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**THE CODE OF PROFESSIONAL RESPONSIBILITY IN
ATTORNEY MALPRACTICE: ILLINOIS ATTORNEYS
HAVE A DUTY TO INFORM CLIENTS OF
AN INTENT TO SETTLE—ROGERS V. ROBSON,
MASTERS, RYAN, BRUMUND & BELOM**

In malpractice actions against attorneys,¹ Illinois courts have long distinguished breaches of the standard of professional care, which may result in civil liability,² from violations of the Illinois Code of Professional Responsibility (Illinois Code),³ which may invoke disciplinary sanctions.⁴ Although

1. In recent years attorney malpractice actions have increased dramatically. R. MALLEN & V. LEVIT, *LEGAL MALPRACTICE* 16 (1977) [hereinafter cited as MALLEN & LEVIT] (relative frequency of legal malpractice in Illinois from 1969 to 1976 was more than double the relative frequency measured from 1900 to 1976); McCarthy, *Insurance Aspects of Legal Malpractice*, in ABA SECTION OF INSURANCE, NEGLIGENCE, AND COMPENSATION LAW, *PROFESSIONAL LIABILITY OF TRIAL LAWYERS: THE MALPRACTICE QUESTION* 50, 64 (1979) (frequency of claims filed against attorneys increased approximately four times from 1973 to 1976, from 1.8 claims to 7.2 claims per 100 policies); 1 *PROFESSIONAL LIABILITY REP.* 185-86 (May 1977) (malpractice claims filed against only .5% of attorneys nationwide in 1973, against 6% in 1976, and against a projected 8% in 1977).

As to the difficulty of obtaining comprehensive and accurate statistical information on the extent of attorney malpractice, see Pfenningstorf, *Types and Causes of Lawyers' Professional Liability Claims: The Search for Facts*, 1980 AM. B. FOUNDATION RESEARCH J. 253 and Note, *Improving Information on Legal Malpractice*, 82 YALE L.J. 590 (1973).

2. See, e.g., *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966) (attorney owes client good faith and must exercise reasonable skill and diligence in prosecution of case); *Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller*, 75 Ill. App. 3d 516, 394 N.E.2d 559 (1st Dist. 1979) (attorney liable to client for damages only when he fails to exercise a reasonable degree of care and skill); *Morrison v. Burnett*, 56 Ill. App. 129 (3d Dist. 1894) (attorney required to use ordinary skill and prudence). See also Note, *Standard of Care in Legal Malpractice*, 43 IND. L.J. 771 (1968).

3. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (1980). The 1980 Illinois Code was officially adopted on June 3, 1980, and became effective on July 1, 1980. It was added to Supreme Court Rule 771. *Preface, ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY* (1980). See note 28 and accompanying text *infra*.

The former Code of Professional Responsibility was promulgated in 1969 by the American Bar Association and adopted by the Illinois State Bar and Chicago Bar Associations in 1970. It replaced the American Bar Association's Canons of Professional Ethics, originally promulgated in 1908. See ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (rev. 1977). See generally Morgan, *The Evolving Concept of Professional Responsibility*, 90 HARV. L. REV. 702 (1977); Schnapper, *The Myth of Legal Ethics*, 64 A.B.A.J. 202 (1978); Wright, *The Code of Professional Responsibility: Its History and Objectives*, 24 ARK. L. REV. 1 (1970).

The American Bar Association recently announced a draft of a new code, known as the Rules of Professional Conduct. The new code may require, among other controversial changes, an attorney to balance obligations owed to a client against the duty to be fair and candid to all others in the legal system. See Greenhouse, *The Lawyers Struggle to Uphold Their Ethics*, N.Y. Times, Feb. 10, 1980, § 4, at 10, col. 1; Greenhouse, *Lawyers' Group Offer a Revision in Code of Ethics*, *id.*, Feb. 2, 1980, §A, at 6, col. 1.

4. Censure, suspension, and disbarment are the typical sanctions invoked in disciplinary proceedings. Slight misconduct may warrant censure. See, e.g., *In re Lada*, 69 Ill. 2d 581, 737

the Illinois Supreme Court has viewed the Illinois Code as a "guide" for professional conduct,⁵ mere violation of the Illinois Code has not been sufficient to justify the imposition of tort liability. Nevertheless, in *Rogers v. Robson, Masters, Ryan, Brumund & Belom*,⁶ the Illinois Supreme Court affirmed the appellate court's⁷ apparent use of an Illinois Code violation to form the basis for civil tort liability. In *Rogers*, the supreme court held that attorneys have a duty arising from the attorney-client relationship to inform their clients of their intent to settle claims out of court regardless of contractual authority to the contrary.⁸

The purpose of this Note is fourfold. First, as background, it examines the role codes of professional responsibility have assumed in both tort and disci-

N.E.2d 301 (1978) (failure to inform divorce court of judgment lien upon marital residence which client had quitclaimed to wife prior to divorce action); *In re Sherman*, 60 Ill. 2d 590, 328 N.E.2d 553 (1975) (failure to properly remit funds); *In re Williams*, 57 Ill. 2d 63, 309 N.E.2d 579 (1974) (representation of conflicting interests where attorney for wife in suit to collect on insurance had represented husband previously and had ordered wife to change policy so that children would be beneficiaries).

More severe misconduct may warrant suspension. See, e.g., *In re Gold*, 77 Ill. 2d 224, 396 N.E.2d 25 (1979) (failure to file federal income tax return); *In re Levin*, 77 Ill. 2d 205, 395 N.E.2d 1374 (1979) (neglect of a legal matter); *In re Turner*, 75 Ill. 2d 128, 387 N.E.2d 282 (1979) (commingling and conversion of funds and giving false testimony before the Inquiry Board); *In re LaPinska*, 72 Ill. 2d 461, 381 N.E.2d 700 (1978) (accepting private employment which conflicts with duties as city attorney and using position to obtain favorable settlement); *In re Sherre*, 68 Ill. 2d 56, 368 N.E.2d 912 (1977) (conviction on four counts of mail fraud); *In re Taylor*, 66 Ill. 2d 567, 363 N.E.2d 845 (1977) (neglect in performing and completing services).

Gross misconduct may warrant disbarment. See, e.g., *In re Smith*, 75 Ill. 2d 124, 387 N.E.2d 316 (1979) (three independent acts of conversion and continuing false representations to clients), *cert. denied*, 444 U.S. 841 (1979); *In re Mitran*, 75 Ill. 2d 118, 387 N.E.2d 278 (1979) (concealment of prior conviction on application to bar), *cert. denied*, 444 U.S. 916 (1979); *In re Stills*, 68 Ill. 2d 49, 368 N.E.2d 897 (1977) (conversion of client's funds for personal use).

5. E.g., *In re Taylor*, 66 Ill.2d 567, 363 N.E.2d 845 (1977); *In re Hallett*, 58 Ill. 2d 239, 319 N.E.2d 48 (1974); *In re Broverman*, 40 Ill. 2d 302, 239 N.E.2d 816 (1968); *In re Krasner*, 32 Ill. 2d 121, 204 N.E.2d 10 (1965).

6. 81 Ill. 2d 201, 407 N.E.2d 47 (1980). The *Rogers* case already has inspired considerable comment. See Horan & Spellmire, *Lawyer's Liability in Illinois: Current Legal Issues*, 69 ILL. B.J. 200, 300 (1981); Tybor, *Client Consent Ordered for Settlement*, NAT'L L.J., July 7, 1980, at 3; 26 ILLINOIS STATE BAR ASSOCIATION, TRIAL BRIEFS 1 (July 1980); 25 ILLINOIS STATE BAR ASSOCIATION, TRIAL BRIEFS 1 (Oct. 1979). See also 26 ILLINOIS STATE BAR ASSOCIATION, TRIAL BRIEFS 1 (Sept. 1980) ("[t]he significance of the *Rogers* decision does not rest in the court's interpretation of ethical standards, but in its use of them to impose civil liability upon attorneys").

7. 74 Ill. App. 3d 467, 392 N.E.2d 1365 (3d Dist. 1979).

8. It is well settled that absent contractual authority to the contrary an attorney cannot settle a client's claim without consent. See, e.g., *Clarion Corp. v. American Home Prods. Corp.*, 494 F.2d 860 (7th Cir. 1974) (once the lawyer has fulfilled obligation to evaluate a settlement offer, the final decision whether to settle or not is for the client); *Chiapetti v. Knapp*, 20 Ill. App. 3d 538, 314 N.E.2d 489 (1st Dist. 1974) (attorney employed to defend a suit has no authority to compromise, to give up any right of his client, or to consent to judgment against his client without express consent) (citing *City of Des Plaines v. Scientific Mach. Movers, Inc.*, 9 Ill. App. 3d 438, 292 N.E.2d 154 (1st Dist. 1972)); *Zamouski v. Gerraro*, 1 Ill. App. 3d 890, 275 N.E.2d 429 (2d Dist. 1971) (attorney authorized to represent a client does not necessarily have authority to conclude a settlement).

plinary proceedings. Second, it discusses the reasoning of the appellate and supreme courts in *Rogers*. Third, it argues that the court has for the first time blurred, if not totally eliminated, the distinction between violation of the Illinois Code and breach of the tort standard of professional care. Finally, it takes account of the practical implications of the courts' decision for the legal profession.

BACKGROUND

Disciplinary actions differ significantly from civil suits in tort. Although professional negligence has occasionally been found to warrant discipline,⁹ professional misconduct is typically the basis for disciplinary proceedings.¹⁰ Procedural disparities between tort and disciplinary proceedings underscore their fundamental difference. Discipline is designed to protect the public and preserve the integrity of the bar;¹¹ thus, damages need not be proven¹² and proof must satisfy the strict standard of clear and convincing evidence.¹³ Civil actions are meant to financially compensate injured plaintiffs;¹⁴ thus, damages must be shown, and proof is merely by a preponderance of the evidence.¹⁵ This fundamental difference in purpose dictates the entirely separate character of the two proceedings.¹⁶

9. Failure to exercise ordinary care can be grounds for discipline in Illinois. See, e.g., *In re Chapman*, 69 Ill. 2d 494, 372 N.E.2d 675 (1978) (failure to take action on behalf of client) (citing *In re Taylor*, 66 Ill. 2d 567, 363 N.E.2d 845 (1977) (neglect in performance of duties)).

10. E.g., *In re Howard*, 69 Ill. 2d 343, 372 N.E.2d 371 (1978) (bribery); *In re Reynolds*, 32 Ill. 2d 331, 205 N.E.2d 429 (1965) (fraud); *In re Bodkin*, 21 Ill. 2d 458, 173 N.E.2d 440 (1961) (practice of law while suspended); *In re Becker*, 16 Ill. 2d 488, 158 N.E.2d 753 (1959) (conflict of interest while serving as alderman).

11. *In re Levin*, 77 Ill. 2d 205, 395 N.E.2d 1374 (1979); *In re Chapman*, 69 Ill. 2d 494, 372 N.E.2d 675 (1978); *In re Leonard*, 64 Ill. 2d 398, 356 N.E.2d 62 (1976); *In re Andros*, 64 Ill. 2d 419, 356 N.E.2d 513 (1976); *In re Krasner*, 32 Ill. 2d 121, 204 N.E.2d 10 (1965). But see *In re Ruffalo*, 390 U.S. 544 (1968) (wherein the Supreme Court stated that disciplinary proceedings are quasi-criminal adversary proceedings).

12. *Greenbaum v. State Bar*, 15 Cal. 3d 893, 544 P.2d 921, 126 Cal. Rptr. 785 (1975) (misappropriation of funds not excused because client incurred no loss as a result); *Mendicino v. Magagna*, 572 P.2d 21 (Wyo. 1977) (although pecuniary loss was not shown, a four year suspension was imposed for failure to close estates for over 24 years).

13. ILL. SUP. CT. R. 753(c). See *In re Simpson*, 47 Ill. 2d 562, 268 N.E.2d 20 (1971) (proof by clear and convincing evidence necessary, but court not required to be "naive or impractical"); *In re Moore*, 8 Ill. 2d 373, 134 N.E.2d 324 (1956) (proof of the charges must be established by clear and convincing evidence and record must be free from doubt not only as to the act charged, but as to the motive with which it was done).

14. See, e.g., *Roberts v. Sears Roebuck & Co.*, 471 F. Supp. 372 (7th Cir. 1979). See also RESTATEMENT (SECOND) OF TORTS §§ 901, 903 (1977).

15. *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974) (client has duty to prove by a preponderance of evidence that attorney breached duty to client) (citing *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908) (action on note for attorney's services)).

16. Other procedural disparities exist. For example, compliance with a statute of limitations is not required in disciplinary actions. See, e.g., *In re Bossnov*, 60 Ill. 2d 439, 328 N.E.2d 309 (1975) (there is no statute of limitations applicable in a disciplinary proceeding; court will not

In actions for professional negligence, Illinois courts have adhered to the standard of care enunciated in *Stevens v. Walker & Dexter*,¹⁷ where the Illinois Supreme Court held that attorneys have a duty to employ a reasonable degree of care and skill.¹⁸ An attorney need not exercise always perfect judgment¹⁹ but must only conform to the knowledge and skill common to members of the legal profession.²⁰ Whether an attorney's conduct satisfies this standard is a question of fact²¹ necessitating expert testimony²² except when the negligence is "apparent and undisputed."²³ Further, a plaintiff must prove that but for the attorney's negligence, the claim would have been successful.²⁴ Finally, plaintiffs must plead and prove monetary loss as a result of the attorney's negligence.²⁵

refuse to entertain charges simply because of the passage of time (13 years)); *In re Anderson*, 370 Ill. 515, 19 N.E.2d 330 (1939) (court will not refuse to hear charges against an attorney because time has expired unless it would be unjust or unfair to compel him to answer such charges (9 years)); *People ex rel. Stead v. Phillips*, 261 Ill. 576, 104 N.E. 144 (1914) (statute of limitations or limitations established by the court are not applicable in disbarment proceedings).

Also, in disciplinary proceedings the formalities of pleading are inapplicable. *See, e.g., In re Broverman*, 40 Ill. 2d 302, 239 N.E.2d 816 (1968) (disciplinary proceeding is not a lawsuit with formalities of pleading) (quoting *In re Becker*, 16 Ill. 2d 488, 158 N.E.2d 753 (1959)); *In re Yablunsky*, 407 Ill. 111, 94 N.E.2d 841 (1950) (same).

17. 55 Ill. 151 (1870).

18. *Id.* at 152. An attorney will be presumed to have discharged the duty to exercise a reasonable degree of care and skill until the plaintiff proves the contrary. *Piper v. Green*, 216 Ill. App. 590 (4th Dist. 1920). For a general discussion of the elements of malpractice actions, see Bridgman, *Legal Malpractice—A Consideration of the Elements of a Strong Plaintiff's Case*, 30 S.C. L. REV. 213 (1979); Kasten, *Attorney Malpractice in Illinois: An Early Chapter in a Book Destined for Great Length*, 13 J. MAR. L. REV. 309 (1980); Mallen, *Recognizing and Defining Legal Malpractice*, 30 S.C. L. REV. 203 (1979); Wade, *The Attorney's Liability for Negligence*, 12 VAND. L. REV. 755 (1959); Note, *New Developments in Legal Malpractice*, 26 AM. U.L. REV. 408 (1977); Note, *Attorney Malpractice*, 63 COLUM. L. REV. 1292 (1963).

19. *Dorf v. Relles*, 355 F.2d 488 (7th Cir. 1966) (whether attorney negligent in conducting prosecution); *Smiley v. Manchester Ins. & Indem. Co.*, 71 Ill. 2d 306, 375 N.E.2d 118 (1978) (whether attorney negligent in refusing to settle within policy limits); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974) (whether attorney negligent in failing to file report with Secretary of State).

20. *Olson v. North*, 276 Ill. App. 457, 473 (2d Dist. 1934).

21. *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908); *House v. Maddox*, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1st Dist. 1977); *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974); *Sanitary Hair Goods v. Elliott*, 191 Ill. App. 563 (1st Dist. 1915).

22. *Brown v. Gitlin*, 19 Ill. App. 3d 1018, 313 N.E.2d 180 (1st Dist. 1974); *Kohler v. Woolen, Brown & Hawkins*, 15 Ill. App. 3d 455, 304 N.E.2d 677 (4th Dist. 1973); *Olson v. North*, 276 Ill. App. 457 (2d Dist. 1934). *See generally* Breslin & McMonigle, *The Use of Expert Testimony in Actions Against Attorneys*, 47 INS. COUNSEL J. 119 (1980); Note, *Use of Expert Testimony in Attorney Malpractice Cases*, 15 HASTINGS L.J. 584 (1964).

23. *House v. Maddox*, 46 Ill. App. 3d 68, 360 N.E.2d 580 (1st Dist. 1977) (allowing statute of limitations to run indicates such "obvious and explicit carelessness" that expert testimony is not needed to prove "that which is already abundantly clear").

24. *Priest v. Dodsworth*, 235 Ill. 613, 85 N.E. 940 (1908) (plaintiff must prove that failure to collect debt was due to culpable neglect of attorney, and that but for such negligence the debt could or would have been collected); *Chicago Red Top Cab Ass'n v. Gaines*, 49 Ill. App. 3d 332, 364 N.E.2d 328 (1st Dist. 1977) (in action for failure to file appeal plaintiff must show that he

The difference between civil suits and disciplinary proceedings is acknowledged in the preliminary statement of the American Bar Association Code of Professional Responsibility (ABA Code) which explicitly states that the Code does not define standards of civil liability.²⁶ Rather, the ABA Code provides that its ethical considerations are aspirational in character and that its disciplinary rules delineate minimum standards of professional conduct the breach of which warrants discipline.²⁷ Significantly, the recently adopted Illinois Code²⁸ omits any similar disclaimer, stating only that it is applicable to disciplinary proceedings.²⁹ Notwithstanding this omission, use of the Code to define standards with which to impose civil tort liability not only contradicts the weight of Illinois precedent³⁰ but also exceeds the specific limitations of the ABA Code,³¹ the model for the Illinois Code.

Nevertheless, in recent years the ABA Code has assumed an increasingly larger role in attorney malpractice cases.³² A minority of courts have held that the standard of professional care is "governed" by this Code. In the landmark case of *Lysick v. Walcom*,³³ for example, insurance defense coun-

would have prevailed had appeal been filed); *Oda v. Highway Ins. Co.*, 44 Ill. App. 2d 235, 194 N.E.2d 489 (1st Dist. 1963) (plaintiff unable to show that but for decision of insurance counsel to present a joint defense decision would have been in plaintiff's favor); *Piper v. Green*, 216 Ill. App. 590 (4th Dist. 1920) (plaintiff must allege and prove solvency of defendant for attorney to be held negligent for neglect of a claim which was barred by the statute of limitations); *Goldzier v. Poole*, 82 Ill. App. 469 (1st Dist. 1898) (plaintiff must show that debtor was solvent). For criticism of the harshness of the "but for" test and discussion of recent judicial attempts to lessen the restrictiveness of this test, see Note, *The Standard of Proof of Causation in Legal Malpractice Cases*, 63 CORNELL L. REV. 666 (1978).

25. *Chicago Red Top Cab Ass'n v. Gaines*, 49 Ill. App. 3d 332, 364 N.E.2d 328 (1st Dist. 1977) (citing *Trustees of Schools v. Schroeder*, 2 Ill. App. 3d 1009, 278 N.E.2d 431 (1st Dist. 1971)).

26. *Preliminary Statement*, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976).

27. *Id.*

28. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY (1980). See note 3 *supra*.

29. It states: "Conduct of attorneys which violates the Code of Professional Responsibility contained in article VIII of these rules or which tends to defeat the administration of justice or to bring the courts or the legal profession into disrepute shall be grounds for discipline by the court." ILL. SUP. CT. R. 771 (emphasis added).

30. See cases cited in note 10 *supra*.

31. See note 26 *supra*.

32. For discussion of the interrelationship between the ABA Code of Professional Responsibility and attorney malpractice, see MALLEEN & LEVIT, *supra* note 1, at 17; Gaudineer, *Ethics & Malpractice*, 26 DRAKE L. REV. 88 (1976); Mutnick, *The Nexus Between Professional Discipline and Legal Malpractice*, 2 BRIEF/CASE 8 (1976); Wolfram, *The Code of Professional Responsibility as a Measure of Attorney Liability in Civil Litigation*, 30 S.C. L. REV. 281 (1979) [hereinafter cited as Wolfram]; Comment, *Violation of the Code of Professional Responsibility as Stating a Cause of Action in Legal Malpractice*, 6 OHIO N.U. L. REV. 692 (1979).

33. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). See also *Woodruff v. Tomlin*, 593 F.2d 33 (6th Cir. 1979) (trial court's exclusion of the conflict of interest issue as defined by DR 5-105 from other issues of malpractice held prejudicial error); *Kinnamon v. Staitman & Snyder*, 66 Cal. App. 3d 893, 136 Cal. Rptr. 321 (1977) (attorney's threat to file a criminal complaint against plaintiff in violation of the California Rules of Professional Conduct held to allege a cause of action for intentional infliction of emotional distress); *Ishmael v. Millington*, 241 Cal.

sel failed to inform the insured that a conflict of interest had developed when a claimant made a demand for the limits of the policy. Though the attorney had obtained authority from the insurer to settle for the policy limits, he responded to the claimant's demand by offering slightly less. This failure to effect settlement resulted in a verdict against the insured for twenty times the amount offered. The court found that the attorney's failure to disclose to the insured either the offer to settle or its rejection violated the standard of care.³⁴ Under this standard, an attorney is obliged to disclose all facts and circumstances which, in the judgment of an attorney of ordinary skill and capacity, would enable the client to intelligently decide whether to allow the attorney to continue as counsel.³⁵ The court did not define the standard of care solely in terms of reasonableness, but rather stated that the standard is that of ordinary care under the circumstances and is "governed" by standards of professional ethics.³⁶ This minority view departs from traditional negligence analysis in that the standard of care is articulated in accordance with the minimum requirements of a code of professional responsibility and not solely in accordance with the standard of reasonableness.³⁷

The majority of decisions have rejected this view, holding that violation of a code of professional responsibility does not provide a sufficient basis for a tort action. These courts have ruled that such codes were not intended to be used as standards for imposing tort liability,³⁸ and have noted that precedent does not support such use.³⁹ Believing that reliance on professional responsi-

App. 2d 520, 50 Cal. Rptr. 592 (1966) (attorney's representation of both parties in a divorce action in violation of the California Code of Professional Conduct held to enable trier of fact to find the attorney negligent).

34. 258 Cal. App. 2d at 152, 65 Cal. Rptr. at 417.

35. *Id.* at 147, 65 Cal. Rptr. at 414.

36. *Id.* at 149, 65 Cal. Rptr. at 415. The court mentioned the possibility that an attorney and an insured may enter into an agreement that relieves the attorney of any duty to the insured regarding settlement, but cautioned that the parties must recognize that the attorney-client relationship does not extend to settlement. Further, the court suggested that an attorney may have a duty to inform the insured that only the insurance company is represented in settlement if circumstances make it likely that an insured may be misled into believing the representation includes both insured and insurer. *Id.* at 150, 65 Cal. Rptr. at 415. The court mentioned no reason why an agreement of this type would contradict public policy. See Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954).

37. See Wolfram, *supra* note 32, at 305. The author, in reference to *Ishmael v. Millington*, 241 Cal. App. 2d 520, 50 Cal. Rptr. 592 (1966), stated that "the court's explicit reliance on the lawyer's Code delineated the attorney's tort duties in a way that precluded application of a lesser standard." *Id.*

38. *Bickel v. Mackie*, 447 F. Supp. 1376 (N.D. Iowa 1978); *Brody v. Ruby*, 267 N.W.2d 902 (Iowa 1978); *Nelson v. Miller*, 277 Kan. 271, 607 P.2d 438 (1980); *Hill v. Willmott*, 561 S.W.2d 331 (Ky. Ct. App. 1978); *People v. Green*, 405 Mich. 273, 274 N.W.2d 448 (1979); *Freidman v. Dozorc*, 83 Mich. App. 429, 268 N.W.2d 673 (1978); *Commonwealth v. Pfaff*, 233 Pa. Super. Ct. 153, 335 A.2d 751 (1975).

39. See, e.g., *Noble v. Sears, Roebuck & Co.*, 33 Cal. App. 3d 654, 109 Cal. Rptr. 269 (1973).

bility codes would oversimplify the ethical obligations inherent in any attorney-client relationship,⁴⁰ these courts have held that the sole remedy for a Code violation is the public remedy of discipline and not the private remedy of compensatory damages.⁴¹ Despite this weight of authority, the appellate court in *Rogers* appears to have adopted the minority position.

FACTS AND PROCEDURAL HISTORY

In 1972, James D. Rogers, M.D., was sued for medical malpractice by Quilico, a former patient.⁴² At the time of the alleged negligent act Rogers was covered by a professional liability insurance policy. The policy, however, had lapsed prior to the filing of Quilico's lawsuit.⁴³ The policy provided that the written consent of the insured⁴⁴ was required before the insurer could settle a claim but that no consent was necessary if the claim was against a former insured⁴⁵ even if the claim were filed while the policy was still in force.⁴⁶ Rogers' insurer retained the law firm of Robson, Masters, Ryan, Brumund & Belom to represent it and Rogers.⁴⁷ Rogers expressed his irritation with the litigation in a letter to the law firm which stated: "I refuse to participate any further with Mr. Quilico's absurd accusations. . . . I trust you can dispose of this problem with little difficulty."⁴⁸ In

40. See, e.g., *Spencer v. Burglass*, 337 So. 2d 596 (La. Ct. App. 1976).

41. *Merritt-Chapman & Scott Corp. v. Elgin Coal, Inc.*, 358 F. Supp. 17 (E.D. Tenn. 1972); *Martin v. Trevino*, 578 S.W.2d 763 (Tex. Civ. App. 1978).

42. See *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 469, 392 N.E.2d 1365, 1368 (3d Dist. 1979).

43. *Id.* at 469, 392 N.E.2d at 1368. Policy FW 2864-94 stated in pertinent part:

Injury arising out of the rendering of or failure to render, during the policy period, professional services in the practice of the profession described in the declarations by any person for whose acts or omissions the partnership insured is legally responsible, and the company shall have the right and duty to defend any suit against the insured seeking such damages, even if any of the allegations of the suit are groundless, false or fraudulent, and may make such investigation and with the written consent of the insured, such settlement of any claim or suit as it deems expedient, but the company shall not be obligated to pay any claim or judgment or, to defend any suit after the applicable limit of the company's liability has been exhausted by payment of judgments or settlements *nor shall the written consent of a former insured be required before the company may make any settlement of any claim or suit even if such claim or suit was made, preferred or alleged while such former insured was an insured under this policy.*

Brief for Plaintiff-Appellant at 6-7, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (3d Dist. 1979) (emphasis added).

44. The policy defined an insured as "any person qualifying as an insured in the 'Persons Insured' provision." This "Persons Insured" provision stated that "each of the following is an Insured under this Insurance to the extent set forth below: (a) under Individual Professional Liability, each individual named in the declarations as Insured. . . ." *Id.* at 7.

45. 74 Ill. App. 3d at 470-71, 392 N.E.2d at 1369.

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

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

48. *Id.* at 478, 392 N.E.2d at 1374. Plaintiff wrote two letters pertaining to settlement. The first letter, dated March 8, 1972, was addressed not to the defendant but to the insurance

1974, the law firm effected a settlement between the insurer and Quilico, the insurer paying Quilico \$1,250 in return for a covenant not to sue.⁴⁹ At no time prior to settlement did the law firm obtain the unequivocal consent of Rogers to settle nor did the firm inform him of the imminency of the settlement.⁵⁰

Rogers sued the law firm claiming that it wrongfully settled the action without his express permission or knowledge.⁵¹ The trial court dismissed the complaint, holding it insufficient in the *ad damnum* clause.⁵² The Illinois Appellate Court for the Third District upheld the dismissal, but without prejudice.⁵³ Rogers again filed suit alleging the same facts and cause of action.⁵⁴ The defendant law firm moved for summary judgment,⁵⁵ arguing that no genuine issue of fact existed regarding its contractual authority to settle the malpractice action without Rogers' consent because the policy at issue expressly authorized the insurer to settle all claims against a former insured without his consent.⁵⁶ The trial court granted the defendant's motion for summary judgment finding that, because as a matter of law the policy authorized settlement without Rogers' consent, there existed no material issue of fact.⁵⁷ Rogers appealed.

company's representative. This letter stated that "[a]bsolutely no settlement should be made favoring this individual." Brief for Defendant-Appellants at 9-10, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

49. 74 Ill. App. 3d at 469, 392 N.E.2d at 1368.

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

51. *Id.* at 468, 392 N.E.2d at 1368.

52. *Id.* at 469, 392 N.E.2d at 1368. See also ILL. REV. STAT. ch. 110, § 34 (1979). The Illinois statute regarding the *ad damnum* request states in pertinent part:

Demands for relief which the allegations of the pleadings do not sustain may be objected to on motion or in the answering pleading. In actions for injury to the person, any complaint filed which contains an *ad damnum*, except to the minimum extent necessary to comply with the circuit rules of assignment where the claim is filed, shall be dismissed without prejudice forthwith upon motion of a defendant or upon the court's own motion.

Id. Except in the case of default, a prayer for relief does not limit the relief obtainable. *Dils v. City of Chicago*, 62 Ill. App. 3d 474, 378 N.E.2d 1130 (1st Dist. 1978); *City of Chicago v. Nielsen*, 38 Ill. App. 3d 941, 349 N.E.2d 532 (1st Dist. 1976).

53. 74 Ill. App. 3d at 469, 392 N.E.2d at 1368. See ILL. REV. STAT. ch. 110, § 34 (1977).

54. 74 Ill. App. 3d at 469, 392 N.E.2d at 1368.

55. A motion for summary judgment must comply with the requirements set forth in ILL. REV. STAT. ch. 110, § 57(3) (1979), which states in pertinent part:

The judgment or decree sought shall be rendered forthwith if the pleadings, depositions, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment or decree, as a matter of law.

Id. In *Littrel v. Coats Co.*, 62 Ill. App. 3d 516, 379 N.E.2d 293 (2d Dist. 1978), the court stated that although the purpose of summary judgment is to avoid litigation of a factual issue, different inferences may be derived from even undisputed facts and thus motions for summary judgment should be granted only when reasonable persons could not arrive at different inferences from undisputed facts. *Id.* at 517, 379 N.E.2d at 296.

56. 74 Ill. App. 3d at 468, 392 N.E.2d at 1368.

57. *Id.*

The Appellate Court Opinion

In reversing the trial court's grant of summary judgment, the appellate court focused primarily on whether the defendant breached a duty owed to Rogers that existed independent of the provisions for settlement contained in the insurance policy.⁵⁸ That is, the appellate court, relying upon settled principles of contract construction,⁵⁹ found that the trial court was correct in finding no duty within the policy that obligated the defendant to obtain Rogers' consent,⁶⁰ but also held that the trial court erred in failing to find a duty elsewhere. Focusing on the "tripartite relationship"⁶¹ between the insurer, the insured, and the defendant, the court reasoned that in situations where an attorney represents both the insured and the insurer, "[t]he attorney-client relationship between the insured and the attorney imposes upon

58. The court also considered the issue of whether the trial court erred in granting summary judgment prior to discovery. The court found that the plaintiff failed to comply with Supreme Court Rule 191(b), which allows additional discovery prior to summary judgment if the affidavits of either party fail to present a genuine issue as to any material fact, by submitting an affidavit that: (1) names the persons from whom the material facts are to be obtained; (2) shows why their affidavits cannot be procured; (3) states what they would testify to if sworn; and (4) provides reasons for this belief. The appellate court concluded that since plaintiff did not comply with this rule, he could not initiate additional discovery prior to summary judgment. *Id.* at 471, 392 N.E.2d at 1370. See ILL. REV. STAT. ch. 110A, § 191 (1979).

59. The principles involved in the construction of insurance contracts are identical to those involved in construing other contracts. Thus, the purpose in the construction of an insurance policy is to determine the intent of the parties. If no ambiguity exists relative to the terms of the policy, the intention of the parties must be determined from the language of the policy alone. In these situations, the court should give effect to the plain and obvious import of the language without considering extrinsic evidence unless such construction would lead to unreasonable or absurd consequences. But if the terms are ambiguous and uncertain, the court should consider extrinsic matters such as the purpose sought to be accomplished, the subject matter of the contract, the circumstances surrounding the issuance of the policy, and the conduct of the parties. *Seeburg Corp. v. United Founders Life Ins. Co.*, 82 Ill. App. 3d 1034, 1036, 403 N.E.2d 503, 506 (1st Dist. 1980). See generally 1 G. COUCH, INSURANCE §§ 15.1-.96 (2d ed. 1959); 2 R. LONG, LAW OF LIABILITY INSURANCE §§ 16.01-.18 (1979); Young, Lewis & Lee, *Insurance Contract Interpretation: Issues and Trends*, 1975 INS. L.J. 71.

60. The court also held that this provision did not contradict public policy. Rogers had argued that the insurance company could effectively evade its contractual obligations to obtain written consent before settlement merely by canceling or refusing to renew and that this would be against public policy. In rejecting this argument, the court found that the record was devoid of any indication that the insurance company had failed to renew in an attempt to evade the provision which required written consent of an insured before settlement. 74 Ill. App. 3d at 471, 392 N.E.2d at 1370.

61. The tripartite relationship existing when an attorney represents both an insured and an insurer often gives rise to malpractice actions by an insured against an attorney for representation of conflicting interests. See generally Berg & Cohen, *The Dangers of Playing Both Ends from the Middle: The Dilemma of Insurance Companies' Defense Counsel*, 29 FED'N INS. COUNSEL Q. 281 (1979); Brodsky, *Duty of Attorney Appointed by Liability Insurance Co.*, 14 CLEV. MAR. L. REV. 375 (1965); Jacobs, *Ethical Conflicts in Relations between an Insured, His Primary Carrier, His Excess Carrier and His Attorney*, 24 FED'N INS. COUNSEL Q. 50 (1974); Mallen; *Insurance Counsel: The Fine Line between Professional Responsibility and Malpractice*, 45 INS. COUNSEL J. 244 (1978).

the attorney the same professional obligations that would exist had the attorney been personally retained by the insured."⁶²

Significantly, the court insisted that some of these obligations "originate" with the fundamental principle of Canon 5 of the Illinois Code⁶³ which provides that "A Lawyer Should Exercise Independent Judgment on Behalf of a Client."⁶⁴ Conceding that the present action was not a disciplinary proceeding and that the Illinois Code does not carry the authority of precedent in tort actions, the court nevertheless asserted that both civil suits and disciplinary proceedings concern conduct that falls below certain "minimum standards."⁶⁵ Therefore, the appellate court reasoned that professional standards of ethics are "relevant considerations" in malpractice actions.⁶⁶

Analyzing the facts of *Rogers* in accordance with these relevant considerations, the court observed that in situations where a conflict of interest arises between insured and insurer, an attorney may not continue to represent both clients unless disclosure of the conflict is made to each.⁶⁷ Citing *Lysick v. Walcom*,⁶⁸ a case which had applied a code of professional responsibility in a malpractice case, the court concluded that the defendant had a duty to disclose all facts and circumstances which, in the judgment of a lawyer of ordinary skill and capacity, would have enabled the parties to make a free

62. 74 Ill. App. 3d at 472, 392 N.E.2d at 1370. See *Allstate Ins. Co. v. Keller*, 17 Ill. App. 2d 44, 52, 149 N.E.2d 482, 486 (1st Dist. 1958) ("[a]n insurer's attorneys are bound by the same high standards which govern all attorneys, whether or not privately retained").

The appellate court also made reference to American Bar Association ethical opinion No. 1822, which states:

When an attorney is employed by an insurer in an action to defend an insured, he is employed to and does, in fact, represent the insured as well as the insurer whether or not the action is under a reservation of right. His subsequent representation of the insurer against the insured to declare that the policy does not cover the accident could be unethical if such results in representing conflicting interests.

ABA COMM. ON PROFESSIONAL ETHICS, OPINIONS, No. I-822 (1965).

63. The court also relied upon ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-17 (1976), which states in pertinent part:

Typically recurring situations involving potentially differing interests are those in which a lawyer is asked to represent . . . an insured and his insurer. . . . Whether a lawyer can fairly and adequately protect the interests of multiple clients in these and similar situations depends upon an analysis of each case. In certain circumstances, there may exist little chance of the judgment of the lawyer being adversely affected by the slight possibility that the interests will become actually differing; in other circumstances, the chance of adverse effect upon his judgment is not unlikely.

The court further relied upon ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY, DR 5-107(c) (rev. 1977), which states: "A lawyer shall not permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such legal services." See generally Gibson, *ABA Code Canon 5—Professional Judgment*, 48 TEX. L. REV. 351 (1970).

64. ILLINOIS CODE OF PROFESSIONAL RESPONSIBILITY CANON 5 (rev. 1977).

65. 74 Ill. App. 3d at 473, 392 N.E.2d at 1371.

66. *Id.*

67. *Id.*

68. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

and intelligent decision regarding representation.⁶⁹ The court asserted that at the moment the defendant became aware that a settlement was imminent and that Rogers did not want the case settled,⁷⁰ a conflict of interest⁷¹ arose that precluded the defendant from continuing to represent both insured and insurer without full disclosure.⁷² The appellate court concluded that in failing to disclose the circumstances of the impending settlement to Rogers the defendant breached a duty to him that rendered it liable for damages⁷³ sustained as a proximate cause of the breach.⁷⁴ The court speculated that failure to disclose the facts regarding the settlement precluded Rogers from pursuing other alternatives, including releasing the insurer from its contractual obligations, retaining different counsel and defending the malpractice action independently.⁷⁵

Finally, the court addressed the issue of whether Rogers' damages were legally sufficient to sustain his complaint.⁷⁶ The court was convinced that had the Quilico action been defended, Rogers would have prevailed and might have brought a successful malicious prosecution action against Quilico.⁷⁷ Further, the court felt that Rogers might have been able to prove that he had sustained a loss of patients and had suffered increases in professional liability insurance premiums.⁷⁸ Therefore, the appellate court re-

69. 74 Ill. App. 3d at 474, 392 N.E.2d at 1371.

70. See note 106 and accompanying text *infra*.

71. See notes 103-117 and accompanying text *infra*.

72. 74 Ill. App. 3d at 474, 392 N.E.2d at 1371.

73. See notes 76 & 78 *infra*.

74. 74 Ill. App. 3d at 475, 392 N.E.2d at 1372.

75. *Id.*

76. *Id.* at 476, 392 N.E.2d at 1373. Justice Alloy, in his dissenting opinion, insisted that Rogers did not allege damages sufficient to sustain his complaint, stating that

[t]he instant case involves an action for damages as against the defendant and is based upon the only specific allegations . . . of damages, *i.e.* specifically, that if the Quilico lawsuit had been tried and the decision was in favor of the doctor, the doctor speculates that he might have filed a malicious prosecution action against Quilico and recovered from Quilico. As we must note, the allegations raised only clearly speculative issues with respect to damages.

74 Ill. App. 3d at 478, 393 N.E.2d at 1375 (Alloy, J., dissenting). See note 78 *infra*.

77. In a malicious prosecution suit, a plaintiff must plead and prove: (1) that the plaintiff in the original lawsuit acted maliciously and without probable cause; (2) that the prior lawsuit terminated in the plaintiff's favor; and (3) that special injury not necessarily resulting in any and all suits prosecuted to recover for like causes of action was suffered. *Berlin v. Nathan*, 64 Ill. App. 3d 940, 945, 381 N.E.2d 1367, 1371 (1st Dist. 1978). See generally Chambers, *Physician Recovery for Bad Faith Medical Malpractice Actions*, 10 TEX. TECH. L. REV. 391 (1979); Mallen, *An Attorney's Liability for Malicious Prosecution, A Misunderstood Tort*, 46 INS. COUNSEL J. 407 (1979).

78. 74 Ill. App. 3d at 476, 392 N.E.2d at 1373. The appellate court's treatment of damages is problematic. The majority declared that the damages the plaintiff alleged were not challenged by the defendant on appeal. *Id.* at 475, 392 N.E.2d at 1373. The dissent asserted that Rogers himself conceded in his appellate brief that the issue of damages was raised by the defendant on appeal in its motion for summary judgment. *Id.* at 479, 392 N.E.2d at 1375-76 (Alloy, J., dissenting). Worse, the majority and dissenting opinions were not even in agreement as to

versed the trial court's grant of summary judgment and remanded the case for further proceedings so that the trial court and a jury could decide the issues of proximate causation⁷⁹ and damages.⁸⁰

The Supreme Court Opinion

Chief Justice Goldenhersh's brief opinion for the Supreme Court centered on the attorney-client relationship between the defendant and the plaintiff, which, in the court's view, imposed a duty requiring the law firm to disclose its intent to settle the litigation.⁸¹ According to the court, the duty to disclose was not removed by the insurer's contractual authority to settle without the plaintiff's consent.⁸² The court limited its holding by stating that it did not decide whether the insurer was authorized to settle without the plaintiff's consent under the insurance policy, what recourse the plaintiff had under the policy, and whether any damages proximately caused by breach of the duty to disclose could be proven.⁸³ In short, the court affirmed the appellate court's reversal of summary judgment because the record did not conclusively show the absence of any genuine issue of material fact.⁸⁴

CRITIQUE

Three fundamental criticisms can be made of the appellate and supreme courts' analyses. The most basic, and the most important to the legal profes-

precisely what damages Rogers had alleged. The majority claimed that Rogers had alleged both loss of an opportunity to file a malicious prosecution suit against Quilico *and* loss of direct and referred surgical patients, increases in his professional liability insurance premiums, and accrual of legal expenses and costs. *Id.* at 476, 392 N.E.2d at 1373. The dissent insisted that Rogers alleged only deprivation of an opportunity to file a malicious prosecution suit, characterizing such an allegation as purely speculative. *Id.* at 478, 392 N.E.2d at 1375 (Alloy, J., dissenting). Remanding the issue of damages for trial may have only compounded the problem. As stated by the dissent:

To reverse summary judgment granted in the instant case . . . would set a very unsound precedent. To argue that such speculative elements of damages, as asserted in the instant case, can sustain the complaint and authorize further procedures on the basis of such unfounded speculation, is inconsistent with the standards of practice which are designed to protect defendants from lawsuits which are not properly grounded in fact and in law.

Id. at 479, 392 N.E.2d at 1375 (Alloy, J., dissenting).

79. *Id.* at 476, 392 N.E.2d at 1373. Compare Justice Alloy's statement that "Dr. Rogers presented nothing by affidavit in the hearing on the motion for summary judgment to show damage proximately resulting from defendant's omission to advise Dr. Rogers prior to the settlement by the insurer." *Id.* at 480, 392 N.E.2d at 1376 (Alloy, J., dissenting).

80. *Id.* at 476, 392 N.E.2d at 1373.

81. 81 Ill. 2d at 205, 407 N.E.2d at 49. The court stated that defendant's motion for summary judgment and the supporting affidavits did not deal with issues stated in plaintiff's affidavits but only focused on the insurer's authority to settle as provided by the insurance policy. The court therefore did not discuss the extent of the insurer's authority to settle pursuant to the insurance contract, and based its decision solely on the relationship between the defendant and the plaintiff. *Id.* at 205, 407 N.E.2d at 49.

82. See note 43 *supra*.

83. 81 Ill. 2d at 205-06, 407 N.E.2d at 49.

sion, is that the appellate court erroneously relied upon the Illinois Code to define the standard of professional care. Additionally, however, both courts erred in elevating a mere divergence of opinion between an insured and an insurer to the level of a conflict of interest, the predicate upon which the courts' finding of duty rested. Finally, the courts can be criticized for incorrectly analyzing case law, thus failing to distinguish *Rogers* from excess liability cases where a duty to disclose is validly imposed.

The Code in Attorney Malpractice

The appellate and supreme courts' analyses in *Rogers* fail most fundamentally in suggesting that the Illinois Code is relevant in defining the duties attorneys owe clients, while leaving unspecified the precise role of the Code in actions against attorneys.⁸⁵ Because the supreme court did not state whether the Illinois Code merely provides evidence of custom, whether it in fact defines the standard of care, or whether it constitutes prima facie evidence of negligence,⁸⁶ it would appear to have accepted the appellate court's ruling that this Code provides "relevant considerations" in both tort and disciplinary actions.⁸⁷ Yet, the appellate court primarily relied upon a case that defined the standard of professional care in terms of ethical standards.⁸⁸ Thus, a possible inference from the appellate court opinion, and as a result, from the supreme court's affirmance, is that the Illinois Code has become something more than mere evidence of the duties attorneys owe clients.

In suggesting that the Illinois Code was important in defining the duties owed a client, the appellate court ignored the differences between tort and disciplinary proceedings, making an analytical error in stating that both procedures pertain when an attorney's conduct infringes upon "certain minimum standards."⁸⁹ The disciplinary rules articulate minimum levels of conduct which, when breached, warrant discipline,⁹⁰ while the standard of professional care prescribes in distinct circumstances whether an attorney's conduct conforms to the "knowledge and skill common to members of the

84. See note 55 *supra*.

85. The supreme court merely stated that the duty "stemmed from their attorney-client relationship . . . and was not affected by the extent of the insurer's authority to settle without plaintiff's consent." 81 Ill. 2d at 205, 407 N.E.2d at 49. The appellate majority concluded that "[w]hile the insurance policy and its provision may appropriately regulate the rights between the insurer and insured, these provisions ought not and do not negate the duties an attorney owes his client." 74 Ill. App. 3d at 476, 392 N.E.2d at 1373.

86. Breach of a statute may constitute prima facie evidence of negligence if the plaintiff can prove that the violation proximately caused injury and that the statute was intended to protect a class to which he belongs from the kind of injury that he suffered. *Barthel v. Illinois Cent. Gulf R.R.*, 74 Ill. 2d 213, 384 N.E.2d 323 (1978).

87. 74 Ill. App. 2d at 473, 392 N.E.2d at 1371.

88. *Lysick v. Walcom*, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). See note 33 and accompanying text *supra*.

89. 74 Ill. App. 3d at 473, 392 N.E.2d at 1371.

90. *Preliminary Statement*, ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976).

legal profession.”⁹¹ Were the Illinois Code to “govern” the standard of professional care, situations, arguably like that in *Rogers*,⁹² would arise where an attorney would not be found negligent within the traditional negligence analysis, but would be deemed negligent for violating the Illinois Code.⁹³ Because using the Illinois Code in this way would result in the obvious anomaly of holding an attorney liable for conduct that previously conformed to the standard of care, this approach far exceeds the purpose and scope for which the Illinois Code was originally designed⁹⁴ and confers upon it a role for which it is analytically inadequate.⁹⁵

The supreme court’s analysis also failed to designate the parameters of the particular duty defined in *Rogers*. In stating that the duty to disclose arises out of the attorney-client relationship, the court did not limit the duty to situations in which conflicts of interest exist,⁹⁶ or to situations involving a malpractice claim.⁹⁷ Similarly, the supreme court failed to address adequately either the nature of the required disclosure⁹⁸ or the type of response required⁹⁹ before settlement may be effected properly. Consequently, the scope of the duty is left unspecified, providing attorneys with little practical guidance.

As a result of their lack of specificity, the appellate and supreme courts effectively granted clients the discretion to avoid contractual agreements that exist pursuant to an attorney-client relationship. Although an insured who is

91. *Olson v. North*, 276 Ill. App. 457, 473 (2d Dist. 1934).

92. Justice Alloy, dissenting, stated that *Rogers*:

is not a case where an attorney has subjected a client to monetary damages by reason of negligent or incompetent action by the attorney.

This is a case where Dr. Rogers, as an insured, got precisely the insurance coverage and protection provided in his policy, which included the right by the insurer to settle the case, which was done without any cost to Dr. Rogers.

This is not a case where the court of review (as undertaken by the majority opinion in seeking to find some damage to Dr. Rogers) should strain to theorize that Dr. Rogers might have taken over the defense of the *Quilico* action and have been successful in such defense, and thereafter could file a malicious prosecution action against Quilico in which he would thereafter be successful (all without any support in the record in this case and wholly speculative).

74 Ill. App. 3d at 480, 392 N.E.2d at 1376 (Alloy, J., dissenting).

93. Many of the standards contained in the disciplinary rules obviously were meant to be nothing more than precatory guidelines, unrelated to the standard of professional care. *See, e.g.*, DR 2-101 (c)(form of attorney advertising should be direct, dignified and readily comprehensible); DR 7-101 (a)(1)(D)(attorneys should not fail to treat with courtesy and consideration all persons involved in the legal process).

94. *See* note 26 and accompanying text *supra*.

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

96. *See* notes 103-117 and accompanying text *infra*.

97. *See* 26 ILLINOIS STATE BAR ASSOCIATION, TRIAL BRIEFS 1, 2 (July 1980) (the author, in reference to *Rogers*, points out that “[t]here appears to be no express limitation of the applicability of the doctrine to malpractice cases”).

98. *See* note 128 and accompanying text *infra*.

99. *See* note 48 and accompanying text *supra*.

party to an insurance contract may discharge the attorney retained by the insurer and conduct the litigation independently,¹⁰⁰ until this right is exercised insureds are bound by contractual obligations existing pursuant to the attorney-client relationship.¹⁰¹ In *Rogers*, the contract unambiguously authorized settlement without plaintiff's consent.¹⁰² Thus, the plaintiff's decision to terminate the attorney-client relationship and the underlying contractual obligations should have been clearly expressed to the defendant and not simply assumed as a right existing independent of, and contrary to, the permission to settle conferred by the insurance contract.

The appellate and supreme courts used the Illinois Code in a manner that suggests the Code may henceforth govern the standard of care. This approach will produce anomalous and inequitable results and will render suspect the binding authority of contracts entered into pursuant to the attorney-client relationship.

Conflicts of Interest

In determining that the attorneys in *Rogers* had before them a conflict of interest, the appellate court abjured settled procedures required of a reviewing court. Plaintiff's appellate brief identified the conflict of interest at issue as concerning the interpretation of the insurance policy.¹⁰³ That is, the plaintiff argued that the phrase "former insured" was ambiguous and that the defendant had a duty to disclose that ambiguity.¹⁰⁴ Rejecting this argument,¹⁰⁵ the appellate court determined that the conflict involved the preferences between settlement and non-settlement of the insured and the in-

101. See *Sokol v. Mortimer*, 81 Ill. App. 2d 55, 225 N.E.2d 496 (1st Dist. 1967). In *Sokol*, the client argued that a contract for attorney's fees between an attorney and a client was presumptively fraudulent, and thus unilaterally voidable by the client, due to the fiduciary character of the attorney-client relationship. The court held that the contract did not create a presumption of fraud and thus was not unilaterally voidable by the client because this would "exculpate a client from dealing in an open and above board fashion with his attorney and impose upon such attorney an unwarranted and inequitable burden." *Id.* at 61, 225 N.E.2d at 499. The court quoted from *Rolfe v. Rich*, 149 Ill. 436, 35 N.E. 352 (1893) (although dealings between attorney and client are subject to close scrutiny, the law does not proclaim all contracts made by an attorney with a client *ipso facto* void or voidable at the instance of the client) and *Morrison v. Smith*, 130 Ill. 304, 23 N.E. 241 (1889) (though closely scrutinized, those dealings between attorney and client that are obviously fair and just will be upheld). See also Brief for *Amicus Curiae* of the Illinois Defense Counsel, at 11, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

102. See note 43 *supra*.

103. Brief for Plaintiff-Appellant at 11-12, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (3d Dist. 1979).

104. *Id.*

105. 74 Ill. App. 3d at 471, 392 N.E.2d at 1369.

surer.¹⁰⁶ Apparently, the appellate court ignored the plaintiff's argument as to what the conflict was and decided the case in the plaintiff's favor on grounds that he did not argue. In so holding for the plaintiff, the appellate court deviated from the settled rule that a reviewing court will search the record for the purpose of affirmance and not for the purpose of reversal.¹⁰⁷

The appellate and supreme courts also misapprehended the circumstances necessary for a conflict of interest.¹⁰⁸ For a conflict of interest to exist, an adversity of interest is required, not a mere difference of opinion.¹⁰⁹ Canon 6

106. The court stated that

[w]hen defendant became aware that a settlement was eminent [*sic*] because of the preference of the insurance company, and that their other client, the plaintiff, did not want the case settled, a conflict arose and defendant could not continue to represent both without a full and frank disclosure of the circumstances to his clients.

Id. at 474, 392 N.E.2d at 1372. By its use of two restrictive clauses after the word "aware," the court seems to suggest that the defendant was aware of plaintiff's desire not to settle. This interpretation is erroneous. On the one hand, the insurance contract itself provided a kind of notice to the defendant, suggesting that plaintiff's preference was to relinquish full control of settlement upon becoming a former insured. *See* note 43 and accompanying text *supra*. On the other hand, Rogers' letter to the law firm in which he urged the defendant to dispose of the Quilico lawsuit 'with little difficulty' did not unambiguously convey his desire not to settle and may have, in fact, encouraged settlement. *See* note 48 and accompanying text *supra*. Hence, to assert that defendant was aware of plaintiff's desire not to settle is simply unsubstantiated by the facts.

107. 74 Ill. App. 3d at 480, 392 N.E.2d at 1376 (Alloy, J., dissenting). *See* First Fed. Sav. & Loan Ass'n v. 4800 Marine Drive, Inc., 49 Ill. App. 2d 218, 198 N.E.2d 583 (1st Dist. 1964) (*per curiam*) (mortgage foreclosure); Spears v. Spears, 45 Ill. App. 2d 167, 195 N.E.2d 237 (1st Dist. 1963) (contempt of court for failure to pay support); Russell v. Halyama, 27 Ill. App. 2d 359, 170 N.E.2d 8 (4th Dist. 1960) (action for alleged negligence of employer).

108. *See generally* Allen, *Some Conflict of Interest Problems in Insurance Litigation*, 37 INS. COUNSEL J. 512 (1970); Aronson, *Conflict of Interest*, 52 WASH. L. REV. 807 (1977); Corbo, *Defending Insurance Companies and the Insured—Can Two Masters be Served?*, 55 CHICAGO B. REC. 102 (1973); Ford, *The Insurance Contract: The Conflict of Interest it Breeds*, 36 INS. COUNSEL J. 610 (1969); Hutcheson, *Recurring Conflict Problems Facing Insurance Defense Attorneys*, 37 INS. COUNSEL J. 501 (1970); Shadur, *Lawyers' Conflicts of Interest: An Overview*, 58 CHICAGO B. REC. 190 (1977); Comment, *Full Consent: An Invitation to Conflicts of Interests in the Attorney-Client Relationship*, 1972 L. SOC. ORD. 435.

109. MALLEN & LEVIT, *supra* note 1, at 62 (1979 Supp.) ("A mere diversity of interests between clients does not create conflicting interests. Rather, there must be actual *adversity*. . ."). *See In re LaPinska*, 72 Ill. 2d 461, 381 N.E.2d 700 (1978), in which the court stated that a conflict of interest arises "whenever an attorney's independent judgment on behalf of a client may be affected by a loyalty to another party." *Id.* at 469, 381 N.E.2d at 703. *See also* Matter of Special February 1977 Grand Jury, 581 F.2d 1262 (7th Cir. 1978) (court may grant disqualification of attorney if the possibility of a conflict of interest becomes great enough); Ross v. City of Geneva, 43 Ill. App. 3d 976, 357 N.E.2d 829 (2d Dist. 1976) (to establish a conflict of interest an actual conflict is not required but only a 'reasonable possibility' of conflict), *aff'd*, 71 Ill. 2d 27, 373 N.E.2d 1342 (1978). *See, e.g.,* Westinghouse Elec. Corp. v. Gulf Oil Corp., 588 F.2d 221 (7th Cir. 1978) (conflict of interest in representation of a party in action where adverse party is former client); Estate of Ragen, 79 Ill. App. 3d 8, 398 N.E.2d 198 (1st Dist. 1979) (no

of the former ABA Canons of Professional Ethics stated that a conflict of interest arises when an attorney owes one client a duty in direct conflict with duties owed another client.¹¹⁰ The current ABA Code defines a conflict of interest in terms of the adverse effect that continued representation may have on the independent judgment and loyalty of a lawyer.¹¹¹ The rationale of the duty to disclose a conflict of interest is to ensure that an attorney will not subordinate the interests of one client to those of another.¹¹²

In *Rogers*, the specific contractual authority to settle and the general ethical obligation to exercise independent judgment on behalf of a client gave rise to a mere appearance of a conflict of interest.¹¹³ Although plaintiff's letter to the law firm¹¹⁴ did not expressly authorize settlement, it certainly did not preclude it. It therefore failed to provide the law firm with adequate notice as to plaintiff's settlement preference.¹¹⁵ This lack of notice did not produce a settlement that subordinated the plaintiff's interests to those of the insurer since the settlement was pursuant to the insurance contract and it resulted in no liability to the insured.¹¹⁶ Consequently, the circumstances in *Rogers* do not approximate those necessary to create a

conflict of interest when attorney who previously represented father of illegitimate child in a custody suit subsequently represented the child and her mother in suit to have child declared the father's heir).

110. ABA CANONS OF PROFESSIONAL ETHICS (1908). Under Canon 6, an attorney had a duty to disclose to the client at the time of the retainer all circumstances pertaining to the attorney-client relationship and any interest in the controversy which might have influenced the client's selection of counsel. Also, representation of clients with conflicting interests was permissible under Canon 6 after consent of all concerned was obtained and after disclosure of the facts. See H. DRINKER, LEGAL ETHICS 311 (1953).

111. ABA CODE OF PROFESSIONAL RESPONSIBILITY (1976). The seven disciplinary rules that accompany Canon 5 pertain generally to the following areas: DR 5-101 (refusing employment where attorney's judgment affected by personal interests and where attorney may be called upon to testify as a witness); DR 5-102 (withdrawing as counsel if attorney becomes a witness); DR 5-103 (avoiding proprietary interest in litigation); DR 5-104 (avoiding business transactions with client if conflicting interests exist); DR 5-105 (refusing to accept or continue employment if interests of multiple clients impair independent judgment); DR 5-106 (settling aggregate claims of or against multiple clients); DR 5-107 (avoiding compensation from one other than client).

The Annotated ABA Code of Professional Responsibility states that DR 5-105 provides a two-prong test in determining whether a conflict of interest exists: (1) whether the attorney's independent judgment is impaired or (2) whether the attorney is representing differing interests which adversely affect either the attorney's judgment or loyalty. ABA ANNOTATED CODE OF PROFESSIONAL RESPONSIBILITY (1979).

112. See ABA CODE OF PROFESSIONAL RESPONSIBILITY, ETHICAL CONSIDERATION 5-1 (1976) which states in pertinent part that "[n]either [a lawyer's] personal interests, the interests of other clients, nor the desires of third persons should be permitted to dilute his loyalty to his client."

113. Brief for *Amicus Curiae* of the Illinois Defense Counsel, at 24, *Rogers v. Robson*, Masters, Ryan, Brumund & Belom, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

114. See note 48 and accompanying text *supra*.

115. As emphasized by Justice Alloy's appellate dissent "[i]t can readily be observed that disposition of the lawsuit 'with little difficulty,' was certainly accomplished by the settlement." 74 Ill. App. 3d at 478, 392 N.E.2d at 1374 (Alloy, J., dissenting).

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

genuine adversity of interests. The supreme court appears to have equated what would seem to be a mere divergence of opinion with a true conflict of interest.¹¹⁷

Excess Liability

The appellate court relied heavily upon excess liability cases, thereby utilizing the reasoning and rationale of precedent wholly inapplicable to the situation in *Rogers*.¹¹⁸ Excess liability cases result from actions by insurance counsel that expose an insured to personal liability in excess of the policy limits.¹¹⁹ In such cases, as in *Lysick v. Walcom*,¹²⁰ which the appellate court cited, an attorney's *failure to settle* produces excess liability. In failure to settle cases, an insurer's desire to defend the claim or to obtain the lowest possible settlement offer, as opposed to an insured's preference for prompt settlement to avoid the risk of personal liability, produces a conflict of interest. In these cases, it is the potential of personal liability¹²¹ that jeopard-

117. This error can be traced to the appellate court's misplaced reliance on the case of *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976). In *Maryland* a genuine conflict of interest arose over a coverage dispute which exposed the insured to potential personal liability. The court correctly and specifically identified the conflict as being that of interpretation of the policy's coverage clause, the resolution of which would result in liability to either insured or insurer. In this instance, disclosure by the insurance counsel was properly required. But the appellate court's express rejection of plaintiff's argument that the conflict of interest arose over an interpretation of the insurance policy renders *Maryland* wholly inappropriate. In *Rogers*, the plaintiff was not exposed to personal liability and no conflict of interest existed as to the interpretation of the insurance policy. Thus the court's reliance on *Maryland* is both incorrect and inconsistent. 74 Ill. App. 3d at 473, 392 N.E.2d at 1371. In light of this analysis, it is interesting to note that the one case cited in plaintiff's entire *pro se* brief was *Maryland*. Brief for Plaintiff-Appellant at 12, *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 74 Ill. App. 3d 467, 392 N.E.2d 1365 (3d Dist. 1979).

118. See generally P. MAGARICK, *EXCESS LIABILITY: RESPONSIBILITIES OF THE INSURER* (1976); Brittle, *Avoiding Insurer's Excess Liability*, 28 FED'N. INS. COUNSEL Q. 298 (1978); Gallagher, *The Problems of Defense Counsel Negotiating Settlement in Cases Involving a Potential Excess Judgment*, 37 INS. COUNSEL J. 506 (1970); Keeton, *Liability Insurance and Responsibility for Settlement*, 67 HARV. L. REV. 1136 (1954); Koesterer, *Liability in Excess of the Policy Limits*, 27 FED'N. INS. COUNSEL Q. 55 (1973); Snow, *Excess Liability—Crisci and Lysick*, 36 INS. COUNSEL J. 51 (1969); Turner, *Excess Liability*, 24 FED'N. INS. COUNSEL Q. 55 (1973).

119. Principle II of the Guiding Principles, standards promulgated by the National Conference Of Lawyers and Liability Insurers, outlines three fundamental situations which may result in excess liability: (1) where a probability exists that the damage will exceed the policy limits and the insurance company has retained counsel to defend the claim; (2) where the prayer of the complaint exceeds the policy limits; or (3) where an unlimited or indefinite prayer for damages exists and thus the probability that the verdict may exceed the coverage limit. In these situations, the company or the insurance counsel should inform the insured of the potential for excess exposure so that the insured may retain additional counsel. *Guiding Principles of the National Conference of Lawyers and Liability Insurers*, AM. JUR. 2d Desk Book, Doc. No. 91.4 (1978 Supp.).

120. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

121. The potential for excess liability was pivotal for the court in *Ivy v. Pacific Automobile Ins. Co.*, 156 Cal. App. 2d 652, 320 P.2d 140 (1958). The court stated:

izes the insured's interests and creates a situation requiring disclosure¹²² to protect those interests. In wrongful settlement cases,¹²³ as in *Rogers*, an insured's potential liability is negligible in comparison to failure to settle cases since negotiating a settlement involves far less risk than defending the claim on its merits. Hence, the appellate court's reliance on excess liability authority, in which a substantial risk of serious personal injury to an insured exists, is wholly inapposite to the wrongful settlement situation in *Rogers*.

IMPACT

For Illinois insurance attorneys, an initial and obvious consequence of *Rogers* will be to render effectively meaningless the provisions in professional liability insurance policies that delegate control of settlement.¹²⁴ This, in turn, will militate against the public policy to encourage settlement of claims.¹²⁵ Regarding former insureds, the policy reasons for allowing control of settlement to be delegated are persuasive. Lines of communication become more tenuous with time so that merely contacting the client may become burdensome or impossible.¹²⁶ From the standpoint of practicality and effi-

By the terms of the insurance policy the control of the defense of the action is turned over to the insurer, and the insured is precluded from interfering in any settlement procedure. But when liability in excess of the policy limits is involved the insured's interests become directly involved.

Id. at 660, 320 P.2d at 146.

122. See note 128 *infra*.

123. See *e.g.*, *Coon v. Ginsberg*, 32 Colo. App. 206, 509 P.2d 1293 (1973) (in action for wrongful settlement burden of proof is on the client to show that claim was meritorious and that attorney's negligence in failing to prosecute was a proximate cause of damages).

See also *Aquilina v. O'Connor*, 59 A.D.2d 454, 399 N.Y.S.2d 919 (1977). In *Aquilina*, the plaintiff-physician sued the defendant-law firm for discontinuance of a medical malpractice action, which the plaintiff alleged deprived him of his right to a judicial vindication of the claim. The court held for the defendant noting that the "law recognizes no abstract 'right' to have a judicial determination on the facts of any lawsuit." *Id.* at 454, 399 N.Y.S.2d at 920.

124. Settlement by agreement represents the most important means by which cases are disposed prior to trial. For example, from the period of January through June of 1980, of the 2,617 cases terminated that were assigned for trial in the Law Division of the Circuit Court of Cook County, 1,780, or 68.0%, were dismissed by agreement. In contrast, only 88 or 3.4% were dismissed for want of prosecution; 422, or 16.1%, by finding of the court; and 327, or 12.4%, by jury verdict. ADMINISTRATIVE OFFICE OF THE ILLINOIS COURTS, STATISTICAL REPORT ON THE CIRCUIT COURT OF COOK COUNTY, ILLINOIS FOR JUNE 1980. See also H. ROSS, SETTLED OUT OF COURT: THE SOCIAL PROCESS OF INSURANCE CLAIMS ADJUSTMENTS 4 (1970).

125. *Metropolitan Hous. Dev. Corp. v. Village of Arlington Heights*, 66 F.2d 1006 (7th Cir. 1980) (law favors and encourages settlement; action for discriminatory zoning); *Airline Stewards and Stewardesses Ass'n Local 550 v. American Airlines, Inc.*, 573 F.2d 960 (7th Cir. 1978) (law favors encouragement of settlement; action under Title VII of the Civil Rights Act); *Willis v. Reum*, 64 Ill. App. 3d 146, 381 N.E.2d 46 (2d Dist. 1978) (policy of law to favor compromise of claims; actions for personal injuries). See generally Renfrew, *Negotiation and Judicial Scrutiny of Settlements in Civil and Criminal Antitrust Cases*, 57 CHICAGO B. REC. 130 (1975).

126. See *Bailey v. Reeber*, 54 Misc. 2d 773, 283 N.Y.S.2d 450 (1967). In *Bailey* a dispute arose after extensive time, money, and effort had been expended in attempting to locate the insured. The court held that the insurer, having failed to locate the insured with due diligence, may have an adequate basis for a disclaimer.

ciency, a former insured should be bound by the terms of an insurance contract that was knowingly entered into.¹²⁷

Another consequence of *Rogers* will be to broaden the potential tort liability of Illinois insurance attorneys. Since the supreme court merely affirmed the existence of a duty to disclose, attorneys have been provided little guidance regarding the nature of the disclosure¹²⁸ and response¹²⁹ required prior to settlement and the extent of their authority in the settlement process.¹³⁰ Where previously, attorneys could rely upon the written certainty of an insurance contract, they now must attempt to follow the broad dictates of the *Rogers* courts, increasing the probability that their disclosure will be found inadequate or that the response will be misconstrued. By effectively abrogating contractual authority to settle, the *Rogers* courts have substantially increased the likelihood that Illinois insurance attorneys will inadvertently incur malpractice liability.

Whether *Rogers* will lead to civil liability in tort for violations of other ethical standards remains to be seen. If other ethical standards come to be used to define the standard of professional care, attorneys will incur liability in situations that before could not have sustained a cause of action in tort.¹³¹ As emphasized by Justice Alloy's dissent from the appellate court decision, *Rogers* is not a case in which an attorney's negligence exposed a client to monetary damage.¹³² In *Rogers*, the Illinois Supreme Court has done nothing to dispel the troubling implication propounded by the appellate court that violation of an ethical standard will now be sufficient to form the basis of tort liability.

127. See generally R. POSNER, *ECONOMIC ANALYSIS OF LAW*, §§ 20.2, 21.4 (2d ed. 1977); Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 417-29 (1973).

128. The appellate court required an attorney to disclose all facts and circumstances which would enable the client to make an intelligent decision regarding representation. But consider other standards suggested for disclosure. The Guiding Principles suggest that when a conflict of interest arises the attorney should inform the client of such conflict and invite him to retain his own counsel at his own expense. DR 5-105(c) suggests disclosure of the possible effects that representation of multiple clients will have on an attorney's independent professional judgment. *Maryland Casualty Co. v. Peppers*, 64 Ill. 2d 187, 355 N.E.2d 24 (1976), suggests the disclosure of the conflicting interests. And the supreme court stated that a client is entitled to a full disclosure of the intent to settle the litigation. Obviously, informing a client of an intent to settle will not satisfy all of the above standards.

129. See note 48 and accompanying text *supra*.

130. Courts are divided as to what extent clients should control the litigation process. One line of cases holds that an attorney controls all procedural aspects of a client's claim while the client controls the subject matter of the litigation. As stated in *W.A. Robinson Inc. v. Burke*, 327 Mass. 670, 100 N.E.2d 366 (1951), "[b]y virtue of his employment as attorney he had authority to do in behalf of his client what was necessary or incidental to the prosecution and management of the action so far as his acts affected the remedy and not the cause of action." *Id.* at 674-75, 100 N.E.2d at 369. Another line of cases requires an attorney to follow a client's instructions. For cases illustrating each line of decisions see, Spiegel, *Lawyering and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PENN. L. REV. 41, 50 nn. 32 & 37 (1979). See also D. ROSENTHAL, *LAWYER AND CLIENT: WHO'S IN CHARGE?* (1974).

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

132. 74 Ill. App. 3d at 480, 392 N.E.2d at 1376 (Alloy, J., dissenting).

CONCLUSION

In *Rogers*, the Illinois Supreme Court broadened the potential liability of attorneys, taking a decisive step toward allowing the Illinois Code of Professional Responsibility to define the standard of care in professional negligence. Although this trend augers well for bringing greater recognition to the Illinois Code, the Code is an inadequate vehicle with which to determine professional negligence. Instead, the standard of professional care should be determined within the traditional negligence analysis, with the Illinois Code being used solely as evidence of custom. Unless clearer and more specific guidance as to the relationship between this Code and attorney malpractice is forthcoming, Illinois attorneys may be subject to malpractice actions for breaches of ethical obligations.

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