CASE NOTE

INSURANCE—SETTLEMENT OF A MEDICAL MALPRACTICE SUIT BY AN ATTORNEY WITHOUT THE INSURED'S CONSENT CONSTITUTES A BREACH OF THE ATTORNEY-CLIENT RELATIONSHIP, EVEN WHEN THE ATTORNEY HAS THE AUTHORITY TO SETTLE UNDER THE INSURANCE CONTRACT, UNLESS THERE IS A PRIOR FULL AND FRANK DISCLOSURE BY THE ATTORNEY TO THE INSURED OF ALL MATERIAL FACTS AND CIRCUMSTANCES.—*Rogers v. Robson, Masters, Ryan, Brumund & Belom* (Illinois 1980).

In 1972, the defendant, Robson, Masters, Ryan, Brumund & Belom (Robson), a partnership of attorneys, was retained by Employer's Fire Insurance Company (Employer's) to defend a medical malpractice action filed against one of Employer's insureds, Dr. James Rogers (Rogers).[1] Rogers informed Robson that he did not wish that a settlement be offered to the plaintiff, Quilico, nor would he consent to any settlement.[2] At the same time, however, Rogers wrote a letter to Robson in which he requested that the matter be solved "quickly and with little difficulty."[3] In 1974, the action was settled by Robson for a nominal sum, a covenant not to sue and an express denial of liability as to Rogers.[4] Rogers was not insured by Employer's at that time,[5] and he was not informed in advance of the settle-

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

2. Rogers v. Robson, Masters, Ryan, Brumund & Belom, 74 Ill. App. 3d 467, —, 392 N.E.2d 1365, 1368 (1979). The supreme court opinion is very brief, and many of the pertinent facts are only found in the appellate opinion.

3. *Id.* at —, 392 N.E.2d at 1374 (dissenting opinion). This point was not brought up as an issue on appeal to the Illinois Supreme Court. In his dissent in the appellate court decision, Justice Alloy viewed the letter as evidence that plaintiff was "resistive to settlement." *Id.* at —, 392 N.E.2d at 1374 (dissenting opinion). The part of the letter discussed reads: "I refuse to participate any further with Mr. Quilico's absurd accusations . . . . I trust you can dispose of this problem quickly and with little difficulty." *Id.* at —, 392 N.E.2d at 1374 (dissenting opinion).

4. *Id.* at —, 392 N.E.2d at 1368.

5. *Id.* at —, 392 N.E.2d at 1369. It was established by affidavit that Rogers was insured by the insurer, Employer's Fire Insurance Company, from June 1, 1970 to June 1, 1971. *Id.* at —, 392 N.E.2d at 1368. The pertinent part of the policy read:

> The company will pay on behalf of the insured all sums which the insured shall become obligated to pay as damages . . . 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 defend any suit

ment, nor was his consent obtained.[6]

Rogers then filed suit against Robson, alleging that he was damaged by the wrongful settlement without his express permission or knowledge.[7] The trial court granted summary judgment for the defendant, presumably on the grounds that such a nonconsensual settlement was authorized by the insurance policy.[8] Rogers appealed, and the appellate court reversed the trial court.[9] Robson then appealed to the Illinois Supreme Court, *held*, affirmed. Settlement of a medical malpractice suit by an attorney without the insured's consent constitutes a breach of the attorney-client relationship, even when the attorney has the authority to settle under the insurance contract, unless there is a prior full and frank disclosure by the attorney to the insured of all material facts and circumstances. *Rogers v. Robson, Masters, Ryan, Brumund & Belom*, 81 Ill. 2d 201, 407 N.E.2d 47 (1980).

The Illinois Supreme Court, in a brief opinion,[10] discussed only one of the several issues addressed by the appellate court,[11] the disclosure requirement,[12] and affirmed on the basis of the widely-accepted standard for sum-

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> after the applicable limits of the company's liability has been exhausted . . . 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, proffered or alleged while such former insured was an insured under his policy.

Id. at _, 392 N.E.2d at 1369.

6. *Id.* at _, 392 N.E.2d at 1368.

7. *Id.* at _, 392 N.E.2d at 1368. Rogers' initial action against defendant was dismissed by the trial court because of a deficiency in the ad damnum request for damages in the complaint. *Id.* at _, 392 N.E.2d at 1368. On appeal, the lower court was upheld, but the dismissal was held without prejudice. The present action was filed alleging basically the same facts and cause of action as in the previous suit. *Id.*

8. *Id.*

9. *Id.*

10. 81 Ill. 2d 201, 407 N.E.2d 47.

11. 81 Ill. 2d at _, 407 N.E.2d at 48. The issues presented to the court of appeals, but not considered by the supreme court were: first, whether a question of fact existed as to defendant's authority to settle the malpractice action without plaintiff's consent, 74 Ill. App. 3d at _, 392 N.E.2d at 1369; second, whether public policy prohibited settlement without the consent of Dr. Rogers, *id.* at _, 392 N.E.2d at 1370; third, whether the trial court erred in awarding summary judgment prior to discovery, *id.* at _, 392 N.E.2d at 1370; and finally, whether Dr. Rogers was damaged as a result of defendant's actions, *id.* at _, 392 N.E.2d at 1373.

The appellate court held that the insurance policies were contracts and should have been construed as such. *Id.* at _, 392 N.E.2d at 1369. Further, the trial court's ruling that the settlement could be made without the consent of the formerly insured physician was viewed by the appellate court as being fully supported by the plain meaning of the language used in the contract. *Id.* at _, 392 N.E.2d at 1369. Additionally, such a settlement was not contrary to public policy. *Id.* at _, 392 N.E.2d at 1370. Plaintiff's assignment of error concerning the allowance of summary judgment before discovery was also quashed. *Id.* at _, 392 N.E.2d at 1370. Over a strong dissent, the court ruled that plaintiff's complaint had set forth several allegations of damages which were specific enough to withstand a motion for summary judgment. *Id.* at _, 392 N.E.2d at 1370.

12. 81 Ill. 2d at _, 407 N.E.2d at 49.

mary judgments.[13] The court found that there were genuine issues of material fact to be decided,[14] and thus returned the case to the trial court for a full litigation of the various issues and allegations raised by Rogers.[15] The court further expressly disclaimed the opportunity to decide matters raised and considered by the appellate court.[16] However, by affirming the appellate decision, which dealt with several issues, and expressly declining to rule on some of those matters, the court has left open to speculation important questions pertaining to attorneys who do insurance defense work and to the profession in general.[17]

The key issue addressed by the court was whether the defendant law firm breached a duty to Dr. Rogers that existed independently of the insurance contract by settling the Quilico action without the knowledge or express consent of Dr. Rogers.[18] The court found that the defendant owed a duty to the plaintiff that existed independently of the insurance contract, and that the defendant's method of settling the Quilico action violated that duty.[19] Rogers, as well as the insurance company, was the client of the defendant, and was therefore entitled to a full disclosure of Robson's intent to settle the litigation without his consent and contrary to his express instructions.[20] Robson's duty to disclose was based upon the attorney-client relationship, and any contractual authority of the insurance carrier to settle the action did not affect that relationship.[21]

The court apparently approved of the rationale of the appellate court and dealt with the issue briefly, citing only two cases regarding the duty owed to the plaintiff and its breach, one of which was not entirely relevant to the matter.[22] The appellate court reasoned that there was a duty arising out of the attorney-client relationship between plaintiff and defendant; and

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13. *Id.* at _, 407 N.E.2d at 49.

14. *Id.* at _, 407 N.E.2d at 49. The principal reason for the finding of the court apparently arose out of the affidavits filed by the opposing parties on the summary judgment. The court noted that the defendants' affidavit referred only to the authority of the insurer to settle the malpractice suit, and did "not deal with the matters stated in the plaintiff's affidavit." *Id.* at _, 407 N.E.2d at 49. The matters raised by the plaintiff included his repeated contacts with the defendants in which he refused to consent to settlement, the assurances he received that the action would be defended, and the lack of notice that settlement was intended. *Id.* at _, 407 N.E.2d at 48.

15. *Id.* at _, 407 N.E.2d at 49.

16. *Id.* at _, 407 N.E.2d at 49.

17. *Id.* at _, 407 N.E.2d at 49.

18. *Id.* at _, 407 N.E.2d at 48-49. *See* text accompanying notes 25-39 *infra*.

19. 81 Ill. 2d at _, 407 N.E.2d at 49.

20. *Id.* at _, 407 N.E.2d at 49.

21. *Id.* at _, 407 N.E.2d at 49.

22. *Id.* at _, 407 N.E.2d at 49, citing Thorton v. Paul, 74 Ill. 2d 132, 384 N.E.2d 335 (1978) and Maryland Cas. Co. v. Peppers, 64 Ill. 2d 187, 355 N.E.2d 24 (1976). The *Thorton* opinion cites to *Maryland Casualty* for principles not pertinent to this discussion. 74 Ill. 2d 132, _, 384 N.E.2d 335, 339. However, *Maryland Casualty* is directly applicable to the *Rogers* decision and will be discussed more fully below. *See* text accompanying note 90 *infra*.

that this duty was measured by ethical standards derived from the Canons of Professional Ethics.[23] The appellate court found that this duty was breached when the defendant continued to represent both the insurer and the insured after it had been made aware of a conflict of interest among the two parties in regard to the settlement of the Quilico action.[24]

An analysis of this issue requires an examination of the nature and extent of the duty owed, the basis for finding the duty, and a determination of how the duty of the attorney is apportioned in light of the relationship between the insured, the insurer and the attorney. The initial query of the appellate court was whom the defendant represented, and to what extent. The appellate court found that the insured was the client of the attorney employed by the insurer.[25] In the course of its discussion the court based much of its rationale upon the case of *Lysick v. Walcom*.[26] *Lysick* concerned an action for damages for alleged bad faith and negligence in the representation of an insured as to the matter of the settlement of a wrongful death claim.[27] The *Lysick* court stated that the insured was owed the same obligation of good faith and fidelity by the attorney as if he had retained the attorney personally.[28] The *Lysick* holding has been followed in other jurisdictions.[29]

A similar rule was stated in a much quoted Iowa case, *Henke v. Iowa Mutual Casualty Co.*[30] which involved a suit against a liability insurer by the insured for the negligent failure to settle a claim against him within his policy limits.[31] The insured applied for an order directing the insurer to allow inspection of communications between it and the attorney handling the litigation.[32] The Iowa Supreme Court held that there was a "clear personal relationship"[33] between the insured and the attorney, and that the insured was entitled to the usual confidences of attorney and client.[34] Perhaps more importantly, in *Henke* the court made it very clear that the fact that someone else selected and compensated an attorney did not control the attorney client relationship, but was merely a fact to be considered in proving that such a relationship exists.[35]

Some courts have held that the attorney owes a higher duty to the in-

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23. 74 Ill. App. 3d at _, 392 N.E.2d at 1371.
24. *Id.* at _, 392 N.E.2d at 1372.
25. *Id.* at _, 392 N.E.2d at 1370.
26. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).
27. *Id.* at _, 65 Cal. Rptr. at 413.
28. *Id.* at _, 65 Cal. Rptr. at 413.
29. *See* text accompanying notes 30-35 *infra*.
30. 249 Iowa 614, 87 N.W.2d 920 (1958).
31. *Id.* at 616, 87 N.W.2d at 922.
32. *Id.*
33. *Id.* at 618, 87 N.W.2d at 923.
34. *Id.*
35. *Id.* at 617, 87 N.W.2d at 923.

sured than to the insurer.[36] One such case is *American Mutual Liability Insurance Co. v. Superior Court*,[37] in which an attorney who had been retained to represent an orthopedic surgeon in a malpractice suit was held to owe his primary duty to the surgeon.[38] The court reasoned that while the attorney also owed the insurance company a fiduciary duty, it was secondary in priority to that owed to the insured, and therefore the attorney was bound to the insured to a greater extent.[39]

The appellate court in *Rogers* found this duty to be imposed upon the insurance counsel by way of Canon 5 of the Code of Professional Responsibility of the American Bar Association.[40] It cited *In re Taylor*,[41] which recognized the Canons of Ethics contained in the Code of Professional Responsibility as a "safe guide for professional conduct."[42] Further support for this position is found in *Lysick v. Walcom*,[43] in which the California appellate court stated that "the attorney represents two clients, the insured and the insurer, and he owes to both a duty of care imposed by statute and the rules governing professional conduct."[44]

The defendant argued that the professional standards of ethics were not relevant considerations in an action for malpractice[45] which is based upon a negligence standard. However, the appellate court did not agree,[46] and flatly rejected the proposition that the Canons of Ethics were not relevant considerations in a tort action.[47] The court relied heavily upon the *Taylor*[48] decision,[49] which dealt with a disciplinary hearing for an attorney for the neglect

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36. *See, e.g.*, Parsons v. Continental Nat'l Am. Group, 113 Ariz. 223, 550 P.2d 94 (1976).

37. 38 Cal. App. 3d 579, 113 Cal. Rptr. 561 (1974).

38. *Id.* at 592, 113 Cal. Rptr. at 572.

39. *Id.*

40. 74 Ill. App. 3d at _, 392 N.E.2d at 1371. Canon 5 states that "A lawyer should exercise independent professional judgment on behalf of a client." *Id. See* ABA CANONS OF PROFESSIONAL ETHICS No. 5.

41. 66 Ill. 2d 567, 363 N.E.2d 845 (1977).

42. *Id.* at _, 363 N.E.2d at 847.

43. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

44. *Id.* at _, 65 Cal. Rptr. at 413 (citations omitted). In *Rogers*, the supreme court mentioned that the Illinois Defense Counsel and the Illinois State Bar Association submitted amici curiae briefs arguing that the lower appellate court erred in implying that proof of violations of the Code of Professional Responsibility established a per se basis for imposing liability on an attorney. 81 Ill. 2d at _, 407 N.W.2d at 48. However, this point was not discussed at length in the Illinois Supreme Court opinion.

45. 74 Ill. App. 3d at _, 392 N.E.2d at 1371. This point was not discussed by the supreme court. *See* note 52 *infra*.

46. 74 Ill. App. 3d at _, 392 N.E.2d at 1371.

47. *Id.* at _, 392 N.E.2d at 1371. *Accord*, Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (decided after *Rogers*); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968). *But see* Brody v. Ruby, 267 N.W.2d 902 (Iowa 1978).

48. 66 Ill. 2d 567, 363 N.E.2d 845 (1977).

49. 74 Ill. App. 3d at _, 392 N.E.2d at 1371.

of his obligations to his client's affairs.[50] However, the *Taylor* court was careful to point out that the Code of Professional Responsibility was not binding on the courts, but that the Canons of Ethics instead only constituted a guide for professional conduct.[51] The *Taylor* court stated that attorneys have been disciplined for not observing the Canons of Ethics, but it did not consider imposing the Canons as a criteria for civil liability.[52]

The concept of disciplining an attorney for failure to meet the minimum standards for professional conduct established by the Canons may be incongruent with the premise that tort liability should be imposed for such non-observance. However, the appellate court in *Rogers* stated that "it would be anomolous . . . to hold that professional standards of ethics are not relevant considerations in a tort action, but are in a disciplinary proceeding."[53]

Although it would seem reasonable to assert that ethical standards are valid considerations in a civil action such as this, the scope of these considerations should be taken into perspective. The appellate court apparently relied upon the application of these standards as a cornerstone of its ruling that defendant owed plaintiff a duty and had breached it.[54] Such an application of the Canons of Ethics expands the impact that the Canons have on the area of civil litigation and would seem to be far beyond their intended scope.[55] The Code of Professional Responsibility was developed and instituted by lawyers, not by judges, "so as to mark the proper path for any attorney who senses a conflict between various duties."[56]

If these standards of conduct are to be imposed as a measure for tort liability, they must be considered in light of the elements that constitute a cause of action for malpractice. In Illinois, it is clear that an attorney is liable to his client only when he fails to exercise a reasonable degree of care and skill.[57] The question of whether the requisite degree of care and skill has been exercised is one of fact.[58]

The standard of care against which the attorney's conduct is measured in Illinois is established by expert testimony.[59] In an action involving a con-

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50. 66 Ill. App. 3d at _, 363 N.E.2d at 846.

51. *Id.* at _, 363 N.E.2d at 847.

52. *Id.* at _, 363 N.E.2d at 847.

53. 74 Ill. App. 3d at _, 392 N.E.2d at 1371.

54. *Id.*

55. *See* ABA Code of Professional Responsibility, Preliminary Statement. "The Code makes no attempt to . . . define standards for civil liability of lawyers for professional conduct." *Id.*

56. Matter of Frerichs, 238 N.W.2d 764, 769 (Iowa 1976).

57. Smiley v. Manchester Ins. & Indem. Co., 71 Ill. 2d 306, _, 375 N.E.2d 118, 122 (1978). This standard is mentioned only briefly by the appellate court. 74 Ill. App. 3d at _, 392 N.E.2d at 1372.

58. Brown v. Gitlin, 19 Ill. App. 3d 1018, _, 313 N.E.2d 180, 182 (1974).

59. Schmidt v. Hinshaw, Culbertson, Moelmann, Hoban & Fuller, 75 Ill. App. 3d 516, _, 394 N.E.2d 559, 563 (1979).

flict of interest in an attorney-client relationship, it has been held that "unless the conflict were so clear as to be undisputed, expert testimony or some substitute therefore would once again seem to be required, in order to establish the standard of care applicable to the attorney's decision whether or not to withdraw."[60] The *Rogers* court would appear to imply the Canons of Ethics as a suitable substitute for expert testimony in view of the appellate court's comment that the Robson firm "breached a duty which, if damages and proximate cause are established will make the defendant liable. . . ."[61] The use of the Canons of Ethics by the finder of fact in some instances would seem to cause serious problems. Further, the duty is "imposed not on the mere possibility of occurrence, but on what the reasonable prudent man would then have foreseen as likely to happen."[62] Whether the Canons of Ethics reflect the ideas of a reasonably prudent man is open to question.[63]

The Illinois Supreme Court has expressly stated that the Canons of Ethics are not enforceable by the courts as binding obligations.[64] The *Rogers* decision raises serious questions as to the validity of that ruling, since any importation of the standards of conduct established in the Canons into the malpractice area will eventually result in all attorneys conforming their conduct to the Canons, not by threat of disciplinary proceedings, but instead by an enhanced threat of civil liability.

Another problem created by the use of the Canons of Ethics in a civil case is the burden of proof required. In a legal malpractice case, the elements must be proved by a preponderance of the evidence,[65] but in a disciplinary proceeding the charges must be proven by clear and convincing evidence.[66] This different burden underscores the difficulty in using the Canons for purposes other than those for which they were created.[67] To allow the recovery of damages from an attorney for violating the Canons of Ethics on a less stringent burden of proof than would be required to subject him to discipline may create an irreconciliable conflict that the courts will be forced to resolve. Some courts completely discount the idea of using the Code of Professional Responsibility as a basis for private cause of action for negligence.[68]

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60. *Id.* at _, 394 N.E.2d at 565.

61. 74 Ill. App. 3d at _, 392 N.E.2d at 1372.

62. Brainerd v. Kates, 68 Ill. App. 3d 781, _, 386 N.E.2d 586, 590 (1979).

63. The preliminary statement of the Code of Ethics states that the Canons are axiomatic norms of professional conduct expected of lawyers in their relationship with the public, with the legal system and with the legal profession. ABA Code of Professional Responsibility, Preliminary Statement. *See* text accompanying note 56 *supra*.

64. In re Krasner, 32 Ill. 2d 121, _, 204 N.E.2d 10, 14 (1965).

65. Brown v. Gitlin, 19 Ill. App. 3d at _, 313 N.E.2d at 182.

66. In re Krasner, 32 Ill. 2d at _, 204 N.E.2d at 13.

67. *See* text accompanying notes 56 and 64 *supra*.

68. *See, e.g.*, Brody v. Ruby, 267 N.W.2d 902, 907 (Iowa 1978)(countersuit by physician against plaintiff and her lawyers).

It would appear that there is a danger in using the ethical standards of the legal profession as a yardstick by which to measure the appropriate conduct of an attorney in a tort action based upon negligence, especially those attorneys retained by insurance companies. The use of such ethical standards creates a nebulous area around the professional responsibility of the insurance counsel. Since the duty of the attorney is owed to both the insured and the insurer,[69] a change in the relationship between the insured and the insurer would require the attorney to re-evaluate his position between the two in light of that duty. Since the interests of the insured and the insurer are unified in the hope of a successful defense of a claim, the attorney is usually able to exercise independent judgment on behalf of both clients with no apparent ethical problems.[70]

Situations do arise, as in *Rogers*, where there is a conflict of interest. It appears that the choice rests with the attorney, who is bound on both sides by an attorney-client relationship. The attorney is caught between two clients whom he must represent in accordance with professional standards. The *Rogers* appellate court stated that in this situation the attorney does not necessarily have to withdraw upon the discovery of a conflict of interest; all he need do is make full disclosure to the parties of the presence of the conflict.[71] The supreme court held that Dr. Rogers was entitled to a full and frank disclosure of the intent to settle the litigation without his consent.[72] This theory is not new and seems to be well settled.[73] Of course, what constitutes such a disclosure depends on the circumstances surrounding the situation.[74]

The *Rogers* court adopted the view of *Lysick v. Walcom*[75] that when an attorney represents two clients with conflicting interests in the same subject matter, the attorney must "disclose all facts and circumstances which in the judgment of a lawyer of ordinary skill and capacity, are necessary to enable his client to make a free and intelligent decision regarding the representation."[76] The insured should be promptly notified of any pending settlement negotiations.[77] Also, a client may presume that because of the attorney's failure to disclose matters such as settlement negotiations "that he has no

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69. *See* text accompanying note 44 *supra*.

70. *See* Keeton, *Ancillary Rights of the Insured Against His Liability Insurer*, 28 INS. COUNSEL J. 395, 413 (1961).

71. 74 Ill. App. 3d at _, 392 N.E.2d at 1371.

72. 81 Ill. 2d at _, 407 N.E.2d at 49.

73. Parson v. Continental Nat'l Am. Group, 113 Ariz. 223, 550 P.2d 94 (1976); Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

74. Lysick v. Walcom, 258 Cal. App. 2d at _, 65 Cal. Rptr. at 415.

75. 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968).

76. 74 Ill. App. 3d at _, 392 N.E.2d at 1371 (citing Lysick v. Walcom, 258 Cal. App. 2d 136, 65 Cal. Rptr. 406 (1968)).

77. 258 Cal. App. 2d at _, 65 Cal. Rptr. at 414.

Settlement Disclosures to

will interfere with his representation."[78] It
no right to "settle away" any rights of the insured
the benefit of his other client.[79] These rights do not ari
ice contract but from the attorney-client relationship impos
attorney.[80]

ough not explicitly stated in *Rogers*, it would seem that full and
isclosure cannot enable the tripartite relationship to continue if the
t precludes the attorney from competently representing the interests
ch client.[81] The attorney is given the choice of representing his insured
nt "fully within the bounds of the law or of telling his client that he
annot do so, so that the client may obtain another attorney if he wishes."[82]
The *Rogers* appellate court found that by settling the case the defen-
dant foreclosed opportunities to the plaintiff, such as the hiring of another
attorney.[83] The only pertinent case regarding this issue cited by the Illinois
Supreme Court, *Maryland Casualty Company v. Peppers*,[84] stated that seri-
ous ethical questions prohibit an attorney from representing an insured
when there is a serious conflict of interest between the insured and the in-
surer.[85] However, if the insured is willing to accept the defense furnished by
the attorney engaged by the insurer after a full disclosure by that attorney
of the conflicting interests, those ethical demands will be satisfied.[86]
Rogers could have decided to continue to retain the defendant as his
attorney, with the likelihood that the case would be settled without his con-
sent. Although the appellate court indicated that this result would not have
violated ethical duties,[87] it is difficult to understand how mere disclosure
could justify taking action contrary to the express wish and adverse to the
interests of a client. The other alternative offered by the appellate court
would have involved a release of the insurance company by Rogers, followed
by his retention of his own counsel for the defense of the action.[88] Not only
would this course foreclose the attorney-client relationship, but it would also
expose the insured to the risk of a ruinous judgment. The risk involved
nearly guarantees that this alternative would seldom be exercised, and both

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78. Mallen, *Insurance Counsel: The Fine Line Between Professional Responsibility and Malpractice*, 45 Ins. Counsel J. 244, 255 (1978) (an excellent article dealing with the scope of the attorney-client relationship in the context of the insured and attorney) [hereinafter cited as Mallen].
79. Ivy v. Pacific Auto. Ins. Co., 156 Cal. App. 2d 652, —, 320 P.2d 140, 148 (1958).
80. Id. at —, 320 P.2d at 148.
81. Mallen, *supra* note 78, at 255.
82. Thode, *The Ethical Standard for the Advocate*, 39 Tex. L. Rev. 575, 582 (1961)(emphasis omitted).
83. 74 Ill. App. 3d at —, 392 N.E.2d at 1372.
84. 64 Ill. 2d 187, 355 N.E.2d at 30.
85. *Id.* at —, 355 N.E.2d at 31.
86. 74 Ill. App. 3d at —, 392 N.E.2d at 1372.
87. *Id.* at —, 392 N.E.2d at 1372.
88. 74 Ill. App. 3d at —, 392 N.E.2d at 1372.

Rogers courts, of course, reviewed this action in hindsi
ternatives diminish the true ethical role of the
situation did not lend itself to the gloomy scenario the app
natives actually suggest. As noted in the dissent to the appellate
this was not a case where the attorney had caused great monetary
due to negligence or incompetence.[90]

In other cases, however, the options available to the insured wh
comes a party to a conflict of interest with his insurer are limited. Nei
the appellate court nor the supreme court opinion adequately discussed t
consequences to the insured who decides to waive the coverage and defen
himself. In either case the attorney is apparently absolved from further ethi-
cal responsibilities after performing the simple act of disclosure.

The *Rogers* appellate court adhered to the principle that the defendant
was civilly liable to a plaintiff who suffered a loss due to the lack of disclo-
sure.[91] Although not discussed by the supreme court, the issue of damages in
such an action is tentative at best. Rogers claimed loss of business, loss of
reputation, legal fees, increase in insurance fees, and that if he had prevailed
in the action by Quilico, he would have had an action for malicious prosecu-
tion.[92] A strong dissent in the appellate opinion termed the damages as
nothing more than speculative.[93] The covenant not to sue and the express
denial of liability on the part of Dr. Rogers, both in conjunction with a nom-
inal sum paid by the insurance company, did not seem to bear any weight
on the issue of damages.[94] Of course, the appellate court left the issue of
proximate cause and damages to be decided by a jury and the court ordered

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89. *Id.* at —, 392 N.E.2d at 1373 (Alloy, J., dissenting).

90. *Id.* at —, 392 N.E.2d at 1376 (Alloy, J., dissenting). It is questionable whether the failure to notify Rogers caused any damages. Any damages he may have sustained were caused by the settlement, which, as the appellate court held, could have been made by the insurer without Rogers' consent. *Id.* at —, 392 N.E.2d at 1369-70. Had the insurer dismissed the defendant Robson, or merely settled without notifying Rogers, there is no hint that Rogers would have had a cause of action against anyone. To hold that damages might be assessed against the defendant in this case suggests, as Judge Alloy indicated, that the majority premised their decision on a "search [of] the record to support Dr. Rogers' claim against the defendant." *Id.* at —, 392 N.E.2d at 1376 (Alloy, J., dissenting). Judge Alloy also noted that Rogers presented nothing in the hearing on the motion for summary judgment to demonstrate damages proximately caused by the defendant's omission, and labelled the damages that Rogers might potentially claim as "entirely speculative." *Id.* at —, 392 N.E.2d at 1373. At the appellate level, defendant did not specifically contest any issue relating to damages. The defendant's brief states: "The question of whether Dr. Rogers was in fact damaged as a result of the settlement is not relevant to a determination of whether the defendant is liable to Dr. Rogers for settling the underlying lawsuit." *Id.* at —, 392 N.E.2d at 1373.

91. *Id.* at —, 392 N.E.2d at 1373.

92. *Id.* at —, 392 N.E.2d at 1373.

93. *Id.* at —, 392 N.E.2d at 1376 (Alloy, J., dissenting). *See* note 90 *supra*.

94. *Id.* at —, 392 N.E.2d at 1373. The court did not mention these items in its brief discussion of damages.

the case remanded.[95]

The problem presented in these situations is underscored by the realities of the relationship between the insurer, the attorney retained to defend the claim and the insured. A growing number of attorneys rely on insurance companies for a major, if not total, source of income,[96] and they develop close working relationships with these insurance companies. The attorney would be understandably reluctant to reject the interest of the insurance carrier and represent the insured when such a conflict arises, since such a decision could be expensive, if not financially disastrous, for the attorney. This fact, coupled with the difficulty of ascertaining when a conflict of interest exists, and what constitutes a full and frank disclosure[97] complicates the attorney's decision-making process.

The insurance company appears to be the victor in a situation such as this. The burden of decision-making is placed upon the attorney. The risk of loss is placed upon the insured. Finally, the insurer may still sue the attorney for any breach of its attorney-client relationship, although there is apparently little litigation of this type.[98]

This case presents an interesting paradox between the insurance contract rights and the rights and responsibilties of the attorney-client relationship. The Illinois court further complicated this underlying problem by apparently importing the Canons of Ethics into the body of professional negligence law. The duties attendant upon the attorney-client relationship, particularly the obligation of full and frank disclosure properly rest upon the shoulders of the attorney,[99] and other courts have so held.[100] However, incorporating the standards of the Canons as a basis for tort liability may project the profession into an area where the opportunities for violation and the potential liabilities are not easily recognizable. An attempt to follow the easily identifiable rights of the insurance contract may result in an unwitting violation.

Finally, the alternatives offered by the court for satisfying all ethical considerations arising out of a conflict of interest between the insured and insurer fall short of providing adequate protection for the insured client, particularly those without the knowledge or resources to protect themselves.

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95. *Id.* at _, 392 N.E.2d at 1373.

96. Mallen, *supra* note 78, at 245.

97. *See* text accompanying notes 75-82 *supra*.

98. Mallen, *supra* note 78, at 250. Among the possible reasons for the lack of such actions are: (1) the close relationship formed between the insurer and attorneys by continued association, (2) willingness on the part of insurers to forgive, and (3) the decision to terminate the relationship in preference to litigation when a conflict arises. *Id.*

99. *See* text accompanying notes 75-82 *supra*.

100. Woodruff v. Tomlin, 616 F.2d 924 (6th Cir. 1980) (question of liability for tactical decisions before and during trial); Lieberman v. Employers Ins., 171 N.J. Super. 39, 407 A.2d 1256 (Super. Ct. App. Div., 1979) (attorney's failure to disclose intent to settle medical malpractice action).

Such alternatives may also allow attorneys who derive a large part of their livelihood from defense work to evade the hard decisions required when such a conflict arises.

Rogers is solely a decision on a summary judgment motion, and if full litigation of the issues raised results, perhaps different principles may emerge. Yet the underlying concern is commonplace in the everyday practice of insurance law, and the potential traps for the unwary command cognizance of the principles upon which the *Rogers* decision was based.

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