

Fall 1980

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Kent H. Roberts

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Recommended Citation

Kent H. Roberts, *Conflicts of Interest and Collateral Estoppel in Uninsured Motorist Cases*, 45 Mo. L. REV. (1980)

Available at: <https://scholarship.law.missouri.edu/mlr/vol45/iss4/9>

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Roberts: Roberts: Conflicts of Interest and Collateral Estoppel in Uninsured Motorist Cases

Although the *Rogers* attorney malpractice decision potentially affects the entire insurance industry, it might be limited to malpractice cases where the insured is a defendant. A malpractice case creates a special hazard to the insured in that it may be viewed as an attack on his professional reputation. A loss of reputation may have a significant effect on a professional's career and earning potential. In one case where an engineer unreasonably refused to settle, concern for his professional reputation was found to be a most relevant consideration.⁴³ But damage to reputation may result in economic damages to a nonprofessional as well. A traveling salesman's reputation as a driver may have a significant effect on his marketability to a corporation. A clean driving record has a significant impact on a teenager's insurance premium rate.⁴⁴

Even though the holding in the *Rogers* attorney malpractice case is questionable, the case demonstrates the difficulties incurred by the attorney who represents both the insured and insurer in the same cause of action. The possibility of a conflict of interest exists throughout the relationship, even when settlement is made within the policy limits, and the attorney must be aware of this potential conflict. If a conflict does arise, the attorney must make full disclosure to both clients and act in conformity with Disciplinary Rule 5-105. A failure to do so may lead to disciplinary proceedings, a malpractice action, or both.

JASON A. RESCHLY

CONFLICTS OF INTEREST AND COLLATERAL ESTOPPEL IN UNINSURED MOTORIST CASES

*Oates v. Safeco Insurance Co. of America*¹

On January 15, 1973, Patrick Oates filed suit against Bernard Coad in Iron County, Missouri, to recover for injuries allegedly caused by Coad's negligence in an automobile collision between Oates and Coad. Coad counterclaimed for injuries resulting from the accident. Oates answered the counterclaim through counsel retained by his liability insurance carrier, Safeco Insurance Company of America. After Coad dis-

43. *Transit Cas. Co. v. Spink Corp.*, 94 Cal. App. 3d 124, 136, 156 Cal. Rptr. 360, 367 (1979). The court found professional reputation to be a relevant consideration in whether the insured had wrongfully refused to consent to settle.

44. *See Wood Truck Leasing, Inc. v. American Auto. Ins. Co.*, 526 S.W.2d 223, 224 (Tex. Civ. App. 1975). The plaintiff in *Wood Truck Leasing* brought suit against the insurer because the insurer had settled within policy limits a claim against him, which resulted in higher premiums. The court reversed a summary judgment for the insurer, but concluded that plaintiff's claim should be rejected absent a showing of bad faith or fraud on the part of the insurer. *See* authorities cited note 37 *supra*.

1. 583 S.W.2d 713 (Mo. En Banc 1979).

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closed that he did not at the time of the accident have automobile liability insurance, Oates filed a separate action in the City of St. Louis against Safeco to recover his damages from the collision. The latter action was based on a provision in Oates' insurance policy that Safeco would be liable to the insured motorist for damages resulting from an automobile accident if: (1) the other motorist was uninsured; (2) the other motorist and not the insured was at fault in the accident; and (3) the insured could prove the amount of his damages.² The policy did not require that the insured have an unsatisfied judgment against the uninsured motorist.³

A month after the second action was filed, Oates voluntarily dismissed his suit against Coad. On June 28, 1973, Safeco answered the St. Louis suit, but raised no affirmative defenses. In the April 1974 trial on Coad's counterclaim, Oates was found to be at fault in the accident and was held liable in the amount of \$1,500. After the Iron County judgment became final, Safeco satisfied Coad's judgment as per contract with Oates and then amended its answer in the St. Louis suit to state a defense of collateral estoppel on the issue of fault in the collision.

On September 20, 1976, Oates struck from the St. Louis petition all allegations of primary negligence leaving only a claim under the humani-

2. *Id.* at 715. The National Bureau of Casualty Underwriters 1956 Standard Insurance Form provides in part:

[The insurer] agrees [to] pay all sums which the insured or his legal representative shall be legally entitled to recover as damages from the owner or operator of an uninsured automobile because of bodily injury, sickness or disease, including death resulting therefrom . . . sustained by the insured, caused by the accident . . .

A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE 299 (1969). Such a provision is required in all automobile liability policies in Missouri. RSMo § 379.203 (1978). See also note 36 *infra*. Courts interpreting the clause have looked to the intent of the legislature rather than the intent of the parties. In Missouri, the phrase "legally entitled to recover" is, as a matter of law, interpreted "to mean simply that the plaintiff must be able to establish fault on the part of the uninsured motorist." *Reese v. Preferred Risk Mut. Ins. Co.*, 457 S.W.2d 205, 208 (Mo. App., St. L. 1970) (quoting *Booth v. Fireman's Fund Ins. Co.*, 253 La. 521, 529, 218 So. 2d 580, 583 (1968)). Thus, it is no defense for the insurer merely to show that the insured could not, at the time of filing the suit against insurer, recover from the uninsured motorist. Missouri courts routinely reject such arguments when they are based on the existence of mere procedural impediments. *Oates v. Safeco Ins. Co. of America*, 583 S.W.2d at 719 (compulsory counterclaim rule); *Edwards v. State Farm Ins. Co.*, 574 S.W.2d 505, 506 (Mo. App., K.C. 1978) (tort statute of limitations, no recovery); *Byrn v. American Universal Ins. Co.*, 548 S.W.2d 186, 190 (Mo. App., St. L. 1977) (Iowa guest statute, no recovery); *Crenshaw v. Great Cent. Ins. Co.*, 527 S.W.2d 1, 4-5 (Mo. App., St. L. 1975) (wrongful death statute of limitations, no recovery). See Davis, *Uninsured Motorist Coverage: Some Significant Problems and Developments*, 42 Mo. L. REV. 1, 8-9 (1977).

3. 583 S.W.2d at 715. See also *Edwards v. State Farm Ins. Co.*, 574 S.W.2d 505, 506 (Mo. App., K.C. 1978).

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tarian doctrine.⁴ Safeco's motion to dismiss the suit was sustained on the ground of collateral estoppel. The dismissal was appealed to the Missouri Court of Appeals for the Eastern District and transferred to the Missouri Supreme Court. The supreme court reversed, holding that when an insured motorist is represented in a suit against an uninsured motorist by an attorney retained by his insurer, the insured is not bound by the resolution of the issues therein in a subsequent suit against the insurer under the uninsured motorist clause.

A party asserting collateral estoppel must show that an issue in the present lawsuit is identical to an issue in a previous lawsuit; that the issue was resolved on the merits and was essential to the judgment entered; and that the party to be estopped was, or was privy to, a party who was bound by the determination in the first suit.⁵ The party opposing estoppel can then appeal to the court's discretion to deny estoppel by showing that he did not have a full and fair opportunity to litigate the issue.⁶ This is

4. Under the humanitarian doctrine a party may, in some cases, recover even though he is not totally free from fault. See *Martin v. Sherrell*, 418 S.W.2d 209, 213-14 (Mo. App., Spr. 1967). See generally Becker, *The Missouri Supreme Court and the Humanitarian Doctrine in the Year 1954*, 20 Mo. L. REV. 38 (1955); Rich, *The Humanitarian Doctrine Re-Examined*, 26 J. Mo. BAR 38 (1970). The requirements for recovery under the doctrine are delineated in Mo. APPROVED INSTR. No. 17.15 (1977 ed.).

5. *Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n*, 19 Cal. 2d 807, 813, 122 P.2d 892, 895 (1942). Traditionally, the party asserting estoppel was required to show that he too was bound by the judgment in the prior suit. *Bigelow v. Old Dominion Copper Co.*, 225 U.S. 111, 127 (1912). In Missouri, the requirement of mutuality of estoppel is technically alive after *Oates*. 583 S.W.2d at 719. See also *Marusic v. Union Elec. Co.*, 377 S.W.2d 454, 459 (Mo. 1964). The supreme court has created an exception to the mutuality rule for defensive use of collateral estoppel by a stranger to the prior suit against a party to the prior suit. *Arata v. Monsanto Chem. Co.*, 351 S.W.2d 717, 722 (Mo. 1961). The *Oates* case falls within that rather large exception. The Missouri Court of Appeals for the Eastern District has not abandoned mutuality of estoppel further than required by *Arata*. *Gerhardt v. Miller*, 532 S.W.2d 852, 854-55 (Mo. App., St. L. 1975). The Missouri Court of Appeals for the Western District, however, has abolished the requirement of mutuality altogether. *LaRose v. Casey*, 570 S.W.2d 746, 749 (Mo. App., K.C. 1978) (defensive use); *In re Estate of Gould*, 547 S.W.2d 863, 869 (Mo. App., K.C. 1977) (offensive use). It is clear from the tone of *Oates* that while not technically dead, mutuality of estoppel in Missouri is on the verge of extinction. With respect to the three *Bernhard* elements, there is some question of whether the issue of fault was fully resolved on the merits in the Iron County suit because of Missouri's humanitarian doctrine by which a plaintiff can overcome a finding of contributory negligence. *Oates* was asserting a claim under that doctrine when the motion for summary judgment was granted. See note 4 and accompanying text *supra*.

6. *Blonder-Tongue Lab., Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329, 350 (1971); *Makariw v. Rinard*, 336 F.2d 333, 334-35 (3d Cir. 1964); *United States v. Silliman*, 167 F.2d 607, 614 (3d Cir. 1948), cert. denied, 335 U.S. 825 (1949); *Teitelbaum Furs, Inc. v. Dominion Ins. Co.*, 58 Cal. 2d 601, 605, 375 P.2d 439, 441, 25 Cal. Rptr. 559, 561 (1962), cert. denied, 372 U.S. 966 (1963); *Niles v. Niles*, 35 Del. Ch. 106, 112, 111 A.2d 697, 701 (1955); *Chas. Ind. Co. v. Cecil B. Wood, Inc.*, 56 Ill. App. 2d 30, 38, 205 N.E.2d 786, 790 (1965); *Gollner v. Cram*, 258 Minn. 8, 13, 102 N.W.2d 521, 525 (1960). For a full discussion, see Comment, *Collateral Estoppel: The Changing Role of the Rule of Mutuality*, 41 Mo. L. REV. 521, 529-38 (1976).

established by proving that his previous opportunity to litigate was not the equivalent of that awaiting him in the present litigation⁷ and that the difference in opportunity actually prejudiced him in the first suit.⁸ In the alternative, the opponent to estoppel may rely on arguments that certain public policies override the policies supporting collateral estoppel.⁹ Such arguments succeed only "on rather rare occasions," however.¹⁰

The court said that Oates was denied a full and fair opportunity to litigate in Iron County because his attorney was representing conflicting interests. The court, relying on a discussion by Professor Alan Widiss,¹¹ pointed out that when an insurer intervenes in a suit by its insured against an uninsured motorist to protect itself from liability under the uninsured

7. See cases cited note 6 *supra*. The clearest discussion of this element is found in New York cases. In *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 72, 246 N.E.2d 725, 729, 298 N.Y.S.2d 955, 961 (1969), the New York Court of Appeals stated:

A decision whether or not the plaintiff drivers had a full and fair opportunity to establish their nonnegligence in the prior action requires an exploration of the various elements which make up the realities of litigation. A comprehensive list of the various factors which should enter into a determination whether a party has had his day in court would include such considerations as the size of the claim, the forum of the prior litigation, the use of initiative, the extent of the litigation, the competence and experience of counsel, the availability of new evidence, indications of a compromise verdict, differences in the applicable law, and foreseeability of future litigation.

The Appellate Division of the New York Supreme Court added in *Read v. Sacco*, "In testing the fairness of the earlier litigation, the presence of counsel in behalf of the losing party, the regularity of the procedures . . . , the adequacy of those procedures in the particular case and the limits of the jurisdiction of the first court are all significant and helpful guides." 49 A.D.2d 471, 474, 375 N.Y.S.2d 371, 375 (1975). See also *American Province Corp. v. Metropolitan Util. Dist.*, 178 Neb. 348, 352, 133 N.W.2d 466, 469 (1965); RESTATEMENT (SECOND) OF JUDGMENTS § 88, Comment b (Tent. Draft No. 2, 1975).

8. *Schwartz v. Public Adm'r*, 24 N.Y.2d 65, 73, 246 N.E.2d 725, 730, 298 N.Y.S.2d 955, 961 (1969).

9. *Blonder-Tongue Lab., Inc. v. University of Ill. Foundation*, 402 U.S. 313, 330 (1971) (unsuccessfully argued that opportunity to relitigate patent validity would further goal of rewarding inventors); *Spilker v. Hankin*, 188 F.2d 35, 38-39 (D.C. Cir. 1951) (successfully argued that opportunity to relitigate contract claim between attorney and client required by the "special concern" of the courts in supervising attorneys' fee contracts); *Greenfield v. Mather*, 32 Cal. 2d 23, 35, 194 P.2d 1, 8 (1948) (successfully argued that opportunity to relitigate appropriate because the prior judgment was based on a misapprehension of both law and facts).

10. 1B J. MOORE, FEDERAL PRACTICE ¶ 0.405[11], at 783-84 (2d ed. 1974), in summarizing federal cases, states:

Although, on the whole, the doctrines of res judicata and collateral estoppel are strictly applied, they have been occasionally rejected or qualified in cases in which an inflexible application would have violated an overriding public policy or resulted in manifest injustice to a party. Courts recognize that the doctrines of res judicata and collateral estoppel express a salutary policy of benefit to society and to the parties of putting an end to litigation, but are not inexorable rules of law. And have, on rather rare occasions, weighed the policy of ending litigation against another policy which would be abrogated by a mechanical application of res judicata or collateral estoppel.

11. A. WIDISS, A GUIDE TO UNINSURED MOTORIST COVERAGE §§ 7.2-3 (1969).

motorist provision by aiding the defense of the uninsured motorist and, in the same suit, the uninsured motorist counterclaims for affirmative relief against the insured (triggering the insurer's duty to provide counsel for the insured), an attorney representing both the insurer and the insured represents conflicting interests. The interest of the insured is to obtain a judgment for damages against the uninsured motorist in as large an amount as legitimately possible. The interest of the insurer, by contrast, is best served by a finding that both were negligent. This would defeat the insured's claim under the uninsured motorist provision and at the same time foreclose the necessity of indemnifying the insured for any judgment obtained against him by the uninsured motorist. The next best result from the insurer's point of view would be a finding that the party with greater damages is at fault. That party may well be the insured.

The court concluded that because "[t]he present rules . . . [allowing the insurer a right to intervene] simply are not calculated to afford fairness to the parties, because of the continuing conflict of interest problem which is simply exacerbated when the uninsured motorist counterclaims,"¹² it would be inequitable to apply collateral estoppel. The court reversed and remanded the case for trial on the fault issue.

The opinion, by its terms, refers to the insurance company as representing conflicting interests. Conflicts of interest take on significance only when there is a fiduciary relationship present. As explained in *Craig v. Iowa Kemper Mutual Insurance Co.*:¹³

The mere relationship of insurer and insured does not import an obligation of trust. Rather, in the absence of special circumstances, the relation between the parties to a contract is that of debtor and creditor.

. . . .

. . . No independent duty of good faith and trust accrues to the policy insured under this [uninsured motorist] coverage. The very contrary results: under the uninsured motorist provision the policy insured and the insurer become adversaries who deal with wariness, not principal and agent who deal with trust.¹⁴

The court noted, however, that when the insurer undertakes to control the defense of the insured against the claims of others, a fiduciary relationship arises.¹⁵

If courts focus on representation of the insured by the insurer, there would seem to be an "obvious and almost constant conflict of interest problem in uninsured motorist cases."¹⁶ The issue of full and fair opportunity to litigate is designed, however, to focus the court's attention

12. 583 S.W.2d at 721.

13. 565 S.W.2d 716 (Mo. App., K.C. 1978).

14. *Id.* at 723-24.

15. *Id.* at 723.

16. 583 S.W.2d at 720. See text accompanying notes 15 *supra* and 26 *infra*. The insurer would be in the same position as an attorney representing both from the standpoint of conflicting interests.

on the practice of law in the first suit.¹⁷ It is elementary that an insurance company cannot practice law except through its agents. Thus, it would seem that the focus in collateral estoppel might properly be placed on the attorney affiliated with or hired by the insurer.¹⁸

The reason that the focus of the court on the attorney or the insurer is important is a rule which *Oates* addresses indirectly. The court explicitly pointed out that *Oates* made "no claim . . . that able defense counsel retained by . . . [Safeco] rendered less than competent representation,"¹⁹ but still denied estoppel. Left undisclosed is how *Oates* met his burden of proof on the issue of actual prejudice. The result seems defensible on basic principles of agency law. *Oates* alleged that his attorney was faced with a conflict of interest. Such a conflict in the context of a fiduciary relationship, such as that between attorney and client, would create a presumption of a breach of fiduciary obligation.²⁰ The result in collateral estoppel should be to shift the burden on the issue of actual prejudice back to the party seeking estoppel. The presumption of breach of fiduciary obligation is generally rebuttable by a showing that the attorney complied with Disciplinary Rule 5-105(C) of the Missouri Code of Professional Responsibility.²¹ That rule provides: "[A] lawyer may represent multiple clients if it is obvious that he can adequately represent the interest of each and if each consents to the representation after full disclosure of the possible effect of such representation on the exercise of his independent profes-

17. See cases cited note 6 *supra*.

18. In some portions of the *Oates* opinion, it seems as if the court was focusing on the attorney though denoting the insurance company. This is particularly evident in the court's suggestion of a rule change concerning the insurer's right to intervene as a remedy for the problem. 583 S.W.2d at 721. If the insurer is defending the insured, the insurer's conflict of interest is the same whether or not it intervenes in the suit as a party. Nationwide, courts tend to focus on the attorney rather than the insurer in analyzing conflicts of interest. See R. KEETON, BASIC TEXT ON INSURANCE LAW § 7.7(b) (1971).

An argument can be made against evaluating the situation from the point of view of the insurer. Because the conflict of interest is "irreconcilable," see text accompanying note 26 *infra*, courts would be compelled to disqualify any attorney selected by the insurer to represent the insured. See *Acorn Printing Co. v. Brown*, 385 S.W.2d 812, 817-18 (Mo. App., Spr. 1964). See also *In re Gopman*, 531 F.2d 262, 266-67 (5th Cir. 1976). As a result, the insured would in Missouri now lose entirely the contractual right to have counsel paid for by the insurer, a right of considerable economic value. See generally *International Paper Co. v. Continental Cas. Co.*, 35 N.Y.2d 322, 326, 320 N.E.2d 619, 621, 361 N.Y.S.2d 873, 876 (1974). This loss would be unjustified because the attorney can in fact ably and ethically defend the insured in many cases. See text accompanying notes 23-33 *infra*.

19. 583 S.W.2d at 720.

20. See *In re Estate of Willets*, 173 Misc. 199, 201, 17 N.Y.S.2d 578, 580 (Sur. Ct. 1939); *Van Dyke v. White*, 55 Wash. 2d 601, 611-12, 349 P.2d 430, 436-37 (1960).

21. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 292-93 (6th Cir. 1979); *Fund of Funds, Ltd. v. Arthur Anderson & Co.*, 435 F. Supp. 84, 96 (S.D.N.Y. 1977), *aff'd in part and rev'd in part*, 567 F.2d 225 (2d Cir. 1977); *In re Farr*, 264 Ind. 153, 160-62, 340 N.E.2d 777, 782-83 (1976); *Acorn Printing Co. v. Brown*, 385 S.W.2d 812, 818-19 (Mo. App., Spr. 1964). *Farr* and *Brown* discuss the elements of an adequate disclosure and a knowledgeable consent.

sional judgment on behalf of each."²² An understanding of the controvertability of the presumption in various situations under the regular rules of professional ethics and a sensitivity to the various public policies served or disserved by an absolute denial of collateral estoppel should guide courts in resolving the question of whether to allow rebuttal of the presumption of actual injury in collateral estoppel.

The applicability of Disciplinary Rule 5-105(C) varies with the situation in which a conflict of interest is presented. In uninsured motorist cases, there are four possible conflict of interest situations. The first is the situation involving the insurer who intervenes once it is discovered that the defendant is uninsured.²³ The second is present when an attorney who regularly represents and presumably will continue in other cases to represent the insurance company undertakes to defend the insured against the uninsured motorist at the insurer's expense. For convenience, this will be referred to as the regular defense attorney situation. The third may be present when an attorney selected by, but with no previous tie to, the insurer represents the insured. This will be referred to as the insurer's choice situation. Finally, there is the situation where the attorney is selected by the insured with the insurer liable for the attorney's fees. The fourth situation is available to insureds when, upon disclosure of the conflict of interest by the attorney retained by the insurer pursuant to Disciplinary Rule 5-105(C), they choose their own attorney. Missouri courts have not yet been asked to address this situation.²⁴ The overwhelming majority of jurisdictions allow insureds in this situation to recover attorney's fees from the insurer.²⁵ This will be referred to as the insured's choice situation.

In Informal Opinion 977, the Standing Committee on Professional Ethics of the American Bar Association has taken the position that in the case of the attorney also representing the intervening insurer by defending the uninsured motorist, "the conflict of interest is irreconcilable and is so marked that an attorney should not, even with the 'express consent of all concerned, given after a full disclosure of all the facts,' undertake to represent [both]."²⁶ Accepting that view, there is nothing with which an attorney can rebut the presumption, and thus, collateral estoppel raised by the insurer should always be denied. The defense of collateral estoppel

22. Mo. SUP. CT. R. 4, DR 5-105(C).

23. This is the situation described in the text accompanying note 11 *supra*.

24. Missouri has regularly allowed insureds to recover attorneys' fees where the insurer has denied coverage or otherwise breached its duty to defend. *Centennial State Bank v. S.E.K. Constr. Co.*, 518 S.W.2d 143, 151 (Mo. App., K.C. 1974). It is not a great step from that position to hold the insurer liable when the insurer has performed its duty questionably by assigning an attorney to the case who faces conflicting interests. See cases cited note 25 *infra*.

25. See, e.g., *Maryland Cas. Co. v. Peppers*, 64 Ill. 2d 187, 198-99, 355 N.E. 2d 24, 30-31 (1976); *Brohawn v. Transamerica Ins. Co.*, 276 Md. 396, 409-15, 347 A.2d 842, 851-54 (1975) (collecting cases).

26. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 977 (1967).

could never arise from such a situation, however. The insurer intervenes for the purpose of defeating the claims of the insured in order to escape liability under the uninsured motorist endorsement. Under the compulsory counterclaim rule,²⁷ the insured must assert all claims he has against the insurer, an opposing party, which arise out of the same occurrence or transaction. In an earlier decision,²⁸ the Missouri Supreme Court held that a claim against an insurance company under the uninsured motorist provision arises out of the same occurrence or transaction as the underlying automobile accident. The insured must therefore assert his uninsured motorist claim against the insurer after the insurer intervenes or lose it due to the counterclaim rule.

Evaluation of the remaining three situations is somewhat more complex. The conflict of interest between the insured and the insurer is similar in each. The insured wants to establish liability for the uninsured motorist and to recover as large an amount as is legitimately possible. The insurer, on the other hand, wants either a modest judgment or no judgment at all.

While the interest of insured and insurer are as adverse as those in the case of the intervening insurer, the latter three situations are distinguishable from the attorney's point of view. The intervening insurer defeats coverage under the uninsured motorist provision by defending the uninsured motorist against liability. Thus, an attorney retained by the intervening insurer, in effect, would be representing the insured and the uninsured motorist. The insured wants to avoid a finding that he was at fault. Both the insured and the uninsured motorist would be served by a finding that the other was at fault. If either party succeeds with the aid of the attorney, the interests of the attorney's other client, the insurer, who entered the case to avoid liability under both the uninsured motorist and the regular liability provisions of the insured's policy, will have been defeated. Thus, the attorney could not fulfill his duty to one of his clients without breaching his duty to the other. Furthermore, the attorney would have access to confidences and secrets with which to sabotage the defense of both the uninsured motorist and the insured, and thus, could directly serve the interest of the insurer by aiding a finding of contributory negligence.

In the latter three situations, by contrast, the attorney has no responsibility for, nor control over, the defense of the uninsured motorist. Without the duty to the uninsured motorist, there is still a conflict between the

27. Mo. Sup. Ct. R. 55.32(a), which provides in part:

A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction.

28. *State ex rel. Farmers Ins. Co. v. Murphy*, 518 S.W.2d 655, 658-61 (Mo. En Banc 1975).

insurer and the insured, but for the attorney it is not necessarily irreconcilable. The attorney was retained by the insurer to represent the insured in order to protect the insurance company from liability for the insured's negligence. If the attorney's agency is limited to the insurer's duty to defend, there is no conflict for the attorney for it is possible for the insurer to deny coverage for the uninsured motorist's negligence and admit liability for the alleged negligence of the insured.

An important difference between the three situations is the relation of the attorney to the interests of the insurer. The insurer is a client of the regular defense attorney and of the attorney retained for an isolated case. The attorney has a professional obligation to his client, and thus, in an uninsured motorist case faces a conflict of interest.²⁹ It is an open question whether an attorney selected by the insured in fact faces a conflict of interest. The attorney has no professional obligation to the insurer and thus does not feel a conflict between clients on an ethical level. It cannot be overlooked, however, that the attorney's natural desire to enhance the possibility of future business with an insurer is an incentive to become sensitized to the insurer's interests.

A countervailing consideration is that an attorney wishing to aid the insurer is stymied if he is acting solely out of self-interest. The only method by which he can protect the monetary interests of the insurer where an uninsured motorist is involved is by a poor performance in the defense of the insured. While this is likely to be welcomed by the insurer at the time, in future cases, the insurer is likely to remember the attorney's poor performance, and might view him with disfavor when selecting counsel to defend the insurance company against liability. He may be selected for future uninsured motorist cases but, as about ten percent of motorists are uninsured,³⁰ the trade is hardly the most profitable that the insurer has to offer. An able defense of the insured seems, by contrast, much more likely to impress the insurer in the selection of an attorney in future cases, however annoying it is to the insurer in the present case. The latter situation represents then a grey area. According to *Oates*, the trial court should "carefully consider the equities of the particular situation; lest one be unjustly prevented from having a full and fair hearing on his claim."³¹ It would seem that, at least in the context of collateral estoppel, the trial court should determine whether the attorney disclosed "the possible effects of such representation on the exercise of his independent professional judgment"³² on behalf of the insured.

While the ABA questions the ethics of a regular defense attorney who

29. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 977 (1967).

30. Comment, *Uninsured Motorist Insurance: California's Latest Answer to the Problem of the Financially Irresponsible Motorist*, 48 CALIF. L. REV. 516, 516 (1960).

31. 583 S.W.2d at 721.

32. Mo. SUP. CT. R. 4, DR 5-105(C).

would attempt to represent the insured in an action against (or by) the uninsured motorist, the implication of Informal Opinion 977 is that the attorney may continue such representation if the requirements of Disciplinary Rule 5-105(C) are met.³³ The latter two situations therefore would seem to present a fortiori cases for the applicability of Disciplinary Rule 5-105(C). In summary, according to principles of professional ethics, Disciplinary Rule 5-105(C) is applicable in all three situations and a showing of compliance with the rule should be required.

From the standpoint of public policy, there is little to be said in favor of encouraging insurer's regular defense counsel to represent insureds in uninsured motorist cases. The conflict of interest between his clients is pronounced. In addition, the attorney's own financial interests continue after disclosure to dictate solicitude for the insurer's interests in order to retain a lucrative relationship. Thus, it would be rare indeed that a regular defense attorney could comply with Disciplinary Rule 5-105(C), which requires that it be "obvious that he can adequately represent the interests of each."³⁴ If the attorney believes he can meet this requirement, the insurer would have no incentive to seek out more dispassionate counsel for the insured. If the insured does not reject the proffered counsel, the insurer can only benefit from the representation by an attorney sympathetic to all of its needs. Under the decision in *Wells v. Hartford Accident & Indemnity Co.*,³⁵ if the insured wins the suit against the uninsured motorist, the insurance company is estopped on the fault issue regardless of the nature of the insured's representation. Under a presumption rebuttable by proof of compliance with Disciplinary Rule 5-105(C), the burden of showing actual prejudice to his opportunity to litigate would shift back to the insured who has little access to evidence with which to meet the burden, and would probably fail. Thus, the insured would be estopped as a practical matter if he loses.

An additional factor in favor of denying estoppel is the state's policy of requiring uninsured motorist coverage.³⁶ Multiplication of the social

33. ABA COMM. ON PROFESSIONAL ETHICS, INFORMAL OPINIONS, No. 977 (1967). To be effective, the attorney would have to abandon representation of the insurer in the matter entirely. The lawyer should first determine, however, to what extent representing the insured involves litigation the subject matter of which is "substantially related" to work done for the "former" client. Because there is a possibility that secrets and confidences of the former client would be of use in representing a new client, an attorney may not represent the new client in such a matter. *Melamed v. ITT Continental Baking Co.*, 592 F.2d 290, 292 (6th Cir. 1979) (collecting cases).

34. Mo. SUP. CT. R. 4, DR 5-105(C).

35. 459 S.W.2d 253, 259 (Mo. En Banc 1970).

36. RSMo § 379.203 (1978) provides:

No automobile liability insurance covering liability arising out of the ownership, maintenance, or use of any motor vehicle shall be delivered or issued for delivery in this state with respect to any motor vehicle registered or principally garaged in this state unless coverage is provided therein or supplemental thereto . . . for the protection of persons insured thereunder who are legally entitled to recover damages from owners or

costs attendant to a public policy diminishes the utility of that policy. The efficacy of this state policy would therefore be subverted under a rule merely requiring compliance with Disciplinary Rule 5-105(C) because such a rule, bringing with it counsel of questionable loyalty, would diminish the economic value of the insurer's contractual duty to provide counsel in defense of suits by uninsured motorists. It is doubtful though whether these considerations outweigh those supporting collateral estoppel in cases where the insured consented after a full appraisal of the alternatives.

There is good reason in addition to the already strong policies supporting collateral estoppel not to deny estoppel in the insurer's choice situation. If the estoppel is denied, the insurance company is put in an extremely difficult situation. Under *Wells*, the insurer is bound by a determination favorable to the insured on the fault issue in a subsequent suit against the insurer.³⁷ If the insured loses, under *Oates*, he would not be bound by the decision in a subsequent suit under the uninsured motorist provision. The result is a risk-free trial for the insured at the insurer's immediate expense. In Missouri, the remedy for the insurer is to intervene in the suit between the insured and the uninsured motorist.³⁸ When it does so, the situation is not unlike the aggravated situation described by *Widiss* and the court in *Oates*. Certainly what conflict there is for the attorney is exacerbated by daily contact with the insurer. The result would be that because of the uninsured motorist provision in his policy, the insured's contractual right to have counsel paid for by the insurer is devalued.

There is a suggestion in *Oates* that the proper remedy would be a rule change to take away the insurer's absolute right to intervene.³⁹ This approach has been followed elsewhere.⁴⁰ While such a change would eliminate the insured's problem, it is still difficult to imagine what public policy supports an artificial restriction on the scope of estoppel when the attorney, who had only a marginal conflict of interest to begin with, fully disclosed it to the insured who then intelligently consented to continued

operators of uninsured motor vehicles because of bodily injury, sickness or disease, including death, resulting therefrom.

Prior to a 1971 revision of the statute, 1971 Mo. LAWS 398, § 1, RSMo § 379.203 (1969), contained the following language: "[P]rovided, however, that the coverage required under this section shall not be applicable where any insured named in the policy shall reject the coverage in writing." After the deletion of this clause, the Missouri Court of Appeals for the Western District, faced with a contractual provision which in some particulars "effectively whittled away" the coverage mandated by the language of the statute, declared all such exclusionary clauses void. *Otto v. Farmers Ins. Co.*, 558 S.W.2d 713, 717-19 (Mo. App., K.C. 1977) (collecting cases). Thus, "[s]ection 379.203 . . . becomes a part of every policy of insurance to which it is applicable to the same effect as if it were written out in full in the policy itself." *Id.* at 717. See also *Steinhaefel v. Reliance Ins. Co.*, 495 S.W.2d 463, 468 (Mo. App., St. L. 1973).

37. 459 S.W.2d at 259.

38. *State ex rel. State Farm Mut. Auto. Ins. Co. v. Craig*, 364 S.W.2d 343, 349 (Mo. App., Spr. 1963).

39. 583 S.W.2d at 721.

40. *Allstate Ins. Co. v. Hunt*, 450 S.W.2d 668, 671-73 (Tex. Civ. App. 1970).

representation. To the contrary, denial of estoppel would be unjustifiably and perhaps unconstitutionally⁴¹ harmful to the insurer after the rule change. The insurer would still face the prospect of subsidizing the insured's risk-free trial, but now without any mode for defending itself against future claims.

Turning to the facts in *Oates*, the result reached by the Missouri Supreme Court is correct under these principles. While the conflict of interest situation is not that described by the court, the attorney was selected by the insurer, so there was a conflict of interest present. The conflict can be overcome in this situation by compliance with Disciplinary Rule 5-105(C), but there was no evidence offered of compliance with the rule requirements. The presumption of a lack of a full and fair opportunity to litigate therefore was not rebutted and collateral estoppel was inapplicable. *Oates*, however, is devoid of mention of presumptions and Disciplinary Rule 5-105(C), and by a literal interpretation of its language would seem to hold that representation by counsel retained by the insurer in the prior suit absolutely precludes application of collateral estoppel. Presumably the public policy overriding estoppel is that against attorneys representing conflicting interests, a situation which is absent after there has been compliance with Disciplinary Rule 5-105(C).

The application of collateral estoppel in the context of uninsured motorist cases is problematic. The *Oates* decision suggests many of the difficulties, but does not help resolve them. In particular, future litigation should clarify whether the presumption of actual prejudice is rebuttable in the conflict of interest situations by a showing of compliance with Disciplinary Rule 5-105(C). Public policy seems to indicate that in some situations, it should be.

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41. Such a result probably would be violative of the insurer's right to due process. State *ex rel.* State Farm Mut. Auto. Ins. Co. v. Craig, 364 S.W.2d 343, 347 (Mo. App., Spr. 1963). The rule change, therefore, would have to be accompanied by the overruling of *Wells v. Hartford Accident & Indem. Co.*, 459 S.W.2d 253 (Mo. En Banc 1970), which would place upon insureds who first seek recovery from the tortfeasor an undesirable burden of proving operative facts twice.