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Standard of Care in Malpractice Actions Against Insurance Defense Counsel: Inapplicability of the Code of Professional Responsibility

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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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3. Code, supra note 1, Preliminary Statement.
"violations of the Code are frequently treated as evidence of negligence or negligence per se." This practice has become so common that CPR use in malpractice actions has been recognized as the "majority view."

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


through the right to defend or settle a liability suit as it deems expedi-
ent.\textsuperscript{13} Defense counsel's simultaneous duties of loyalty to the insurer and the insured do not conflict when the interests of all parties coincide.\textsuperscript{14} Conflicts may arise, however, in suits in which the insured faces liability in excess of his coverage,\textsuperscript{15} or when the insured wishes to proceed to trial despite the insurer's desire to limit its liability through settlement.\textsuperscript{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.\textsuperscript{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.\textsuperscript{18} Defense counsel, with duties of loyalty running to each party, is caught in the middle.
The concerns of the policyholder and the carrier may be reversed in a professional liability suit in which the insurer is typically precluded from making settlement without the consent of the insured. The policyholder may wish to go to trial to clear his name and avoid increased premiums. The insurer, however, may believe that valid consent has been obtained or that an exception to the policy exists 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.

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


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. And as their ability to pursue their unique practice is threatened, insurance rates may be expected to skyrocket because two attorneys may be needed to perform a task handled presently by one.

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.

I. INAPPLICABILITY OF THE CODE

Canon 5 of the CPR contains general prohibitions against the representation of clients with conflicting interests. 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."
Counsel faced with a conflict of interests is directed by Disciplinary Rule (DR) 5-105 to take one of three actions: (A) decline employment; (B) withdraw from employment; or (C) continue representation if it is obvious that adequate representation of each client may be ensured after full disclosure and client consent. 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.

The Code also provides no guidelines for assessing the consequences that might flow from a given conflict. "The 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.

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 representation on the exercise of his independent professional judgment on behalf of each.


These courts ignore three persuasive arguments against Code use outside the disciplinary context, and particularly in insurance defense malpractice actions: 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, to adopt these sections as establishing a standard of care would remove the discretionary element necessary for counsel to function in the insurance setting. Insurance lawyers would be forced to choose between declining employment and continually facing malpractice exposure be-

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, Dahlquist, 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.

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-

38. See supra note 10 and accompanying text.
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,” but might also constitute a violation of DR 2-110, in which the lawyer is admonished not to withdraw until he takes reasonable steps to avoid prejudice to his client. 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. DR 5-105(C), in response to this inflexibility, attempts to prescribe a standard for valid representation of adverse clients. 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” 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].” 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.

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)(3). 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).
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.\textsuperscript{57} This shortcoming is illustrated by the Illinois decision in Rogers v. Robson, Masters, Ryan, Brumund & Belom.\textsuperscript{58}

In Rogers, pursuant to a valid policy exclusion, consent of the insured to settlement was unnecessary.\textsuperscript{59} The insurer exercised its contractual right to settle and its counsel, under the tripartite relationship, negotiated a settlement without informing the insured.\textsuperscript{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.\textsuperscript{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 \textit{per se} basis for imposing liability on an attorney in a malpractice action,"\textsuperscript{62} but nevertheless sidestepped the issue, and affirmed the finding of negligence solely on the failure to disclose.\textsuperscript{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.\textsuperscript{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,\textsuperscript{65} a meaningless gesture given the contractual settlement provisions. The "thin line between malpractice and professional responsibility"\textsuperscript{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.\textsuperscript{67}

\textsuperscript{57} Fordham, \textit{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); \textit{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, \textit{supra} note 8, at 389.

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

\textsuperscript{59} \textit{Id.} at 470, 392 N.E.2d at 1369.

\textsuperscript{60} \textit{Id.} at 469, 392 N.E.2d at 1368.

\textsuperscript{61} \textit{Id.} at 472-74, 392 N.E.2d at 1371-72.

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

\textsuperscript{63} \textit{Id.} at 205-06, 407 N.E.2d at 49.

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

\textsuperscript{65} \textit{See Dondanville, supra} note 25, at 65.

\textsuperscript{66} Haskell, \textit{supra} note 50, at 27, col. 1 (referring specifically to insurance defense practice).

\textsuperscript{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. 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. 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”—is also too vague to serve as a standard of civil 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.


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. 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." Nor does it give any indication of when it becomes "obvious" that one can represent a client under a conflict situation. Code language alone, therefore, cannot stand as a liability standard, but rather "necessitate[s] explanation and expert testimony" both of which would be lost if DR 5-105(C) established negligence per se.

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. If such a court finds even "the potential for irreconcilable conflict" it may hold the insured's consent invalid. 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. Plain-
tiff must simply offer settlement below policy limits but in excess of a normally acceptable value to the carrier. 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. 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."

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. 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...
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

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.
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. 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. 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," would send the cost of insurance coverage skyrocketing. Strong public policy militates against any doctrine that would ultimately result in prohibitively high insurance premiums.

A singular loyalty standard would also upset the traditional and developed contractual relationships between the interested parties. 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.

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.


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. 805, 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, 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. 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.

Policyholder control over settlement would also set the stage for a reversal of the current excess liability situation. The insurer is presently held to a good faith standard in its decision to go to trial in lieu of settling. 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. 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


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


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. 599, 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;" it forms the basis for attorney liability in a malpractice suit.\textsuperscript{112}

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


\textsuperscript{114} See generally R. Mallen & V. Levit, \textit{supra} note 8, §§ 253-259 (discussing each factor).

\textsuperscript{115} See \textit{infra} notes 126-27 and accompanying text.

\textsuperscript{116} See \textit{infra} notes 128-35 and accompanying text.

\textsuperscript{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 \textit{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. \textit{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, \textit{supra} note 8, § 254, at 332.

\textsuperscript{118} Ethical considerations are composed of generic rules that are not specifically applicable to the unique tripartite relationship. See R. Mallen & V. Levit, \textit{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 \textit{Conflicts of Interest}, \textit{supra} note 8, at 1490.


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

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

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

\textsuperscript{123} W. Prosser, \textit{supra} note 108, § 37, at 207; Restatement (Second) of Torts § 328C comment b (1965); \textit{Standard of Care}, \textit{supra} note 113, at 775-76.
of conduct" and determines whether it has been met. Many jurisdictions also require expert testimony to aid in that determination.

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]." Evidence of custom is highly probative of the reasonableness of attorney conduct in any precise circumstance, 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. Although no jurisdiction has certified the insurance bar as specialists, insurance practice is similar to those

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


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


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.\textsuperscript{130} Specialization has been recognized in those fields in which attorneys through active practice have gained a "special competence"\textsuperscript{131} in a discrete area of the law.\textsuperscript{132} Generally, the recognized specialist is held to a higher standard of care than the ordinary lawyer\textsuperscript{133} because the specialist must exercise a degree of skill and care commensurate with practice in that specialty.\textsuperscript{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.\textsuperscript{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):\textsuperscript{136} ten short rules that directly address problems encountered by defense counsel.\textsuperscript{137} As such, the Guiding Principles would consti-
stitute 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 clarification."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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137. See supra note 136, ¶¶ I-X.
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.
143. See supra note 75 and accompanying text.
144. 69 Ill. B.J. 505, 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.

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