

LEGEND

&Client& means the policyholder
&DC& means dependent counsel
&InsCo& means liability insurer
&Blank& means supply appropriate information
&Victim& means the injured third party plaintiff

Attorneys for Plaintiff,
&Client&

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

&Victim&)	Case No.
)	
Plaintiff,)	MEMORANDUM OF POINTS AND
vs.)	AUTHORITIES
&Client&)	
and DOES 1 to 250, Inclusive,)	DATE:
)	TIME:
Defendants.)	DEPT:
_____)	
		Action Filed:

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Rest. Liab. Ins. § 16

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1 **FACTUAL STATEMENT**

2 &InsCo& issued a policy of liability insurance to &Client&. &Victim& sued &Client& (the
3 **&Victim& Action**). &InsCo& agreed to defend &Client& in the &Victim& Action under a
4 reservation of rights to deny coverage. &InsCo& appointed one of its panel counsel, &CD& to defend
5 &Client& in the &Victim& Action. &CD& accepted the assignment from &InsCo& to represent
6 &Client& in the &Victim& Action. &CD& accepted compensation from &InsCo& to represent
7 &Client& in the &Victim& Action. &CD& did not comply with the Rules of Professional Conduct
8 (Rule). The attorney-client relationship between &Client& and &DC& is established by the fact that
9 &DC& has entered an appearance in this action purporting to represent &Client&'s interests.

10 **DISCUSSION**

11 **1. The Trial Court Has the Authority to Disqualify Counsel**

12 “A trial court’s authority to disqualify an attorney derives from the power inherent in every
13 court ‘[t]o control in furtherance of justice, the conduct of its ministerial officers, and of all other
14 persons in any manner connected with a judicial proceeding before it, in every matter pertaining
15 thereto.’ [Citations.]” (*People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.*
16 (1999) 20 Cal.4th 1135, 1145.) “[T]he trial court’s conclusions of law, however, review is de novo; a
17 disposition that rests on an error of law constitutes an abuse of discretion. (*Haraguchi v. Superior*
18 *Court* (2008) 43 Cal.4th 706, 711-712.)

19 “The primary value at stake in cases of simultaneous or dual representation is the attorney’s
20 duty-and the client’s legitimate expectation-of loyalty. ¶ The paradigmatic instance of such prohibited
21 dual representation - one roundly condemned by courts and commentators alike - occurs where the
22 attorney represents clients whose interests are directly adverse in the same litigation. ¶ Indeed, in all
23 but a few instances, the rule of disqualification in simultaneous representation cases is a per se or
24 ‘automatic’ one.” (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 284, 285, fn.3 (*Flatt*).) “[T]he
25 purpose of the rules against representing conflicting interests is not only to prevent dishonest conduct,
26 but also to avoid placing the honest practitioner in a position where he may be required to choose
27 between conflicting duties or attempt to reconcile conflicting interests. [Citations.]” (*Woods v.*
28 *Superior Court* (1983) 149 Cal.App.3d 931, 936.)

1 **2. The Attorney-Client Relationship Is Fiduciary, Including Duties of**
2 **Undivided Loyalty, Disclosure, and Confidentiality**

3 **A. &DC& Owes Fiduciary Duties to &Client&**

4 “The relation between attorney and client is a fiduciary relation of the very highest character,
5 and binds the attorney to most conscientious fidelity.” (*Cox v. Delmas* (1893) 99 Cal. 104, 123.)

6 “[A]n attorney is precluded from assuming any relation which would prevent him from devoting his
7 entire energies to his client’s interests. Nor does it matter that the intention and motives of the
8 attorney are honest. The rule is designed not alone to prevent the dishonest practitioner from
9 fraudulent conduct, but as well to preclude the honest practitioner from putting himself in a position
10 where he may be required to choose between conflicting duties, or be led to an attempt to reconcile
11 conflicting interests, rather than to enforce to their full extent the rights of the interest which he
12 should alone represent.” (*Anderson v. Eaton* (1930) 211 Cal. 113, 116 (*Anderson*) (citations
13 omitted.))

14 **B. &DC& Owes a Duty of Undivided Loyalty to &Client&**

15 “An attorney’s duty of loyalty to a client is not one that is capable of being divided, at least
16 under circumstances where the ethical obligation to withdraw from further representation of one of
17 the parties is mandatory, rather than subject to disclosure and client consent.” (*Flatt, supra*, 9 Cal.4th
18 at 282.)

19 “It is . . . an attorney’s duty to protect his client in every possible way, and it is a violation of
20 that duty for him to assume a position adverse or antagonistic to his client without the latter’s free and
21 intelligent consent given after full knowledge of all the facts and circumstances.” (*Anderson, supra*,
22 211 Cal. at 116 (citations omitted).)

23 [Discuss facts showing &DC& is loyal to &InsCo&]

24 **C. &DC& Owes a Duty of Disclosure to &Client&**

25 “It is the duty of an attorney to do all of the following: . . . To respond promptly to reasonable
26 status inquiries of clients and to keep clients reasonably informed of significant developments in
27 matters with regard to which the attorney has agreed to provide legal services.” (Bus. & Prof. Code §
28 6068(m); see also, (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-89

1 (Neel).) “Adequate communication with clients is an integral part of competent professional
2 performance as an attorney.” (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.) The duty may require
3 the lawyer to disclose one’s own malpractice. (See, Rest.3d Law Governing Lawyers § 20, Comment
4 c.) “[T]he disclosure must be full and complete, and any material concealment or misrepresentation
5 will amount to fraud. Cases in which the defendant stands in a fiduciary relationship to the plaintiff
6 are frequently treated as if they involved fraudulent concealment of the cause of action by the
7 defendant. The theory is that although the defendant makes no active misrepresentation, this element
8 is supplied by an affirmative obligation to make full disclosure, and the non-disclosure itself is a
9 ‘fraud.’” (*Neel, supra*, 6 Cal.3d at 188-89.)

10 &DC&, not &Client&, must initiate disclosure. “The relation between attorney and client is a
11 fiduciary relation of the very highest character. [An attorney] owes a duty to communicate to his
12 client whatever information he acquires in relation to the subject matter involved in the transaction.”
13 (*Neel, supra*, 6 Cal.3d at 189-190 (citations, ellipses, and quotation marks omitted).) “[T]he existence
14 of a conflict of interest should be identified early in the proceedings so it can be treated effectively
15 before prejudice has occurred to either party.” (*Cumis, supra*, 162 Cal.App.3d at 371, fn.7.)

16 [Discuss facts showing &DC& has failed to make required disclosures to &Client&]

17 **D. &DC& Owes a Duty of Confidentiality to &Client&**

18 &DC& may not communicate to &InsCo& confidential information received by &DC& from
19 &Client& that may impact &Client&’s insurance coverage with &InsCo&. “It is the duty of an
20 attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve
21 the secrets, of his or her client.” (Bus. & Prof. Code. § 6068(e)(1).) “A lawyer shall not reveal
22 information protected from disclosure by Business and Professions Code section 6068, subdivision
23 (e)(1) unless the client gives informed consent.” (Rule 1.6.) “[C]onfidential communication between
24 client and lawyer’ means information transmitted between a client and his or her lawyer in the course
25 of that relationship and in confidence by a means which, so far as the client is aware, discloses the
26 information to no third persons. . . .” (Evid. Code § 952.) “[T]he client, whether or not a party, has a
27 privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication
28 between client and lawyer if the privilege is claimed by: (a) The holder of the privilege; (b) A person

1 who is authorized to claim the privilege by the holder of the privilege; or (c) The person who was the
2 lawyer at the time of the confidential communication, but such person may not claim the privilege if
3 there is no holder of the privilege in existence or if he is otherwise instructed by a person authorized
4 to permit disclosure.” (Evid. Code § 954.)

5 “[T]he purpose and necessities of the relation between a client and his attorney require, in
6 many cases, on the part of the client, the fullest and freest disclosure to the attorney of the client’s
7 objects, motives, and actions. Thus the protection of confidences and secrets is not a rule of mere
8 professional conduct, but instead involves public policies of paramount importance which are
9 reflected in numerous statutes. (*In re Jordan*, (1972) 7 Cal.3d 930, 940-41.)

10 [Discuss facts showing &DC& has communicated confidential information to &InsCo&
11 impacting coverage]

12 **3. Rule 1.7 Prohibits Conflicted Dual Representation**

13 Rule 1.7 prohibits &DC& from representing &InsCo& and &Client& whose interests
14 potentially conflict without their informed written consent where: 1) &InsCo& and &Client& are
15 directly adverse; **or** 2) there is a significant risk that &DC&’s representation of &Client& will be
16 materially limited by &DC&’s responsibilities to or relationships with &InsCo&. &DC& may
17 ethically represent &Client& only if all of the three following conditions exist: 1) &DC& reasonably
18 believes that it will be able to provide competent and diligent representation to each &InsCo& and
19 &Client&; **and**; 2) the representation is not prohibited by law; **and** 3) the representation “does not
20 involve” the assertion of a claim by &InsCo& against &Client&. It is insufficient that &DC&
21 believes that it can represent &Client& if such representation is unlawful or if it “involves”
22 &InsCo&’s reservation of rights. As explained below, the Cumis Test tracks these requirements
23 rendering it unlawful to &DC& to represent &Client& and prohibiting &DC& from representing
24 &Client& unless &InsCo&’s reservation of rights is limited to grounds that have “nothing to do with”
25 issues raised in this action. (*Long v. Century Indemnity Co.* (2008) 163 Cal.App.4th 1460, 1470
26 (*Long*).)

27 California is a two-client state which recognizes that dependent counsel represents both the
28 insurer and the policyholder as a client. “In the insured-insurer relationship, the attorney

1 characteristically is engaged and paid by the carrier to defend the insured. If the matter reaches
2 litigation, the attorney appears of record for the insured and at all times represents him. In such a
3 situation, the attorney has two clients.” (*American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38
4 Cal.App.3d 579, 591-92 (ellipses omitted).) “The signed defense guidelines, with the negotiated
5 hourly rate, and subsequent correspondence, along with the subsequent dealings between the
6 [dependent counsel] defendants and [the insurer], reflected an agreement between them and an
7 attorney-client relationship as a matter of law.” (*Berger, Kahn, supra*, 79 Cal.App.4th at 127.)

8 Even if the insurer were not considered to technically be a “client”, &DC& must still comply
9 with Rule 1.7. &DC& has a relationship with &InsCo&, which is “another person who may be
10 affected substantially by resolution of the matter.” (Rule 1.7, Comment [4].) Because a liability
11 insurance policy is a contract of indemnity, all liability insurers are always and necessarily “affected
12 substantially by resolution” of a judgment entered against its policyholder.

13 &DC& accepted an assignment from &InsCo& to represent the interests of both &InsCo& and
14 &Client&. However, because &InsCo& has issued a reservation of rights, &DC& may not ethically
15 appear as &Client&’s attorney of record in this matter without complying with Rule 1.7.

16 **4. Rule 1.8.6 Prohibits Insurer Compensation**

17 Rule 1.8.6 prohibits &DC& from charging or accepting compensation for representing
18 &Client& from &InsCo& unless: 1) the insurer does nothing to interfere with dependent counsel’s
19 independent professional judgment; 2) dependent counsel protects the policyholder’s confidential
20 information potentially impacting coverage; and 3) dependent counsel obtains the policyholder’s
21 informed written consent.

22 Any violation of these Rules renders the contract between &InsCo& and &DC& void as
23 against public policy. “A lawyer engaging in clear and serious violation of duty to a client may be
24 required to forfeit some or all of the lawyer’s compensation for the matter. . . . California cases have
25 drawn a line between cases involving serious ethical violations such as conflicts of interest, in which
26 compensation is prohibited, and technical violations or potential conflicts, in which compensation
27 may be allowed.” (*Sheppard, Mullin, Richter & Hampton, LLP v. J-M Manufacturing Co., Inc.* (2016)
28 244 Cal.App.4th 590, 614-17.) The court went on to discuss *Jeffry v. Pounds* (1977) 67 Cal.App.3d 6,

1 11 in which a law firm breached the Rule [then numbered 5-102(B)] requiring informed written
2 consent to represent dual clients with conflicting interests, and denied recovery of any fees for work
3 performed after the conflict arose. (*Id.* at 617-18.)

4 &DC& may not ethically accept compensation from &InsCo& to defend &Client& in this
5 matter without &Client&'s informed written consent, which &Client& has not given.

6 **5. &DC& Has Violated Duties to &Client&**

7 [Discuss facts showing &DC& has violated its duties to &Client&.]

8 **6. The Two Part Cumis Rule**

9 In the landmark Cumis case in 1984, California lead the way for the nation that attorney ethics
10 prohibit dependent counsel like &DC& from representing the interests of a liability insurer and its
11 policyholder whenever the insurer and policyholder have potential conflicts without complying with
12 the Rules.

13 **A. Part One - The Wrong**

14 It is wrong for &DC& to fail to make disclosure to &Client&. "Canons of Ethics impose upon
15 lawyers hired by the insurer an obligation to explain to the insured and the insurer the full
16 implications of joint representation in situations where the insurer has reserved its rights to deny
17 coverage." (*Cumis, supra*, 162 Cal.App.3d at 375.)

18 **B. Part Two - A Remedy**

19 An appropriate remedy for this wrong is that &DC& may not represent &Client&. "If the
20 insured does not give an informed consent to continued representation, counsel must cease to
21 represent both." (*Ibid.*)

22 **C. &DC& Has Wronged &Client&**

23 &DC& has failed to investigate or analyze potential conflicts of interest. &DC& has failed to
24 make the required disclosure to &Client&. &DC& has failed to seek or obtain &Client&'s informed
25 written consent.

26 **D. The Remedy for &DC&'s Wrong Is Disqualification**

27 [Discuss facts showing &DC& has not investigated, analyzed, or disclosed potential conflicts
28 of interest created by &InsCo&'s reservation of rights.]

7. The Cumis Quality of Conflict of Interest Analysis

Dependent counsel must thoroughly investigate and analyze potential conflicts of interest in order to obtain a client's "informed written consent" to ethical representation. Rule 1.0.1(e) defines informed consent to mean the policyholder's "agreement to a proposed course of conduct 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." Rule 1.4 elaborates on what a lawyer must explain to the client: "A lawyer shall promptly inform the client of any decision or circumstance with respect to which disclosure or the client's informed consent is required; reasonably consult with the client about the means by which to accomplish the client's objectives in the representation; keep the client reasonably informed about significant developments relating to the representation, including promptly complying with reasonable requests for information and copies of significant documents when necessary to keep the client so informed; and advise the client about any relevant limitation on the lawyer's conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."

The purpose of dependent counsel's written disclosure is to warn the policyholder to at least consider distrusting a reserving insurer and its dependent counsel. "Through reservation, the insurer gives the insured notice of how it will, or at least may, proceed and thereby provides it an opportunity to take any steps that it may deem reasonable or necessary in response - including whether to accept defense at the insurer's hands and under the insurer's control . . . or, instead, to defend itself as it chooses." (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 61, fn.27.)

Building on a foundation of the Canons of Ethics, case law clearly illuminates what dependent counsel must communicate and explain. "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 . . . or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.'" (*Berger, Kahn, supra*, 79 Cal.App.4th at 131

1 quoting *Dynamic Concepts, supra* 61 Cal.App.4th at 1007-1008.)

2 One court elaborated upon the questions to be asked and answered by a Proper Cumis
3 Analysis: “(1) what is the exact nature of the claims asserted in the underlying action, (2) what
4 defenses to coverage are asserted by the insurers, and to what extent, if at all, are they logically related
5 to the liability issues raised in the underlying action, (3) what factual questions have to be resolved in
6 order to sustain or defeat such defenses, (4) what is the likely nature of the available evidence, (5) to
7 what extent, if at all, will [the policyholder] suffer prejudice by the enforced discovery of the evidence
8 which tends to support or defeat its claim of coverage or the defenses raised by the insurers and (6) to
9 what extent, if at all, will a confidentiality order realistically protect [the policyholder] from
10 prejudicial disclosure.” (*Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980; see also
11 *Armstrong Cleaners, Inc. v. Erie Ins. Exch.* (S.D. Ind. 2005) 363 F.Supp.2d 797, 816 (“fact- intensive
12 and case-specific nature of the inquiry.”).)

13 The duty to initiate an investigation, analysis, and written disclosure falls only on the lawyer,
14 not on the lay policyholder. Thus, dependent counsel has “the obligation to render a full and fair
15 disclosure to the [client] of all facts which materially affect his rights and interests. . . . [Lawyers
16 have] an affirmative obligation to make full disclosure, and the non-disclosure itself is a ‘fraud.’”
17 (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6 Cal.3d 176, 188-89.) Dependent counsel
18 also owes a duty to the policyholder “under Civil Code, section 2860, to disclose potential conflicts of
19 interest.” (*Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal
20 App 4th 1219, 1224.)

21 If a policyholder sues dependent counsel or a reserving insurer, it assumes the evidentiary
22 “burden of proof as to each fact the existence or nonexistence of which is essential to the claim for
23 relief or defense that he is asserting.” (Evid. Code §500.) However, the plaintiff’s burden of proof at
24 trial in a coverage contest should not be confused with dependent counsel’s ethical burden to clear
25 conflicts of interest before starting work on a third party liability dispute. Dependent counsel’s burden
26 to clear conflicts or quit does not shift simply because the policyholder is forced to sue. Thus, the
27 policyholder is only required to show that dependent counsel failed to comply with Rule 1.7, not that
28 dependent counsel had a disqualifying conflict of interest.

1 [Discuss facts showing &DC& has not done an adequate analysis.]

2 **8. The Cumis Test**

3 About two-thirds of American jurisdictions follow the “per se” rule that all reservations of
4 rights require a reserving insurer to pay for independent counsel. (See, [http://dutyto defend.com/](http://dutyto defend.com/50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/)
5 [50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-](http://dutyto defend.com/50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/)
6 [to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/](http://dutyto defend.com/50-state-survey-does-rpc-rule-1-7-disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-independent-counsel-when-reserving-rights-to-deny-coverage/)).

7 However, in California, “not every conflict of interest triggers an obligation on the part of the
8 insurer to provide the insured with independent counsel at the insurer’s expense.” (*James 3 Corp. v.*
9 *Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1101; see also, *Dynamic Concepts, Inc. v. Truck*
10 *Ins. Exchange* (1998) 61 Cal.App.4th 999, 1006 (“But not every reservation of rights entitles an
11 insured to select Cumis counsel.”))

12 Thus, the California rule requires dependent counsel, insurers, and courts to answer this
13 question: “What potential conflicts of interest ethically disqualify dependent counsel from
14 representing a policyholder whose insurer has reserved its rights to later deny coverage to its
15 policyholder? The answer to this question is well established in California law.

16 Perhaps the best expression of the test is this: “Cumis can be read to suggest that this conflict
17 arises whenever the insurer asserts a reservation of its right to assert noncoverage, while still
18 providing a defense to the liability action. This interpretation of Cumis would be erroneous. It is only
19 when the basis for the reservation of rights is such as to cause assertion of **factual or legal theories**
20 which undermine or are contrary to the positions to be asserted in the liability case that a conflict of
21 interest sufficient to require independent counsel, to be chosen by the insured, will arise.” (*State Farm*
22 *Fire & Casualty Co. v. Superior Court (Durant)* (1989) 216 Cal.App.3d 1222, 1231, fn.3 (citations
23 omitted, emphasis added).)

24 However, the California test has been expressed by fourteen published opinions in a variety of
25 ways, both negatively and positively. *Expressed negatively*, dependent counsel has no disqualifying
26 conflict of interest and the liability insurer that reserves its rights *is not required* to pay for
27 independent counsel if each ground upon which the insurer may later deny coverage: 1) has “nothing
28 to do with the issues being litigated in the underlying action” (*Long, supra*, 163 Cal.App.4th at 1470

1 (citation and ellipsis omitted)); 2) “is logically unrelated to the issues of consequence in the
2 underlying case” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 302; 3) “is
3 independent of the issues in the underlying case;” (*Blanchard v. State Farm Fire & Casualty Co.*
4 (1991) 2 Cal.App.4th 345, 350; see also, *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th
5 1388, 1422 (*Gafcon*)); or 4) “is extrinsic to the issues in the underlying action.” (*Gafcon, supra*, 98
6 Cal.App.4th at 1422.)

7 *Expressed positively*, dependent counsel has no disqualifying conflict of interest and the
8 liability insurer that reserves its rights *is required* to pay for independent counsel: 1) “whenever [the
9 insurer’s and policyholder’s] common lawyer’s representation of the one is rendered less effective”
10 (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713); 2) if coverage issues
11 “overlap” issues in the third party liability action (*United Enterprises, Inc. v. Superior Court* (2010)
12 183 Cal. App. 4th 1004, 1010); 3) if any coverage question depends “upon the insured’s own
13 conduct” (*Foremost Ins. Co. v. Wilks* (1988) 206 Cal.App.3d 251, 261); 4) if “[i]nsurance counsel had
14 [an] incentive to attach liability to [the insured]” (*Berger, Kahn, supra*, 79 Cal.App.4th at 131; 5) if
15 “the ground of noncoverage was based on the nature of the insured’s conduct” (*McGee v. Superior*
16 *Court* (1985) 176 Cal.App.3d 221, 226); 6) if “the outcome of the coverage issue can be controlled by
17 the way counsel defends the case” (*Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278, 282; Civ.
18 Code § 2860(a)); 7) “can be controlled by counsel first retained by the insurer for the defense of the
19 claim” (Civ. Code § 2860(b)); 8) “the way counsel retained by the insurance company defends the
20 action will affect an underlying coverage dispute between the insurer and the insured” (*James 3 Corp.*
21 *v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1108); 9) “the basis for the reservation of rights
22 is such as to cause assertion of factual or legal theories which undermine the positions to be asserted
23 in the liability case” (*State Farm Fire & Cas. Co. v. Superior Court* (1989) 216 Cal.App.3d 1222,
24 1226, fn.3.) and 10) “where the issue creating the conflict is one which must be decided in the
25 underlying action.” (*Truck Ins. Exchange v. Superior Court* (1996) 51 Cal.App.4th 985, 994; see also,
26 *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1372, 1395-1396.)

27 The Cumis Test is also supported by out-of-state reliable authorities, although these are not
28 binding on this court. The A.L.I. Restatement of Liability Insurance expresses the Cumis Test in

1 terms of “facts at issue in common” as follows:

2 “When an insurer with the duty to defend provides the insured notice of a ground for
3 contesting coverage under § 15 and there are facts at issue that are common to the legal action for
4 which the defense is due and to the coverage dispute, such that the action could be defended in a
5 manner that would benefit the insurer at the expense of the insured, the insurer must provide an
6 independent defense of the action.” (Rest. Liab. Ins. § 16. The Obligation to Provide an Independent
7 Defense)

8 **Illinois:** “[I]f insurer-retained counsel would have the opportunity to shift facts in a way that
9 takes the case outside the scope of policy coverage, then the insured is not required to defend the
10 underlying suit with insurer-retained counsel.” (*Amer. Family Mut. Ins. Co. v. W.H. McNaughton*
11 *Builders, Inc.*, 843 N.E.2d 492, 498, 501 (Ill. 2006). **Indiana:** “[T]he very real probability that the
12 jury in the [underlying liability] Lawsuit will decide issues of fact potentially dispositive of the
13 coverage dispute . . . entitles [the policyholder] to independent defense counsel at the . . . Insurers’
14 expense.” (*Auto-Owners Ins. Co. v. Lake Erie Land Co.* 2:12-CV-184 JD (N.D. Ind. 2013)

15 **Maryland:** “Because it was in the insurer’s interest to establish noncoverage, and in the insured’s
16 interest to be found liable only for the covered claims, it was necessary for the insurer to allow the
17 insured to choose independent counsel.” (*Allstate Ins. Co. v. Campbell*, 334 Md. 381, 392, 639 A.2d
18 652, 657 (1994).) **Mississippi:** “Any lawyer who attempts to represent two adverse masters places

19 himself in a precarious, perilous position. [Rules of ethics] are distilled principles of ancient, time-
20 honored, and judicially-enforced conduct on the part of lawyers in representing clients. Without them
21 our system of justice would be doomed. It hardly needs to be added that no insurance policy can
22 validly diminish a lawyer’s duty to his insured client. In sum, the ethical dilemma thus imposed upon
23 the carrier-employed defense attorney would tax Socrates, and no decision or authority we have
24 studied furnishes a completely satisfactory answer.” (*Foster, supra*, 528 So.2d at 269, 274.) (*Hartford*
25 *Acc. & Indem. Co. v. Foster* 528 So.2d 255, 269, 274 (Miss. 1988).) **New York:** “Independent
26 counsel is only necessary in cases where the defense attorney’s duty to the insured would require that
27 he defeat liability on any ground and his duty to the insurer would require that he defeat liability only
28 upon grounds which would render the insurer liable. When such a conflict is apparent, the insured

1 must be free to choose his own counsel whose reasonable fee is to be paid by the insurer.” (*Pub. Serv.*
2 *Mut. Ins. Co. v. Goldfarb*, 425 N.E.2d 810, 53 N.Y.2d 392, 401 (1981).) **Oklahoma:** “Independent
3 counsel is only necessary in cases where the defense attorney’s duty to the insured would require that
4 he defeat liability on any ground and his duty to the insurer would require that he defeat liability only
5 upon grounds that would render the insurer liable.” (*Nisson v. Am. Home Assur. Co.*, 917 P.2d 488,
6 490 (Okla. 1996).) **Pennsylvania:** Where “the loyalty of the insurer’s counsel to that insured is raised,
7 the insured is entitled to select its counsel. . . . [and the insurer] is obligated to provide conflict-free
8 counsel and relinquish control of the defense.” (*Rector v. Amer. Nat’l Fire Ins. Co.* No. Civ.A. 00-
9 2806 (E.D. Pa. 2002).) **Texas:** “[I]f the attorney appointed by the insurance company would have an
10 incentive to act for the insurance company’s interest rather than the insured’s interest, and therefore
11 deprive the insured of its right to independent counsel, a conflict of interest exists triggering the
12 insured’s right to select counsel.” (*Coats, Rose, Yale, Ryman & Lee, P.C., v. Navigators Specialty Ins.*
13 *Co.*, 830 F. Supp.2d 216, 219 (N.D. Tex. 2011).) “A disqualifying conflict of interest exists where the
14 facts to be adjudicated in the liability lawsuit are the same facts upon which coverage depends.”
15 (*Partain v. Mid-Continent Spec. Ins. Serv.*, 838 F.Supp2d 547, 555 (S.D. Tex. 2012).) See also:
16 **Alaska:** *CHI of Alaska, Inc. v. Employers Reinsurance Corp.*, 844 P.2d 1113, (Alaska 1993);
17 **Louisiana:** *Belanger v. Gabriel Chemicals, Inc.*, 787 So.2d 559, 565-66 (2001); **Nevada:** *State Farm*
18 *Mut. Auto. Ins. Co. v. Hansen*, 131 Nev. Adv. Op. 74 (2015); **Ohio:** *Red Head Brass, Inc. v. Buckeye*
19 *Union Ins. Co.*, 135 Ohio App.3d 616, 626, 735 N.E.2d 48, 55 (Ohio Ct. App. 1999); **South**
20 **Carolina:** *Twin City Fire Ins. Co. v. Ben Arnold-Sunbelt Beverage Co. of S.C., LP*, 336 F. Supp.2d
21 610 (D.S.C., 2004); **Tennessee:** *In re Youngblood*, 895 S.W.2d 322, 328 (Tenn. 1995).)

22 **A. &DC& Has Failed to Investigate or Analyze Potential Conflicts of Interest**

23 [Discuss facts showing &DC& failed to investigate and do an adequate analysis.]

24 **B. &DC& Has Failed to Make Required Disclosure to &Client&**

25 [Discuss facts showing &DC& failed to make disclosure.]

26 **C. &DC& Has Failed to Seek or Obtain &Client&’s Informed Written Consent**

27 [Discuss facts showing &DC& failed to seek or obtain &Client&’s informed written consent.]

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