

Rule of Professional Conduct, Rule 1.7 And The Cumis Rule

Prologue

“The mandatory rule of (attorney) disqualification in cases of dual representations - analogous to the biblical injunction against ‘serving two masters’ (Matthew 6:24) - is a self-evident.” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 286 (ellipses omitted).)

Introduction

Lawyers may not ethically represent multiple clients with conflicting interests without an adequate analysis of potential conflicts, written disclosure to the clients of the analysis¹, and often, obtaining their informed written consent before accepting employment or thereafter. (Rules of Professional Conduct (Rule), Rule 1.7 (eff. 11/1/18 - old California Rule 3-310).) This prohibition applies to insurer retained, **dependent** counsel when the liability insurer agrees to defend its policyholder under a reservation of rights. Violations of this rule may have disciplinary, malpractice, financial consequences, and perhaps an injunctive relief.

The Cumis Rule

“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 . . . , counsel must cease to represent both.” (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 375 (*Cumis*).)

California Rule 1.7

A California lawyer is prohibited from representing dual clients whose interests conflict without *first* fulfilling ethical obligations: 1) making a detailed conflict analysis; 2) making written disclosure; and 3) perhaps obtaining informed written consent. The clients’ interests may conflict if: (a) they are directly adverse², (b) there is a risk that client relationships may limit the lawyer³, (c) party, witness, family, and intimate relationships exist⁴, (d.1) the lawyer objectively

¹ Old Rule 3-310 defined disclosure as “informing the client . . . of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client”.

² “(a) A lawyer shall not, without informed written consent from each client . . . represent a client if the representation is directly adverse to another client in the same or a separate matter.”

³ “(b) A lawyer shall not, without informed written consent from each affected client . . . represent a client if there is a significant risk the lawyer’s representation of the client will be materially limited by the lawyer’s responsibilities to or relationships with another client . . . or a third person, or by the lawyer’s own interests.”

⁴ “(c) Even when a significant risk requiring a lawyer to comply with paragraph (b) is not present, a lawyer shall not represent a client without written disclosure of the relationship to the client and compliance with paragraph (d) where: (1) the lawyer has, or knows that another lawyer in the lawyer’s firm has, a legal, business, financial, professional, or personal relationship with or responsibility to a party or witness in the same matter; or (2) the lawyer knows or reasonably

believes that no harm will result; (d.2) the representation is not unlawful; and (d.3) the representation does not “involve” one client asserting a claim by against the other client.⁵

ABA Rule 1.7

ABA Rule 1.7 states that a lawyer shall not represent a client if the representation involves a concurrent conflict of interest, meaning that: 1) one client will be directly adverse to another client; or 2) there is a significant risk that the representation will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer. But the lawyer may represent a client if four elements are present: 1) the lawyer reasonably believes s/he is able to provide competent and diligent representation to each affected client; 2) the representation is not prohibited by law; 3) one client does not assert a claim against another client; and 4) each affected client gives informed written consent.

Dependent Counsel Has an Attorney-Client Relationship with the Insurer

Dependent counsel almost always represents both the interests of both the insurer and the policyholder as clients. While the existence of an attorney client relationship⁶ is normally a question of fact,⁷ “signed defense guidelines, with the negotiated hourly rate, and subsequent correspondence, along with the subsequent dealings between the [dependent counsel and an insurer], reflected an agreement between them and an attorney-client relationship as a matter of law.”⁸ “[T]he attorney has two clients.”⁹

A Reservation of Rights Always Creates Conflicts of Interest

“[W]hen coverage is disputed, the interests of the insured and the insurer are always divergent. [L]awyers hired by the insurer [have] an obligation to explain to the insured the full implications of joint representation in situations where the insurer has reserved its rights to deny coverage.”¹⁰

Dependent Counsel’s Duty to Analyze Potential Conflicts of Interest

A lawyer may not ethically start work to represent multiple clients with conflicting interests

should know that another party’s lawyer is a spouse, parent, child, or sibling of the lawyer, lives with the lawyer, is a client of the lawyer or another lawyer in the lawyer’s firm, or has an intimate personal relationship with the lawyer.”

⁵ “(d) Representation is permitted under this rule only if the lawyer complies with paragraphs (a), (b), and (c), and: (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client; (2) the representation is not prohibited by law; and (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal.”

⁶ See, *Attorney Client Relationship* at DutytoDefend.com.

⁷ See, *Dependent Counsel Always Represents the Insurer* at DutytoDefend.com.

⁸ *Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 127 (*Berger, Kahn*).

⁹ *American Mut. Liab. Ins. Co. v. Superior Court* (Nork) (1974) 38 Cal.App.3d 579, 592.

¹⁰ *Cumis, supra*, 162 Cal.App.3d at 375 (ellipses omitted).

without first adequately analyzing¹¹ potential conflicts and making written disclosure of the analysis to the clients. This analysis is required when a liability insurer agrees to defend its policyholder under a reservation of rights to later deny coverage or when other potential conflicts of interest arise.

“There is no talismanic rule that allows a facile determination of whether a disqualifying conflict of interest exists”,¹² but the lawyer should analyze the claims asserted, the insurer’s coverage defenses, disputed factual issues, and available evidence. “[T]raditional obligations of an attorney are in no way abridged by the fact that an insurer employs him to represent an insured. [T]he attorney owes the ‘highest duty’ 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.”¹³

Dependent Counsel Has the Burden to Initiate a Conflict Analysis

The burden of conflict of interest analysis falls squarely on the lawyer, not the client. “The rationale is that, as between the lay client and the attorney, the latter is more qualified to recognize and analyze the client’s legal needs.”¹⁴ Rule 1.7 obligates the lawyer examine the facts creating a potential conflict of interest among multiple clients, analyze them, and make written disclosure to the clients. Nothing in the law requires a client to analyze conflicts of interest at the time the attorney-client relationship is formed nor thereafter. If a policyholder is forced to sue an unethical lawyer, the plaintiff “the burden of proof as to each fact the existence . . . of which is essential to the claim for relief . . . that he is asserting.”¹⁵ Policyholders can easily carry the burden of proof that a lawyer failed to analyze potential conflicts of interest and make written disclose. Proving that a disqualifying conflict of interest exists is far more complicated.

Dependent Counsel’s Duty to Make an Adequate Written Disclosure

Dependent counsel’s duty of full disclosure¹⁶ includes “the obligation to render a full and fair disclosure to the [client] of all facts which materially affect his rights and interests.”¹⁷ “Adequate communication with clients is an integral part of competent professional performance as an attorney.”¹⁸ The duty may require the lawyer to disclose one’s own malpractice.¹⁹ “[N]on-

¹¹ See, *Duty to Initiate Analysis of Conflicts of Interest* at DutytoDefend.com.

¹² *Berger, Kahn, supra*, 79 Cal.App.4th at 131, quoting *Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-1008.

¹³ *Betts v. Allstate Ins. Co.* (1984) 154 Cal.App.3d 688, 716 (ellipses omitted).

¹⁴ *Nichols v. Keller* (1993) 15 Cal.App.4th 1672, 1685.

¹⁵ Evid. Code § 500.

¹⁶ See, *Duty of Disclosure* at DutytoDefend.com.

¹⁷ *Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-189 (*Neel*).

¹⁸ *Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.

¹⁹ See, Rest.3d Law Governing Lawyers § 20, Comment c.

disclosure itself is a ‘fraud.’”²⁰

An adequate analysis of potential conflicts of interest should include the following: “(1) what is the exact nature of the claims asserted in the underlying action, (2) what defenses to coverage are asserted by the insurers, and to what extent, if at all, are they logically related to the liability issues raised in the underlying action, (3) what factual questions have to be resolved in order to sustain or defeat such defenses, (4) what is the likely nature of the available evidence, (5) to what extent, if at all, will [the policyholder] suffer prejudice by the enforced discovery of the evidence which tends to support or defeat its claim of coverage or the defenses raised by the insurers and (6) to what extent, if at all, will a confidentiality order realistically protect [the policyholder] from prejudicial disclosure.”²¹

Confidentiality

No lawyer may ethically disclose to the insurer confidential information²² impacting coverage. A lawyer must “maintain inviolate the confidence, and at every peril to himself or herself to preserve the secrets, of his or her client.”²³ “A lawyer shall not reveal information protected from disclosure . . . unless the client gives informed consent.”²⁴ “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.”²⁵

Financial Consequences

“A lawyer shall not enter into an agreement for, charge, or accept compensation for representing a client from one other than the client unless . . . the lawyer obtains the client’s informed written consent.”²⁶ While dependent counsel is normally paid by the insurer, not the policyholder. But the policyholder may become liable to reimburse the insurer for the fees and costs paid by the insurer to dependent counsel if the insurer reserves its rights to obtain reimbursement.²⁷ Thus, dependent counsel who fail to comply with Rule 1.8.6 may be required to disgorge to the policyholder those expenses that the policyholder must reimburse the insurer.

²⁰ *Neel, supra*, 6 Cal.3d at 189.

²¹ *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980.

²² See, *Duty of Confidentiality* at DutytoDefend.com.

²³ Bus. & Prof. Code § 6068(e)(1).

²⁴ Rule 1.6(a).

²⁵ *Styles v. Mumbert* (2008) 164 Cal.App.4th 1163, 1168 (citations omitted).

²⁶ Rule 1.8.6(c) (ellipses omitted).

²⁷ See, *Buss Defense Cost Reimbursement* at DutytoDefend.com.