The Inadmissibility of Professional Ethical Standards in Legal Malpractice Actions after *Hizey v. Carpenter*

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THE INADMISSIBILITY OF PROFESSIONAL ETHICAL
STANDARDS IN LEGAL MALPRACTICE ACTIONS AFTER
HIZEY v. CARPENTER

Marc R. Greenough

Abstract: In Hizey v. Carpenter, the Washington Supreme Court became the only court of last resort to prohibit introduction of the Code of Professional Responsibility and the Rules of Professional Conduct as evidence of an attorney's common law duty of care in an action for legal malpractice. This Note examines the Hizey decision and argues that the court should not create a preferential standard for attorneys. Instead, the court should admit professional ethical standards as evidence in legal malpractice actions on the same basis that the court admits statutes, ordinances, and administrative rules in other actions for negligence.

Gordon and Jessie Hizey invested in a parcel of commercial real property in Skagit County in 1968. When they decided to sell the land in 1983, the bank officer negotiating the purchasers' assumption of the Hizeys' outstanding loan on the property insisted that the Hizeys remain obligated under the loan. The bank officer recommended her husband, Timothy Carpenter, as a real estate lawyer to draw up a joint venture agreement. Subsequently, in order for the purchasers to obtain construction financing to develop the property, Carpenter drafted an agreement converting the executed joint venture agreement into a limited partnership.

The purchasers went bankrupt in 1986, preventing the Hizeys from recovering more than a fraction of their interest in the property. Having lost their retirement nest egg, the Hizeys sued Carpenter for malpractice. They claimed that he represented both the buyers and the sellers when he drafted the documents. In addition, the Hizeys claimed that Carpenter was negligent when he failed to advise them to obtain independent counsel until after he converted their creditor interest to an equity interest under the limited partnership agreement.

2. The bank officer considered most of the members of the purchasers group less than creditworthy. Id. at 255, 830 P.2d at 649.
4. The Hizeys sold the property for $950,000 and gave the purchasers a $270,000 credit against the price for assuming the outstanding loan. Hizey, 119 Wash. 2d at 255, 830 P.2d at 649. In bankruptcy court the Hizeys eventually settled for $300,000. The court awarded the Hizeys $150,000; they netted approximately $99,000. Id. at 256, 830 P.2d at 649.
At trial, Carpenter moved to exclude the testimony of the Hizeys' expert witness on the ground that it would be improper to admit evidence regarding the professional ethical standards governing attorneys. The trial court agreed and ruled that the expert could not refer to specific rules, testify as to the existence of the Code of Professional Responsibility (CPR) or the Rules of Professional Conduct (RPC), or testify that the CPR or the RPC established the duty of care in a legal malpractice action. Without hearing this evidence, the jury returned a verdict in favor of Carpenter.

The Hizeys appealed the trial judge's decision to exclude the expert testimony, and the court of appeals certified the issue to the Washington Supreme Court for resolution. In *Hizey v. Carpenter*, the state supreme court unanimously upheld the trial judge's determination, ruling that a plaintiff may not inform the jury of the existence of the CPR or the RPC in a legal malpractice action, either directly through jury instructions or by the testimony of experts.

This Note argues that the *Hizey* court erred by departing from the majority of other jurisdictions and past Washington appellate decisions admitting professional ethical standards as evidence in legal malpractice actions. Instead, the court should analyze the CPR and the RPC on the same basis as statutes, ordinances, and administrative rules in other actions for negligence. Part I examines the admissibility of the CPR and the RPC in other jurisdictions as well as in Washington. Part II summarizes the issues and holding in *Hizey*. Part III criticizes the *Hizey* decision on five separate grounds. Finally, Part IV proposes an alternative to *Hizey* that would allow trial courts the same discretion to admit professional ethical standards in legal malpractice actions as in other actions for negligence. This alternative would eliminate the preferential double standard *Hizey* creates for lawyers as defendants in legal malpractice actions.

I. PROFESSIONAL ETHICAL STANDARDS AS A MEASURE OF AN ATTORNEY'S DUTY OF CARE

In an action for legal malpractice, the plaintiff must establish the common law duty of care owed by the defendant attorney. Jurisdictions other than Washington vary widely on the admissibility of professional ethical standards as evidence of this duty of care and consequently on the admissibility of professional ethical violations as

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5. *Id.* Carpenter also objected on the ground that the expert, Professor David Boerner, was not an expert in real estate law. *Id.*

evidence of a breach of the duty of care. Prior to Hizey, Washington courts assumed, without explicitly deciding, that the CPR and the RPC were admissible evidence in several extradisciplinary contexts, including legal malpractice actions.

A. Establishing Legal Malpractice in Washington

Legal malpractice in Washington is a form of professional negligence.\(^7\) To make out a prima facie case for legal malpractice, the plaintiff must establish four elements: (1) an attorney-client relationship, which gives rise to a duty of care owed by the attorney to the client; (2) an act or omission by the attorney in breach of that duty of care; (3) damage to the client; and (4) proximate causation between the breach of the duty and the damage.\(^8\) The attorney-client relationship gives rise to the duty of care.\(^9\) Therefore, nonclients can recover from an attorney for legal malpractice only by showing that they were the intended beneficiaries of the attorney's actions.\(^10\) To conform to the duty of care, an attorney must possess and exercise the degree of care, skill, diligence, and knowledge commonly possessed and exercised by a reasonable, careful, and prudent lawyer in the State of Washington.\(^11\)

In order to establish the appropriate duty of care, the plaintiff normally must present testimony by an expert witness.\(^12\) The practice of law is a highly technical field beyond the knowledge of the ordinary layperson.\(^13\) Most lay jurors cannot determine without expert testimony the degree of care, skill, diligence, and knowledge possessed by a reasonable, careful, and prudent lawyer.\(^14\) Expert testimony therefore is necessary unless the area of alleged malpractice lies within the common knowledge of laypersons.\(^15\)

\(^7\) See Bowman v. John Doe Two, 104 Wash. 2d 181, 185, 704 P.2d 140, 142 (1985) (holding that once the plaintiff establishes an attorney-client relationship, the elements for legal malpractice are the same as for negligence).

\(^8\) Hizey, 119 Wash. 2d at 260, 830 P.2d at 651.

\(^9\) Id.

\(^10\) See Bohn v. Cody, 119 Wash. 2d 357, 365, 832 P.2d 71, 75-76 (1992) (holding that attorney liability extends beyond privity of contract only for third-party beneficiaries of an attorney-client relationship and those who satisfy a multifactor balancing test that includes the extent the transaction was intended to affect the plaintiff).


\(^15\) Walker, 92 Wash. 2d at 858, 601 P.2d at 1282; see also Hansen v. Wightman, 14 Wash. App. 78, 93, 538 P.2d 1238, 1249 (1975).
B. Use of the CPR and the RPC to Establish the Duty of Care

Professional ethical standards in the legal profession developed independently from the common law duty of care. The Washington Supreme Court adopted the CPR effective January 1, 197216 pursuant to the court’s exclusive, inherent power to admit, enroll, discipline, and disbar attorneys.17 The Preliminary Statement of the CPR provides that the CPR does not “undertake to define standards for civil liability of lawyers for professional conduct.”18 The supreme court replaced the CPR with the RPC effective September 1, 1985.19 When adopting the RPC, however, the court declined to replace the CPR Preliminary Statement with the Scope of the American Bar Association Model RPC.20

Courts take four different approaches to admitting professional ethical standards as evidence of an attorney’s duty of care in legal malpractice actions. First, some courts hold that professional ethical standards conclusively establish the duty of care and that any violation constitutes negligence per se. Second, a minority of courts finds that a professional ethical violation establishes a rebuttable presumption of legal malpractice. Third, a large majority of courts treats professional

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16. WASH. CT. C.P.R., reprinted in 80 Wash. 2d 1119 (1972). The CPR consists of Canons, Ethical Considerations, and Disciplinary Rules. The Canons express in general terms the standards of professional conduct expected of lawyers and embody the general concepts from which the drafters derived the Ethical Considerations and Disciplinary Rules. The Ethical Considerations are aspirational in character. The Disciplinary Rules are mandatory and state the minimum level of conduct below which no lawyer can fall without being subject to disciplinary action. Id. at 1121. The CPR superseded the 47 Canons of Professional Ethics that had been in effect since 1950. See id. at 1119.


18. WASH. CT. C.P.R., Preliminary Statement, reprinted in 80 Wash. 2d 1119, 1122 (1972).


20. The court instead retained portions of the CPR Preliminary Statement. Id. at 1105. The Scope of the Model RPC provides in part:

Violation of a Rule should not give rise to a cause of action nor should it create any presumption that a legal duty has been breached. The Rules are designed to provide guidance to lawyers and to provide a structure for regulating conduct through disciplinary agencies. They are not designed to be a basis for civil liability. Furthermore, the purpose of the Rules can be subverted when they are invoked by opposing parties as procedural weapons. The fact that a Rule is a just basis for a lawyer’s self-assessment, or for sanctioning a lawyer under the administration of a disciplinary authority, does not imply that an antagonist in a collateral proceeding or transaction has standing to seek enforcement of the Rule. Accordingly, nothing in the Rules should be deemed to augment any substantive legal duty of lawyers or the extradisciplinary consequences of violating such a duty.

MODEL RULES OF PROFESSIONAL CONDUCT Scope (1983).
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ethical standards as evidence of the common law duty of care. Finally, one court has found professional ethical standards inadmissible as evidence of an attorney's duty of care.

In California, courts hold professional ethical standards equivalent to the duty of care that an attorney owes a client. In *Ishmael v. Millington*, the California District Court of Appeal found the common law duty of care an inadequate measure of an attorney's duty in a legal malpractice action where the plaintiff alleged that the attorney had represented conflicting interests. Instead, the court held the defendant attorney to the more specific professional ethical standards requiring extensive disclosure. More recently, in *Day v. Rosenthal*, another California appellate court held without further elaboration that the California RPC conclusively established the defendant attorney's duty of care and explicitly equated violations to breaches of the duty of care.

Most courts reject the theory that a violation of the CPR or the RPC constitutes a breach of the common law duty of care. These courts point out that disciplinary action remains the only direct remedy for violations and that a violation does not give rise to a separate cause of action.

A small minority of courts holds that a professional ethical violation establishes a rebuttable presumption of negligence. In *Albright v. Burns*, a New Jersey appellate court held that the plaintiff's proof of a violation provided a sufficient basis to shift the burden in a legal malpractice action to the defendant attorney to disprove any impropriety. The *Albright* court held that a failure to meet the minimum

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22. *Id.* at 597.
23. *Id.*
25. *Id.* at 102-04. Other courts state in dicta that a professional ethical violation may constitute negligence per se. See, e.g., *Hatcher v. Roberts*, 478 So. 2d 1083, 1087 (Fla. Dist. Ct. App. 1985) (finding that the CPR provisions defined the defendant attorney's duty of care but dismissing plaintiff's action for lack of proximate cause), *review denied*, 488 So. 2d 68 (Fla. 1986); *Carlson v. Morton*, 745 P.2d 1133, 1137 (Mont. 1987) (acknowledging that violation of some disciplinary rules alone may constitute negligence, but not the rules cited by the plaintiff); *O'Toole v. Franklin*, 569 P.2d 561, 566-67 (Or. 1977) (finding that violations of statutory professional ethical standards may give rise to private rights of action independent of the common law, but only intentional and deliberate, rather than negligent, violations).
29. *Id.* at 391. The Scope of the Model RPC expressly disavows the creation of such a presumption. See *supra* note 20.
standard of competence established by the RPC gives rise to an inference of malpractice. The Michigan Court of Appeals in *Lipton v. Boesky* found the CPR analogous to criminal statutes and reasoned that a wrongful act may offend a private individual as well as the general public. By holding CPR violations to be rebuttable evidence of malpractice, the court sought to enable clients to rely on the same standards of professional conduct as those the CPR requires of attorneys in their relationships with the public, the legal system, and the legal profession.

A large majority of courts finds that a violation of the CPR or the RPC, while not establishing a rebuttable presumption of negligence, does constitute relevant evidence of a breach of an attorney's duty of care. Several reasons persuade these courts to find professional ethical standards relevant. Some courts admit evidence of professional ethical standards in both tort actions and disciplinary proceedings because both contexts involve conduct failing to meet certain minimum standards. Other courts admit the CPR and the RPC because

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they admit statutes and ordinances\textsuperscript{36} or practice codes\textsuperscript{37} to define the duty of care in other actions for negligence.\textsuperscript{38} Only one court prior to \textit{Hizey} found professional ethical standards inadmissible in a legal malpractice action. In \textit{Bross v. Denny},\textsuperscript{39} the Missouri Court of Appeals held that two brief references to the CPR made by the plaintiff's attorney did not constitute reversible error but found such references generally inadmissible.\textsuperscript{40} The court cited a previous Missouri decision that dismissed an action for malpractice based exclusively on a CPR violation.\textsuperscript{41} However, the \textit{Bross} court never explained why the previous decision required exclusion of the CPR as evidence of an attorney's duty of care.\textsuperscript{42}

C. Use of Professional Ethical Standards in Washington

1. Use When Defining an Attorney's Common Law Duty of Care

Washington's intermediate appellate courts have used professional ethical standards when defining an attorney's duty of care in actions for legal malpractice on at least three occasions. However, these courts assumed without further analysis that evidence of an ethical violation was relevant and admissible in an action for legal malprac-


38. Commentators advance at least two additional reasons for admitting professional ethical standards as evidence of an attorney's duty of care. See, e.g., Charles W. Wolfram, \textit{The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation}, 30 S.C. L. REV. 281 (1979). First, the Preliminary Statement accords the CPR a neutral rather than hostile standing, never indicating that it would be inappropriate for a court to examine the CPR for guidance in civil actions. Id. at 287. Second, courts can achieve a more acceptable level of attorney compliance with the CPR by admitting it as evidence in legal malpractice actions. Id. at 286–95.


40. Id. at 420.

41. Id. (citing Greening v. Klamen, 652 S.W.2d 730, 734 (Mo. Ct. App. 1983)).

42. Id. The \textit{Greening} court acknowledged that courts frequently look to the CPR in order to determine an attorney's duty of care. \textit{Greening}, 652 S.W.2d at 734.
tice. In *Hamilton v. State Farm Mutual Automobile Insurance Co.*, the court approved the use of the Canons of Professional Ethics in both expert testimony and jury instructions as evidence of the duty of care owed by an insurer's attorney to both the insurer and the insured. The *Hamilton* court relied on the Washington Supreme Court's invocation of Canon 6 as the proper duty of care owed by an attorney with conflicting interests in an earlier insurance case. In *Kelly v. Foster*, the court affirmed a trial judge's disposition of a legal malpractice action alleging attorney conflict of interest where the jury instructions incorporated provisions of the CPR.

One Washington court balanced two competing CPR provisions to determine an attorney's duty of care in *Hawkins v. King County*, a legal malpractice action against a court-appointed defense attorney. The *Hawkins* court weighed the plaintiff's claim that the defendant attorney had violated a Disciplinary Rule requiring disclosure of material information against the attorney's duty of zealous advocacy. The court ultimately found that the duty of zealous advocacy overrode the duty to disclose and upheld summary judgment for the defendant.

2. Use Other Than When Defining an Attorney's Common Law Duty of Care

Washington courts have also invoked professional ethical standards on many occasions other than when defining an attorney's duty of care in legal malpractice actions. Four months prior to *Hizey*, the Wash-

45. The plaintiffs called two expert witnesses who expressly testified that Canon 8 of the Canons of Professional Ethics defined the defendant attorney's duty of care in the conduct of a client's litigation. *Id.* at 182, 511 P.2d at 1022. The Canons were in effect at the time of the attorney's actions. *Id.*; see supra note 16.
48. *Id.* at 153, 813 P.2d at 600. The complete report of the proceedings was not before the court. The court ruled only on whether the plaintiff could recover attorney fees. *Id.* at 151 n.1, 813 P.2d at 599 n.1.
50. *Id.* at 342–43, 602 P.2d at 364–65 (Disciplinary Rule 7-102(A)(3)).
51. *Id.* at 341–43, 602 P.2d at 364–65 (Disciplinary Rule 7-101(A)(1)).
52. *Id.* at 343, 602 P.2d at 365. The *Hawkins* court did indicate that a Disciplinary Rule created no legal duty to disclose and stated that a theory of liability based exclusively on an ethical violation would fail for lack of substance. *Id.*

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Washington Supreme Court decided in *Eriks v. Denver*\(^53\) that an attorney who violated the conflict of interest provisions of the CPR breached his fiduciary duty to his clients as a matter of law.\(^54\) The court ordered the defendant to disgorge his fees as a means of attorney discipline, distinguishing an action for disgorgement based on a breach of fiduciary duty from an action for malpractice.\(^55\) The most common use of the CPR in an extradisciplinary context has been to determine the reasonableness of attorney fees.\(^56\) Washington courts also have referred to professional ethical standards in order to disqualify attorneys\(^57\) and to regulate the terms of the sale of a law practice.\(^58\) Courts have even applied the CPR to nonattorneys.\(^59\)

II. *HIZEY v. CARPENTER*

The Washington Supreme Court found its first opportunity to rule explicitly on the propriety of admitting professional ethical standards as evidence of an attorney’s common law duty of care in *Hizey*. The court ruled all such evidence inadmissible, expressly rejecting both the negligence per se approach and the more common evidence-of-negligence approach.\(^60\)

The *Hizey* court followed the majority of courts when it found that an ethical violation does not constitute negligence per se for two reasons. First, the court cited the Preliminary Statement of the CPR, which disavows any undertaking to define standards for civil liability.\(^61\) This clear and unambiguous language, the court stated, precludes any violation from conclusively establishing a cause of action for malpractice.\(^62\) Second, the court pointed out that the breach of a

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54. Id. at 459–60, 824 P.2d at 1211–12.
55. Id. at 463, 824 P.2d at 1213. The court held as a matter of law that a conflict of interest prevented the defendant from adequately representing his clients. Id. at 462, 824 P.2d at 1213. The trial judge reserved the issue of legal malpractice for another phase of the trial. Id.
60. The *Hizey* court did not explicitly address the approach that holds an ethical violation to be a rebuttable presumption of negligence.
61. See supra note 18 and accompanying text.
professional ethical standard provides only a public, disciplinary remedy.\textsuperscript{63}

However, the \textit{Hizey} court departed from the majority of jurisdictions, which admits professional ethical standards as evidence of an attorney's common law duty of care.\textsuperscript{64} The court cited four reasons for denying admission of the CPR and the RPC in legal malpractice actions. First, the court rejected the analogy between professional ethical standards and statutes, because the state supreme court, rather than the legislature, adopted the CPR and the RFC.\textsuperscript{65} Second, the court found the CPR and the RPC too vague to establish the duty of care, because they constitute only a minimum level of conduct.\textsuperscript{66} Third, the court found that a plaintiff's use of the CPR and the RPC in a malpractice action would upset the balance in the legal system, emphasizing the attorney-client relationship at the expense of the courts and public.\textsuperscript{67} Finally, the court found that adequate common law theories exist for redressing private injury, including actions for negligence, breach of contract, and fraud.\textsuperscript{68} The court specifically asserted its receptivity to providing recovery under the Consumer Protection Act.\textsuperscript{69} The court concluded from these reasons that testimony regarding professional ethical standards was "a makeweight capable only of misdirecting the jury."\textsuperscript{70}

III. CRITIQUE OF \textit{HIZEY}

The \textit{Hizey} court improperly singled out legal malpractice as the one extradisciplinary context in which professional ethical standards constitute inadmissible evidence. The court's decision is flawed in five respects. First, neither the language of the CPR and the RPC nor the

\textsuperscript{63} \textit{Id.} at 259, 830 P.2d at 651.

\textsuperscript{64} \textit{See supra} notes 34--38 and accompanying text.

\textsuperscript{65} \textit{Hizey}, 119 Wash. 2d at 261, 830 P.2d at 652.

\textsuperscript{66} \textit{Id.} at 261--62, 830 P.2d at 652.

\textsuperscript{67} \textit{Id.} at 263, 830 P.2d at 653.

\textsuperscript{68} \textit{Id.} at 263--64, 830 P.2d at 653.

\textsuperscript{69} \textit{Id.} at 264, 830 P.2d at 653. The Consumer Protection Act provides that "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful." \textit{WASH. REV. CODE} § 19.86.020 (1992). Any person injured in his or her business or property by a violation of the Consumer Protection Act may bring a civil action to recover treble damages and attorney's fees. \textit{Id.} § 19.86.090. In Short v. Demopolis, 103 Wash. 2d 52, 65--66, 691 P.2d 163, 170 (1984), the court held that the entrepreneurial aspects of law practice are "trade or commerce" within the meaning of the Consumer Protection Act. Prior to \textit{Short}, no precedent existed to establish that the legal profession is involved in trade or commerce. \textit{See Lightfoot v. MacDonald}, 86 Wash. 2d 331, 338, 544 P.2d 88, 92 (1976).

\textsuperscript{70} \textit{Hizey}, 119 Wash. 2d at 264, 830 P.2d at 653.
court's past decisions justify finding inadmissibility. Second, the court erred in analyzing the evidentiary attributes of the CPR and the RPC differently from those of statutes. Third, the court created an unworkable standard of admissibility for the trial courts, threatening their ability to produce just results. Fourth, by excluding professional ethical standards from actions for legal malpractice, the court subverted their beneficial and educational effects, artificially arresting the development of the common law duty of care. Finally, the court created a double standard that favors attorneys in legal malpractice actions over laypersons in other actions for negligence.

A. The CPR and the RPC Do Not Require Finding Inadmissibility

The *Hizey* court misread the language of the Preliminary Statement as precluding the admissibility of professional ethical standards as relevant evidence of an attorney's common law duty of care. The language of the Preliminary Statement does not compel this result. The Preliminary Statement asserts that the CPR does not "undertake to define standards for civil liability of lawyers for professional conduct." The word "undertake" connotes more than the meaning of "attempt" or "engage in." It implies a greater burden amounting to a guarantee or an obligation. In the Preliminary Statement, the drafters of the CPR merely refused to guarantee that the CPR would define conclusively any standards of civil liability.

The drafters of the RPC never intended to prohibit every extradisciplinary introduction of the CPR and the RPC into the courtroom. By the time the drafters promulgated the Scope of the Model RPC, several courts had held the CPR admissible as relevant evidence of an attorney's duty of care. In addition, influential commentators had argued that courts should accord the CPR a position of neutrality rather than hostility in civil actions. While the drafters of the RPC disavowed any intent to alter the common law duty of care and had

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71. See supra note 18 and accompanying text.
73. Most courts do not find that this absence of guarantee renders the CPR irrelevant in determining an attorney's duty of care in a legal malpractice action. See supra notes 34–38 and accompanying text. Furthermore, the *Hizey* court neglected entirely to consider its ability to admit the CPR irrespective of the drafters' intent. See supra notes 28–33 and accompanying text.
74. See supra note 20 and accompanying text.
75. See supra notes 34–38 and accompanying text. The Washington Supreme Court declined to replace the Preliminary Statement with the more restrictive Scope when the court adopted the RPC. See supra note 20 and accompanying text.
76. See supra note 38.
the opportunity to prohibit expressly any introduction of the RPC as evidence of such, they declined to do so.\textsuperscript{77}

The Hizeys' use of the CPR and the RPC fit within the drafters' intent. The Scope of the Model RPC more explicitly indicates the drafters' intent when declining to guarantee standards of civil liability. The Scope provides that a violation of the RPC should not give rise to a cause of action by creating a duty that otherwise would not exist.\textsuperscript{78} In other words, the drafters intended to prevent a violation from giving rise to a cause of action not resulting from an attorney-client relationship.\textsuperscript{79} The Hizeys did not invoke the CPR and the RPC to create such an independent cause of action. Rather, they attempted to explain to the jury the elusive concept of an attorney's duty of care. Even if the expert witness had referred to professional ethical standards to establish that duty of care, the Hizeys still would have needed to prove the existence of the attorney-client relationship giving rise to the duty, proximate causation, and damages.\textsuperscript{80} The Hizeys sought only to inform the jury of the existence of professional ethical standards to which the ordinary lawyer of reasonable prudence should refer in exercising professional judgment.

Furthermore, despite its fastidiousness with respect to the admissibility of professional ethical standards in legal malpractice actions, the Washington Supreme Court has admitted the CPR and the RPC in many other extradisciplinary contexts.\textsuperscript{81} The court in the \textit{Hizey} opinion itself expressly approved the admissibility of the CPR and the RPC in civil actions against attorneys other than malpractice.\textsuperscript{82} The

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\item \textsuperscript{77} See supra note 20.
\item \textsuperscript{78} See supra note 20.
\item \textsuperscript{80} See supra note 8 and accompanying text.
\item \textsuperscript{81} See supra notes 53–59 and accompanying text.
\item \textsuperscript{82} Hizey v. Carpenter, 119 Wash. 2d 251, 264, 830 P.2d 646, 653–54 (1992). One Washington court conceded that by upholding the RPC in contexts other than disciplinary proceedings, as a necessary or logical consequence it was defining standards for civil liability for
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court also has applied the CPR to laypersons, despite explicit language in the Preliminary Statement disclaiming any such applicability.\(^{83}\) In short, the *Hizey* court singled out legal malpractice as the one context in which it prohibits evidence of professional ethical violations.\(^{84}\) Neither the standards themselves nor the court’s past use of them justifies this narrow exception.

### B. The Hizey Court Improperly Rejected the Analogy Between Professional Ethical Standards and Statutes

The *Hizey* court improperly dismissed the analogy between professional ethical standards and statutes. Two theories justify admitting statutes as evidence of the duty of care in a civil action for negligence. Both theories apply to professional ethical standards as well.\(^{85}\) Ignoring the applicability of these theories, the *Hizey* court improperly criticized the CPR and the RPC as unduly vague and unusually prone to upsetting the balance in the legal system among attorneys, clients, the court, and the public. The court should not have distinguished between ethical and statutory standards as admissible evidence in a legal malpractice action.

The first theory for admitting statutes states that the ordinary person of reasonable prudence obeys the law.\(^{86}\) While this holds true only theoretically for all statutes,\(^{87}\) the CPR and the RPC explicitly establish the minimum standards for conduct by a professional attorney.\(^{88}\) The ordinary lawyer exercising reasonable prudence adheres to professional ethical standards, because violations constitute grounds for discipline. Courts should, therefore, treat professional ethical violations as evidence of a breach of the duty of care.

The second theory for extending statutory standards to civil actions states that the court should defer to the legislature’s indication of the proper duty of care and thereby further democratically expressed poli-

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\(^{84}\) *Hizey*, 119 Wash. 2d at 266, 830 P.2d at 654.

\(^{85}\) For courts that embrace the statutory analogy, see supra note 36 and accompanying text.

\(^{86}\) See W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 36, at 221 (5th ed. 1984).

\(^{87}\) See id.

\(^{88}\) See supra note 16.
cies. Although the Hizey court maintained that the legislature had no role in adopting the CPR and the RPC, the Washington legislature has decided specifically that the standards of the American Bar Association should govern attorney ethics. Admitting evidence of ethical violations in legal malpractice actions would further the policy of the legislature by ensuring greater conformity with the professional ethical standards adopted by the court with its express approval.

The Hizey court improperly dismissed the analogy between ethical and statutory standards, diminishing the impact of its subsequent criticisms of the CPR and the RPC. Many statutes, ordinances, and administrative rules as well as professional ethical standards constitute only the minimum level of conduct and provide only a public remedy. Moreover, the CPR and the RPC may actually be less vague than many statutes. The Washington Supreme Court finds professional ethical standards sufficiently precise that a violation may support disbarment. Finally, attorneys may invoke their compliance with professional ethical standards antithetical to clients' interests in defending against malpractice liability, having every incentive to introduce evidence emphasizing the balance among attorneys, clients, the court, and the public. By ignoring these attributes, the Hizey court erred in drawing an artificial and unsupported distinction between statutes and professional ethical standards.

C. Hizey Creates Unworkable Standards for Trial Courts

As it rushed to proscribe every mention of professional ethical standards in legal malpractice actions, the Hizey court created insoluble dilemmas for trial judges, seriously threatening the ability of the courts to render just verdicts. A plaintiff normally must define the

89. See Keeton et al., supra note 86, § 36, at 222.
90. See supra note 66 and accompanying text.
91. See supra note 17.
92. See Keeton et al., supra note 86, § 36, at 233 (contending that a statutory standard constitutes no more than a minimum); id. at 220 (contending that statutes, ordinances, and administrative rules usually are penal in character and carry only criminal penalties).
93. California courts employ professional ethical standards precisely because they are less vague than the general duty of care by which the court traditionally requires juries to assess professional negligence. See supra notes 22–23 and accompanying text.
94. See, e.g., In re Disciplinary Proceeding Against Johnson, 114 Wash. 2d 737, 748, 790 P.2d 1227, 1232 (1990) (holding that an attorney's failure to preserve the integrity of client funds in violation of RPC 1.14 ordinarily leads to disbarment). The United States Supreme Court considers disbarment proceedings to be quasi-criminal in nature. In re Ruffalo, 390 U.S. 544, 551 (1968).
95. See Benjamin, supra note 79, at 783.
defendant attorney’s duty of care by means of expert testimony.\textsuperscript{96} When forming an opinion, an expert may rely on evidence that would not be admissible at trial.\textsuperscript{97} However, an opponent may require the expert to disclose on cross-examination the factual basis underlying the opinion.\textsuperscript{98} Thus, the plaintiff’s expert, when testifying that an attorney breached the duty of care, may rely on the fact that the attorney violated a professional ethical standard.\textsuperscript{99} Furthermore, the expert may introduce into testimony learned treatises which themselves are based at least in part on the CPR and the RPC.\textsuperscript{100} But under \textit{Hizey}, the expert may not disclose any such reliance on cross-examination.\textsuperscript{101}

When defense counsel questions the basis for the expert’s opinion, the trial judge faces the Scylla of Evidence Rule 705\textsuperscript{102} and the Charybdis of \textit{Hizey}. The trial judge must consider whether defense counsel has opened the door by inquiring into the expert’s basis.\textsuperscript{103} If so, then \textit{Hizey} has no practical effect whatsoever, as the expert is free to disclose the professional ethical standards underlying the opinion. Defense counsel faces the dilemma of opening the door or allowing the expert’s opinion to go unchallenged. If the trial judge determines that \textit{Hizey} precludes any such opening of the door, then the trial deteriorates into a battle of experts, all of whom must maintain the absurd fiction that their opinions are valid, yet not based on any extrinsic standards such as the CPR and the RPC. Finally, the plaintiff ordinarily should be able to inquire into specific instances of a witness’s conduct on cross-examination for the purpose of attacking credibility.\textsuperscript{104} If the trial judge, relying on \textit{Hizey}, strictly refuses to admit any reference to the CPR or the RPC, the resulting litigation will not reliably produce just results.\textsuperscript{105}

\begin{itemize}
  \item \textsuperscript{96} See \textit{supra} notes 12–15 and accompanying text.
  \item \textsuperscript{97} \textit{WASH. R. EVID.} 703.
  \item \textsuperscript{98} \textit{WASH. R. EVID.} 705.
  \item \textsuperscript{100} See \textit{WASH. R. EVID.} 803(a)(18).
  \item \textsuperscript{101} “[I]n a legal malpractice action . . . the jury may not be informed of the CPR or the RPC, either directly through jury instructions or through the testimony of an expert who refers to the CPR or the RPC.” \textit{Hizey}, 119 Wash. 2d at 266, 830 P.2d at 654.
  \item \textsuperscript{102} See \textit{supra} note 98 and accompanying text.
  \item \textsuperscript{103} Washington courts generally admit otherwise inadmissible evidence when the objecting party first opens the door. \textit{State v. Tarman}, 27 Wash. App. 645, 651 n.4, 621 P.2d 737, 741 n.4 (1980).
  \item \textsuperscript{104} \textit{WASH. R. EVID.} 608(b).
  \item \textsuperscript{105} The Hizeys said after the trial that confused jurors had told them, “We’re sorry . . . . We felt [Carpenter] hadn’t treated people right, but we didn’t know what to do.” Peter Lewis, \textit{Two Kinds of Justice? Whidbey Island Couple Think So—Lawyers’ Ethics Code Can’t Be Used in Suit}, \textit{Seattle Times}, July 29, 1992, at A1.
\end{itemize}

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D. Hizey ERECTS an Artificial Barrier Between Ethics and Malpractice

By foreclosing any mention of the CPR and the RPC in actions for legal malpractice, the *Hizey* court diminished the positive effect of professional ethical standards on attorney conduct. The court has insisted that professional ethical standards do not affect the common law duty of care, and the drafters disavowed any intent to do so. Nevertheless, the CPR has had a significant influence on the conduct that the public expects from attorneys. For example, the CPR more precisely defines the duty of care with respect to conflicts of interest and prohibits multiple representation that once comported with the common law duty of care. In addition, effective lawyer discipline in Washington depends upon both the threat of malpractice actions as well as all too infrequent formal disciplinary proceedings. The *Hizey* court precluded any further beneficial deterrent or educational impact of the CPR and the RPC by jealously preserving its exclusive monopoly on their use. The court should not have artificially arrested the development of the common law duty of care.

E. Hizey Creates a Preferential Double Standard for Attorneys

By refusing to admit the professional ethical standards of attorneys, the *Hizey* court established that lawyers in Washington play by different rules than laypersons. The court refused to admit as evidence mandatory professional ethical standards despite having admitted the standards of other professions as evidence of a common law duty of

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108. The Preliminary Statement provides that the CPR “define[s] the type of ethical conduct that the public has a right to expect” of lawyers. *WASH. CT. C.P.R.*, Preliminary Statement, reprinted in 80 Wash. 2d 1119, 1121 (1972).


110. In 1989, the Chief Disciplinary Counsel of the Washington State Bar Association reported receiving 1870 complaints, or 14 complaints per 100 active in-state lawyers. Of these, 59 resulted in the discipline of 17 lawyers, or 0.13% of the active in-state lawyers. This was the lowest percentage recorded since the Bar began reporting such statistics in 1981. The fact that the Bar stays any disciplinary investigation pending resolution of civil suits indicates how heavily the Bar relies on private malpractice actions to enforce professional ethical standards. *See* Leland G. Ripley, *Enforcing the Rules Through the Disciplinary Process: How the System Works*, in SECOND ANNUAL PROFESSIONAL RESPONSIBILITY INSTITUTE: ENFORCING PROFESSIONAL ETHICS 1 (Washington Law School Foundation 1990). Commentators argue as well that courts can enhance attorney compliance with professional ethical standards by admitting them as evidence in legal malpractice actions. *See supra* note 38.
In addition, the court reinforced the special treatment lawyers receive under the Consumer Protection Act (CPA). The *Hizey* court maintained that it has been open to new theories of attorney liability, but the CPA covers only the entrepreneurial aspects of the legal profession. The CPA provides no remedy at all in claims for negligence and legal malpractice. Ironically, the court held previously that the unauthorized practice of law does constitute a violation of the CPA. Thus, the plaintiff in an action for negligence against a layperson engaged in the unauthorized practice of law may introduce violations of the CPR and the RPC and request treble damages under the CPA. The plaintiff in a legal malpractice action may neither refer to professional ethical standards nor seek recovery under the CPA. The court should not have created a preferential double standard for attorney misconduct.

IV. AN ALTERNATIVE TO *HIZEY*

The *Hizey* court improperly rejected the analogy between professional ethical standards and statutes, finding the former inadmissible as evidence of an attorney's common law duty of care and creating a separate standard for attorneys in legal malpractice actions. The court instead should allow trial courts to analyze the CPR and the RPC using the Tort Reform Act and the law of evidence to determine the applicability of the CPR and the RPC in each case. By taking this approach, the court would avoid creating a preferential double standard for attorneys, ensuring fairer trials for plaintiffs in legal malpractice actions. The court should admit professional ethical standards in legal malpractice actions on the same basis as other statutes in an action for

111. See supra note 37.
112. See supra note 69 and accompanying text.
113. See supra note 69.
114. Short v. Demopolis, 103 Wash. 2d 52, 66, 691 P.2d 163, 170 (1984). The Short court acknowledged the important public policy interests at stake in refusing to extend the CPA to cover legal malpractice and thereby denying injured clients a complete remedy. Id. at 62, 691 P.2d at 168–69. In contrast, the *Hizey* court characterized the limited relief extended by *Short* as an expansive receptivity to additional theories of recovery. See supra note 69 and accompanying text.
116. See supra note 59 and accompanying text.
117. See supra notes 69, 115, and accompanying text.
118. See supra note 101.
119. See supra note 114 and accompanying text.
negligence. Washington's Tort Reform Act provides explicitly that the trier of fact may consider a violation of a statute, ordinance, or administrative rule as evidence of negligence. The court must determine that the statute, ordinance, or administrative rule is for the benefit or protection of the person injured or addressed to the particular harm suffered before it admits evidence of a violation. Applying this approach to legal malpractice, a form of negligence, a trial court would determine the applicability of professional ethical standards in the unique context of each case. When deciding whether specific CPR and RPC provisions exist for the benefit of the plaintiff, the court would distinguish between actions for malpractice by clients and those by third parties who have failed to establish an attorney-client relationship. These well established procedures would ensure that the trial court admitted evidence of professional ethical standards only when justified by the facts of each case.

After finding the CPR or the RPC relevant, the trial court then would apply the Rules of Evidence to determine the admissibility of the specific provisions at trial. The trial court would decide whether the danger of misleading the jury substantially outweighs the probative value of evidence of a violation. The defendant would bear the burden of making this showing, and the appellate courts could reverse the determination only when the trial court had abused its discretion. In addition, the trial court would have its traditional discretion in admitting otherwise inadmissible evidence when an expert

120. WASH. REV. CODE § 5.40.050 (1992). The Tort Reform Act provides in part, "A breach of a duty imposed by statute, ordinance, or administrative rule shall not be considered negligence per se, but may be considered by the trier of fact as evidence of negligence . . . ." Id.

121. WASHINGTON PATTERN JURY INSTRUCTIONS: CIVIL 60.03, at 439 (3d ed. 1989).

122. See supra notes 7–15 and accompanying text.

123. One commentator asserts that because the CPR places an extremely diverse nature of duties and standards on lawyers, the court should evaluate each provision to determine whether a violation creates a cause of action. Robert Dahlquist, The Code of Professional Responsibility and Civil Damage Actions Against Attorneys, 9 OHIO N.U. L. REV. 1, 29 (1982); see also KEETON ET AL., supra note 86, § 36, at 231 (contending that the arbitrary classification of all breaches of statutes as no negligence at all leaves too little flexibility to formulate a duty of care).


125. For a discussion regarding establishing an attorney-client relationship in Washington, see supra note 10 and accompanying text. Many courts hold that a professional ethical violation cannot give rise to a cause of action by a third party. See supra note 79.

126. WASH. R. EVID. 403.

127. 5 KARL B. TEGLAND, EVIDENCE LAW AND PRACTICE § 105, at 346 (3d ed. 1989).

testifies to the factual basis underlying an opinion,\textsuperscript{129} when testimony takes the form of a learned treatise,\textsuperscript{130} and when a plaintiff seeks to attack the defendant's credibility.\textsuperscript{131}

On the facts of \textit{Hizey}, the trial court likely would have admitted expert testimony on the CPR and the RPC as probative of Carpenter's common law duty of care. First, under the Tort Reform Act, the Hizeys would have demonstrated their status as intended beneficiaries of the CPR and the RPC by establishing their attorney-client relationship.\textsuperscript{132} Second, under the law of evidence, Carpenter would have borne the burden of proving that any possible confusion of the jury substantially outweighed the probative value of the specific CPR and RPC provisions governing conflicts of interest.\textsuperscript{133} Evidence Rule 403 traditionally has vested the court with discretion to eliminate distracting side issues.\textsuperscript{134} In \textit{Hizey}, the professional ethical standards to which the plaintiff's expert would have testified were not side issues but rather central to defining the applicable duty of care. The Hizeys' expert witness should have been free to testify that in formulating Carpenter's particular duty of care he had taken into consideration pertinent provisions of the CPR and the RPC. By eliminating the double standard protecting attorneys who injure clients when violating professional ethical standards, the \textit{Hizey} court could have ensured a fairer trial.

V. CONCLUSION

The \textit{Hizey} court erred by departing from the majority of courts and past Washington decisions and singling out legal malpractice as the one context in which professional ethical standards are inadmissible. In so doing, the court created an unworkable standard for trial courts and subverted the beneficial deterrent effects of the CPR and the RPC. The court instead should admit the CPR and the RPC on the same basis as statutes, ordinances, and administrative rules in actions for negligence. By analyzing professional ethical standards under the well

\textsuperscript{129} See \textit{supra} note 98 and accompanying text.
\textsuperscript{130} See \textit{supra} note 100 and accompanying text.
\textsuperscript{131} See \textit{supra} note 104 and accompanying text.
\textsuperscript{132} The Washington Supreme Court already has ruled that an attorney may violate the conflict-of-interest provisions of the CPR with respect to clients. \textit{See supra} note 124 and accompanying text.
\textsuperscript{133} \textit{See supra} notes 126–27 and accompanying text. By holding testimony on the CPR and the RPC to be "a makeweight capable only of misdirecting the jury," \textit{see supra} note 69 and accompanying text, the \textit{Hizey} court in effect based its decision on Evidence Rule 403 without observing the procedural safeguards inherent in the proper application of the Rules of Evidence.
\textsuperscript{134} \textit{TEGLAND, supra} note 127, § 106, at 352–53.
established guidelines of the Tort Reform Act and evidence law, courts would avoid creating a preferential double standard for lawyers in legal malpractice actions and ensure fairer trials.