

A Complex Web of Loyalties: The Tri-Partite Relationship & Cumis Counsel



ETHICALLY SPEAKING

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*"No one can serve two masters."
(Matthew 6:24.)*

This biblical adage about loyalty is not only relevant in everyday life but is also present in California law where legal ethics and insurance defense often intersect. The Tri-Partite relationship of dual representation of both the insurance carrier and its insured is a unique aspect of insurance defense that harbors potential conflicts of interest. Cal. State Bar Form. Opin. 1995-139; ABA Form. Opin. 08-450. Under some circumstances, this complex web of relationships can create a situation where the insured has a right to be appointed independent counsel. This appointed attorney is referred to as "Cumis counsel" and is named after the seminal California Court of Appeals decision of the same name. (*San Diego Fed. Credit Union*

v. Cumis Ins. Soc'y, 162 Cal.App.3d 358 (1984). Cumis counsel has its own unique rights and obligations with respect to the insured, the carrier and its defense attorney.

Identifying the Conflict

Being aware of which conflicts of interest require Cumis counsel not only maximizes the best outcome for both the carrier and its insured but also minimizes risk in the event an insured was entitled to but did not receive independent counsel. But what exactly does this type of conflict of interest look like? Not every conflict of interest requires Cumis counsel to be appointed; the conflict must be "significant, not merely theoretical, actual, not merely potential." (*Dynamic Concepts Inc. v. Truck Ins. Exch.*, 61 Cal.App.4th 999, 1007 (1998).)

One of the most common conflicts of interest requiring Cumis counsel occurs when the defense attorney initially retained by the carrier has the ability to control the outcome of issues on which coverage depends. Also, Cumis counsel is required if an insurer intends to settle a third party claim for more than its insurance policy limits without the consent of the insured. Other situations where a Cumis-type of conflict arises

include cases where a carrier may defend against an insured's claim based on its reservation of rights and where the insured's conduct is at issue in the underlying third party lawsuit.

Further, there may be potential for a Cumis conflict where, in an effort to present a common defense, the carrier defends parties other than its insured. In this situation, the carrier owes the same duty of appointing Cumis counsel to uninsured co-defendants as it does to its own insured. Also, if co-defendants who are jointly represented by the same attorney through the same carrier will deprive either of fair representation, independent counsel is required. In fact, there may be an actual conflict of interest when the interests of the carrier and its insured are simply mutually different or where the independent counsel appointed by the carrier provides an ineffective or less than full defense of the insured.

Even if a conflict of interest may loom on the horizon, a carrier is not required to retain independent counsel the minute it discovers the potential for conflict. For example, if a carrier instructs originally retained counsel to avoid coverage issues in defending the third party action, then it may avoid having to appoint independent counsel. Additionally, courts do not consider the carrier's reservation of rights to seek reimbursement from the insured for defense costs or settlement payments for non-covered claims to be a coverage dispute and therefore do not require that Cumis counsel be appointed to defend the insured.

Finally, defense counsel for the insured may not disclose confidential information to the insurer which would result in denial of the insured's coverage (Cal. State Bar Form. Opin. 1995-139), and may be required to withdraw from representation to avoid representing conflicting interests. ABA Form. Opin. 08-450.

Appointing Cumis Counsel

Assuming there is a situation wherein Cumis counsel is required, the carrier and the insured have new rights and obligations that come into play. The insured officially has a right to choose the attorney appointed as Cumis counsel and as such, the insured's interest in controlling the litigation is superior to that of the carrier's interest in the same. But the carrier still has the right to insist that the selected counsel have certain minimum qualifications. For example, the statute allows the carrier to require that the

attorney have at least five years of civil litigation practice which includes substantial defense experience in the subject at issue in the litigation as well as errors and omissions coverage. (Cal. Civ. Code, sec. 2860, subd. (c).)

The carrier also has limited payment obligations with respect to Cumis counsel. The carrier is only obligated to pay the "rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended." (Cal. Civ. Code, sec. 2860, subd. (c).)

Additionally, the carrier's duty to pay is limited to services reasonably required to defend the insured and may be limited to judicial review for reasonableness.

Cumis Counsel's Rights and Obligations

While the carrier has the duty to foot the bill for independent counsel, Cumis counsel has its own rights and obligations once it has been retained to represent the insured. Both the attorney initially retained by the carrier and Cumis counsel can participate in every aspect of the lit-

igation. (Cal. Civ. Code, sec. 2860, subd. (f).) Additionally, Cumis counsel is considered to represent the interests of the insured alone. While the carrier technically pays Cumis counsel for the legal services rendered, there is no attorney-client relationship between Cumis counsel and the carrier. As a result, there are Cumis-counsel-specific duties that reflect the unique role Cumis counsel play in representing the insured.

For example, Cumis counsel has a statutory reporting requirement pertaining to certain information relating to the action. By statute, Cumis counsel must disclose "all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action." (Cal. Civ. Code, sec. 2860, subd. (d).) If a carrier demands that certain information claimed to be privileged by Cumis counsel be disclosed, the claim is subject to in camera review by a judge. (Id.) However, the Cumis counsel must be mindful because to the extent communications are made to the insurance carrier to "try to persuade the carrier to provide coverage," they are being shared with "a potential adversary—an act sufficient to waive work product protection." *First Pac. Networks, Inc. v. Atl. Mut. Ins. Co.*, 163 F.R.D. 574, 582-83 (N.D. Cal. 1995).

Further, neither Cumis counsel nor originally retained counsel may settle directly with the claimant without the other attorney's knowledge and consent. (Cal. Civ. Code, sec. 2860, subd. (f).) If this duty is breached, the violating attorney may be subject to tort liability if the settlement is prejudicial to the insured.

Looming Gray Areas

While there are statutory guidelines for Cumis counsel, there are still many gray areas in Cumis counsel's role and responsibilities that have yet to be defined. For example, Civil Code section 2860 does not set forth a resolution mechanism when Cumis counsel and counsel originally retained by the carrier disagree on essential matters such as who ultimately controls the litigation in an attorney dispute. Courts have been unclear as to whether the carrier can force the insured to give up control of the litigation where the two have conflicting interests, which can potentially occur in every instance where Cumis counsel is appointed. While the *Cumis* decision and its subsequent

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enactment have been on the books for a quarter of a century, it will take courts many more years to further define Cumis counsel's unique role in insurance defense litigation.



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