ANNOTATED COVERAGE QUESTIONNAIRE

USE NOTES:

This Annotated Coverage Questionnaire may assist users to assess responses received from an insurer to a Coverage Questionnaire. Each question from the Coverage Questionnaire is repeated below, followed by authorities supporting correct or preferred responses. Authorities in parentheses refer to articles that may be found at DutytoDefend.com through the Table of Contents.

The Coverage Questionnaire should be used in coordination with an Ethical Compliance Questionnaire, dependent counsel's responses to the Ethical Compliance Questionnaire and the Annotated Ethical Compliance Questionnaire.

Do you unconditionally waive all bases upon which you may deny coverage to me?

"Yes" is the preferred answer, because it usually ends the risk that any coverage contest will create a disqualifying conflict of interest between the insurer and the policyholder. Waiver is the voluntary relinquishment of a known right. (*Estoppel, Waiver, and Forfeiture*.) While a waiver may be inferred from and insurer's conduct, such as failing to promptly assert a reservation of rights (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 754 (*Miller*)), the best evidence of a waiver is a simple, written statement by the insurer. Courts have allowed insurers to reserve their rights after very long delays, impliedly finding no waiver or estoppel by the delay. (*A 40 Day Regulatory Deadline to Deny Liability Insurance Coverage Is Poorly Enforced*). Obtaining an insurer's express waiver is a fast, cheap, and easy procedure to resolve a coverage contest - much better than costly, stressful, and wasteful coverage litigation.

If a judgment includes punitive damages, will you pay all compensatory damages?

"Yes" is the preferred answer. Civil Code § 2860(b) declares that "No conflict of interest shall be deemed to exist as to allegations of punitive damages." However, "[t]he 'classic' situation [where a conflict of interest exists] is where the third party seeks damages based on the insured's negligence, and the insurer seeks to avoid providing a defense by arguing that the insured acted intentionally." (*David Kleis, Inc. v. Superior Court* (1995) 37 Cal. App. 4th 1035, 1044.) Thus, while an insurer is not required to provide independent counsel due to a punitive damage claim alone, the insurer **is required** to provide independent counsel if the insurer reserves its rights to deny coverage because a punitive damage claim implies that the policyholder is guilty of uninsurable wilful conduct and also refuses to pay compensatory damages. Under California law, compensatory damages may be payable even though punitive damages are awarded. "We reject [the insurer]'s claim that imposition of punitive damages negates an insured's coverage for compensatory damages as well as punitive damages. Nonintentional torts may also form the basis for punitive damages. In those cases, section 533 is not applicable because the harm has not resulted from a 'wilful act,' thus only indemnification of the punitive damages portion of the recovery is prohibited. [W]here an act performed without intent to harm has nevertheless resulted in injury and possible exposure to punitive damages because it was done with conscious disregard of the rights or safety of others. Although indemnification of the punitive damages is disallowed for public policy reasons, the conduct is not wilful as contemplated by section 533. Thus, the policy of insurance would still cover the compensatory damage portion of plaintiff's recovery." (*Peterson v. Superior Court* (1982) 31 Cal. 3d 147, 158-159 (citations and ellipses omitted).)

While the insurer is free to deny coverage for compensatory damages if punitive damages are awarded, doing so may require the insurer to pay for independent counsel to conduct the policyholder's defense.

Will you solicit and accept an offer to settle within my policy limit?

While insurers have an implied duty to settle a lawsuit against its policyholder when it received a proper offer to settle within policy limits, insurers do not have a duty to initiate a settlement offer within policy limits. "An insured's claim for 'wrongful refusal to settle' cannot be based on his or her insurer's failure to *initiate* settlement overtures with the injured third party, but instead requires proof the third party made a reasonable offer to settle the claims against the insured for an amount within the policy limits. We conclude there is no substantial evidence [the underlying plaintiff] ever offered to settle her claims *against* [the policyholder] for an amount within [the policyholder]'s policy limits. (*Graciano v. Mercury General Corp.* (2014) 231 Cal.App.4th 414, 427 (citations and ellipses omitted, emphasis original).) However, dependent counsel has a duty of undivided loyalty to the policyholder (*Duty of Undivided Loyalty*) and arguably owes a duty to protect the interests of the policyholder to initiate a settlement offer within policy limits. This question is also addressed in the Ethical Questionnaire.

INVESTIGATION

Have you completed an investigation of each claim asserted against me?

"Yes" is the correct answer if 40 days have passed. An insurer must "immediately, but in no event more than fifteen (15) calendar days . . . begin any necessary investigation of the claim." (Cal. Code Regs. § 2695.5(e)(3).) The insurer "shall immediately, but in no event more than forty (40) calendar days, accept or deny the claim, in whole or in part . . . in writing and provide a statement listing all factual and legal bases for each reason given for [a] denial [including reference to each] specific policy provision" (Cal. Code Regs. § 2695.7(b) (ellipses omitted).) Establishing that the insurer's investigation is completed may help to prevent the insurer from expanding the scope of its reservation of rights in the future.

Have you completed an investigation of my claims for defense and indemnification?

A notice of claim is actually three claims: 1) a third party claim by the plaintiff for payment of damages; 2) a first party claim by the policyholder for a defense against the plaintiff's damage claim; and 3) a first party claim by the policyholder for a indemnification for a judgment awarding the plaintiff damages. "'Investigation' means all activities of an insurer or its claims agent related to the determination of **coverage, liabilities**, or nature and extent of **damages** afforded by an insurance policy and other obligations or **duties** arising from an insurance policy." (Cal. Code Regs. § 2695.(2)(k) (ellipsis omitted).) As a practical matter, most insurers determine coverage before starting to evaluate the plaintiff's damage claim, but frequently the "investigation" consists of nothing more that comparing the language of a complaint to the language of a policy.

"[A]n insurer may breach the covenant of good faith and fair dealing when it fails to properly investigate its insured's claim." (*Egan v. Mutual of Omaha Ins. Co.* (1979) 24 Cal.3d 809, 817 (*Egan*).) To protect the insured's peace of mind and security, "an insurer cannot reasonably and in good faith deny payments to its insured without thoroughly investigating the foundation for its denial." (*Egan, supra*, 24 Cal.3d at 819; *Wilson v. 21st Century Ins. Co.* (2007) 42 Cal.4th 713, 721; *Jordan v. Allstate Ins. Co.* (2007) 148 Cal.App.4th 1062, 1072.) The

adequacy of the insurer's investigation is "(a)mong the most critical factors bearing on the insurer's good faith." (*Shade Foods, Inc. v. Innovative Products Sales & Marketing, Inc.* (2000) 78 Cal.App.4th 847, 879.)

SETTLEMENT

Have you attempted in good faith to effectuate a prompt, fair, and equitable settlement of each claimant's claim against me?

"Yes" is the correct answer. An insurer must attempt "in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear." (Ins. Code § 790.03(h)(5).) The insurer may not properly delay resolution by asserting a false defense and the policyholder should not cooperate with the insurer to do so. "[A]s stated some years ago by Judge Cardozo, a cooperation clause may not be expanded to require the assured 'to combine with the insurer to present a sham defense.'" (*Valladao v. Fireman's Fund Indem. Co.* (1939) 13 Cal.2d 322, 329.) A desire for prompt resolution of a liability dispute may create an incentive for the policyholder to properly confess genuine liability rather than drag out protracted litigation.

Will you attempt in good faith to effectuate a prompt, fair, and equitable settlement of my claims for defense and indemnification?

Similarly to the previous question, the correct answer is "yes". The insurer and the policyholder should attempt to resolve all coverage contests. This question should invite settlement negotiations.

INSURER STANDARDS

Have you adopted written standards for the prompt investigation of claims?

"Yes" is the correct. "Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims," knowingly committed, constitutes an unfair business practice. (Ins. Code § 790.03(h)(c).) "Every insurer shall adopt written standards for the prompt investigation and processing of claims." (Cal. Code Regs. § 2695.6(a).) The investigation and processing of claims are different tasks that warrant the adoption and implementation of separate standards. Many liability insurers have very poor written standards. "'Investigation' means all activities of an insurer or its claims agent related to the determination of coverage, liabilities, or nature and extent of damages afforded by an insurance policy and other obligations or duties arising from an insurance policy." (Cal. Code Regs. § 2695.(2)(k) (ellipsis omitted).) "[E]very insurer shall immediately, but in no event more than fifteen (15) calendar days later (1) acknowledge receipt of [a notice of claim]; (2) provide to the [policyholder] necessary forms, instructions, and reasonable assistance; (3) begin any necessary investigation of the claim." (Cal. Code Regs. § 2695.5(e) (ellipses omitted).)

Have you adopted written standards for the prompt processing of claims?

"Yes" is the correct. See above. While most insurers have adopted *procedural* standards, many insurers have not adopted *substantive* standards that accurately state the legal basis for properly accepting or denying claims. It is important to obtain a copy of the insurer's standards to determine if the insurer applies lawful standards and to prove that a violation was "knowingly committed" which "means performed with actual, implied or constructive knowledge, including, but not limited to, that which is implied by operation of law." (Cal. Code Regs. § 2695.(2)(l).) "Willful" "means simply a purpose or willingness to commit the act, or make the omission. It

does not require any intent to violate law, or to injure another, or to acquire any advantage." (Cal. Code Regs. § 2695.(2)(y) (ellipsis omitted).)

INDEPENDENT COUNSEL

Generally, a liability insurer that agrees to defend has a contractual "right" to control its policyholder's defense, so long as no conflict of interest exists. Most liability policies state that the insurer has the "right to defend" and many policies state that the insurer may select counsel to conduct the defense. However, an insurer exercises this contractual right, dependent counsel chosen by the insurer still must satisfy separate ethical obligations to the policyholder, including that dependent counsel cannot accept or continue representation of dual clients who have conflicting interests without analyzing potential conflicts, making written disclosure to and obtaining informed written consent from the policyholder and the insurer.

Thus the policyholder's right to select and direct independent counsel at the insurer's expense does not derive from the insurance policy contract. Instead it derives from the ethical prohibition imposed on dependent counsel. "The obligation of an insurer to provide independent Cumis counsel for an insured is premised on the ethical inability of an attorney to represent conflicting interests." (*United Pac. Ins. Co. v. Hall* (1988) 199 Cal. App.3d 551, 556.) "The Cumis opinion was based heavily on the canons of ethics and the possibly conflicting choices confronting an attorney" (*Blanchard v. State Farm Fire & Casualty Co.* (1991) 2 Cal.App.4th 345, 350; see also, *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App.4th 1372, 1394; *Mosier v. S. Cal. Physicians Ins. Exch.* (1998) 63 Cal. App.4th 1022, 1042 (*Mosier*).

"Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent to continued representation, counsel must cease to represent both [and] the insurer must pay the reasonable cost for hiring independent counsel by the insured." (*Cumis, supra*, 162 Cal.App.3d at 375 (citations and ellipses omitted).)

Will you pay for independent counsel to defend me?

"Yes" is the correct answer if the insurer has reserved rights to later deny coverage on any ground that is related to disputed issues of fact or law in the liability dispute. (*Cumis Test*; *Top Ten Insurer Coverage Decisions*.)

Will you pay independent counsel invoices within 40 days?

"Yes" is the correct answer. Each invoice submitted by independent counsel constitutes a claim for policy benefits - payment for the costs of defense. "Upon receiving [a] claim, every insurer . . . shall immediately, but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in part." (Cal. Code Regs. § 2695.7(b).) The compulsory arbitration of fee disputes provision of Civil Code 2860 does not apply unless the insurer agrees unconditionally that it has a duty to defend and that a conflict of interest exists that requires the insurer to provide independent counsel. (*Civil Code § 2860 - Protection Must Be Earned* and *How Often Must an Insurer Pay Independent Counsel?*)

Will you pay the hourly rate charged by independent counsel to defend me?

The rate limitation provision of Civil Code 2860 does not apply unless the insurer agrees unconditionally that it has a duty to defend and that a conflict of interest exists that requires the insurer to provide independent counsel. (*Civil Code § 2860 - Protection Must Be Earned*.)

Amounts of an invoice that are not challenged must be paid immediately. "Upon acceptance of the claim in whole or in part, every insurer shall immediately, but in no event more than thirty (30) calendar days later, tender payment. The amount of the claim to be tendered is the amount that has been accepted by the insurer." (Cal. Code Regs. § 2695.7(h) (ellipses omitted).) Thus, only those entries on an invoice that are being challenged in good faith should be withheld, pending resolution of a fee dispute. (*Civil Code § 2860 - Limited Application* and *How Much Must an Insurer Pay Independent Counsel?*)

INDEMNITY FOR THE LAWSUIT

Are all claimed damages covered for indemnity?

"Yes" is the preferred answer. One of the "qualifiers" for coverage is the nature of the *damage* claimed by the plaintiff. For example, physical injury to tangible property may be covered while "intellectual property" damage may not. (*Anatomy of a Liability Insurance Policy*). It is important to determine if the insurer denies coverage because of the nature of the relief that the plaintiff seeks, and may be another point on which the policyholder and the plaintiff may choose to cooperate.

Is all of my alleged wrongful conduct covered for indemnity?

"Yes" is the preferred answer. A "Yes" is the preferred answer. Another one of the "qualifiers" for coverage is the nature of the policyholder's alleged conduct or activity. For example, an auto accident is likely to be covered, but a resulting road rage fist fight may not be covered because of "intentional" conduct by the policyholder. (*Anatomy of a Liability Insurance Policy*). It is important to determine if the insurer denies coverage because of the nature of the relief that the plaintiff seeks, and may be another point on which the policyholder and the plaintiff may choose to cooperate, including pleading. (*Plead Into Coverage Properly*).

Is all of each claimant's allege loss caused by an occurrence, offense, or wrongful act that is covered for indemnity?

"Yes" is the preferred answer for an "occurrence" policy. A common form of liability coverage requires that covered damage be caused by an "occurrence", usually defined as an "accident". To resolve a coverage contest, it is important to establish whether the insurer seeks to disclaim coverage because there is no "occurrence". A "claims made" policy usually covers a "wrongful act" rather than an "occurrence", addressed in the next question. (*Anatomy of a Liability Insurance Policy*). Professional liability, D&O and some EPL policies often use this form. To resolve a coverage contest, it is important to establish whether the insurer seeks to disclaim coverage because there is no "wrongful act". (*Anatomy of a Liability Insurance Policy*).

DEFENSE OF THE LAWSUIT

A liability policy makes two primary promises: 1) to defend against claims that are *potentially* covered; and 2) to indemnify for a judgment that is *actually* covered. (*Duty to Defend*). The scope of any coverage contest will be defined by those claims alleged by a plaintiff that an insurer asserts are not covered by its policy. It is important to require the insurer to identify all such claims early. If the insurer later seeks to expand the scope of its coverage challenge, the policyholder may resist such expansion by alleging waiver, estoppel, and a failure to adequately investigate.

Do you agree unconditionally that the provisions of each policy impose upon you a duty to defend me and do you waive all rights to assert that you have no duty to defend me?

Both "Yes" and "No" answers have advantages. "Yes" puts an issue to bed. "No" may entitle independent counsel to be paid full rates, monthly. This tactical question intentionally mirrors the language of Civil Code § 2860(a): "the insurer shall provide independent counsel to represent the insured" if two prerequisites are satisfied, one of which is that "the provisions of a policy of insurance impose a duty to defend upon an insurer." "[I]n the absence of a stipulation or unconditional agreement between the insurer and insured, unless and until there has been a judicial determination of an insurer's duty to defend . . . the provisions of Civil Code section 2860 are *inapplicable*." (*Handy v. First Interstate Bank* (1993) 13 Cal.App.4th 917, 926 (*Handy*) (emphasis added); *Civil Code § 2860 - Limited Application*).

Some insurers may answer "no" because they choose to reserve the right to later prove that they had no duty to defend in the first place, even though they pay for a defense in the interim. However, insurers that answer "no", may be obligated to pay independent counsel at full rates (*How Much Must an Insurer Pay Independent Counsel?*) and every 30-40 days. (*How Often Must an Insurer Pay Independent Counsel?*).

Do you agree unconditionally that a conflict of interest exists which creates a duty on your part to provide independent counsel to me and waive all rights to assert that you have no duty to provide independent counsel to me?

Mirroring the previous question, both "Yes" and "No" answers have advantages. "Yes" puts an issue to bed. "No" may entitle independent counsel to be paid full rates, monthly. This tactical question intentionally mirrors the language of the second prerequisite established by Civil Code § 2860(a): "the insurer shall provide independent counsel to represent the insured" "[i]f . . . a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured." Absent an "unconditional agreement [or] judicial determination . . . [of] the existence of a conflict of interest, the provisions of Civil Code section 2860 are *inapplicable*." (*Handy, supra*, 13 Cal.App.4th at 926 (emphasis added); *Civil Code § 2860 - Limited Application*).)

INSURER DECISIONS

After an insurer has been notified of a claim, it is required to make a series of important decisions, including whether to concede full coverage, deny all coverage, reserve its rights to later deny coverage, hire dependent counsel to conduct the policyholder's defense, pay independent counsel to control the policyholder's defense, file a declaratory relief action to resolve a coverage contest, seek reimbursement of defense costs, and seek reimbursement of settlement costs. To resolve a coverage contest, the policyholder should ask the insurer to disclose each of these decisions.

Have you denied each claimant's claim against me in whole or in part?
Have you denied my claims for defense and indemnification in whole in or part?

"Yes" is the correct answer after 40 days. "Upon receiving proof of claim, every insurer . . . shall immediately, but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in part." (Cal. Code Regs. § 2695.7(b).) A "no" answer suggests a violation of regulations, but a "yes" answer alone does not provide much guidance. The insurer is asked to explain its answers below. By the time a plaintiff has filed a lawsuit, typically the insurer has

denied the claim in whole. But the insurer's explanation of why it has denied the claim should arm the policyholder to respond appropriately.

Have you communicated to me in writing all grounds now known to you upon which you may deny coverage?

"Yes" is the correct answer. Where an insurer denies [a policyholder's claim for defense and indemnity], in whole or in part, it shall do so in writing and shall provide a statement listing all bases for such rejection or denial and the factual and legal bases for each reason given for such denial [and if] based on a specific policy provision, provide an explanation of the application of the provision." (Cal. Code Regs. § 2695.7(b) (ellipses omitted).) A failure to do so may waive coverage defenses. (*Miller, supra*, 100 Cal.App.3d 754). Because insurers must conduct a thorough investigation *before* a claim, a "no" answer may imply a regulator violation. A "yes" answer may arm the policyholder to resist attempts by an insurer to expand the scope of its reservation of rights after 40 days unless it can show that information upon which it later reserves rights was unavailable to the insurer in its initial investigation. It is no uncommon for coverage lawyers hired by an insurer to try to improperly spruce up the insurer's reservation of rights long after the regulatory deadline has passed.

Are all grounds of your reservation of rights based on coverage disputes that have nothing to do with the issues being litigated in the lawsuit?

"Yes" is the preferred answer to trigger the insurer's obligation to pay independent counsel. However, this is a deceptively complex question. More than half of the states apply a simple and rigid "per se" rule that an insurer who reserves its rights to later deny coverage must *always* pay for independent counsel (*50 State Survey*). California modifies the "per se" rule to require a liability insurer to pay for independent counsel selected and directed by the policyholder if its reservation of rights raises grounds to deny coverage that are "related" to issues in the liability lawsuit. (*Cumis Test*). Because many insurers fail to "adopt and implement reasonable [*substantive*] standards for the prompt investigation and processing of claims" (Ins. Code § 790.03(h)(3)), some insurers will not understand this question. If the insurer answers ""yes", it may be required to pay for independent counsel. If the insurer answers "no" it may refuse to pay independent counsel - that in turn may trigger a procedural step to seek a court decision to resolve whether a disqualifying conflict of interest exists. (*Top Ten Procedural Options to Resolve Conflicts of Interest*.) If the insurer explains that it does not understand the question, it may have violated regulations.

Will you expressly waive any grounds upon which you may deny coverage?

"Yes" is the preferred answer. While not required to do so, the insurer may choose to narrow the scope of a coverage contest by eliminating one of more ground of conflict.

Do you unconditionally waive all rights to recover allocation or reimbursement of costs of defense, pursuant to contract or *Buss vs. Superior Court*?

"Yes" is the preferred answer. Under California law, an insurer may agree to defend its policyholder while reserving its rights to later sue its own policyholder to get back some or all of its costs of defense, but it must specifically reserve this right (*Buss Defense Cost Reimbursement*). However, an insurer that "insists upon appointed counsel rather than allowing the insured to control the defense" "may be estopped from seeking reimbursement from its insured for the defense costs of uncovered claims." (*Dynamic Concepts, Inc. v. Truck Ins.*

Exchange (1998) 61 Cal.App.4th 999, 1007, fn.6 (*Dynamic Concepts*).) An insurer that answers "no" may prompt a policyholder to withhold consent for dependent counsel to accept compensation from the insurer. (Rule 3-310(F).)

Do you unconditionally waive all rights to recover allocation or reimbursement of costs of settlement, pursuant to contract or *Blue Ridge vs. Jacobsen*?

"Yes" is the preferred answer, but the insurer need not make this decision until the time of settlement. Under California law, an insurer may settle a liability dispute over the objection of its policyholder and later sue its own policyholder to get back its costs of settlement, but it must specifically reserve this right at the time of settlement (*Blue Ridge Settlement Cost Reimbursement*). However, there are many good choices a policyholder may make in response. (*Blue Ridge Settlement Reimbursement - Response Options*).

Have you been prejudiced by late notice of suit?

Policyholders should give all insurers that might provide coverage notice as soon as possible, as some cases deny recovery to a policyholder of so called pretender fees. (*Pretender Fees*) Some insurers may claim that they have been prejudiced by late notice, but to enforce such a claim, the insurer must satisfy the notice-prejudice rule. "The law is established that where an insurance company denies liability under a policy which it has issued, it waives any claim that the notice provisions of the policy have not been complied with." (*Shell Oil Co. v. Winterthur Swiss Ins. Co.* (1993) 12 Cal.App.4th 715, 762.) "In order to demonstrate actual, substantial prejudice from lack of timely notice, an insurer must show it lost something that would have changed the handling of the underlying claim. If the insurer asserts that the underlying claim is not a covered occurrence or is excluded from basic coverage, then earlier notice would only result in earlier denial of coverage. To establish actual prejudice, the insurer must show a substantial likelihood that, with timely notice, and notwithstanding a denial of coverage or reservation of rights, it would have settled the claim for less or taken steps that would have reduced or eliminated the insured's liability." (*Id.* at 763.)

RELATIONSHIP WITH DEPENDENT COUNSEL

Dependent counsel's compliance with Rule 3-310 may turn on the nature of one's relationship to a liability insurer. The succinct phrase "dependent counsel" describes the counterpart to "***in***dependent counsel." This moniker acknowledges that "[a]s a practical matter . . . in reality, the insurer's attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured" (*Purdy v. Pacific Automobile Ins. Co.*(1984) 157 Cal.App.3d 59, 76 (*Purdy*)), "[i]nsurance companies hire relatively few lawyers and concentrate their business. A lawyer who does not look out for the Carrier's best interest might soon find himself out of work." (*Cumis, supra*, at 364), and "defense counsel and the insurer frequently have a longstanding, if not collegial, relationship" (*Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 131 (*Berger, Kahn*).) "In California, an attorney may usually, under minimum standards of professional ethics, represent dual interests as long as full consent and full disclosure occur." (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147 (*Lysick*); See, also *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 528 (*Ishmael*); *Industrial Indem. Co. v. Great American Ins. Co.* (1977) 73 Cal.App. 3d 529, 537 (*Industrial Indem.*).)

Because of this relationship, "[w]here there is a conflict between insurer and insured, appointed counsel may tend to favor the interests of the insurer primarily because of the prospect of future employment. Even the most optimistic view of human nature requires us to realize that

an attorney employed by an insurance company will slant his efforts, perhaps unconsciously, in the interest of his real client - the one who is paying his fee and from whom he hopes to receive future business - the insurance company. [T]he attorney's economic interests weigh heavily in favor of the insurer, which, after all, may retain his services in other cases; yet the rules of professional responsibility tip the scales toward the insured. Although [some] courts seem to trust the insurer and attorney to act in the best interests of the insured, the more common view is that the longstanding ties that defense counsel has with the insurer will inevitably influence his conduct of the case. The attorney, wishing to maintain the insurer's business, does not want to aggravate the company. Insurance counsel's relationship with the insurer is contractual, usually ongoing, supported by strong financial interests, and often strengthened by sincere friendships." (*CHI of Alaska, supra*, 844 P.2d at 1115-17 (citations and ellipses omitted).)

Rules of Professional Conduct, Rule 3-310 requires dependent counsel to analyze potential conflicts of interest, make written disclosure to and obtain the informed written consent of both policyholder and the insurer before accepting or continuing representation of the policyholder or accepting compensation from the insurer. (*Duty to Comply with Rule 3-310*).

It is important to policyholders seeking to require an insurer to pay for independent counsel to flesh out the facts underlying the relationship between the insurer and dependent counsel.

Do you have an attorney-client relationship with dependent counsel?

"Yes" is the correct answer. California law recognizes the dual client relationship ("[T]he attorney has two clients." (*American Mut. Liab. Ins. Co. v. Superior Court* (*Nork*) (1974) 38 Cal.App.3d 579, 592); The insurer and its lawyer may have "an attorney-client relationship as a matter of law." (*Berger, Kahn, supra*, 79 Cal.App.4th at 127)) in a tripartite relationship. (*Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1406-07 (*Gafcon*).) Policyholders should be highly suspicious of dependent counsel and insurers who deny this relationship. However, because the existence of an attorney client relationship depends on the facts (*Attorney Client Relationship*), it is essential to ferret out admissible of the underlying facts present in dependent counsel's relationship with the insurer.

Also if the insurer and dependent counsel claim that the policyholder is dependent counsel's *only* client, the policyholder alone should be able to direct dependent counsel.

Did you hire dependent counsel to discharge your promise to defend me in the lawsuit?

"Yes" is the correct answer. "By its very nature the duty assumed by [the insurer] to defend its assured against suits must necessarily be classified as a delegable duty, understood by all parties as such, for [the insurer] had no authority to perform that duty itself and, in fact, was prohibited from appearing in the California courts. (Bus. & Prof. Code § 6126.) Since a carrier is not authorized to practice law, it must rely on independent counsel for the conduct of the litigation." (*Merritt v. Reserve Ins. Co.* (1973) 34 Cal.App.3d 858, 880-81 (citations omitted).)

It is important to establish that the insurer hired dependent counsel in the capacity as a lawyer to help define the relationship between the insurer and dependent counsel.

Did you hire dependent counsel to protect your interests in the lawsuit?

"Yes" is the correct answer. There is nothing wrong with an insurer protecting its interests nor with an insurer hiring an attorney to do so, but the resulting relationship may create conflicts of interest for dependent counsel. As an indemnitor, the insurer is entitled to protect its interests in the plaintiff's lawsuit. However, control of the defense may impact the binding effect of a liability judgment on the insurer. "In the interpretation of [an insurance] contract, the following

rules are to be applied, unless a contrary intention appears: [The insurer] is bound, on request of the [policyholder], to defend actions, but the [policyholder] has the right to conduct such defenses, if he chooses to do so; If the [insurer] is not allowed to control its defense, judgment against the [policyholder] is only presumptive evidence against the [insurer]. (Civ. Code § 2778(4)(6) (ellipses omitted).)

Did you hire dependent counsel to protect me in the lawsuit?

"Yes" is the correct answer. "In California, it is settled that absent a conflict of interest, an attorney retained by an insurance company to defend its insured under the insurer's contractual obligation to do so represents and owes a fiduciary duty to the insured. [T]he defense attorney's fiduciary duty runs to the insured." (*Gafcon, supra*, 98 Cal.App.4th at 1406 (ellipses omitted).) However, when the insurer is paying for independent counsel, some dependent counsel consider themselves to be mere "monitoring" counsel, representing the insurer only, not representing the policyholder.

Have you communicated any litigation guidelines to dependent counsel?

"Yes" is the correct answer. Most liability insurers require defense counsel to qualify to be on a pre-approved "panel" to defend policyholders, thus being called "panel counsel". Typically, the insurer negotiates favorable hourly rates, and requires counsel to comply with "guideline" to control the conduct of the lawyer. "[W]e question the wisdom and propriety of so-called 'outside counsel guidelines' by which insurers seek to limit or restrict certain types of discovery, legal research, or computerized legal research by outside attorneys they retain to represent their insureds where there is a potential for an uncovered claim. . . . Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds. If the attorney's representation is to be limited in any way that unreasonably interferes with the defense, it is the insured, not the insurer, who should make that decision." (*Dynamic Concepts, supra*, 61 Cal.App.4th at 1009, fn.9.)

Do you expect to direct dependent counsel's conduct of my defense?

"No" is the correct answer, but "Hell, yes" is the probably answer. Whether or not an insurer imposes written litigation guidelines upon dependent counsel, the real question is whether there is a risk that the insurer will direct the conduct of the policyholder's defense in any of three arenas of potential conflict: 1) a lack luster defense; 2) steering the outcome away from coverage; and 3) obtaining access to confidential coverage information. (See, *CHI of Alaska, supra*, 844 P.2d at 1118.)

Do you expect dependent counsel to obtain your approval to do anything or to incur any expense regarding my defense?

Again, "No" is the correct answer, but "Hell, yes" is the probably answer. Most insurers exercise control over dependent counsel by requiring prior approval for certain kinds of legal work and of requiring prior approval of all big ticket expenses. Exercise of such control may prejudice the interests of the policyholder and create ethical conflicts for dependent counsel.

Do you expect dependent counsel to disclose to you any confidential information relating to coverage?

"No" is the correct answer. Dependent counsel's access to confidential information creates conflicts of interest. (See, *CHI of Alaska, supra*, 844 P.2d at 1118-20.) Dependent counsel must

analyze the insurer's coverage defenses in order to begin to distinguish between information counsel must and must not disclosure to the insurer. "[T]he lawyer is forced to walk an ethical tightrope, and not communicate relevant information which is beneficial to one or the other of his clients. (fn.5: "The ethical duty not to disclose confidences arise(s) from the need to encourage clients to disclose all possibly pertinent information to their attorneys, and protect only the confidential information disclosed. The duty not to represent conflicting interests is an outgrowth of the attorney-client relationship itself, which is confidential, or fiduciary. Not only do clients at times disclose confidential information to their attorneys; they also repose confidence in them. The conflicting-interests rule (is bottomed) on both (of these attributes.)'" (*Cumis, supra*, 162 Cal.App.3d at 366, fn.5. (*Cumis*) (ellipses omitted).)

Following is an actual email confirming what dependent counsel told a policyholder about the duty of confidentiality: "You told me that there is no attorney client privilege so everything you will report everything to [the insurer], including whether or not I damaged [the claimant's] property intentionally. Couldn't that hurt me?"

Does dependent counsel represent you in any separate matter?

"No" is the preferred answer. Rules 3-310(C)(3) provides that a lawyer "shall not, without the informed written consent of each client . . . [r]epresent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter." Some dependent counsel firms do liability defense work and also do coverage work for the same insurers. Such dependent counsel may be particularly well equipped to visit prejudice upon a policyholder and may be disqualified because they represent the insurer in some matter not even related to the plaintiff's liability dispute.

Could you be affected substantially by resolution of the lawsuit?

"Yes" is the correct answer. It is not necessary for the relationship between the insurer and dependent counsel to be characterized as an "attorney-client" relationship to invoke the requirements of Rule 3-310. A lawyer "shall not accept or continue representation of a [policyholder] without providing written disclosure where [the lawyer] has a legal, business, financial, professional, or personal relationship with another entity [such as an insurer] the [lawyer] knows or reasonably should know would be affected substantially by resolution of the matter." (Rule 3-310(B)(3) (ellipses omitted).)

A liability insurance policy is a contract of indemnity by which the insurer contractually agrees to be bound by the outcome of a judgment against its policyholder even though the insurer is not a party to the lawsuit. "Upon an indemnity against liability . . ., the [policyholder] is entitled to recover [from the insurer] upon becoming liable [to an injured plaintiff by entry of judgment]," (Civil Code § 2778(1).) Thus, a liability insurer will always be "affected substantially by resolution of the lawsuit" because it will be bound by the findings of liability and damages in the lawsuit.

As an entity that may incur the costs of defense, settlement, or judgment, a liability insurer is always an entity that would be affected substantially by resolution of the matter and dependent counsel cannot believably disclaim knowledge that the insurer would be affected substantially by resolution of the matter. Almost humorously, some insurers may claim that they will not be affected "substantially" because the amount of money at risk in plaintiff's claim is small. The correct interpretation of Rule 3-310 is that without regard to absolute value, the insurer "would be affected substantially by resolution of the matter" because it is paying for the defense and may pay for a settlement or judgment.

POLICY CONDITIONS

All liability insurance policies answer questions such as Who, What, Where, and When. Liability policies specify several "conditions" that the policyholder must satisfy in order to perfect coverage (*Anatomy of a Liability Insurance Policy*). The following series of questions should be non-controversial, but it is best to put these issues to rest at an early stage.

A reservation of rights may create three types of conflicts of interest: 1) policy conflicts, that generally *do not* create disqualifying conflict of interest; plus 2) coverage; and 3) confidentiality conflicts, both of which *do* generally create disqualifying conflicts of interest for dependent counsel. ("All three general types of conflicts of interests between insurer and insured - the insurer may offer mere token defense, the insurer may steer result to judgment under an uninsured theory of recovery, the insurer may gain access to confidential or privileged information which it may later use to its advantage - apply in coverage defense cases. However, the second reason does not apply in policy defense cases. Policy defenses, such as lack of notice or noncooperation, involve facts which are generally irrelevant to the litigation between the plaintiff and the insured. Therefore, appointed counsel has no opportunity to "covertly frame [a] defense to achieve a verdict based upon [a theory under which no coverage would result] so that [the insurer] could later assert that the defense was not covered. Thus, the need for independent counsel is, if anything, greater in coverage than in policy defense cases. (*CHI of Alaska, Inc. v. Employers Reinsurance Corp.,* 844 P.2d 1113, 1118 (Alaska 1993) (*CHI of Alaska*).)

Are you the insurer under each policy issued to me?

"Yes" is the preferred answer. Many insurers delegate claims handling to other entities, either for corporate efficiency or to attempt to avoid bad faith liability by putting a layer of corporate protection between the insurer and proper claims handling. It is important to find out with whom the policyholder is dealing. It is also important to identify the proper entities to sue.

Am I an insured under each policy?

"Yes" is the preferred answer. Most liability policies identify a "named" insured on the declarations page of the policy, have endorsements identifying additional insureds, and define certain categories of persons who qualify as an "insured" to whom the insurer owes duties. It is best to verify that the insurer recognizes all defendants in a plaintiff's lawsuit as insureds. (*Anatomy of a Liability Insurance Policy*).

An insurer may assume fiduciary like duties to persons who are not an insured. In *Mosier, supra*, 63 Cal. App. 4th at 1040-41 (ellipses omitted), an insurer voluntarily provided a defense to a non-insured, and thereby "created a relationship giving rise to a duty based on the principle that one who voluntarily comes to the aid of another, having no initial duty to do so, becomes bound to exercise due care in the performance of the duties it undertakes to provide. [T]he relationship here is analogous to the conflict situation which can arise from the tripartite relationship recognized in (*Cumis*) and its progeny."

Have I satisfied the notice provisions of each policy?

"Yes" is the preferred answer. Liability policies require the policyholder to alert the insurer that a claim against a policyholder exists. Logically, the insurer cannot be faulted for failing to honor its policy obligations if the policyholder never asks for help. (*Anatomy of a Liability Insurance Policy*). However, the notice-prejudice rule excuses untimely notice unless the insurer can demonstrate prejudice. "[P]rejudice must be shown [by the insurer] with respect to breach

[by the policyholder] of notice clause." (*Clemmer v. Hartford Ins. Co.* (1978) 22 Cal.3d 865, 882.)

Did all alleged loss happen during the policy period of each policy?

"Yes" is the preferred answer. All liability policies ask the question "when?" "Occurrence" policies cover accidents that happen during the policy period as stated on the declarations page. "Claims made" policies cover claims of which the policyholder and/or the insurer are notified during the policy period. (*Anatomy of a Liability Insurance Policy*). It is important to establish whether the "when" question is critical to coverage and is a point on which the policyholder and the plaintiff may choose to cooperate. (*Cooperation: A Strategic Choice*).

Did all alleged loss happen within the coverage territory of each policy?

"Yes" is the preferred answer. Most liability policies require that the liability producing event occur within the defined coverage territory, but most policies define that territory as anywhere in the world. (*Anatomy of a Liability Insurance Policy*). Some auto policies exclude loss in Mexico. However, it very rare that "where" become a coverage problem.

Have I paid the premium?

"Yes" is the preferred answer. If the policyholder has not paid the premium, a policy may not be in force when a liability producing event occurs. This can be a very serious issue, as juries tend not to sympathize with those who simply fail to pay their bills. However, as an example, insurers that require a policyholder to "remit" payment by a certain date may invite controversy whether the policyholder must put the check in the mail by that date or whether the insurer must receive the check by that date.

Have I violated any policy provision?

"No" is the preferred answer. Most liability policies have cooperation, no voluntary payment, and no action clauses that must be satisfied to perfect coverage. (*Control of Settlement*). Satisfying these provisions usually occurs after the defense of a plaintiff's lawsuit has commenced. It is best to eliminate these provisions as coverage defenses at an early stage.

Also, the *Cumis* Test is that an insurer must provide independent counsel to defend the policyholder unless all grounds to deny coverage have "nothing to do with" the subject matter of the liability dispute, such as violations of policy conditions. (*Cumis Attorney Disqualification Test - When Does the Right to Independent Counsel Vest?*) If the insurer admits that it does not challenge coverage on any ground of violating a policy condition, the fact may support a claim that the insurer must pay for Cumis counsel.

BUSINESS PRACTICES

Business & Professions Code § 17200, known as the Unfair Competition Law, provides that "unfair competition shall mean and include any unlawful, unfair or fraudulent business act or practice." "Any person who engages in unfair competition may be enjoined. The court may make such orders as may be necessary to prevent any practice which constitutes unfair competition. Any person may pursue representative claims or relief on behalf of others." (Bus. & Prof. Code § 17203 (ellipses omitted).)

Insurance Code §790.03(h), known as the unfair claims practices act, define "unfair methods of competition and unfair and deceptive acts or practices in the business of insurance [if]

[k]nowingly committ[ed] or perform[ed] with such frequency as to indicate a general business practice." The statute then specifies a series of unfair practices and regulations flesh out behavioral requirements of a liability insurer. Terms of an insurance policy impose enforceable duties on an insurer. Case law also specifies an array of duties owed by an insurer to its policyholder.

"[A]n unlawful business practice or act is an act or practice, committed pursuant to business activity, that is at the same time forbidden by law. Virtually any law can serve as the predicate for a 17200 action; it may be civil, statutory, regulatory, or court-made. It is not necessary that the predicate law provide for private civil enforcement. [S]ection 17200 'borrows' violations of other laws and treats them as unlawful practices independently actionable. [D]etermination of whether a business practice or act is 'unfair' entails examination of the impact of the practice or act on its victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. [A]n 'unfair' business practice occurs when it offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers. (*Gafcon, supra*, 98 Cal.App.4th at 1425 (citations and ellipses omitted).)

When the insurer agrees to defend any policyholder under a reservation of rights, do you have a business practice to:

- **Always provide ethical dependent counsel to defend the insured?**
  While liability insurance companies promise to defend their policyholders in lawsuit, insurers cannot lawfully discharge this duty itself, since insurers are not licensed to practice law.
  "No person shall practice law in California unless the person is an active member of the State Bar." Bus & Prof §6125. Thus, the insurer can fulfill its promise to defend only by paying for ethical counsel to provide "a proper defense" to the policyholder. (See, *Travelers Ins. Co. v. Lesher* (1986) 187 Cal.App.3d 169, 191.) Any lawyer with ethical conflicts is subject to "per se or automatic disqualification" from representing a policyholder. (*State Farm Mutual Automobile Ins. Co. v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1431.) Disqualifying conflicted counsel is "analogous to the biblical injunction against 'serving two masters' (Matthew 6:24)." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 286.)

- **Compel your insured to surrender control of the lawsuit you agree to defend?**
  "Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed consent, [dependent] counsel must cease to represent both. Moreover, divergent interests brought about by the insurer's reservation of rights [require that] the insurer must pay the reasonable cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation." (*Cumis, supra*, 162 Cal.App.3d at 375 (citations and ellipses omitted).)

- **Disclose to the insured that when coverage is disputed, your interests and the interests of the insured are always divergent?**
  "[W]hen coverage is disputed, the interests of the insured and the insurer are always divergent. The attorney should not be placed in the position of divided loyalties. Such an arrangement would be adverse to the best interests of the insured, the insurer, the attorney, and the profession." (*Cumis, supra*, 162 Cal.App.3d at 375.)

"Every insurer shall disclose to a [policyholder] all benefits, coverage, or other provisions of any insurance policy that may apply to the claim. When additional benefits might reasonably be payable, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability. (Cal. Code Regs. § 2695.4(a) (ellipses omitted).)

- **Permit the policyholder to conduct the defense if he, she, or it chooses to do so?**
  "In the interpretation of a contract of indemnity, the following rules are to be applied, unless a contrary intention appears: The [insurer] is bound, on request of the [policyholder], to defend actions brought against [the policyholder] in respect to the matters embraced by the indemnity, but [the policyholder] has the right to conduct such defenses, if he chooses to do so." (Civ. Code § 2778(4) (ellipses omitted).)

- **Disclose to and assist the insured to get all benefits that might reasonably be payable under a policy?**
  "Every insurer shall disclose to a [policyholder] all benefits, coverage, or other provisions of any insurance policy that may apply to the claim. When additional benefits might reasonably be payable, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability. (Cal. Code Regs. § 2695.4(a) (ellipses omitted).)

- **Analyze whether your reservation of rights creates a conflict of interest which creates a duty on your part to provide independent counsel to the insured?**
  "If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured." (Civ. Code § 2860(a).) Neither the Cumis case nor section 2860 specify any test to determine whether a given reservation of rights creates a duty to provide independent counsel. But in the 33 years since the Cumis case was decided, the courts have clarified the proper test. (*Cumis Attorney Disqualification Test - When Does the Right to Independent Counsel Vest?*)

- **Provide independent counsel to the insured unless your reservation of rights is limited to coverage disputes that have nothing to do with the issues being litigated in the lawsuit?**
  "[W]hen the reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying action there is no conflict of interest, and no duty to appoint independent counsel." (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1470 (*Long*) (citation and ellipsis omitted).)

When your reservation of rights creates a duty to provide independent counsel to the policyholder, do you have a business practice to:

- **Hire dependent counsel to conduct the defense?**
  "Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage. If the insured does not give an informed

consent, [dependent] counsel must cease to represent both. The insurer may not compel the insured to surrender control of the litigation." (*Cumis, supra*, 162 Cal.App.3d at 375.)

- **Require dependent counsel to comply with Rule 3-310?**
  "[W]hether in the insurer-insured context or otherwise, the attorney who undertakes to represent parties with divergent interests owes the 'highest duty' to each to make a 'full disclosure of all facts and circumstances which are necessary to enable the parties to make a fully informed decision regarding the subject matter of litigation, including the areas of potential conflict and the possibility and desirability of seeking independent legal advice." (*Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716.)
  "[T]he insurer's fiduciary obligations were consistent with those of the attorney retained to represent the insured, and as a result the insurer should have informed the insured of the conflict of interest and of the opportunity to have independent counsel." (*State Farm Fire & Casualty Co. v. Superior Court* (1989) 216 Cal.App.3d 1222, 1235-1236 (*State Farm*); see also, *Manzanita Park v. Insurance Co. of North America* (9th Cir. 1988) 857 F.2d 549, 555 (*Manzanita*).)
  "Every insurer shall disclose to a [policyholder] all benefits, coverage, or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the [policyholder]. When additional benefits might reasonably be payable under an insured's policy, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability." (Cal. Code Regs. § 2695.4 (ellipses omitted).)

- **Disclose to the insured that you and dependent counsel have an obligation to explain to the insured the full implications of joint representation?**
  "Canons of Ethics impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage." (*Cumis, supra*, 162 Cal.App.3d at 375.)
  "[T]he insurer's fiduciary obligations were consistent with those of the attorney retained to represent the insured, and as a result the insurer should have informed the insured of the conflict of interest and of the opportunity to have independent counsel." (*State Farm, supra*, 216 Cal.App.3d at 1235-1236; see also, *Manzanita, supra*, 857 F.2d at 555.)
  "Every insurer shall disclose to a [policyholder] all benefits, coverage, or other provisions of any insurance policy issued by that insurer that may apply to the claim presented by the [policyholder]. When additional benefits might reasonably be payable under an insured's policy, the insurer shall immediately communicate this fact to the insured and cooperate with and assist the insured in determining the extent of the insurer's additional liability." (Cal. Code Regs. § 2695.4 (ellipses omitted).)

- **Always offer to pay for independent counsel unless your reservation of rights is limited to coverage disputes that have nothing to do with the lawsuit?**
  "[W]hen the reservation of rights is based on coverage disputes that have nothing to do with the issues being litigated in the underlying action there is no conflict of interest, and no duty to appoint independent counsel." (*Long, supra*, 163 Cal.App.4th at 1470 (citation and ellipsis omitted).)
  "[T]he insurer's fiduciary obligations were consistent with those of the attorney retained to represent the insured, and as a result the insurer should have informed the insured of the

conflict of interest and of the opportunity to have independent counsel." (*State Farm, supra*, 216 Cal.App.3d at 1235-1236; see also, *Manzanita, supra*, 857 F.2d at 555.)

- **Pay for independent counsel unless dependent counsel complies with Rule 3-310 or the insured waives the right to independent counsel?**
  If a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel to represent the insured unless, at the time the insured is informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel." (Civ. Code § 2860(a) (ellipsis omitted).)

INFORMATION REQUESTS

Will you please provide me with a copy of the following:

- **Your written standards for the prompt investigation and processing of claims?**
  "The following are hereby defined as unfair methods of competition and unfair and deceptive acts or practices in the business of insurance. Knowingly committing or performing with such frequency as to indicate a general business practice any of the following unfair claims settlement practices: (3) Failing to adopt and implement reasonable standards for the prompt investigation and processing of claims arising under insurance policies." (Ins. Code § 790.03(h)(3).)
  "Every insurer shall adopt and communicate to all its claims agents written standards for the prompt investigation and processing of claims." (Cal. Code Regs. § 2695.6(a).) Cal. Code Regs. § 2695.7 enumerates "Standards for Prompt, Fair and Equitable Settlements."

- **Your claim file?**
  "Every [insurer]'s claim files shall ... contain all documents, notes and work papers (including copies of all correspondence) which reasonably pertain to each claim in such detail that pertinent events and dates of the events can be reconstructed and the [insurer]'s actions pertaining to the claim can be determined." (Cal. Code Regs. § 2695.3(a).)
- **claims manual?**
  [An insurer must] demonstrate compliance by: (2) annual written certification, under penalty of perjury: (A) that the licensee's claims adjusting manual contains a copy of these regulations." (Cal. Code Regs § 2695.6(b)(2)(A).)
- **litigation guidelines?**
  "[W]e question the wisdom and propriety of so-called 'outside counsel guidelines' by which insurers seek to limit or restrict certain types of discovery, legal research, or computerized legal research by outside attorneys they retain to represent their insureds where there is a potential for an uncovered claim. . . . Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how best to competently represent the insureds. If the attorney's representation is to be limited in any way that unreasonably interferes with the defense, it is the insured, not the insurer, who should make that decision." (*Dynamic Concepts, supra*, 61 Cal.App.4th at 1009 fn.9.)

- **Your investigation of all claims?**
  "Every insurer shall conduct and diligently pursue a thorough, fair and objective investigation." (Cal. Code Regs § 2695.7(d).) See INVESTIGATION above.

- **All writings describing the terms of your engagement of dependent counsel including the number of times you hired dependent counsel the total you have paid to dependent counsel for each of the last three years?**
  Most insurers establish a "panel" of approved defense counsel to whom claims agents are authorized to assign the defense of policyholders. Often an insurer's website may include information as to how lawyers may seek to qualify as "panel counsel". Upon being approved, usually the insurer will establish the terms of employment for all cases that may later be assigned.
  Information regarding specific cases may be immune from disclosure because of confidentiality, but gross information such as the number of assignments should not be protected. Often the law firm will assign file numbers to each case, which number has code that identifies the insurer and includes a sequential number identifying the number of cases assigned by that insurer.
  Information regarding specific cases and confidential financial information may be immune from disclosure because of confidentiality, but gross information about total revenue may not be protected.
  Revenue generated for the panel counsel is relevant to establish the dependency of dependent counsel. "As a practical matter . . . in reality, the insurer's attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer's position, whether or not it coincides with what is best for the insured" (*Purdy, supra*, 157 Cal.App.3d at 76), "[i]nsurance companies hire relatively few lawyers and concentrate their business. A lawyer who does not look out for the Carrier's best interest might soon find himself out of work." (*Cumis, supra*, 162 Cal.App.3d at 364), and "defense counsel and the insurer frequently have a longstanding, if not collegial, relationship" (*Berger, Kahn, supra*, 79 Cal.App.4th at 131). "In California, an attorney may usually, under minimum standards of professional ethics, represent dual interests as long as full consent and full disclosure occur." (*Lysick, supra*, 258 Cal.App.2d at 147; See, also *Ishmael, supra*, 241 Cal.App.2d at 528; *Industrial Indem., supra*, 73 Cal.App. 3d at 537.)

- **The names and contact information for all attorneys retained by you in the ordinary course of business in the defense of similar actions in the community where the claim alleged in the lawsuit arose or is being defended?**
  "The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to 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. This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees." (Civ. Code § 2860(c).) Some insurers will assert that they pay an hourly rate that is less than the rate actually paid. Contacting all panel counsel may yield the true rates paid and may also yield whether unlawful behavior qualifies as a general business practice, to establish violations of Insurance Code §790.03(h) and Business & Professions Code §17200.

"business practice" means a standard adopted or implemented, or a method, act, or practice in the business of insurance, performed with such frequency as to indicate a general business practice.

COVERAGE QUESTIONNAIRE

"claim" mean any assertion that you are obligated to pay policy benefits.
"claimant" means any person asserting a claim under any policy.
"dependent counsel" means any attorney selected by any insurer to defend any policyholder.
"I" and "me" means any policyholder.
"independent counsel" means any attorney selected by any policyholder who has no attorney-client, legal, business, financial, professional, or personal relationship with any insurer.
"lawsuit" means any pleading filed against any policyholder by any claimant.
"liability dispute" means any assertion that any policyholder is liable to pay damages to a claimant.
"policy" means any contract of insurance under which you have agreed to defend any lawsuit.
"policyholder" means any insured in any policy.
"you" means the insurer that issued any policy.

Please answer the following questions by checking the appropriate "Yes" or "No" box that most accurately responds to each question and furnish complete explanations to all of your responses based on the facts now known by you. My informed written consent and authorization for dependent counsel to represent me is contingent upon my receipt of satisfactory responses to this Questionnaire.

YES NO

Do you unconditionally waive all bases upon which you may deny coverage to me?
If a judgment includes punitive damages, will you pay all compensatory damages?
Will you solicit and accept an offer to settle the lawsuit within my policy limit?

If you answered "yes" to all three questions, please return this Questionnaire, and disregard the remaining questions. Otherwise, please complete the entire Questionnaire.

INVESTIGATION
Have you completed an investigation of each claim asserted against me?
Have you completed an investigation of my claims for defense and indemnification?

SETTLEMENT
Have you attempted in good faith to effectuate a prompt, fair, and equitable settlement of each claimant's claim against me?
Will you attempt in good faith to effectuate a prompt, fair, and equitable settlement of my claims for defense and indemnification?

INSURER STANDARDS
Have you adopted written standards for the prompt investigation of claims?
Have you adopted written standards for the prompt processing of claims?

INDEPENDENT COUNSEL
Will you pay for independent counsel to defend me?
Will you pay independent counsel invoices within 40 days?
Will you pay the hourly rate charged by independent counsel to defend me?

INDEMNITY FOR THE LAWSUIT

Are all claimed damages covered for indemnity?
Is all of my alleged wrongful conduct covered for indemnity?
Is all of each claimant's allege loss caused by an occurrence, offense, or wrongful act that is covered for indemnity?

DEFENSE OF THE LAWSUIT
Do you agree unconditionally that the provisions of each policy impose upon you a duty to defend me and do you waive all rights to assert that you have no duty to defend me?
Do you agree unconditionally that a conflict of interest exists which creates a duty on your part to provide independent counsel to me and do you waive all rights to assert that you have no duty to provide independent counsel to me?

INSURER DECISIONS
Have you denied each claimant's claim against me in whole or in part?
Have you denied my claims for defense and indemnification in whole in or part?
Have you communicated to me in writing all grounds now known to you upon which you may deny coverage?
Are all grounds of your reservation of rights based on coverage disputes that have nothing to do with the issues being litigated in the lawsuit?
Will you expressly waive any grounds upon which you may deny coverage?
Do you unconditionally waive all rights to recover allocation or reimbursement of costs of defense, pursuant to contract or *Buss vs. Superior Court*?
Do you unconditionally waive all rights to recover allocation or reimbursement of costs of settlement, pursuant to contract or *Blue Ridge vs. Jacobsen*?
Have you been prejudiced by late notice of suit?

RELATIONSHIP WITH DEPENDENT COUNSEL
(If you have not hired dependent counsel, you may disregard this category of questions.)
Do you have an attorney-client relationship with dependent counsel?
Did you hire dependent counsel to discharge your promise to defend me in the lawsuit?
Did you hire dependent counsel to protect your interests in the lawsuit?
Did you hire dependent counsel to protect me in the lawsuit?
Have you communicated any litigation guidelines to dependent counsel?
Do you expect to direct dependent counsel's conduct of my defense?
Do you expect dependent counsel to obtain your approval to do anything or to incur any expense regarding my defense?
Do you expect dependent counsel to disclose to you any confidential information relating to coverage?
Does dependent counsel represent you in any separate matter?
Could you be affected substantially by resolution of the lawsuit?

POLICY CONDITIONS
Are you the insurer under each policy issued to me?
Am I an insured under each policy?

COVERAGE QUESTIONNAIRE

Have I satisfied the notice provisions of each policy?
Did all alleged loss happen during the policy period of each policy?
Did all alleged loss happen within the coverage territory of each policy?
Have I paid the premium?
Have I violated any policy provision?

BUSINESS PRACTICES

When you agree to defend an insured under a reservation of rights, do you have a business practice to:
Always provide ethical dependent counsel to defend the insured?
Compel your insured to surrender control of the lawsuit you agree to defend?
Disclose to the insured that when coverage is disputed, your interests and the interests of the insured are always divergent?
Permit the insured to conduct the defense if he, she, or it chooses to do so?
Disclose to and assist the insured to get all benefits that might reasonably be payable under each policy?
Analyze whether your reservation of rights creates a conflict of interest which creates a duty on your part to provide independent counsel to the insured?
Provide independent counsel to the insured unless your reservation of rights is limited to coverage disputes that have nothing to do with the issues being litigated in any lawsuit filed against the insured?
When your reservation of rights creates a duty to provide independent counsel to any insured, do you have a business practice to:
Hire dependent counsel to conduct the defense?
Require dependent counsel to comply with Rule 3-310?
Disclose to the insured that you and dependent counsel have an obligation to explain to the insured the full implications of joint representation?
Always offer to pay for independent counsel unless your reservation of rights is limited to coverage disputes that have nothing to do with the lawsuit?
Pay for independent counsel unless dependent counsel complies with Rule 3-310 or the insured waives the right to independent counsel?

INFORMATION REQUESTS

Will you please provide me with a copy of all writings evidencing or constituting the following:
Your written standards for the prompt investigation and processing of claims?
Your claim file, claims manual, litigation guidelines?
Your investigation of all claims?
All writings describing the terms of your engagement of dependent counsel including the number of times you hired dependent counsel the total you have paid to dependent counsel for each of the last three years?
The names and contact information for all attorneys retained by you in the ordinary course of business in the defense of actions similar to the lawsuit in the community where the claim alleged in the lawsuit arose or is being defended?