally found the codes and customs of other professionals to be relevant in civil litigation, and there is no reason to treat lawyer codes differently. Fourth, lawyers – the persons who are most likely to be disadvantaged by the use of the rules in substantive contract disputes – play a dominant role in drafting the rules and therefore should not be heard to complain about their use in civil litigation. Fifth, the rules are underenforced by the bar, and their use in civil litigation can help achieve an acceptable level of attorney compliance. Sixth, the professional rules derive from common law duties and therefore do not impose any added burden on lawyers. Finally, the primary argument advanced by courts that reject the use of the professional rules as substantive law – the language in the Preamble to the rules which largely disclaims any influence on or relationship to the substantive law – is weak. The rulemakers drafted the rules to distinguish between appropriate and inappropriate lawyer conduct. If conduct is wrong and therefore subjects the lawyer to discipline, it is illogical to say that we should ignore that rule violation in the context of civil litigation.

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