

Compendium of Attorney Duties

Introduction

The ethical duties of California lawyers to their clients are well established. The duties of dependent counsel are complicated by a relationship with the liability insurers that regularly hire them.¹ Liability insurance companies and their lawyers are regulated by California law. Each must be licensed and is obligated to fulfill a series of duties imposed by law for the benefit of the insurer's policyholder and its lawyer's client. Because insurers are not licensed to practice law, they must hire a lawyer to actually conduct the defense that the insurer promises to provide. Thus, a violation of duty by dependent counsel or an insurer may invite liability, but also synergistically impose liability upon the other. This Memorandum of Law collects California law describing four primary attorney duties with special emphasis on dependent counsel duties owed to an insurer's policyholder because of potential conflicts of interest.

Summary

The four primary duties described here include the duty: 1) of competent representation; 2) of confidentiality; 3) of disclosure; and 4) of undivided loyalty. The ancillary duties are the duty to: 5) respond to inquiry; 6) advise of potential conflicts; 7) advise regarding settlement; 8) advise policyholder of the right to independent counsel; 9) initiate analysis of potential conflicts of interest; 10) decline conflicted representation; and 11) not undermine coverage. Many of these duties are more thoroughly described by other memoranda available on this site.

The Practice of Law Is Regulated

The practice of law is regulated by statutes, case law, and rules of ethics. One must be licensed to practice law.² "Protection of the public shall be the highest priority for the State Bar."³ The [Rules of Professional Conduct] are intended to regulate professional conduct of lawyers to protect the public, the courts, and the legal profession; protect the integrity of the legal system;

¹ The succinct phrase "dependent counsel" describes the counterpart to "independent 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), "[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." (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 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). "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; See, also *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 528; *Industrial Indem. Co. v. Great American Ins. Co.* (1977) 73 Cal.App. 3d 529, 537.)

² "No person shall practice law in California unless the person is an active member of the State Bar." (Bus. & Prof. Code § 6125.)

³ Bus. & Prof. Code § 6001.1.

and promote the administration of justice and confidence in the legal profession.”⁴ Over thirty years ago “the professional obligations of counsel who represents a liability insurer as well as its insured -- need[ed] clarification.”⁵ Case law is now well developed defining the scope of dependent counsel’s duties to the policyholder when conflicts of interest arise.

Duty of Competent Representation

“A lawyer shall not intentionally, repeatedly, recklessly or with gross negligence fail to act with reasonable diligence in representing a client [meaning] that a lawyer acts with commitment and dedication to the interests of the client and does not neglect or disregard, or unduly delay a legal matter entrusted to the lawyer.”⁶ “A lawyer shall provide competent representation to a client.”⁷ A lawyer must act “with reasonable competence and diligence.”⁸

Duty of Confidentiality

“It is the duty of an attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”⁹ “The duty of confidentiality of client information involves public policies of paramount importance. The preservation of confidentiality contributes to the trust that is the hallmark of the client-lawyer relationship. [A lawyer] may not reveal or use confidential information, gained through his prior representation of [a client] . . . because it would be contrary to public policy and would undermine the very nature of the attorney client relationship.”¹⁰ “[W]here . . . a conflict exists because an insurer has reserved its rights, the insured is entitled to independent counsel and to a relationship with that counsel free from the fear of disclosure of privileged communications.”¹¹

Duty of Disclosure

Rule 1.7 prohibits a lawyer from representing dual client without their informed written consent if the clients are directly adverse, there is a risk that client relationships may limit the lawyer’s representation, the lawyer has relationships with a party, a witness, or family, the representation is neither unlawful nor involves one client asserting a claim by against the other client. Rule 1.0.1(e, e-1) defines “informed written consent” to mean that “after the lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks, including any actual and reasonably foreseeable adverse consequences of the proposed course of conduct” the client agrees and consents in writing.

“These traditional obligations of an attorney are in no way abridged by the fact that an insurer employs him to represent an insured. To the insured, the attorney owes the same obligations of

⁴ Rules of Professional Conduct, Rule 1.0 (ellipses omitted).

⁵ *Industrial Indem. Co. v. Great American Ins. Co.* (1977) 73 Cal.App.3d 529, 531.

⁶ Rule 1.3.

⁷ ABA Model Rule 1.1.

⁸ Rest.3d Law Governing Lawyers § 16(2); *Duty of Competent Representation*

⁹ Bus. & Prof. Code § 6068(e); *Duty of Confidentiality*

¹⁰ *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1168.

¹¹ *Rockwell Internat. Corp. v. Superior Court* (1994) 26 Cal.App.4th 1255, 1263.

good faith and fidelity as if he had retained the attorney personally. [T]he 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. The loyalty owed to one client by an attorney cannot consume that owed to the other. Thus a lawyer who, while purporting to continue to represent an insured and who devotes himself to the interests of the insurer without notification or disclosure to the insured, breaches his obligations to the insured and is guilty of negligence.”¹²

1. Duty to Respond to Inquiry

If a client asks, the attorney must tell. “It is the duty of an attorney to . . . respond promptly to reasonable status inquiries of clients and to keep clients reasonably informed of significant developments in matters with regard to which the attorney has agreed to provide legal services.”¹³

2. Duty to Advise of Potential Conflicts

Rule 1.7 does not distinguish between potential and actual conflicts of interest, unlike its predecessor, Rule 3-310. The “distinction between ‘potential’ and ‘actual’ conflicts of interest which is invalid and unworkable.”¹⁴ “We conclude the 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.”¹⁵ Dependent counsel “owed a duty to [policyholder/clients], under Civil Code, section 2860, to disclose potential conflicts of interest between [the insurer] and [the policyholders].”¹⁶ However, an aberrant line of cases applies an “actual and significant” standard.¹⁷

3. Duty to Advise Regarding Settlement

Insurers and policyholders often have conflicting interests regarding settlement. “[S]ince [dependent counsel] was representing two parties with divergent interests, insofar as the settlement of the case was concerned, [dependent counsel] labored under the duty of [disclosure] to enable each of his clients to make free and intelligent decisions regarding the subject matter of the representation. [Dependent counsel’s] duty, therefore, included the obligation to attempt to effectuate a reasonable settlement.”¹⁸

¹² *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716 (*Betts*) (citations, ellipses, and quotation marks omitted).

¹³ Bus. & Prof. Code § 6068(m); *Duty to Respond to Inquiry*

¹⁴ *San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 371, fn.7 (*Cumis*).

¹⁵ *Id.* at 375.

¹⁶ *Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal App 4th 1219, 1224.

¹⁷ *Dynamic Concepts: Right on the Facts; Wrong on the Law!*

¹⁸ *Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 151 (*Lysick*) (ellipses omitted); *Duty to Advise Regarding Settlement*

4. Duty to Advise Policyholder of Right to Independent Counsel

“[T]he attorney retained [by a reserving insurer] to represent the insured should have informed the insured of the conflict of interest and of the opportunity to have independent counsel.”¹⁹ “[M]anipulation of [the policyholder] again evidences an intent to vex, injure and annoy. [The insurer]-hired law firm, was placed in a position of open conflict of interest. Yet neither [the insurer] nor its attorneys bothered to inform the client. It was not until [later] that [the policyholder] was advised of the necessity of and thereafter tendered independent counsel.”²⁰

Duty of Undivided Loyalty

“One of the principal obligations which bind an attorney is that of fidelity. This obligation is a very high and stringent one. It is also an attorney’s duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter’s free and intelligent consent given after full knowledge of all the facts and circumstances. By virtue of this rule an attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client’s interests. Nor does it matter that the intention and motives of the attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position where he may be required to choose between conflicting duties, or be led to an attempt to reconcile conflicting interests, rather than to enforce to their full extent the rights of the interest which he should alone represent.”²¹

1. Duty to Initiate Analysis of Potential Conflicts of Interest

“There is no talismanic rule that allows a facile determination of whether a disqualifying conflict of interest exists. Instead, ‘[t]he potential for conflict requires a careful analysis of the parties’ respective interests to determine whether they can be reconciled.’”²² The attorney has “an independent ethical obligation to disclose the conflict to [the clients] and either obtain written waivers of the conflict or withdraw.”²³ “One of an attorney’s basic functions is to advise. Liability can exist because the attorney failed to provide advice. Not only should an attorney furnish advice when requested, but he or she should also volunteer opinions when necessary to further the client’s objectives.”²⁴ “The rationale is that, as between the lay client and the attorney,

¹⁹ *State Farm Fire & Casualty Co. v. Superior Court* (1989) 216 Cal.App.3d 1222, 1235-1236 (ellipsis omitted); *Manzanita Park v. Insurance Co. of North America* (9th Cir. 1988) 857 F.2d 549, 555.

²⁰ *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 710 (ellipses omitted).

²¹ *Anderson v. Eaton* (1930) 211 Cal. 113, 116 (citations omitted); *Duty of Undivided Loyalty*

²² *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 131, quoting *Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-1008 (*Dynamic Concepts*).

²³ *Id.* at 132.

²⁴ *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1684-1685.

the latter is more qualified to recognize and analyze the client's legal needs."²⁵

2. Duty to Decline Representation with Unresolved Conflicts

"[B]efore a lawyer may represent multiple clients he should explain fully to each client the implications of the common representation and should accept or continue employment only if the clients consent. If [after written disclosure] the insured does not give an informed consent to continued representation, [dependent] counsel must cease to represent both [the policyholder and the insurer]."²⁶

3. Duty to Not Undermine Coverage

A reserving insurer has an "enhanced" obligation of fairness to retain competent defense counsel who fully informs and loyally represents the insured and who refrains from any action that demonstrates a greater concern for the insurer's financial interests than for the insured's potential exposure.)"²⁷ Where an "attorney's active conduct prejudicially affected the insured's substantive rights his breach of duty to the insured amounted to legal malpractice."²⁸ "A conflict of interest was manifested where defense counsel [acted against the interests of the policyholder]. It was misconduct for defense counsel to [undermine the policyholder] in order to protect the insurance company's interests."²⁹ "Had [appointed defense counsel] so misbehaved, they would have been exposed to malpractice liability, disciplinary actions and possible loss of coverage defense by [the insurer]."³⁰

4. Duty to Not Misrepresent Coverage

"Just as an insurer may be held liable for defrauding its insured, so an insurer should not be allowed to deceive a third party beneficiary of the insurance policy. And if an insurer may be found liable to a third party beneficiary for fraud, so may its coverage counsel. Counsel retained by an insurer has an obligation to be truthful in describing insurance coverage to a third party beneficiary. The litigation privilege is not a license to deceive an injured party who steps into the shoes of the insured. Section 11580 grants an injured party the right to file suit in order to recover under the insurance policy. Coverage counsel may not commit fraud in an attempt to defeat that right. And to the extent there is a conflict between an injured party's rights under section 11580 and coverage counsel's reliance on the litigation privilege, the rights of the injured party prevail as they arise under the more specific of the two statutes. Finally, we note that a primary purpose of the litigation privilege is to safeguard litigants and witnesses from subsequent tort suits. The privilege also encourages open channels of communication, promotes the zealous protection of clients' interests, and obligates litigants to expose the bias of witnesses and the falsity of evidence during trial. Those purposes are not frustrated where, consistent with section 11580, an

²⁵ *Id.* at 1685.

²⁶ *Cumis, supra*, 162 Cal.App.3d at 374-75 (ellipses omitted).

²⁷ *Dynamic Concepts, supra*, 61 Cal.App.4th at 1008, fn.8 (ellipsis omitted).

²⁸ *Lysick, supra*, 258 Cal.App.2d at 149.

²⁹ *Price v. Giles* (1987) 196 Cal.App.3d 1469, 1473 (ellipses omitted).

³⁰ *Midiman v. Farmers Ins. Exchange* (1999) 76 Cal.App.4th 102, 122 quoting *Dynamic Concepts, supra*, 61 Cal.App.4th at 1008.

injured party pursues a fraud claim against an insurer's coverage counsel. We need not [condone] fraud in an effort to secure free access to the courts."³¹

³¹ *Shafer v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2003) 107 Cal.App.4th 54, 80-81 (citations, quotation marks, and ellipses omitted).