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Douglas L. Getter

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STANDARD OF CARE IN MALPRACTICE ACTIONS AGAINST INSURANCE DEFENSE COUNSEL: INAPPLICABILITY OF THE CODE OF PROFESSIONAL RESPONSIBILITY

INTRODUCTION

The Code of Professional Responsibility (CPR or Code),[1] which has been adopted in some form by every state,[2] is the authoritative guideline for ethical conduct of attorneys. In its Preliminary Statement, the Code asserts that it does *not* "undertake to define standards for civil liability of lawyers for professional conduct."[3] Similarly, the Model Rules of Professional Conduct (Model Rules)[4] expressly provides that its standards should not be implemented as a measure of civil liability.[5] Despite these admonishments against use outside the disciplinary arena, courts have increasingly applied Code provisions, particularly those relating to conflicts of interest, in legal malpractice actions,[6] and

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1. Model Code of Professional Responsibility (1980) [hereinafter cited as Code].

2. R. Wise, Legal Ethics xv (Supp. 1979); Kramer, *The Appearance of Impropriety Under Canon 9: A Study of the Federal Judicial Process Applied to Lawyers*, 65 Minn. L. Rev. 243, 246 (1980).

3. Code, *supra* note 1, Preliminary Statement.

4. Model Rules of Professional Conduct (Final Draft 1982), *reprinted in* 68 A.B.A. J. Pullout Supp. (1982) [hereinafter cited as Model Rules].

5. Model Rules, *supra* note 4, Scope. The drafters of the Model Rules have only recently adopted the view that ethical standards should not be implemented in civil liability actions. Earlier drafts took the position that although violations of the Model Rules "should not necessarily result in civil liaiblity," they do have "relevance" in civil actions. Model Rules of Professional Conduct Scope (Proposed Final Draft 1981), *reprinted in* 67 A.B.A. J. Pullout Supp. (1981) [hereinafter cited as 1981 Model Rules].

6. *E.g.*, Nolan v. Foreman, 665 F.2d 738, 743 & n.9 (5th Cir. 1982) (holding that breach of the Code states cause of action for legal malpractice); Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.) (CPR standards implemented as evidence of malpractice), *cert. denied*, 449 U.S. 888 (1980); Kinnamon v. Staitman & Snyder, 66 Cal. App. 3d 893, 900-03, 136 Cal. Rptr. 321, 326 (1977) (Hanson, J., dissenting) (recognizing that the majority had used the Code as legal basis of cause of action for malpractice); Lysick v. Walcom, 258 Cal. App. 2d 136, 149, 65 Cal. Rptr. 406, 415 (1968) (attorney standard of care governed by standards of professional ethics); Ishmael v. Millington, 241 Cal. App. 2d 520, 526 n.3, 50 Cal. Rptr. 592, 596 n.3 (1966) (using violation of ethics standards to define cause of action for legal malpractice); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 473, 392 N.E.2d 1365, 1371 (1979) (using Code as the basis for evaluating malpractice liability), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980); Lipton v. Boesky, 110 Mich. App. 589, 598, 313 N.W.2d 163, 167 (1981) (using Code violations as rebuttable evidence of malpractice); Chicago Title Ins. Co. v. Holt, 36 N.C. App. 284, 292, 244 S.E.2d 177, 182 (1978) (relying on Code to dismiss malpractice action); Citizens State Bank v. Shapiro, 575 S.W.2d 375, 386 (Tex. Civ. App. 1978) (assuming without deciding that Code violation stated cause of action for legal malpractice);

"violations of the Code are frequently treated as evidence of negligence or negligence *per se*."[7] This practice has become so common that CPR use in malpractice actions has been recognized as the "majority view."[8]

Use of the CPR's directives on conflicts of interest to impose civil liability is of particular concern to the insurance defense bar.[9] The potential for conflicts of interest is inherent in the tripartite relationship, formed by the typical insurance contract, among defense counsel, insurer and insured.[10] These contracts generally give the insurer the right and the duty to defend suits against the insured.[11] The carrier retains the power to choose counsel[12] and "control" the defense

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Hansen v. Wightman, 14 Wash. App. 78, 94-98, 538 P.2d 1238, 1249-51 (1975) (CPR relevant in defining attorney's duties); *cf. In re* Mid-Atlantic Toyota Antitrust Litig., 93 F.R.D. 485, 490-91 (D. Md. 1982) (using Code to justify dismissal of class action suit); Cambron v. Canal Ins. Co., 246 Ga. 147, 151-52, 269 S.E.2d 426, 430 (1980) (using Code as part of jury instruction in civil litigation); Haynes v. First Nat'l State Bank, 87 N.J. 163, 184, 432 A.2d 890, 901 (1981) (using Code to invalidate a will).

7. Dahlquist, *The Code of Professional Responsibility and Civil Damage Actions Against Attorneys*, 9 Ohio N.U.L. Rev. 1, 2 (1982).

8. Johnston, *Attorney Accountability in Kentucky—Liability to Clients and Third Parties*, 70 Ky. L.J. 747, 768-69 (1982); *see* Underwood, *The Doctor and His Lawyer: Conflicts of Interest*, 30 U. Kan. L. Rev. 385, 388 (1982); *Developments in the Law—Conflicts of Interest in the Legal Profession*, 94 Harv. L. Rev. 1244, 1489-90 (1981) [hereinafter cited as *Conflicts of Interest*]; 14 J. Mar. L. Rev. 589, 592 (1981); *see also* R. Mallen & V. Levit, Legal Malpractice § 256 (2d ed. 1981) (very common).

9. *See* Moritz v. Medical Protective Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977); R. Mallen & V. Levit, *supra* note 8, § 523, at 623; Underwood, *supra* note 8, at 389; 69 Ill. B.J. 508, 510-11 & n.16 (1981). *See generally* Stern, *Dilemmas for Insurance Counsel—Coping with Conflicts of Interest*, 65 Mass. L. Rev. 127 (1980) (discussing difficult ethical problems defense counsel face regularly).

10. Longo v. American Policyholders' Ins. Co., 181 N.J. Super. 87, 91, 436 A.2d 577, 579 (Law Div. 1981). In some situations it may be difficult to recognize that a conflict exists. *See* R. Mallen & V. Levit, *supra* note 8, § 530, at 640-41; Underwood, *supra* note 8, at 385. In others a subtle conflict may be an accepted part of the practice. *See* Keeton, *Liability Insurance and Responsibility for Settlement*, 67 Harv. L. Rev. 1136, 1168 (1954); Morris, *Conflicts of Interest in Defending Under Liability Insurance Policies: A Proposed Solution*, 1981 Utah L. Rev. 457, 459-61. As one court recognized: "There is an inescapable tension for a lawyer, subject to ethical commands far more stringent than those of the insurance marketplace, who must be faithful to the interests of the insurer-client in control of the defense, and must also 'represent the insured as his client with undivided fidelity.' " Moritz v. Medical Protective Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977) (quoting ABA Comm. on Professional Ethics, Formal Op. 282 (1950)).

11. *E.g.*, R. Keeton, Basic Text on Insurance Law 658 app. G (1971) (General Liability—Automotive Policy); P. Magarick, Excess Liability 348 app. I (2d ed. 1982) (Basic Automobile Liability Policy); *see* Sargent v. Johnson, 551 F.2d 221, 230 n.12 (8th Cir. 1977); Moritz v. Medical Protective Co., 428 F. Supp. 865, 871-72 (W.D. Wis. 1977).

12. Moritz v. Medical Protective Co., 428 F. Supp. 865, 871-72 (W.D. Wis. 1977); Merritt v. Reserve Ins. Co., 34 Cal. App. 3d 858, 870, 110 Cal. Rptr. 511, 519

through the right to defend or settle a liability suit as it deems expedient.[13] Defense counsel's simultaneous duties of loyalty to the insurer and the insured do not conflict when the interests of all parties coincide.[14] Conflicts may arise, however, in suits in which the insured faces liability in excess of his coverage,[15] or when the insured wishes to proceed to trial despite the insurer's desire to limit its liability through settlement.[16]

When an insured is sued for an amount in excess of his coverage, he may fear excess judgment and consequent personal liability and thus demand settlement for the policy limits regardless of the circumstances.[17] The insurance company, on the other hand, may not believe that payment of all or part of the policy is warranted, and may wish to proceed to trial.[18] Defense counsel, with duties of loyalty running to each party, is caught in the middle.

(1973); American Home Assurance Co. v. Weissman, 79 A.D.2d 923, 925, 434 N.Y.S.2d 410, 412 (1981); P. Magarick, *supra* note 11, § 3.06, at 52; *see* R. Mallen & V. Levit, *supra* note 8, § 522, at 621; Morris, *supra* note 10, at 465 & n.25.

13. Eureka Inv. Corp. v. Chicago Title Ins. Co., 530 F. Supp. 1110, 1117 (D.D.C. 1982); Griggs v. Bertram, 88 N.J. 347, 360, 443 A.2d 163, 169 (1982); R. Keeton, *supra* note 11, at 658; *see* Continental Ins. Co. v. Bayless & Roberts, Inc., 608 P.2d 281, 284 n.1 (Alaska 1980).

14. Lysick v. Walcom, 258 Cal. App. 2d 136, 146, 65 Cal. Rptr. 406, 413 (1968); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 473, 392 N.E.2d 1365, 1371 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980); Weithers, *The Coverage Role of Defense Counsel*, 48 Ins. Cons. J. 156, 156 (1981).

15. Longo v. American Policyholders' Ins. Co., 181 N.J. Super. 87, 92, 436 A.2d 577, 580 (Law Div. 1981); Alleman, *The Reasonable Thing To Do: The Insurer's Duty to Settle Claims Against Its Insured*, 50 UMKC L. Rev. 251, 252 (1982); Keeton, *supra* note 10, at 1136; Morris, *supra* note 10, at 466-67; Weithers, *supra* note 14, at 157.

16. Lieberman v. Employers Ins., 84 N.J. 325, 340, 419 A.2d 417, 425 (1980); P. Magarick, *supra* note 11, § 3.02, at 46-47; Alsobrook, *Conflicts Between the Insurer and Insured*, 48 Ins. Couns. J. 165, 166 (1981).

17. R. Mallen & V. Levit, *supra* note 8, § 539, at 661-62; Comment, *An Insurer's Failure to Settle: Standing Under the Stowers Doctrine, Texas Deceptive Trade Practices Act, and Article 21.21 of The Insurance Code*, 34 Baylor L. Rev. 441, 456 (1982) [hereinafter cited as *An Insurer's Failure*]; *see* Gallagher & German, *Resolution of Settlement Conflicts Among Insureds, Primary Insurers, and Excess Insurers: Analysis of the Current State of the Law and Suggested Guidelines for the Future*, 61 Neb. L. Rev. 284, 289 (1982).

18. The contractual right of the insurance company to choose trial over settlement has been tempered by the "universally accepted" cause of action for bad faith in settlement negotiations. Note, *Insurance Settlements: An Insured's Bad Faith*, 31 Drake L. Rev. 877, 877 (1982) (discussing the duty of both the insurer and insured to act in good faith in settlement negotiations) [hereinafter cited as *Insured's Bad Faith*]. The insurer that disregards the interests of the policyholder in declining to accept a reasonable settlement offer may find itself liable to the insured (or his assignee) in the event of a jury verdict in excess of policy limits. *E.g.*, Feliciano v. United Servs. Auto. Ass'n, 646 F.2d 695, 697-98 (1st Cir. 1981); Hayes Bros. v.

The concerns of the policyholder and the carrier may be reversed in a professional liability suit[19] in which the insurer is typically precluded from making settlement without the consent of the insured.[20] The policyholder may wish to go to trial to clear his name and avoid increased premiums.[21] The insurer, however, may believe that valid consent has been obtained or that an exception to the policy exists[22] and wish to seize the opportunity, through settlement, to substantially mitigate its potential liability. Again, defense counsel's duties of loyalty are put in tension.[23]

The CPR was not drafted to address the unique predicament of the insurance defense bar. Continued excessive reliance on the Code will place insurance counsel in a difficult position in deciding whether

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Economy Fire & Casualty Co., 634 F.2d 1119, 1122-23 (8th Cir. 1980); Offshore Logistics Servs., Inc. v. Arkwright-Boston Mfrs. Mut. Ins. Co., 469 F. Supp. 1099, 1103-04 (E.D. La. 1979), *modified and affirmed*, 639 F.2d 1142 (1981); Knobloch v. Royal Globe Ins. Co., 38 N.Y.2d 471, 479-80, 381 N.Y.S.2d 433, 437-38, 344 N.E.2d 364, 369-70 (1976). For comprehensive analyses of the bad faith situation, see P. Magarick, *supra* note 11, chs. 10-12; Allen, *Insurance Bad Faith Law: The Need for Legislative Intervention*, 13 Pac. L.J. 833 (1982); *Annual Survey of South Carolina Law* (Jan. 1—Dec. 31, 1979), 32 S.C.L. Rev. 1 (1980) (Business Law Section); Comment, *Insurers' Liability for Excess Judgments in Virginia: Negligence or Bad Faith?*, 15 U. Rich. L. Rev. 153 (1980); Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims—An Emerging Trend*, 45 Fordham L. Rev. 164 (1976); Note, *Insurers' Bad Faith: A New Tort for Kansas?*, 19 Washburn L.J. 467 (1980).

19. 33 Rutgers L. Rev. 1199, 1202-03 (1981); *see Insured's Bad Faith*, *supra* note 18, at 878 (hypothetical example).

20. *E.g.*, The St. Paul Liability Policy (Lawyers' Professional Liability Coverage Form), *reprinted in* R. Mallen & V. Levit, *supra* note 8, at 605 app. (1st ed. 1977); Evanston Ins. Co., Lawyers Professional Liability Insurance Policy, *reprinted in* D. Meiselman, Attorney Malpractice: Law and Procedure § 21.7, at 329, 335 (1980).

21. *See* Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 476, 392 N.E.2d 1365, 1373 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980); Lieberman v. Employers Ins., 84 N.J. 325, 341, 419 A.2d 417, 425 (1980); Aquilina v. O'Connor, 59 A.D.2d 454, 456, 399 N.Y.S.2d 919, 920 (1977).

22. For an example of consent, see Lieberman v. Employers Ins., 84 N.J. 325, 331, 419 A.2d 417, 420 (1980). For an example of an exception, see Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 470-71, 392 N.E.2d 1365, 1369-70 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

23. A third common area of conflict in which the carrier's interests are brought in direct conflict with those of the insured are underlying coverage disputes. J. Kircher & J. Quinn, Insurer's Duty to Defend—An Overview 24-27 (DRI Monograph No. 3, 1978); Fager, *Insured's Right to Independent Counsel In Conflicts of Interest Situations*, 48 Ins. Couns. J. 160, 160-61 (1981). Generally the defense attorney should not involve himself in these coverage disputes because the conflicts of interest are so pronounced. Bianchesi, *Coverage Disputes with the Insured; The Insurer's Perspective*, 48 Ins. Couns. J. 153, 153 (1981); Weithers, *supra* note 14, at 156-57. Consequently, this Note does not discuss such conflicts.

they may continue or even accept employment.[24] And as their ability to pursue their unique practice[25] is threatened, insurance rates may be expected to skyrocket because two attorneys may be needed to perform a task handled presently by one.[26]

Part I of this Note demonstrates how excessive reliance on the Code to impose civil liability on insurance defense counsel suffers from inflexibility and vagueness, and provides plaintiffs' counsel with a weapon to force defense counsel into a precarious position. It also demonstrates that the standard of care resulting from excessive Code use—a standard of singular loyalty—raises more problems than it would solve. Part II analyzes the traditional malpractice theory of professional negligence and contends that its standard of care, based on reasonableness in light of all relevant circumstances, is the only viable standard by which the performance of insurance defense counsel may be measured.[27]

I. Inapplicability of the Code

Canon 5 of the CPR contains general prohibitions against the representation of clients with conflicting interests.[28] Its only direct, albeit unhelpful, reference to the insurance bar is in Ethical Consideration (EC) 5-17, in which the insurer-insured relationship is mentioned as a "recurring [situation] involving potentially differing interests."[29]

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24. *See* Guy, *Insurance Counsel: Liability Still Requires Negligence*, 23 For The Def., Apr. 1981, at 10, 18 (noting that defense counsel may be involved in potential conflict in all cases, and therefore faces possible liability). See *supra* text accompanying notes 14-22.

25. R. Mallen & V. Levit, *supra* note 8, § 522, at 620; Dondanville, *Defense Counsel Beware: The Perils of Conflicts of Interest*, 18 Forum 62, 62 (1982); Weithers, *supra* note 14, at 156.

26. See *infra* notes 93-96 and accompanying text.

27. It may be argued that the same arguments against Code use in malpractice actions against insurance defense counsel, see *infra* notes 36-87 and accompanying text, apply equally to use in disciplinary proceedings against such counsel. If this is so, the traditional reasonableness standard, see *infra* notes 109-25 and accompanying text, might also be more appropriate than Code standards in disciplinary proceedings against insurance counsel. This Note, however, addresses only Code use in malpractice actions.

28. Code, *supra* note 1, Canon 5 ("A Lawyer Should Exercise Independent Professional Judgement on Behalf of a Client.").

29. Code, *supra* note 1, EC 5-17. The American Bar Foundation's Annotated Code of Professional Responsibility (1979) [hereinafter cited as Annotated Code], however, describes the representation of insurers and insureds as "[a]n unresolved area of conflict [for which, in] the Code itself, no specific guidance is offered to the attorney." *Id.* at 233. In Moritz v. Medical Protective Co., 428 F. Supp. 865 (W.D. Wis. 1977), the court remarked that "[t]he law and the canons of ethics defining and governing [the tripartite] relationship are surprisingly unclear." *Id.* at 872. One author, in discussing the plight of the defense attorney, noted recently that "the Code

Counsel faced with a conflict of interests is directed by Disciplinary Rule (DR) 5-105[30] to take one of three actions: (A) decline employment;[31] (B) withdraw from employment;[32] or (C) continue representation if it is obvious that adequate representation of each client may be ensured after full disclosure and client consent.[33] Courts that treat CPR violations as tantamount to negligence per se often rationalize this practice by reasoning that the Code embodies or is strong evidence of the common-law duties owed by an attorney to his client.[34]

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provides little guidance to assist an attorney in identifying specific conflicts peculiar to insurance defense litigation . . . . The Code also provides no guidelines for assessing the consequences that might flow from a given conflict." Underwood, *supra* note 8, at 389. Another contemporary commentator posits that "[t]he search for clear standards in legal ethics is a nightmare worthy of the most horrifying Kafka novel." Aultman, *Legal Fiction Becomes Legal Fantasy*, 7 J. Legal Prof. 31, 34 (1982). Accordingly, there is great difficulty in applying the general precepts of the Code to a specific factual situation.

30. Code, *supra* note 1, DR 5-105.

31. *Id.* DR 5-105(A).

32. *Id.* DR 5-105(B).

33. *Id.* DR 5-105(C). DR 5-105(A)-(C) provides:

> Refusing to Accept or Continue Employment if the Interests of Another Client May Impair the Independent Professional Judgment of the Lawyer.
> (A) A lawyer shall decline proffered employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by the acceptance of the proffered employment, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (B) A lawyer shall not continue multiple employment if the exercise of his independent professional judgment in behalf of a client will be or is likely to be adversely affected by his representation of another client, or if it would be likely to involve him in representing differing interests, except to the extent permitted under DR 5-105(C).
> (C) In the situations covered by DR 5-105(A) and (B), a lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such respresentation on the exercise of his independent professional judgment on behalf of each.

34. Lipton v. Boesky, 110 Mich. App. 589, 597-98, 313 N.W.2d 163, 166-67 (1981); Hansen v. Wightman, 14 Wash. App. 78, 94-95, 538 P.2d 1238, 1249-50 (1975); R. Mallen & V. Levit, *supra* note 8, § 122, at 214; Dahlquist, *supra* note 7, at 2; Underwood, *supra* note 8, at 388; *Conflicts of Interest*, *supra* note 8, at 1489; *see* Woodruff v. Tomlin, 616 F.2d 924, 936 (6th Cir.), *cert. denied*, 449 U.S. 888 (1980); Kinnamon v. Staitman & Snyder, 66 Cal. App. 3d 893, 896-97, 136 Cal. Rptr. 321, 323-24 (1977); Lysick v. Walcom, 258 Cal. App. 2d 136, 149, 65 Cal. Rptr. 406, 415 (1968); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 472-73, 392 N.E.2d 1365, 1371 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980). *Contra* Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978) (Code not a basis for private action); Ayyildiz v. Kidd, 220 Va. 1080, 1085, 266 S.E.2d 108, 112 (1980) (same). A second rationale, drawing an analogy between Code implementation and the accepted use of criminal or regulatory statutes in negligence litigation, has also been recognized in malpractice litigation. Lipton v. Boesky, 110 Mich. App. 589, 597, 313 N.W.2d 163, 166 (1981); Wolfram, *The Code of Professional Responsibility*

These courts ignore three persuasive arguments against Code use outside the disciplinary context, and particularly in insurance defense malpractice actions:[35] the Code's inflexibility, its vagueness and its potential use as a weapon. Additionally, these courts fail to consider the ultimate consequence of Code use—the imposition of a standard of singular loyalty—and its potential effect on insurance practice.

A. *Arguments Against Code Use*

1. Inflexibility

Because DR 5-105(A) and (B) require counsel to withdraw or decline employment in conflict of interest situations,[36] to adopt these sections as establishing a standard of care would remove the discretionary element necessary for counsel to function in the insurance setting.[37] Insurance lawyers would be forced to choose between declining employment and continually facing malpractice exposure be-

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as a Measure of Attorney Liability in Civil Litigation, 30 S.C.L. Rev. 281, 286 (1979); *Conflicts of Interest*, *supra* note 8, at 1489. *But see* Bob Godfrey Pontiac, Inc. v. Roloff, 630 P.2d 840, 844-47 (Or. 1981) (rejecting statute analogy). Although a majority of courts do not currently recognize a cause of action for Code violations alone, Dalhquist, *supra* note 7, at 2, such use of the CPR has gained increased acceptance, *id.*; Johnston, *supra* note 8, at 768-69.

35. Commentators have acknowledged 4 general arguments against Code use in civil litigation: 1) Total expansion of the CPR, where all violations serve as negligence per se, would lead to a "floodgate" of litigation, Dahlquist, *supra* note 7, at 16, and all claims phrased in the language of Code infractions, meritorious or not, would survive motions to dismiss and threaten to bog down an already overburdened court system. *Id.*; Wolfram, *supra* note 34, at 295; 2) Because the burden of proof in disciplinary hearings, "clear and convincing evidence," 30 De Paul L. Rev. 499, 501 (1981), differs in degree from the burden in civil actions, "preponderance of the evidence," Dahlquist, *supra* note 7, at 19 n.117, rules designed for one may not be applicable to the other, *see id.* at 19; 30 De Paul L. Rev. 499, 501 (1981), and proof that may not satisfy the burden at a disciplinary hearing might be sufficient in a liability action, leading to the injustice of finding civilly actionable behavior that would not subject an attorney to discipline, *see* 30 Drake L. Rev. 937, 943 (1981); 3) due to fundamental differences between the "standard of conduct" applied in a disciplinary action and that applied in a civil damages action, Code use is misguided, Dahlquist, *supra* note 7, at 18, because while some situations clearly require money damages, others justify sanctions against the attorney, *id.*, and a merger of the two systems would likely bring about inequitable results; and 4) the overall vagueness of the CPR precludes it from mandating a standard of civil liability, *see id.* at 20, and creates great difficulty in applying its general tenets to a specific situation, Wolfram, *supra* note 34, at 294-95.

36. See *supra* notes 31-32 and accompanying text.

37. At the center of the tripartite relationship the insurance attorney must evaluate liability actions in the face of the divergent interests of the carrier and the insured. *See* Longo v. American Policyholders' Ins. Co., 181 N.J. Super. 87, 91-92, 436 A.2d 577, 579-80 (Law Div. 1981); Leake, *The Role of Defense Counsel Regarding Settlement Demands and Opportunities*, 48 Ins. Couns. J. 169, 169 (1981).

cause a multiplicity of client interests is a fixture of the tripartite relationship.[38]

For example, in *Lieberman v. Employers Insurance*,[39] defense counsel was found to have committed actionable negligence by settling a medical malpractice action against the insured's desire rather than withdrawing from representation.[40] The insured had consented to settlement,[41] but upon learning of possible fraud on the part of the plaintiff-patient, he attempted to revoke his consent.[42] The insurance company refused to honor the revocation and so informed defense counsel.[43] The insurer and defense counsel concluded that defense of the malpractice claim would be "almost impossible,"[44] but continued to prepare for trial.[45] Finally, at a judge-initiated pretrial conference, the plaintiff offered to settle his $3,000,000 claim for $50,000. Defense counsel was instructed by the insurer to settle and did so without consulting the insured.[46]

In finding actionable negligence the Supreme Court of New Jersey held "[t]he attorney's professional dereliction . . . consisted of his failure to inform [the insured] of the clear conflict of interests and his subsequent failure either to withdraw from the case completely or to terminate his representation of either the insured or the insurer."[47] This standard may be traced to DR 5-105 (A) and (B).[48]

The facts indicate that although in hindsight a conflict may have existed at the point the insurer dishonored the insured's withdrawal of consent, a "clear conflict" of interest did not arise until the parties met in judge's chambers immediately before trial.[49] To require counsel to withdraw at this time, however, would not only be "most impracti-

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38. See *supra* note 10 and accompanying text.

39. 84 N.J. 325, 419 A.2d 417 (1980).

40. *Id.* at 340, 419 A.2d at 425.

41. *Id.* at 331, 419 A.2d at 420.

42. *Id.* at 331-32, 419 A.2d at 420.

43. *Id.* at 332, 419 A.2d at 420-21.

44. *Id.* at 331, 419 A.2d at 420.

45. *See id.* at 333, 419 A.2d at 421. The trial had been scheduled and adjourned 11 times. On the date of settlement defense counsel had put the insured "on call" for trial. *Id.*

46. *Id.* at 332-33, 419 A.2d at 421.

47. *Id.* at 340, 419 A.2d at 425. The court also stated that defense counsel's active participation in settlement against his client's wishes was actionable. *Id.*

48. *See* Code, *supra* note 1, DR 5-105(A) & (B); *see also* 33 Rutgers L. Rev. 1199, 1210 & n.94 (1981) (recognizing court's language stems from CPR Canon 5).

49. 84 N.J. at 340, 419 A.2d at 425. Defense counsel had explored both settlement and trial possibilities, *id.* at 333, 419 A.2d at 421, seemingly a prudent course in light of the insured's earlier indecision over the propriety of settling. Without the benefit of hindsight, it was not until a reasonable offer was put forth by the plaintiff immediately preceding trial that defense counsel was put in a position in which the interests of one client *clearly* conflicted with the other.

cal, if not impossible,"[50] but might also constitute a violation of DR 2-110,[51] in which the lawyer is admonished not to withdraw until he takes reasonable steps to avoid prejudice to his client.[52] *Lieberman* is noteworthy not so much for its ultimate finding of negligence, but for the court's reasoning whereby insurance counsel is required either to withdraw, decline employment or face malpractice liability.

Requiring insurance defense counsel to withdraw at all points of conflict would effectively put an end to the well-established and usually effective representation arrangement created by insurance contracts.[53] DR 5-105(C), in response to this inflexibility, attempts to prescribe a standard for valid representation of adverse clients.[54] Unfortunately, this provision of the Code poses problems to insurance counsel as significant as those created by the mandatory withdrawal requirements of DR 5-105(A) and (B).

2. Vagueness

Valid representation of divergent interests under DR 5-105(C) is predicated on two "nebulous"[55] factors: "full disclosure of the possible effect of such representation on [the attorney's] independent professional judgment" and "obvious [ability to] adequately represent the interest of each [client]."[56] The problem with using the "full disclosure" language of DR 5-105(C) as the standard of care is that it gives the attorney little guidance regarding the nature of the information

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50. Haskell, *Insurance Defense Lawyers Face Liability Over Conflicts of Interests*, Nat'l L.J., Feb. 25, 1980, at 27, col. 1; *see* Stanley, *A Defense Lawyer's Dilemma*, 14 Forum 693, 697-98 (1981).

51. Code, *supra* note 1, DR 2-110.

52. *Id.* DR 2-110(A)(2).

> In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

Id. The Code, however, also calls for mandatory withdrawal if the attorney "knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule." *Id.* DR 2-110(B)(2). In the insurance context this rule is most difficult to follow because many conflicts and subsequent alternatives do not manifest themselves until viewed in hindsight. *See* R. Mallen & V. Levit, *supra* note 8, § 162, at 260 (citing insurance cases); 30 Drake L. Rev. 937, 946 (1981).

53. *See* P. Magarick, *supra* note 11, at 60; Weithers, *supra* note 14, at 156. See *supra* notes 10-14 and accompanying text.

54. *See* Code, *supra* note 1, DR 5-105(C).

55. ABC Trans Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817, 830, 413 N.E.2d 1299, 1310 (1980).

56. Code, *supra* note 1, DR 5-105(C). For the full text of DR 5-105(C), see *supra* note 33.

that must be imparted to the insured.[57] This shortcoming is illustrated by the Illinois decision in *Rogers v. Robson, Masters, Ryan, Brumund & Belom*.[58]

In *Rogers*, pursuant to a valid policy exclusion, consent of the insured to settlement was unnecessary.[59] The insurer exercised its contractual right to settle and its counsel, under the tripartite relationship, negotiated a settlement without informing the insured.[60] The court used Canon 5 of the CPR to establish a standard of care, holding that the failure to disclose was itself a sufficient basis for professional negligence.[61] On appeal, the Illinois Supreme Court acknowledged the defense contention that the lower court had used "a violation of the canons or disciplinary rules of the [Code to establish] a *per se* basis for imposing liability on an attorney in a malpractice action,"[62] but nevertheless sidestepped the issue, and affirmed the finding of negligence solely on the failure to disclose.[63]

In agreeing that the attorney had failed to satisfy the general disclosure requirements embodied in DR 5-105, the court provided no specific guidance as to what a lawyer is required to disclose.[64] Arguably, the court would not have found negligence if counsel had informed the insured that the carrier intended to exercise its contractual right to settle,[65] a meaningless gesture given the contractual settlement provisions. The "thin line between malpractice and professional responsibility"[66] becomes an absurdity when liability may be predicated on the failure to carry out a meaningless ritual. Assuming that more than a meaningless gesture is required, insurance defense counsel is still in a quandary because *Rogers* left open the question of exactly what and how much disclosure is required.[67]

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57. Fordham, *There are Substantial Limitations on Representation of Clients in Litigation Which are not Obvious in the Code of Professional Responsibility*, 33 Bus. Law. 1193, 1205 (1978); *Conflicts of Interest*, *supra* note 8, at 1312 n.137; *see* Moritz v. Medical Protective Co., 428 F. Supp. 865, 871-72 (W.D. Wis. 1977); Underwood, *supra* note 8, at 389.

58. 74 Ill. App. 3d 467, 392 N.E.2d 1365 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

59. *Id.* at 470, 392 N.E.2d at 1369.

60. *Id.* at 469, 392 N.E.2d at 1368.

61. *Id.* at 472-74, 392 N.E.2d at 1371-72.

62. Rogers v. Robson, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 204, 407 N.E.2d 47, 48 (1980).

63. *Id.* at 205-06, 407 N.E.2d at 49.

64. *Id.*; 30 De Paul L. Rev. 499, 518 (1981); 69 Ill. B.J. 508, 510 (1981); *see* 30 Drake L. Rev. 937, 947 (1981).

65. *See* Dondanville, *supra* note 25, at 65.

66. Haskell, *supra* note 50, at 27, col. 1 (referring specifically to insurance defense practice).

67. *Rogers* also failed to address a fundamental problem raised by applying Code restraints to the tripartite relationship: If the attorney assigned by the carrier cannot

In fact, courts have differed widely in their interpretation of the amount and type of disclosure necessary.[68] The danger arises that if a court does not feel disclosure was adequate based upon the Code, it may find the attorney negligent per se, even though that attorney based his disclosure on accepted insurance practice.[69] In recognition of defense counsel's dual set of responsibilities, the adequacy of disclosure should be interpreted with a degree of reasonableness in light of the specific circumstance.

The other language of DR 5-105(C)—"obvious that he can adequately represent"[70]—is also too vague to serve as a standard of civil

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ethically settle, who can? *See* R. Mallen & V. Levit, *supra* note 8, § 539, at 663 n.14. It appears that no appointed counsel may receive valid settlement authority due to the ethical straightjacket imposed by the CPR. If the insured is deemed to have the last word on settlement, Code use would then effectively rewrite contractual provisions regarding control of the defense. *See* Guy, *supra* note 24, at 14; 30 De Paul L. Rev. 499, 518 (1981). If the insurer is permitted to settle, the court merely will have drawn a distinction without a difference between the attorney and insurance carrier, except that settlement by counsel would be tantamount to malpractice, while the very same settlement by the insurer would be acknowledged as sound insurance practice.

68. *Compare In re* Lanza, 65 N.J. 347, 352-53, 322 A.2d 445, 448 (1974) (holding that disclosure is a question for the attorney in light of the circumstances) *with* McAlinden v. Wiggins, 543 F. Supp. 1004, 1006 (S.D.N.Y. 1982) (requiring attorney to disclose potential ramifications of joint representation) *and* Jedwabny v. Philadelphia Transp. Co., 390 Pa. 231, 235, 135 A.2d 252, 254 (1957) (defining disclosure as requiring explanation of the possible adverse effect on representation), *cert. denied*, 355 U.S. 966 (1958) *and* Maryland Casualty Co. v. Peppers, 64 Ill. 2d 187, 198, 355 N.E.2d 24, 31 (1976) (requiring attorney to disclose existence of conflict) *and* Fulton v. Woodford, 26 Ariz. App. 17, 20, 545 P.2d 979, 982 (1976) (same) *and* Lysick v. Walcom, 258 Cal. App. 2d 136, 147, 65 Cal. Rptr. 406, 414 (1968) (requiring attorney to disclose all facts so that the client can make an intelligent decision regarding the adequacy of representation) *and In re* Farr, 264 Ind. 153, 167, 340 N.E.2d 777, 785 (1976) (same). *See generally* Annotated Code, *supra* note 29, at 243-44 (discussing difficulty in ascertaining "full disclosure").

69. Under the CPR an attorney must disclose "the possible effect of such representation on the exercise of his independent professional judgment." Code, *supra* note 1, DR 5-105(C). Therefore, if defense counsel does not disclose a conflict's effect on the exercise of his independent professional judgment to the satisfaction of the court, liability may be found. It was recently noted in an analysis of DR 5-105 that "beyond these general guidelines, it remains unclear precisely what full disclosure entails." *Conflicts of Interest*, *supra* note 8, at 1312 n.137. This problem is compounded because different courts implement different disclosure standards. See *supra* note 68. The drafters of the Model Rules have abandoned the term "disclosure," 1981 Model Rules, *supra* note 5, Rule 1.7, and now require "consultation," Model Rules, *supra* note 4, Rule 1.7. The Model Rules further require that consultation include "explanation of the implications of the common representation and the advantages and risks involved." *Id.* Rule 1.7(b)(2). One commentator has suggested that the Model Rules standard is superior to that of the CPR. Dondanville, *supra* note 25, at 67.

70. Code, *supra* note 1, DR 5-105(C). See *supra* note 33, for full text.

liability.[71] As noted recently in one study, "[t]he Code does not indicate how clear a conflict must be in order for representation to be inadequate."[72] Nor does it give any indication of when it becomes "obvious" that one can represent a client under a conflict situation.[73] Code language alone, therefore, cannot stand as a liability standard, but rather "necessitate[s] explanation and expert testimony"[74] both of which would be lost if DR 5-105(C) established negligence per se.[75]

Even if counsel satisfies all the appropriate ethical requirements, he still may not be assured that his continued representation of dual interests will be permissible. Some courts have found attorney disclosure and client consent inapposite to conflict situations.[76] If such a court finds even "the potential for irreconcilable conflict"[77] it may hold the insured's consent invalid.[78] Because the potential for conflict is an inherent feature of the tripartite relationship, the insurance defense lawyer can never be confident that a client's consent will be held valid. In sum, the standard in DR 5-105(C) is too vague and the consequences of its use too uncertain to serve as a standard for imposing civil liability.

3. Code as a Weapon

Use of the Code to impose malpractice liability enables plaintiff's counsel to create and use conflict situations to his advantage.[79] Plain-

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71. *See* Dondanville, *supra* note 25, at 66-67; Fordham, *supra* note 57, at 1204-05; Underwood, *supra* note 8, at 388-89; *Conflicts of Interest*, *supra* note 8, at 1304-05.

72. *Conflicts of Interest*, *supra* note 8, at 1304 (footnote omitted).

73. Fordham, *supra* note 57, at 1204 ("Whether 'it is obvious'—so that you can [adequately represent each client] with consent after full disclosure—is an interesting question. It is fair to say that what is and is not 'obvious' within the meaning of DR 5-105(C) is not obvious. Nor is there any guidance in the case law.").

74. Dahlquist, *supra* note 7, at 25.

75. 69 Ill. B.J. 508, 510 n.16 (1981). If ethical rules were used to create a standard of negligence per se, courts would not have to look any further than the rules themselves to find actionable conduct. *See* Comment, *Violation of the Code of Professional Responsibility as Stating a Cause of Action in Legal Malpractice*, 6 Ohio N.U.L. Rev. 692, 699 (1979).

76. *See* Valley Title Co. v. Superior Court, 124 Cal. App. 3d 867, 882, 177 Cal. Rptr. 643, 651-52 (1981); Klemm v. Superior Court, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509, 512 (1977); Greene v. Greene, 47 N.Y.2d 447, 451-52, 391 N.E.2d 1355, 1357-58, 418 N.Y.S.2d 379, 381-82 (1979); Kelly v. Greason, 23 N.Y.2d 368, 378, 244 N.E.2d 456, 462, 296 N.Y.S.2d 937, 945-46 (1968). *But see* Arcon Constr. Co. v. State Dep't of Transp., 314 N.W.2d 303, 307 (S.D. 1982) (consent held valid).

77. Greene v. Greene, 47 N.Y.2d 447, 451, 391 N.E.2d 1355, 1358, 418 N.Y.S.2d 379, 381-82 (1979).

78. *Id.* See *supra* note 76.

79. Lindgren, *Toward a New Standard of Attorney Disqualification*, 1982 A.B. Found. Res. J. 419, 434-35; Underwood, *supra* note 8, at 386; *cf.* Smiley v. Manches-

tiff must simply offer settlement below policy limits but in excess of a normally acceptable value to the carrier.[80] If defense counsel rejects settlement and proceeds to trial he risks an excess judgment and subsequent malpractice liability for failing to represent the insured's best interests. In the event of an excess judgment, the insured may be permitted to assign to the plaintiff, in return for a covenant not to sue, any cause of action he might have against defense counsel arising out of the liability suit.[81] For this reason, it was recently recognized that "plaintiff's counsel [will] exploit such conflicts to obtain settlement leverage or an additional 'deep pocket,' the unwary defense counsel."[82]

If, on the other hand, defense counsel pushes for settlement just within policy limits for the sole benefit of the insured, he risks the loss of future employment by the insurer.[83] As one commentator stated:

> Defense counsel who become too independent and cause unnecessary problems for the carrier in their zeal to protect rights of the

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ter Ins. & Indem. Co., 71 Ill. 2d 306, 308, 375 N.E.2d 118, 119 (1978) (plaintiff's attorney sought to establish "bad faith" on part of insurance company at pretrial negotiations so that in event of excess judgment, damages would be collectible against the carrier).

80. *See* R. Mallen & V. Levit, *supra* note 8, § 528, at 637 (defense counsel liability increasing because of plaintiff's counsel's use of structured settlement demands); *cf.* Lindgren, *supra* note 79, at 434-35 (discussing tactic of offering different settlements to co-defendants). Insurance company adjusters regularly arrive at acceptable monetary values for plaintiff's damages. H.L. Ross, Settled Out of Court 106-16 (1980).

81. 20B J. Appelman, Insurance Law and Practice § 11,771, at 72-74 (1980); *see* Lysick v. Walcom, 258 Cal. App. 2d 136, 144, 65 Cal. Rptr. 406, 412 (1968). The assignability of excess judgment actions against the insurer by the insured to the plaintiff is generally accepted. *See* Liberty Mut. Ins. Co. v. Davis, 412 F.2d 475, 484-85 (5th Cir. 1969); Smiley v. Manchester Ins. & Indem. Co., 13 Ill. App. 3d 809, 813, 301 N.E.2d 19, 22 (1973). Courts disagree, however, whether a cause of action for legal malpractice may be assigned. R. Mallen & V. Levit, *supra* note 8, § 76. *Compare* Collins v. Fitzwater, 277 Or. 401, 407-09, 560 P.2d 1074, 1078 (1977) (assignable) *with* Christison v. Jones, 83 Ill. App. 3d 334, 339, 405 N.E.2d 8, 11 (1980) (not assignable). Even if a claim were not assignable, the defense attorney would not be immune from an action brought by the insurer for mishandling the liability suit. R. Mallen & V. Levit, *supra* note 8, § 527, at 633-35; Keeton, *supra* note 10, at 1173; *see* Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, 307, 375 N.E.2d 118, 119 (1978).

82. Underwood, *supra* note 8, at 386.

83. *Joint Program of Defense Research Committee and Defense Research Institute: "Whose Case Is It Anyway?"*, 49 Ins. Couns. J. 445, 455 (1982) (remarks of Mr. Wendorff) [hereinafter cited as *Joint Program*]; *see* Schwartz v. Sar Corp., 19 Misc. 2d 660, 666, 195 N.Y.S.2d 496, 503 (Sup. Ct.) (recognizing the natural tie of the insurance counsel to the carrier), *rev'd on other grounds*, 9 A.D.2d 910, 195 N.Y.S.2d 819 (1959); 30 Drake L. Rev. 937, 947 (1981) (addressing the reality of defense counsel's dependence on insurance company as major source of income).

> insured because of an actual or perceived conflict of interest between the insured and the carrier run the risk of being removed from the carrier's roster of defense counsel.[84]

From the plaintiff's view, the opportunity is great for a substantial recovery without the burden of going to trial.

In either case, plaintiff's counsel has strong incentive to create and exploit conflict situations. This result certainly was not intended by the drafters of the CPR who created the Code as an "incentive for the highest possible degree of ethical conduct,"[85] and not as a means for decimating the insurance bar.

The CPR does not lend itself to use in insurance counsel malpractice litigation as it was neither designed for, nor is it capable of factoring in, the realities of insurance defense practice.[86] There must be room for discretion when judging the insurance defense lawyer because the per se limitations found in the Code are "wooden and arbitrary," and therefore not applicable to insurance counsel's unique conflicts.[87]

B. *Effects of a Singular Loyalty Standard*

The CPR is a codification of common-law fiduciary obligations,[88] and malpractice claims against insurance defense lawyers have been phrased, not only as CPR violations, but as failures of counsel to fulfill their fiduciary obligation of undivided loyalty.[89] Courts that construe a violation of the CPR or this fiduciary duty as actionable malpractice impose a standard of singular loyalty upon defense counsel. In the typical attorney-client relationship, violation of the duty of undivided loyalty should be actionable.[90] In the insurance defense setting, however, a duty of strict undivided loyalty is unworkable.[91]

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84. *Joint Program*, *supra* note 83, at 455 (remarks of Mr. Wendorff).

85. Code, *supra* note 1, Preamble.

86. *See* D. Meiselman, *supra* note 20, § 19:5, at 296; *see also* Code, *supra* note 1, Preamble (the Code does not address all situations an attorney may encounter). See *supra* notes 9-22 and accompanying text (discussing problems inherent in insurance defense work that distinguish insurance counsel from ordinary attorney).

87. *See Conflicts of Interest*, *supra* note 8, at 1269 (referring to per se prohibitions on counsel's independent "professional judgment").

88. *See* R. Mallen & V. Levit, *supra* note 8, § 122, at 213; *Conflicts of Interest*, *supra* note 8, at 1312.

89. R. Mallen & V. Levit, *supra* note 8, § 521, at 619-20; *see* Lieberman v. Employers Ins., 84 N.J. 325, 334, 419 A.2d 417, 421-22 (1980); *cf.* Weiner v. Mitchell, Silberberg & Knupp, 114 Cal. App. 3d 39, 43-44, 170 Cal. Rptr. 533, 535 (1980) (litigating against former client); Apple v. Hall, 412 N.E.2d 114, 116 (Ind. Ct. App. 1980) (representation of adverse clients).

90. *See, e.g.*, Christison v. Jones, 83 Ill. App. 3d 334, 338, 405 N.E.2d 8, 10-11 (1980); Daugherty v. Runner, 581 S.W.2d 12, 16 (Ky. Ct. App. 1978). *See generally* R. Mallen & V. Levit, *supra* note 8, §§ 121-133 (general discussion of fiduciary obligations).

91. See *infra* notes 93-104 and accompanying text.

Concededly, upon initial examination a standard of singular loyalty to the insured appears ideal because it seemingly eliminates the dilemmas created by the representation of dual interests.[92] Unfortunately, this standard raises more problems than it solves. Even when it is not the named defendant in a liability suit, the carrier retains a strong direct financial interest in the litigation.[93] To protect its interests, the insurance company would be forced to employ a second set of counsel in all real and potential conflict situations. The resulting increase in legal fees, coupled with the fact that "[i]f [the] insured controlled the settlement decision, self-interest would induce him to make higher settlements,"[94] would send the cost of insurance coverage skyrocketing.[95] Strong public policy militates against any doctrine that would ultimately result in prohibitively high insurance premiums.[96]

A singular loyalty standard would also upset the traditional and developed contractual relationships between the interested parties.[97] Defense counsel would be placed in the unenviable position of opposing the company that hired him. Given the realities of insurance practice and human nature, many of the conflicts found under a dual representation system would therefore still exist.[98]

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92. Morris, *supra* note 10, at 465 (proposing standard of singular loyalty as solution to conflicts faced by defense counsel); *see* Jackson v. Trapier, 42 Misc. 2d 139, 140, 247 N.Y.S.2d 315, 316 (Sup. Ct. 1964) ("[T]he [insured] is the client and not the insurance carrier."); Employers Casualty Co. v. Tilley, 496 S.W.2d 552, 563 (Tex. 1973) (Johnson, J., concurring) ("The representation provided by the attorney more appropriately should be construed as representation of a single client, [the insured]."); 52 Tex. L. Rev. 610, 619 (1974) ("To characterize the attorney as representative of one client rather than two would preserve the high ethical obligations between attorney and insured while eliminating the dilemma caused by [conflicts].").

93. Fager, *supra* note 23, at 160.

94. Keeton, *supra* note 10, at 1166.

95. *Id.* at 1165-66.

96. Allstate Ins. Co. v. Keller, 17 Ill. App. 2d 44, 49, 149 N.E.2d 482, 484 (1958), *overruled on other grounds*, M.F.A. Mut. Ins. Co. v. Cheek, 34 Ill. App. 3d 209, 219, 340 N.E.2d 331, 338 (1975), *aff'd*, 66 Ill. 2d 492, 363 N.E.2d 809 (1977); *see* 19 J. Appleman, *supra* note 81, § 10,501, at 473 (1982); R. Keeton, *supra* note 11, § 8.4(a), at 559; Kesner, *Auto Insurance Rating: A Question of Equal Protection*, 32 Fed. Ins. Couns. Q. 165, 165 (1982); *An Insurer's Failure*, *supra* note 17, at 456.

97. The relationship among the insurer, insured and attorney arises as the result of a "hardboiled commercial transaction"—the insurance contract. Moritz v. Medical Protective Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977) (addressing relationship between insurer and insured); *see* R. Mallen & V. Levit, *supra* note 8, § 522, at 621 (addressing relationship between insurer and attorney).

98. It has been recognized that counsel hired by the insurance company has very strong ties to the carrier. Schwartz v. Sar Corp., 19 Misc. 2d 660, 666, 195 N.Y.S.2d 496, 503 (Sup. Ct.), *rev'd on other grounds*, 9 A.D.2d 910, 195 N.Y.S.2d 819 (1959); 30 Drake L. Rev. 937, 947 (1981). Consequently, it may be unreasonable to expect that a standard of singular loyalty would allow counsel to disregard totally the

Under the tripartite relationship, the insurer, due to its primary financial interest in the defense,[99] has a strong motive to assign the most qualified counsel available to the insured. Under a singular loyalty standard, however, this incentive might be removed because the carrier would wish to retain the finest counsel for its own interests and would assign less adept counsel to represent the insured in order to gain the upper hand in negotiations. Alternatively, if the insured were given the option to choose his own counsel, higher premiums would result.[100] Moreover, giving the insured, who has little knowledge of the insurance bar, the right to select his defense lawyer could lead to the employment of counsel inexperienced in insurance law.[101]

Policyholder control over settlement would also set the stage for a reversal of the current excess liability situation.[102] The insurer is presently held to a good faith standard in its decision to go to trial in lieu of settling.[103] If the insured is given settlement discretion he should similarly be held to a good faith standard, and the insurer should be given a remedy in the event of a capricious settlement.[104] Without any penalty for bad faith settlement, the insured would have little reason to litigate even spurious claims. Accordingly, it is best to leave insurance litigation in the hands of those best able to handle it—the insurance company and defense counsel well trained in insurance law.

II. Advantages of a Professional Negligence Standard

Because dual representation is a necessary evil in insurance litigation, the standard of care to which an attorney should be held in this extraordinary situation must account for the inherent conflicts such counsel face. In light of this requirement, the traditional malpractice

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interests of the insurer. *See* Hamilton v. State Farm Mut. Auto. Ins. Co., 9 Wash. App. 180, 185-86, 511 P.2d 1020, 1023-24 (1973), *aff'd*, 83 Wash. 2d 787, 523 P.2d 193 (1974); D. Meiselman, *supra* note 20, § 19.5, at 296.

99. See *supra* note 93 and accompanying text.

100. *See* Moritz v. Medical Protective Co., 428 F. Supp. 865, 872 (W.D. Wis. 1977) (recognizing that the right to choose counsel is a factor in the price of insurance); *cf.* Keeton, *supra* note 10, at 1165 (giving insured the right to settle would result in higher insurance cost).

101. Commentators have acknowledged that insurance defense counsel plays a specialized role in litigation. Weithers, *supra* note 14, at 156 (unique role); Morris, *supra* note 10, at 463 (specialist). *See infra* note 130 and accompanying text. Accordingly, employment of counsel inexperienced in the field would result in an overall lower quality of legal care.

102. *See* Keeton, *supra* note 10, at 1163-65; *Insured's Bad Faith*, *supra* note 18, at 878.

103. P. Magarick, *supra* note 12, § 10.03. See *supra* note 18.

104. *See* Keeton, *supra* note 10, at 1165; *Insured's Bad Faith*, *supra* note 18, at 878-79.

standard of professional negligence is the sole measure by which insurance counsel should be evaluated.

Traditionally, professional malpractice liability has been based upon the plaintiff's proving the same four basic elements as in other negligence actions: duty, breach of duty, proximate cause and damage.[105] In the insurance setting, a duty is established when defense counsel enters the tripartite relationship.[106] The issues of breach of duty, proximate cause and damages are generally reserved as questions of fact.[107] The standard of care required of the defendant is a question of law.[108]

Although an all-encompassing definition of the standard of care owed by counsel has not and cannot be established for all circumstances,[109] it is commonly held that "*the attorney should exercise the skill and knowledge ordinarily possessed by attorneys under similar circumstances.*"[110] Whether a defendant has failed to satisfy the standard of care, a jury question,[111] is "the heart of the negligence

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105. D. Meiselman, *supra* note 20, § 8:2, at 120; *see* Savings Bank v. Ward, 100 U.S. 195, 198-99 (1879); Malloy v. Sullivan, 415 So. 2d 1059, 1060 (Ala.), *cert. denied*, 103 S. Ct. 308 (1982); Ishmael v. Millington, 241 Cal. App. 2d 520, 523, 50 Cal. Rptr. 592, 593 (1966); Hutchinson v. Smith, 417 So. 2d 926, 927-28 (Miss. 1982); Mendoza v. Schlossman, 87 A.D.2d 606, 607, 448 N.Y.S.2d 45, 46 (1982) (per curiam); *see also* Restatement (Second) of Torts § 328A (1965) (general negligence action).

106. *See* American Mut. Liab. Ins. Co. v. Superior Court, 38 Cal. App. 3d 579, 590-91, 113 Cal. Rptr. 561, 570-71 (1974); Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, 472, 392 N.E.2d 1365, 1370-71 (1979), *aff'd*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980); Lieberman v. Employers Ins., 84 N.J. 325, 338, 419 A.2d 417, 424 (1980).

107. Restatement (Second) of Torts § 328C(b)-(d) (1965); *see* Lieberman v. Employers Ins., 84 N.J. 325, 342, 419 A.2d 417, 426 (1980) (proximate cause and damages); Lysick v. Walcom, 258 Cal. App. 2d 136, 150-56, 65 Cal. Rptr. 406, 416-18 (1968) (breach and proximate cause).

108. Ishmael v. Millington, 241 Cal. App. 2d 520, 525, 50 Cal. Rptr. 592, 595 (1966); W. Prosser, The Law of Torts § 37, at 206 (4th ed. 1971); Restatement (Second) of Torts § 328B(c) (1965).

109. *See* Restatement (Second) of Torts § 328C comment b (1965).

110. R. Mallen & V. Levit, *supra* note 8, § 251, at 318 (footnote omitted) (emphasis in original); *see* 1 N.Y. Pattern Jury Instructions—Civil 2d 2:152 (2d ed. 1974).

> An attorney who undertakes to represent a client impliedly represents that he possesses a reasonable degree of skill, that he is familiar with the rules regulating practice in actions of the type which he undertakes to bring and with such principles of law in relation to such actions as are well-settled in the practice of law in the locality where he practices, and that he will exercise reasonable care. Reasonable care means that degree of care that the average attorney in good standing practicing *in the locality where he practices would exercise under the same circumstances.*

Id. (emphasis added).

111. Ishmael v. Millington, 241 Cal. App. 2d 520, 525-26, 50 Cal. Rptr. 592, 595 (1966); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D. 1981); *see* Restatement (Second) of Torts § 328C(b) (1965).

action;"[112] it forms the basis for attorney liability in a malpractice suit.[113]

Juries may generally consider seven distinct factors[114] in determining whether the standard of care has been violated: custom,[115] specialization,[116] local considerations,[117] ethical considerations,[118] time of the application of the standard,[119] gross negligence[120] and good faith.[121] The court instructs the jury as to the general standard of care expected of the attorney,[122] and the jury considers these individual factors in view of the particular evidence[123] to arrive at a "particular standard

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112. Green, *The Submission of Issues in Negligence Cases*, 18 U. Miami L. Rev. 30, 37 (1963).

113. Note, *Standard of Care in Legal Malpractice*, 43 Ind. L.J. 771, 772 (1968) [hereinafter cited as *Standard of Care*]; *see* Dahlquist, *supra* note 7, at 8; Houser, *Legal Malpractice—An Overview*, 55 N.D.L. Rev. 185, 195 (1979).

114. *See generally* R. Mallen & V. Levit, *supra* note 8, §§ 253-259 (discussing each factor).

115. See *infra* notes 126-27 and accompanying text.

116. See *infra* notes 128-35 and accompanying text.

117. Consideration of locality are often cited by courts as factors in establishing the standard of care. *See, e.g.*, Hutchinson v. Smith, 417 So. 2d 926, 928 (Miss. 1982); Sheets v. Letnes, Marshall & Fiedler, Ltd., 311 N.W.2d 175, 180 (N.D.1981). In State *ex rel.* Florida Bar v. Oxford, 127 So. 2d 107 (Fla. 1960) (per curiam), an attorney escaped disbarment by showing that representation of both husband and wife in a divorce proceeding was common practice in the locality. *Id.* at 112. In an action against defense counsel, however, evidence of practice within the insurance industry would be more helpful in evaluating attorney conduct than evidence of practice within a locality because the question of locality would be encompassed by evidence of specialization. *See* R. Mallen & V. Levit, *supra* note 8, § 254, at 332.

118. Ethical considerations are composed of generic rules that are not specifically applicable to the unique tripartite relationship. *See* R. Mallen & V. Levit, *supra* note 8, § 256, at 341. Because of the probative value of Code violations, such evidence may be highly prejudicial to the defense attorney. *See Conflicts of Interest*, *supra* note 8, at 1490.

119. Generally, an attorney is not liable for conduct that was reasonable in light of the state of the law at the time of his actions, although in hindsight such conduct may prove to have been in error. O'Brien v. Nobel, 106 Ill. App. 3d 126, 130, 435 N.E.2d 554, 557 (1982); *e.g.*, Smith v. St. Paul Fire & Marine Ins. Co., 366 F. Supp. 1283, 1290 (M.D. La. 1973), *aff'd per curiam*, 500 F.2d 1131 (5th Cir. 1974); Smith v. Lewis, 13 Cal. 3d 349, 356, 530 P.2d 589, 593, 118 Cal. Rptr. 621, 625 (1975), *overruled on other grounds, In re* Brown, 15 Cal. 3d 838, 851 n.14, 544 P.2d 561, 569 n.14, 126 Cal. Rptr. 633, 641 n.14 (1976).

120. The relevance of this factor in establishing a standard of care has diminished. *See* R. Mallen & V. Levit, *supra* note 8, § 258.

121. Generally a duty of good faith inheres in the attorney client relationship. D. Meiselman, *supra* note 20, § 1:4. This issue, however, is not of great importance in establishing attorney liability for malpractice. *See* R. Mallen & V. Levit, *supra* note 8, § 257.

122. *See* W. Prosser, *supra* note 108, § 37, at 206; Restatement (Second) of Torts § 328B(c) (1965).

123. W. Prosser, *supra* note 108, § 37, at 207; Restatement (Second) of Torts § 328C comment b (1965); *Standard of Care*, *supra* note 113, at 775-76.

of conduct"[124] and determines whether it has been met. Many jurisdictions also require expert testimony to aid in that determination.[125]

Among the seven factors jurors may consider, custom and specialization are the most significant. Consideration of customary professional practice is important in legal malpractice litigation because it guards against the "potentially destructive propensities of any . . . criteria [that do] not reflect the peculiar needs of the [attorney-client relationship]."[126] Evidence of custom is highly probative of the reasonableness of attorney conduct in any precise circumstance,[127] and therefore, is indispensable when judging the conduct of the insurance attorney. A professional negligence analysis would include documentation of customary insurance defense practices such as dual representation and permit a fact-specific assessment of the propriety of counsel's conduct.

Also relevant under a professional negligence approach would be evidence of specialization.[128] Although no jurisdiction has certified the insurance bar as specialists,[129] insurance practice is similar to those

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124. W. Prosser, *supra* note 108, § 37, at 207; Restatement (Second) of Torts § 328C comment b (1965).

125. *E.g.*, Lentino v. Fringe Employee Plans, Inc., 611 F.2d 474, 480 & n.8 (3d Cir. 1979); Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 271-72, 291 S.E.2d 6, 11 (1982); DiPiero v. Goodman, 436 N.E.2d 998, 999 (Mass. App. Ct. 1982); Dean v. Conn., 419 So. 2d 148, 150-51 (Miss. 1982). Courts have recognized that a jury may not be able to apply negligence principles properly without the aid of expert testimony. Gibson v. Talley, 291 S.E.2d 72, 75 (Ga. Ct. App. 1982) (quoting Berman v. Rubin, 138 Ga. App. 849, 853-54, 227 S.E.2d 802, 806 (1976)); Hughes v. Malone, 146 Ga. App. 341, 345, 247 S.E.2d 107, 111 (1978).

126. *Standard of Care*, *supra* note 113, at 773.

127. *See* Hill Aircraft & Leasing Corp. v. Tyler, 161 Ga. App. 267, 273, 291 S.E.2d 6, 11 (1982); DiPiero v. Goodman, 436 N.E.2d 998, 999 (Mass. App. Ct. 1982) (same) (quoting Glidden v. Terranova, 427 N.E.2d 1169, 1170 (Mass. App. Ct. 1981)); St. Pius X House of Retreats v. Diocese of Camden, 88 N.J. 571, 588, 443 A.2d 1052, 1061 (1982); W. Prosser, *supra* note 108, § 33, at 166; *Standard of Care*, *supra* note 113, at 773, 778.

128. R. Mallen & V. Levit, *supra* note 8, § 253, at 328; *see* Wright v. Williams, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975); Rodriguez v. Horton, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980); Note, *Attorney Malpractice*, 63 Colum. L. Rev. 1292, 1302-04 (1963) [hereinafter cited as *Attorney Malpractice*]. *See generally* Schnidman & Salzler, *The Legal Malpractice Dilemma: Will New Standards of Care Place Professional Liability Insurance Beyond the Reach of the Specialist?*, 45 U. Cin. L. Rev. 541 (1976) (effect of specialization on the standard of care); Comment, *Specialization: The Resulting Standard of Care and Duty to Consult*, 30 Baylor L. Rev. 729 (1978) (same) [hereinafter cited as *Specialization: The Resulting Standard*].

129. R. Mallen & V. Levit, *supra* note 8, § 523, at 623-24. Because specialist certification is designed to aid the general public in choosing counsel, Wells, *Certification in Texas: Increasing Lawyer Competence and Aiding the Public in Lawyer Selection*, 30 Baylor L. Rev. 689, 690-91 (1978), and insurance attorneys are usually selected by carriers, American Home Assurance Co. v. Weissman, 79 A.D.2d 923,

that are granted such status.[130] Specialization has been recognized in those fields in which attorneys through active practice have gained a "special competence"[131] in a discrete area of the law.[132] Generally, the recognized specialist is held to a higher standard of care than the ordinary lawyer[133] because the specialist must exercise a degree of skill and care commensurate with practice in that specialty.[134] Although considerations of specialization may hold defense counsel to a higher level of competence, this factor will also serve to protect the attorney by ensuring evaluation by standards appropriate to his particular practice.[135] Such considerations are imperative because principles designed to govern the typical attorney-client relationship are not necessarily adequate to appraise proper conduct under the atypical tripartite arrangement.

Cognizant of the inherent conflicts created by the tripartite relationship, the American Bar Association (ABA), in conjunction with the major liability insurers, adopted the Guiding Principles of the National Conference of Lawyers and Liability Insurers (Guiding Principles):[136] ten short rules that directly address problems encountered by defense counsel.[137] As such, the Guiding Principles would consti-

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924-25, 434 N.Y.S.2d 410, 412 (1981); *see* 7C J. Appleman, *supra* note 75, § 4681, at 2 (1979), the defense bar may be slow in receiving specialization certification.

130. *See* R. Mallen & V. Levit, *supra* note 8, § 260, at 350 (1st ed. 1977); Morris, *supra* note 10, at 463.

131. Wells, *supra* note 129, at 700.

132. *Standard of Care*, *supra* note 113, at 786; *see* D. Meiselman, *supra* note 20, § 2:10, at 24; *cf.* Wells, *supra* note 129, at 691 (labor law).

133. Hagglund & Birnbaum, *Legal Specialization: The Need for Uniformity*, 32 Fed. Ins. Couns. Q. 301, 309-10 (1982); *see* D. Meiselman, *supra* note 20, § 2:10, at 25; Schnidman & Salzler, *supra* note 128, at 548; *Specialization: The Resulting Standard*, *supra* note 128, at 733-37; *see also Attorney Malpractice*, *supra* note 128, at 1302-04 (arguing that there should be a higher standard).

134. Wright v. Williams, 47 Cal. App. 3d 802, 810, 121 Cal. Rptr. 194, 199 (1975); Rodriguez v. Horton, 95 N.M. 356, 359, 622 P.2d 261, 264 (Ct. App. 1980); R. Mallen & V. Levitt, *supra* note 8, § 253, at 325.

135. *See Standard of Care*, *supra* note 113, at 785; *cf.* Morrison v. MacNamara, 407 A.2d 555, 562 (D.C. 1979) (traditionally "locality rule" was designed to protect doctors by holding them to the proper standard of care); McCoid, *The Care Required of Medical Practitioners*, 12 Vand. L. Rev. 549, 607 (1959) (a professional standard will afford a doctor more protection than a general standard).

136. National Conference of Lawyers and Liability Insurers, Guiding Principles (1969) [hereinafter cited as Guiding Principles], *reprinted in* 20 Fed. Ins. Couns. Q., Summer 1970, at 95 *and in* Weithers, *supra* note 14, at 158. The Guiding Principles were adopted by the ABA on February 7, 1972. *Id.* These principles, however, were rescinded by the ABA in August 1980. *Summary of Action of the House of Delegates*, A.B.A. Ann. Meeting 23 (Aug. 5-6, 1980). The decision to rescind was based upon a general trend at the time and not upon the substance of the Guiding Principles. Underwood, *supra* note 8, at 389 n.31.

137. Guiding Principles, *supra* note 136; *see, e.g.*, *id.* ¶ II ("Claim or Suit in Excess of Limits"); *id.* ¶ III ("Settlement Negotiations in Claims or Suits with Excess

tute a helpful tool for assessing the conduct of insurance defense counsel. Unlike the general tenets of the CPR,[138] these insurance-specific guidelines reflect the troublesome position counsel occupies and attempt to define better the duties owed by each member of the tripartite relationship.[139] These rules, however, cannot and do not seek to resolve all conceivable insurance difficulties.[140] Consequently, the Guiding Principles are not a substitute for the traditional elements considered in the formation of a standard of care, but may serve as a useful aide to the jury in evaluating custom and proper conduct by insurance defense counsel.

Finally, expert testimony should be admitted in a suit against the insurance defense attorney because the inherent conflicts common to insurance practice necessitate explanation by qualified witnesses.[141] One court has noted that "[u]nless the conflict is so clear as to be undisputed, expert testimony is generally necessary to prove lawyer malpractice."[142] If a CPR violation were to establish negligence per se, however, this evidence would be excluded.[143] Moreover, even if Code provisions were used not as the standard of care itself, but rather as evidence thereof, expert testimony would still be necessary because "the Code is subject to varying interpretations, some of which a jury would not understand without clarif[ication]."[144]

The fundamental advantage of a professional negligence standard in legal malpractice actions is that it permits consideration of all relevant factors bearing on counsel's conduct. When addressing such unique or different fact patterns as those raised by insurance defense, a standard that allows such consideration is of crucial importance.

CONCLUSION

If the CPR has a place in malpractice litigation, it must be merely as some evidence of the standard of care—not as the standard itself. In

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Exposure"); *id.* ¶ IV ("Conflicts of Interest Generally—Duties of Attorney"); *id.* ¶ V ("Continuation by Attorney Even Though There is a Conflict of Interest").

138. *See* Code, *supra* note 1, Canon 5. See *supra* notes 86-87 and accompanying text.

139. *See* Guiding Principles, *supra* note 136, ¶¶ I–X.

140. *See* 20 Fed. Ins. Couns. Q., Summer 1970, at 93-94. For example, if the parties do not feel a common defense is warranted they are simply admonished to "seek other procedures to resolve" their differences. Guiding Principles, *supra* note 136, ¶ V.

141. 69 Ill. B.J. 508, 510 & n.16 (1981); *see* ABC Trans. Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817, 831, 413 N.E.2d 1299, 1311 (1980); Hill v. Okay Constr. Co., 312 Minn. 324, 337, 252 N.W.2d 107, 116 (1977).

142. ABC Trans. Nat'l Transp., Inc. v. Aeronautics Forwarders, Inc., 90 Ill. App. 3d 817, 831, 413 N.E.2d 1299, 1311 (1980).

143. See *supra* note 75 and accompanying text.

144. 69 Ill. B.J. 508, 510 n.16 (1981); *see* Wolfram, *supra* note 34, at 294-95.

an action against defense counsel, any purpose served by the CPR is better served by the Guiding Principles. If courts are compelled to apply the CPR to malpractice litigation, it should be only as one of several factors and with a recognition that the Code was not designed as a standard for imposing civil liability. To allow the CPR to serve alone as a standard of care would eliminate consideration of all other crucially important factors in evaluating defense counsel, including custom, specialization and expert testimony. Used alone, the Code becomes a weapon rather than a beneficial tool; it is too vague and inflexible to serve as the proper standard for assessing the insurance attorney. Only by applying the adaptable, well-understood principles of professional negligence can the intricacies of the tripartite relationship be factored into a viable standard for the just appraisal of insurance defense counsel.

Douglas L. Getter