

**LEGEND** (to find and replace)  
&Client& means the policyholder  
&DC& means dependent counsel  
&IC& means independent counsel  
&InsCo& means the liability insurer  
&Blank& means supply appropriate information  
&Victim& means the injured third party plaintiff

Attorneys for Plaintiff,

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

&Client&	)	Case No.
	)	
Plaintiff,	)	PLAINTIFF’S EX PARTE APPLICATION FOR
vs.	)	A TEMPORARY RESTRAINING ORDER
	)	AND ORDER TO SHOW CAUSE WHY A
&DC&, &InsCo& and DOES 1 to 250,	)	PERMANENT INJUNCTION SHOULD NOT
Inclusive,	)	BE ISSUED; MEMORANDUM OF POINTS
	)	AND AUTHORITIES; DECLARATIONS OF
Defendants.	)	&Client& and &IC&

Dept:

Time:

Action Filed: &Date&

1 **EX PARTE APPLICATION**

2 Pursuant to Bus. & Prof. Code § 17200 et. seq., Code Civ. Proc. §§ 525, 526(a), 527, Rules of  
3 Court 3.1150, and 3.1200 to 3.1207, Plaintiff, &Client& applies, on an *ex parte* basis, for a temporary  
4 restraining order, and an order requiring Defendants, &DC& and &InsCo& as well as all officers,  
5 directors, shareholders, members, employees and agents, and all persons acting on their behalf, to  
6 show cause why a permanent injunction should not be issued.

7 This application is based upon the attached memorandum of points and authorities, the  
8 declarations of &Client& and &IC&, the Complaint filed in this action, and upon such further  
9 argument or evidence as maybe presented at the hearing on this Application.

10 **SUMMARY OF CASE**

11 Plaintiff, &Client& is forced to file this action and bring this ex parte application for a  
12 temporary restraining order to prevent the irreparable damage to &Client& from unethical and  
13 unlawful conduct by Defendant, &DC&, a firm of attorneys, and from unlawful conduct by  
14 Defendant, &InsCo&. Undisputable evidence establishes that: 1) &DC& and &InsCo& have  
15 previously and continue to violate and enable the violation of Rules of Professional Conduct (Rule),  
16 Rules 1.7 and 1.8.6, the Cumis Rule and the Cumis Test.

17 The two part Cumis Rule requires first that &DC& always investigate, analyze, and disclose  
18 potential conflicts of interest when its insurer/client agrees to pay for the defense of its policyholder  
19 in a third party liability dispute, issues a reservation of rights to its policyholder challenging coverage  
20 for the suit, and appoints &DC& to represent both the insurer/client and the policyholder/client in the  
21 same action that involves disputed issues of fact or law that could impact coverage. The second part  
22 of the Cumis Rule requires &InsCo& to pay for independent counsel if: 1) &DC& fails to investigate,  
23 analyze and disclosure potential conflicts of interest; or 2) a disqualifying conflict of interest exists.

24 The determination of whether a disqualifying conflict of interest exists is controlled by the  
25 two part Cumis Test, that: 1) &DC& has failed to adequately investigate, analyze, and disclose  
26 potential conflicts of interest; or 2) &DC& has adequately investigated, analyzed, and disclosed  
27 potential conflicts of interest, and either A) correctly determined that no disqualifying conflict of  
28 interest exists; or B) obtains both clients' informed written consent.

1 Where &DC& and/or &InsCo& violate the Cumis Rule or fail the Cumis Test, then &DC&  
2 must quit and &InsCo& must promptly pay for independent counsel selected and directed by solely  
3 by the policyholder to conduct the defense. Undisputable facts establish that &DC& and &InsCo&  
4 have violated the Cumis Rule and failed the Cumis Test.

5 This application is made pursuant to Code Civ. Proc. § 527 on the grounds that: (i) Plaintiff is  
6 likely to succeed on the merits of its claim for breach of fiduciary duty; (ii) that unless the temporary  
7 restraining order is granted, Plaintiff will continue to suffer irreparable injury; and (iii) that the  
8 balance of hardships tips lopsidedly in Plaintiff's favor. &DC& and &InsCo& are behaving  
9 unlawfully, unfairly, and fraudulently.

#### 10 **NOTICE OF APPLICATION**

11 Pursuant to Rule of Court 3.1204(b), notice of this ex parte application was provided  
12 to Defendant, &DC& by emailing a copy of this application which states with specificity the nature of  
13 the relief requested and the date, time, and place for the presentation of the application. &DC&  
14 responded to &Client&'s email by advising that it would appear to oppose the application.

#### 15 **NATURE OF RELIEF REQUESTED**

16 Plaintiff requests that this Court issue a temporary restraining order and an order to show  
17 cause why a permanent injunction should not be issued as follows:

18 Pursuant to Code Civ. Proc. § 527, Plaintiff seeks an order that Defendant, &DC& appear in  
19 this Court on a specific date and time, to show cause why they and their agents, employees,  
20 representatives, and all persons acting in concert or participation with it or them, should not be:

- 21 1) enjoined from representing &Client& in the &Victim& action;
- 22 2) enjoined from accepting compensation from &InsCo& to represent &Client& in the  
23 &Victim& action;
- 24 3) permanently enjoined from representing any policyholder in any third party liability action in  
25 California on behalf of any liability insurer that has issued a reservation of rights without first  
26 complying with Rule 1.7, the Cumis Rule, and the Cumis Test; and
- 27 4) permanently enjoined from accepting compensation to represent any policyholder in any third  
28 party liability action pending in California from any liability insurer that has issued a

1 reservation of rights without first complying with Rules 1.8.6, 1.7, the Cumis Rule, and the  
2 Cumis Test.

3 Pursuant to Code Civ. Proc. § 527, Plaintiff also seeks an order that Defendant &InsCo&  
4 appear in this Court on a specific date and time, to show cause why it and its agents, employees,  
5 representatives, and all persons acting in concert or participation with it or them, should not be:

- 6 1) enjoined from paying compensation to &DC& to represent &Client& in the &Victim& action;
- 7 2) permanently enjoined from appointing any counsel to represent any policyholder in any third  
8 party liability action pending in California when it issues any reservation of rights unless its  
9 chosen counsel first complies with Rules 1.7 and 1.8.6, the Cumis Rule, and the Cumis Test;
- 10 3) permanently enjoined from compensating any appointed counsel to represent any policyholder  
11 in any third party liability action pending in California when it has issued a reservation of  
12 rights unless its chosen counsel first complies with Rules 1.7 and 1.8.6, the Cumis Rule, and  
13 the Cumis Test.

14 October \_\_, 2020

15  
16 \_\_\_\_\_  
17 By:  
18 Attorneys for Plaintiff,  
19 &Client&  
20  
21  
22  
23  
24  
25  
26  
27  
28

1 **TABLE OF CONTENTS**

2 PROLOGUE .....

3 INTRODUCTION .....

4 FACTUAL STATEMENT .....

5 DISCUSSION .....

6 1. The Attorney-Client Relationship Is Fiduciary, Including Duties of

7 Undivided Loyalty, Disclosure, and Confidentiality .....

8 2. Rules 1.7 Prohibits Conflicted Dual Representation .....

9 3. Rules 1.8.6 Prohibits Insurer Compensation .....

10 4. The Two Part Cumis Rule .....

11 5. The Required Quality of Conflict of Interest Analysis .....

12 6. The Cumis Test .....

13 7 &DC& Has Failed to Comply With California Law .....

14 8. The Unfair Competition Law (UCL) .....

15 A. The “Unlawful”, “Unfair” and “Fraudulent” Prongs .....

16 B. Standing to Sue - Injury in Fact .....

17 C. No Adequate Remedy at Law .....

18 D. No Class Action Is Required .....

19 E. Public Interest .....

20 9. &DC&’s Business Practices Are “Unlawful”, “Unfair”, and “Fraudulent” .....

21 CONCLUSION .....

22 **TABLE OF AUTHORITIES**

23 **Federal Cases**

23 *Armstrong Cleaners, Inc. v. Erie Ins. Exch.*

24 (S.D. Ind. 2005) 363 F.Supp.2d 797 .....

25 *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton*

26 (9th Cir. 2014) 752 F3d 755 .....

27 *Price v. City of Stockton*

28 (9th Cir. 2004) 390 F.3d 1105 .....

1 **State Cases**

2 *Aerojet-General Corp. v. Transport Indemnity Co.*

3 (1997) 17 Cal.4th 38 .....

4 *Allied Grape Growers v. Bronco Wine Co.*

5 (1988) 203 Cal.App.3d 432 .....

6 *American Mut. Liab. Ins. Co. v. Superior Court*

7 (1974) 38 Cal.App.3d 579 .....

8 *Anderson v. Eaton*

9 (1930) 211 Cal. 113 .....

10 *Assn. of Calif. Ins. Cos v. Jones*

11 (2017) 2 Cal.5th 376 .....

12 *Barquis v. Merchants Collection Assn.*

13 (1972) 7 Cal.3d 94 .....

14 *Blanchard v. State Farm Fire & Casualty Co.*

15 (1991) 2 Cal.App.4th 345 .....

16 *Buss v. Superior Court* (1997)

17 16 Cal.4th 35 .....

18 *Calvert v. State Bar*

19 (1991) 54 Cal.3d 765 .....

20 *Canton Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton*

21 (2003) 109 Cal App 4th 1219 .....

22 *Clayworth v. Pfizer, Inc.*

23 (2010) 49 Cal.4th 758 .....

24 *Community Assisting Recovery, Inc. v. Aegis Ins. Co.*

25 (2001) 92 Cal.App.4th 886 .....

26 *Cox v. Delmas*

27 (1893) 99 Cal. 104 .....

28 *Dynamic Concepts, Inc. v. Truck Ins. Exchange*

(1998) 61 Cal.App.4th 999 .....

*Flatt v. Superior Court*

(1994) 9 Cal.4th 275 .....

1	<i>Foremost Ins. Co. v. Wilks</i>
2	(1988) 206 Cal.App.3d 251 .....
3	<i>Gafcon, Inc. v. Ponsor &amp; Associates</i>
4	(2002) 98 Cal.App.4th 1388 .....
5	<i>Ghazarian v. Magellan Health, Inc.</i>
6	(2020) 53 Cal.App.5th 171 .....
7	<i>Golden Eagle Ins. Co. v. Foremost Ins. Co.</i>
8	(1993) 20 Cal. App. 4th 1372 .....
9	<i>Gregori v. Bank of America</i>
10	(1989) 207 Cal. App. 3d 291, 308 .....
11	<i>Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon &amp; Gladstone</i>
12	(2000) 79 Cal.App.4th 114 .....
13	<i>Haraguchi v. Superior Court</i>
14	(2008) 43 Cal.4th 706 .....
15	<i>Haskel, Inc. v. Superior Court</i>
16	(1995) 33 Cal.App.4th 963 .....
17	<i>Industrial Indem. Co. v. Great American Ins. Co.</i>
18	(1977) 73 Cal.App. 3d 529 .....
19	<i>In re Jordan</i>
20	(1972) 7 Cal.3d 930 .....
21	<i>Ishmael v. Millington</i>
22	(1966) 241 Cal.App.2d 520 .....
23	<i>James 3 Corp. v. Truck Ins. Exchange</i>
24	(2001) 91 Cal.App.4th 1093 .....
25	<i>Jeffry v. Pounds</i>
26	(1977) 67 Cal.App.3d 6 .....
27	<i>Kwikset Corp. v. Superior Court</i>
28	(2011) 51 Cal.4th 310 .....
	<i>Long v. Century Indemnity Co.</i>
	(2008) 163 Cal.App.4th 1460 .....
	<i>Lysick v. Walcom</i>

1	(1968) 258 Cal.App.2d 136 .....
2	<i>Manufacturers Life Insurance Co. v. Superior Court</i>
3	(1995) 10 Cal.4th 257 .....
4	<i>McGee v. Superior Court</i>
5	(1985) 176 Cal.App.3d 221 .....
6	<i>McGill v. Citibank, N.A.</i>
7	(2017) 2 Cal.5th 945 .....
8	<i>Montrose Chemical Corp. v. Superior Court</i>
9	(1993) 6 Cal.4th 287 .....
10	<i>Moradi-Shalal v. Fireman's Fund Ins. Co.</i>
11	(1988) 46 Cal.3d 287 .....
12	<i>Neel v. Magana, Olney, Levy, Cathcart &amp; Gelfand</i>
13	(1971) 6 Cal.3d 176 .....
14	<i>Novak v. Low, Ball &amp; Lynch</i>
15	(1999) 77 Cal.App.4th 278 .....
16	<i>People v. Cappuccio, Inc.</i>
17	(1988) 204 Cal.App.3d 750 .....
18	<i>People ex rel. Dept. of Corporations v. Speedee Oil Change Systems, Inc.</i>
19	(1999) 20 Cal.4th 1135 .....
20	<i>Purdy v. Pacific Automobile Ins. Co.</i>
21	(1984) 157 Cal.App.3d 59 .....
22	<i>San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.</i>
23	(1984) 162 Cal.App.3d 358 .....
24	<i>Santa Clara County Counsel Attorneys Assn. v. Woodside</i>
25	(1994) 7 Cal.4th 525 .....
26	<i>Sheppard, Mullin, Richter &amp; Hampton, LLP v. J-M Manufacturing Co., Inc.</i>
27	(2016) 244 Cal.App.4th 590 .....
28	<i>Spindle v. Chubb/Pacific Indemnity Group</i>
	(1979) 89 Cal.App.3d 706 .....
	<i>State Farm Fire &amp; Cas. Co. v. Superior Court</i>
	(1989) 216 Cal.App.3d 1222 .....



1 *Truck Ins. Exchange v. Superior Court*  
2 (1996) 51 Cal.App.4th 985 .....

3 *United Enterprises, Inc. v. Superior Court*  
4 (2010) 183 Cal. App. 4th 1004 .....

5 *Vega v. Jones, Day, Reavis & Pogue*  
6 (2004) 121 Cal.App.4th 282 .....

7 *Vu v. Prudential Prop. & Cas. Ins. Co.*  
8 (2001) 26 Cal.4th 1142 .....

9 *Woods v. Superior Court*  
10 (1983) 149 Cal.App.3d 931 .....

11 *Zhang v. Superior Court*  
12 (2013) 57 Cal.4th 364 .....

13 **Statutes**

14 Bus. & Prof. Code § 6068(m) .....

15 Bus. & Prof. Code § 17200 .....

16 Bus. & Prof. Code § 17203 .....

17 Bus. & Prof. Code § 17204 .....

18 Bus. & Prof. Code § 17205 .....

19 Civ. Code § 2860 .....

20 Civ. Code § 3368 .....

21 Civ. Code § 3420 .....

22 Ins. Code § 790.03(h) .....

23 **Regulations**

24 Cal. Code Regs. § 2695.4 .....

25 **Rules of Professional Conduct**

26 Rule 1.0.1(e) .....

27 Rule 1.4 .....

28 Rule 1.6 .....

1	Rule 1.7 .....
2	Rule 1.8.6 .....
3	Rule 5-102(B) .....
4	
5	<b>Treatises</b>
6	The Bible: Matthew 6:24 .....
7	Fifty State Survey: <a href="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/">http://dutyto defend.com/50-state-survey-does-rpc-rule-1-7-</a>
8	<a href="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/">disqualify-insurance-defense-counsel-and-require-liability-insurers-to-pay-</a>
9	<a href="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/">independent-counsel-when-reserving-rights-to-deny-coverage/</a> .....
10	Rest.3d Law Governing Lawyers § 20 .....
11	Rest. Liab. Ins. ....
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

## PROLOGUE

“No one can serve two masters.” (Matthew 6:24.)

## INTRODUCTION

This court should grant to &Client& a immediate TRO, followed promptly by a permanent injunction (as set forth in detail in the Application) based upon indisputable facts and clear law compelling &DC& and &InsCo& from clear, systemic violations of California law, including Rules of Professional Conduct (Rule), Rule 1.7 and 1.8.6, the Cumis Rule, the Cumis Test, Insurance Code § 790.03(h), California Code of Regulations, sections 2695 et. seq., and others.

Whenever an injured third party plaintiff sues a defendant with liability insurance, whose insurer agrees to defend the policyholder under a reservation of its rights to later deny coverage to the policyholder and to the injured plaintiff and the insurer appointed lawyers from its panel, here identified as **dependent** counsel (whose counterparts are **independent** counsel), both dependent counsel and the reserving insurer must follow a well defined and strict Cumis protocol.

Dependent counsel must investigate, analyze, and make written disclosure of its analysis to both the reserving insurer and the policyholder. If dependent counsel fails to do so, it may not accept the assignment from the reserving insurer nor accept compensation for any work performed in violation of Canons of Ethics. If dependent counsel does make the required disclosures and correctly concludes that no disqualifying conflict of interest exists or concludes the opposite but secures the informed written consent of both clients (the reserving insurer and the policyholder), it may accept the assignment and compensation.

Here &DC& and &InsCo& did not adhere to the Cumis protocol, did not follow the Cumis Rule, and failed the Cumis Test. Worse, defendants have arrogantly disclaimed that they are subject to any of this well established law, threatening to visit their unlawful conduct on all other similarly situated California policyholders and injured plaintiffs. They should be stopped. Now.

## FACTUAL STATEMENT

&InsCo& issued a policy of liability insurance to &Client&. &Victim& sued &Client& (the **&Victim& Action**). &InsCo& agreed to defend &Client& in the &Victim& Action under a broad reservation of rights to deny coverage. &InsCo& appointed one of its panel counsel, &CD& to defend

1 &Client& in the &Victim& Action. &CD& accepted the assignment from &InsCo& to represent  
2 &Client& in the &Victim& Action. &CD& accepted compensation from &InsCo& to represent  
3 &Client& in the &Victim& Action. &CD& did not comply with the Rules 1.7 or 1.8.6. The attorney-  
4 client relationship between &Client& and &DC& is established by the fact that &DC& has entered an  
5 appearance in this action purporting to represent &Client&'s interests. In a long series of  
6 communications that sought to resolve this situation, &DC& has declared that it has an attorney  
7 client relationship with &InsCo&, that it has and will continue to communicate confidential  
8 information to &InsCo&, has and intends to continue to accept compensation from &InsCo& to  
9 purport to represent &Client& in the &Victim& action, and that it never investigates, analyzes, or  
10 discloses in writing its analysis of potential conflicts of interest created by any liability insurer's  
11 reservation of rights.

## 12 **DISCUSSION**

### 13 **1. The Attorney-Client Relationship Is Fiduciary, Including Duties of** 14 **Undivided Loyalty, Disclosure, and Confidentiality**

15 &DC& owes fiduciary duties to &Client&. "The relation between attorney and client is a  
16 fiduciary relation of the very highest character, and binds the attorney to most conscientious fidelity."  
17 (*Cox v. Delmas* (1893) 99 Cal. 104, 123.) "[A]n attorney is precluded from assuming any relation  
18 which would prevent him from devoting his entire energies to his client's interests." (*Anderson v.*  
19 *Eaton* (1930) 211 Cal. 113, 116 (*Anderson*) (citations omitted.))

20 &DC& owes a duty of undivided loyalty to &Client&. "An attorney's duty of loyalty to a  
21 client is not one that is capable of being divided, at least under circumstances where the ethical  
22 obligation to withdraw from further representation of one of the parties is mandatory, rather than  
23 subject to disclosure and client consent." (*Flatt v. Superior Court* (1994) 9 Cal.4th 275, 282 (*Flatt*).)

24 &DC& owes a duty of disclosure to &Client&. "It is the duty of an attorney to . . . respond  
25 promptly to reasonable status inquiries of clients and to keep clients reasonably informed. . . ." (Bus.  
26 & Prof. Code § 6068(m); see also, (*Neel v. Magana, Olney, Levy, Cathcart & Gelfand* (1971) 6  
27 Cal.3d 176, 188-89 (*Neel*).) "Adequate communication with clients is an integral part of competent  
28 professional performance as an attorney." (*Calvert v. State Bar* (1991) 54 Cal.3d 765, 782.) "[T]he

1 existence of a conflict of interest should be identified early in the proceedings so it can be treated  
2 effectively before prejudice has occurred to either party.” (*San Diego Navy Fed. Credit Union v.*  
3 *Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 371, fn.7 (*Cumis*).)

4       &DC& may not communicate to &InsCo& confidential information received by &DC& from  
5 &Client& that may impact &Client&’s insurance coverage with &InsCo&. “It is the duty of an  
6 attorney to . . . maintain inviolate the confidence, and at every peril to himself or herself to preserve  
7 the secrets, of his or her client.” (Bus. & Prof. Code. § 6068(e)(1).) “A lawyer shall not reveal  
8 information protected from disclosure by Business and Professions Code section 6068, subdivision  
9 (e)(1) unless the client gives informed consent.” (Rule 1.6.) “[T]he protection of confidences and  
10 secrets is not a rule of mere professional conduct, but instead involves public policies of paramount  
11 importance which are reflected in numerous statutes.” (*In re Jordan*, (1972) 7 Cal.3d 930, 940-41.)  
12 “An insurer does not have the right to receive any information of the insured that is protected by  
13 attorney–client privilege, work-product immunity, or a defense lawyer’s duty of confidentiality under  
14 rules of professional conduct, if that information could be used to benefit the insurer at the expense of  
15 the insured.” (Rest. Liab. Ins. § 11(2).)

16       [Discuss facts showing &DC& has violated these duties]

## 17       **2. Rule 1.7 Prohibits Conflicted Dual Representation**

18       Rule 1.7 prohibits &DC& from representing dual client, both &InsCo& and &Client&, when  
19 certain conflicts of interest loom, if: 1) the clients are directly adverse; **or** 2) &DC&’s representation  
20 of &Client& risks being materially limited. &DC& may ethically represent &Client& only if : 1)  
21 &DC& reasonably believes that it represent both; **and**; 2) there is no legal bar; **and** 3) the  
22 representation “does not involve” &InsCo& reservation against &Client&. &DC&’s reasonable belief  
23 alone is insufficient. The Cumis Test, discussed below, tracks these requirements: &DC& may not  
24 ethically represent &Client& unless &InsCo&’s reservation of rights it limited to grounds that have  
25 “nothing to do with” issues raised in this coverage action. (*Long v. Century Indemnity Co.* (2008) 163  
26 Cal.App.4th 1460, 1470 (*Long*).)

27       California is a two-client state. “In the insured-insurer relationship, . . . the attorney has two  
28 clients.” (*American Mut. Liab. Ins. Co. v. Superior Court* (1974) 38 Cal.App.3d 579, 591-92.) “The

1 signed defense guidelines, with the negotiated hourly rate, and subsequent correspondence, along  
2 with the subsequent dealings between the [dependent counsel and the insurer], reflected an agreement  
3 between them and an attorney-client relationship as a matter of law.” (*Gulf Ins. Co. v. Berger, Kahn,*  
4 *Shafton, Moss, Figler, Simon & Gladstone* (2000) 79 Cal.App.4th 114, 127 (*Berger, Kahn*).)  
5 Independently of the existence of an attorney-client relationship, &DC& must comply with Rule 1.7  
6 because &InsCo& qualifies as “another person who may be affected substantially by resolution of the  
7 matter.” (Rule 1.7, Comment [4].)

8 [Discuss facts showing that &InsCo& is &DC&’s client.]

### 9 **3. Rule 1.8.6 Prohibits Insurer Compensation**

10 Rule 1.8.6 prohibits &DC& from charging or accepting compensation for representing  
11 &Client& from &InsCo& unless &DC& obtains the policyholder’s informed written consent. Any  
12 violation of these Rules renders the contract between &InsCo& and &DC& void as against public  
13 policy. “A lawyer engaging in clear and serious violation of duty to a client may be required to forfeit  
14 some or all of the lawyer’s compensation for the matter.” (*Sheppard, Mullin, Richter & Hampton,*  
15 *LLP v. J-M Manufacturing Co., Inc.* (2016) 244 Cal.App.4th 590, 614-17: see also *Jeffry v. Pounds*  
16 (1977) 67 Cal.App.3d 6, 11, denying recovery of any fees for work performed after a conflict arose.

17 [Discuss facts showing &DC& has accepted compensation.]

### 18 **4. The Two Part Cumis Rule**

19 In the landmark Cumis case in 1984, the court entered a two part ruling, one recognizing  
20 dependent counsel’s ethical obligations to the policyholder, and the second requiring a reserving  
21 insurer to pay for independent counsel in appropriate circumstances. Part One: “Canons of Ethics  
22 impose upon lawyers hired by the insurer an obligation to explain to the insured and the insurer the  
23 full implications of joint representation in situations where the insurer has reserved its rights to deny  
24 coverage.” (*Cumis, supra*, 162 Cal.App.3d at 375.) Part Two: “If the insured does not give an  
25 informed consent to continued representation, counsel must cease to represent both.” (*Ibid.*)

### 26 **5. The Cumis Quality of Conflict of Interest Analysis**

27 Dependent counsel must thoroughly investigate and analyze potential conflicts of interest in  
28 order to obtain a client’s “informed written consent” to ethical representation. Rule 1.0.1(e) defines

1 informed consent to mean the policyholder’s “agreement to a proposed course of conduct after the  
2 lawyer has communicated and explained (i) the relevant circumstances and (ii) the material risks,  
3 including any actual and reasonably foreseeable adverse consequences of the proposed course of  
4 conduct.” Rule 1.4 provides that &DC& must inform &Client& of “any decision or circumstance  
5 with respect to which disclosure or the client’s informed consent is required . . . promptly complying  
6 with reasonable requests for information . . . to the extent reasonably necessary to permit the client to  
7 make informed decisions regarding the representation.”

8         The purpose of dependent counsel’s written disclosure is to warn the policyholder to at least  
9 consider distrusting a reserving insurer and its dependent counsel. The policyholder is entitled to “an  
10 opportunity to take any steps that it may deem reasonable or necessary in response - including  
11 whether to accept defense at the insurer’s hands and under the insurer’s control . . . or, instead, to  
12 defend itself as it chooses.” (*Buss v. Superior Court* (1997) 16 Cal.4th 35, 61, fn.27.)

13         The quality of disclosure required is extensive. “There is no talismanic rule that allows a facile  
14 determination of whether a disqualifying conflict of interest exists. Instead, ‘[t]he potential for  
15 conflict requires a careful analysis of the parties’ respective interests to determine whether they can be  
16 reconciled . . . or whether an actual conflict of interest precludes insurer-appointed defense counsel  
17 from presenting a quality defense for the insured.’” (*Berger, Kahn, supra*, 79 Cal.App.4th at 131  
18 quoting *Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007-08  
19 (*Dynamic Concepts*); see also, *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980;  
20 *Armstrong Cleaners, Inc. v. Erie Ins. Exch.* (S.D. Ind. 2005) 363 F.Supp.2d 797, 816 (“fact- intensive  
21 and case-specific nature of the inquiry.”).)

22         &DC& has a duty to initiate “full and fair disclosure to the [client] of all facts which  
23 materially affect his rights and interests.” (*Neel, supra*, 6 Cal.3d at 188-89.) &DC& also owes a duty  
24 to &Client& “under Civil Code, section 2860, to disclose potential conflicts of interest.” (*Canton*  
25 *Poultry & Deli, Inc. v. Stockwell, Harris, Widom & Woolverton* (2003) 109 Cal App 4th 1219, 1224.)

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

## 27         **6. The Cumis Test**

1 In California<sup>1</sup>, “not every conflict of interest triggers an obligation on the part of the insurer to  
2 provide the insured with independent counsel at the insurer’s expense.” (*James 3 Corp. v. Truck Ins.*  
3 *Exchange* (2001) 91 Cal.App.4th 1093, 1101; see also, *Dynamic Concepts, supra* 61 Cal.App.4th at  
4 1006.)

5 Identifying reservations of rights that do or do not require &DC& to obtain &Client&’s  
6 informed written consent is well established. “It is only when the basis for the reservation of rights is  
7 such as to cause assertion of **factual or legal theories** which undermine or are contrary to the  
8 positions to be asserted in the liability case that a conflict of interest sufficient to require independent  
9 counsel, to be chosen by the insured, will arise.” (*State Farm Fire & Casualty Co. v. Superior Court*  
10 *(Durant)* (1989) 216 Cal.App.3d 1222, 1231, fn.3 (citations omitted, emphasis added).)

11 However, the California test has been expressed by fourteen published opinions in a variety of  
12 ways, both negatively and positively. *Expressed negatively*, dependent counsel has no disqualifying  
13 conflict of interest and the liability insurer that reserves its rights *is not required* to pay for  
14 independent counsel if each ground upon which the insurer may later deny coverage: 1) has “nothing  
15 to do with the issues being litigated in the underlying action” (*Long, supra*, 163 Cal.App.4th at 1470  
16 (citation and ellipsis omitted)); 2) “is logically unrelated to the issues of consequence in the  
17 underlying case” (*Montrose Chemical Corp. v. Superior Court* (1993) 6 Cal.4th 287, 302; 3) “is  
18 independent of the issues in the underlying case;” (*Blanchard v. State Farm Fire & Casualty Co.*  
19 (1991) 2 Cal.App.4th 345, 350; see also, *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th  
20 1388, 1422 (*Gafcon*)); or 4) “is extrinsic to the issues in the underlying action.” (*Gafcon, supra*, 98  
21 Cal.App.4th at 1422.)

22 *Expressed positively*, dependent counsel has no disqualifying conflict of interest and the  
23 liability insurer that reserves its rights *is required* to pay for independent counsel: 1) “whenever [the  
24 insurer’s and policyholder’s] common lawyer’s representation of the one is rendered less effective”  
25

---

26 <sup>1</sup> About two-thirds of American jurisdictions follow the “per se” rule that **all** reservations of  
27 rights require a reserving insurer to pay for independent counsel See, [http://dutyto defend.com/  
28 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/](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/)



1 (*Spindle v. Chubb/Pacific Indemnity Group* (1979) 89 Cal.App.3d 706, 713); 2) if coverage issues  
2 “overlap” issues in the third party liability action (*United Enterprises, Inc. v. Superior Court* (2010)  
3 183 Cal. App. 4th 1004, 1010); 3) if any coverage question depends “upon the insured’s own  
4 conduct” (*Foremost Ins. Co. v. Wilks* (1988) 206 Cal.App.3d 251, 261); 4) if “[i]nsurance counsel had  
5 [an] incentive to attach liability to [the insured]” (*Berger, Kahn, supra*, 79 Cal.App.4th at 131; 5) if  
6 “the ground of noncoverage was based on the nature of the insured’s conduct” (*McGee v. Superior*  
7 *Court* (1985) 176 Cal.App.3d 221, 226); 6) if “the outcome of the coverage issue can be controlled by  
8 the way counsel defends the case” (*Novak v. Low, Ball & Lynch* (1999) 77 Cal.App.4th 278, 282; Civ.  
9 Code § 2860(a)); 7) “can be controlled by counsel first retained by the insurer for the defense of the  
10 claim” (Civ. Code § 2860(b)); 8) “the way counsel retained by the insurance company defends the  
11 action will affect an underlying coverage dispute between the insurer and the insured” (*James 3 Corp.*  
12 *v. Truck Ins. Exchange* (2001) 91 Cal.App.4th 1093, 1108); 9) “the basis for the reservation of rights  
13 is such as to cause assertion of factual or legal theories which undermine the positions to be asserted  
14 in the liability case” (*State Farm Fire & Cas. Co. v. Superior Court* (1989) 216 Cal.App.3d 1222,  
15 1226, fn.3.) and 10) “where the issue creating the conflict is one which must be decided in the  
16 underlying action.” (*Truck Ins. Exchange v. Superior Court* (1996) 51 Cal.App.4th 985, 994; see also,  
17 *Golden Eagle Ins. Co. v. Foremost Ins. Co.* (1993) 20 Cal. App. 4th 1372, 1395-1396.)

18 The authoritative A.L.I. Restatement of Liability Insurance expresses the Cumis Test as  
19 follows: “When . . . there are **facts at issue that are common** to the legal action . . ., the insurer must  
20 provide an independent defense of the action.” (Rest. Liab. Ins. § 16.)

## 21 **7. &DC& Has Failed to Comply With Rule 1.7**

22 [Discuss facts showing &DC& failed to investigate, adequately analyze, make written  
23 disclosure, or seek or obtain &Client&’s informed written consent.]

## 24 **8. The Unfair Competition Law (UCL)**

25 Any person who has suffered injury in fact and has lost money as a result of any unlawful,  
26 unfair or fraudulent business act or practice may enjoin the practice pursuant to the Unfair  
27 Competition Law. Under the statute, “unfair competition” means “any unlawful, unfair or fraudulent  
28 business act or practice.” (Bus. & Prof. Code § 17200.) “Any person who engages, has engaged, or

1 proposes to engage in unfair competition may be enjoined . . . to prevent the use or employment by  
2 any person of any practice which constitutes unfair competition.” (Bus. & Prof. Code § 17203.)  
3 “Actions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and has lost  
4 money . . . as a result of the unfair competition.” (Bus. & Prof. Code § 17204.) “[T]he remedies . . .  
5 provided by this chapter are cumulative to each other and to the remedies . . . available under all other  
6 laws of this state.” (Bus. & Prof. Code § 17205.) “Preventive relief is given by prohibiting a party  
7 from doing that which ought not to be done.” (Civ. Code § 3368 see also, Civ. Code § 3420.) The  
8 three prongs of the UCL, “Unlawful”, “Unfair”, and “Fraudulent” “are alternate grounds for relief.”  
9 (*Zhang v. Superior Court* (2013) 57 Cal.4th 364, 370 (*Zhang*).)

10 “The ‘unfair competition statutes have always been framed in broad, sweeping language,  
11 precisely to enable judicial tribunals to deal with the innumerable new schemes which the fertility of  
12 man’s invention would contrive.’ (*Barquis v. Merchants Collection Assn.* (1972) 7 Cal.3d 94, 112  
13 (quotation marks omitted).) ‘The statute [section 17200] imposes strict liability. It is not necessary to  
14 show that the defendant intended to injure anyone.’” (*Community Assisting Recovery, Inc. v. Aegis*  
15 *Ins. Co.* (2001) 92 Cal.App.4th 886, 891.)

16 Clarifying that *Moradi-Shalal v. Fireman’s Fund Ins. Co.* (1988) 46 Cal.3d 287 **does not bar**  
17 policyholders from seeking non-monetary **injunctive relief** pursuant to the UCL, our Supreme Court  
18 in *Manufacturers Life Insurance Co. v. Superior Court* (1995) 10 Cal.4th 257, 263 state that “the  
19 Legislature intended that rights and remedies available under those statutes were to be cumulative to  
20 the powers the Legislature granted to the Insurance Commissioner to enjoin future unlawful acts and  
21 impose sanctions in the form of license and certificate suspension or revocation when a member of  
22 the industry violates any applicable statute, rule, or regulation.”

### 23 **A. The “Unlawful”, “Unfair” and “Fraudulent” Prongs**

24 The “Unlawful” prong may “borrow” from other judicial, statutory, or regulatory law. “By  
25 proscribing ‘any unlawful’ business act or practice, the UCL ‘borrows’ rules set out in other laws and  
26 makes violations of those rules independently actionable. However, a practice may violate the UCL  
27 even if it is not prohibited by another statute.” (*Zhang, supra*, 57 Cal.4th at 370 (citations and  
28 quotation marks omitted).)

1 Conduct which violates the **Unfair** Insurance Claims Settlement Practices Act clearly  
2 qualifies as a basis for injunctive relief which is “unfair”. (See, *Assn. of Calif. Ins. Cos v. Jones*  
3 (2017) 2 Cal.5th 376, 386-388 (emphasis added).)

4 As discussed above, &DC& owes fiduciary obligations to &Client&. A lawyer has “an  
5 affirmative obligation to make full disclosure, and the non-disclosure itself is a ‘fraud.’” (*Id.* at 189.)  
6 “Active concealment or suppression of facts [even] by a nonfiduciary ‘is the equivalent of a false  
7 representation, i.e., actual fraud.’” (*Vega v. Jones, Day, Reavis & Pogue* (2004) 121 Cal.App.4th 282,  
8 291 (ellipsis omitted).)

9 [Discuss facts showing that defendants’ conduct is unlawful, unfair, and fraudulent.]

#### 10 **B. Standing to Sue - Injury in Fact**

11 &Client& has standing to sue defendants because is has suffered injury in fact and has lost  
12 money. “Actions for relief . . . shall be prosecuted . . . by a person who has suffered injury in fact and  
13 has lost money.” (Bus. & Prof. Code § 17204.) In (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th  
14 310, 321 (*Kwikset*), the Supreme Court stated that “injury in fact is not a substantial or  
15 insurmountable hurdle; as then Judge Alito put it: ‘Injury-in-fact is not Mount Everest’.” The court  
16 clarified that Proposition 64 changed the statute to require that a plaintiff must be a person who had  
17 business dealings with a defendant who suffered some economic injury caused by an unfair business  
18 practice, of which there are “innumerable ways in which economic injury from unfair competition  
19 may be shown. (*Id.* at 323.)

20 The recent case of *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171, the court  
21 stated that under the UCL, “private standing is limited to any ‘person who has suffered injury in fact  
22 and has lost money or property’ as a result of unfair competition.” (quoting, *Clayworth v. Pfizer, Inc.*  
23 (2010) 49 Cal.4th 758, 788.) The purpose of this rule is ‘to confine standing to those actually injured  
24 by a defendant’s business practices and to curtail the prior practice of filing suits on behalf of  
25 “clients who have not used the defendant’s product or service, viewed the defendant’s advertising, or  
26 had any other business. (See also, *Hall v. Time Inc.* (2008) 158 Cal.App.4th 847, 854.) *Ghazarian*  
27 held that paying an attorney in response to unfair competition “is sufficient to establish standing  
28 under the UCL.”

1 [Discuss facts showing that &Client& had direct business dealing with both defendants and  
2 that it paid a sum of money caused by the defendants' conduct.]

### 3 **C. No Adequate Remedy at Law**

4 An award of monetary damages will not adequately give &Client& the relief to which it is  
5 entitled. First, &Client& seeks an injunction in order to compel a change in behavior of the  
6 defendants. No award of monetary damages guarantees any change in behavior. Second, &Client&  
7 does not seek to recover monetary damages or attorneys fees on its claim for injunctive relief, as both  
8 are barred by the statute. Therefore the relief sought on &Client&'s injunctive relief cause of action is  
9 not redundant of it other causes of action seeking monetary damages.

10 A remedy against &DC& under the Cumis Rule is behavioral, not compensatory. "If the  
11 insured does not give an informed consent to continued representation, counsel must cease to  
12 represent both." (*Cumis, supra*, 162 Cal.App.3d at 375.) &DC& has violated the Cumis Rule and  
13 failed the Cumis Test. Again, "the Legislature intended that rights and remedies available under those  
14 statutes were to be cumulative to the powers the Legislature granted . . . to enjoin future unlawful acts  
15 and impose sanctions. . . when a member of the industry violates any applicable statute, rule, or  
16 regulation." (*Manufacturers Life, supra*, 10 Cal.4th at 263.)

17 [Discuss facts showing that &Client& an award of damages at some time in the future will not  
18 correct the unlawful, unfair and fraudulent conduct causing harm daily, such as: Compliance with the  
19 Canons of Ethics is designed to be prophylactic, not remedial nor punitive. (See, *Santa Clara County*  
20 *Counsel Attorneys Assn. v. Woodside* (1994) 7 Cal.4th 525, 546; *Gregori v. Bank of America* (1989)  
21 207 Cal. App. 3d 291, 308-309.) For this court to allow defendants to continue their unlawful, unfair,  
22 and fraudulent conduct in the future in the hopes of unwinding the consequences is like trying to  
23 reconstitute a whole, viable egg from a baked cake.]

### 24 **D. No Class Action Is Required**

25 &Client& may obtain injunctive relief as a single victim without showing harm to others or  
26 filing a class action. In *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945, 959-60, the Supreme Court  
27 held that a plaintiff seeking UCL injunctive relief need not file a class action, stating that a class  
28 action requirement "would largely eliminate the ability of a private plaintiff to pursue such relief."

1 (See also, *Ghazarian v. Magellan Health, Inc.* (2020) 53 Cal.App.5th 171.)

2 A business practice can violate the UCL even though it does not affect more than a single  
3 victim. (See *Allied Grape Growers v. Bronco Wine Co.* (1988) 203 Cal.App.3d 432, 453.)  
4 “[F]airness, as based upon an industry-wide custom and practice, is not a defense. . . . Irrespective of  
5 the asserted fairness of the practice, it is in fact unlawful and therefore enjoined.” (*People v.*  
6 *Cappuccio, Inc.* (1988) 204 Cal.App.3d 750, 763; see also, *Price v. City of Stockton* (9th Cir. 2004)  
7 390 F.3d 1105, 1117 (an injunction that benefits nonparties is permissible).)

#### 8 **E. The Public Interest**

9 This application for a temporary restraining order serves the public interest. “This ‘public  
10 interest’ inquiry generally addresses the impact upon nonparties of granting or withholding injunctive  
11 relief.” (*League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Connaughton* (9th  
12 Cir. 2014) 752 F.3d 755, 766). This motion makes a small ask (obeying the law) with potentially huge  
13 returns to the litigating public.

#### 14 **CONCLUSION**

15 [Discuss facts and law.]

16 October \_\_, 2020

17  
18  
19  
20 \_\_\_\_\_  
21 By:  
22 Attorneys for Plaintiff,  
23 & Client &  
24  
25  
26  
27  
28

1  
2  
3  
4  
5  
6  
7  
8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF LOS ANGELES  
10

11 &Client& ) Case No.  
12 )  
13 Plaintiff, ) (Proposed  
14 vs. ) TEMPORARY RESTRAINING ORDER AND  
15 &DC&, &InsCo& and DOES 1 to 250, ) ORDER TO SHOW CAUSE WHY A  
16 Inclusive, ) PERMANENT INJUNCTION SHOULD NOT  
17 ) BE ISSUED  
18 )  
19 Defendants. ) Action Filed: &Date&  
20

21  
22  
23  
24  
25  
26  
27  
28

**ORDER TO SHOW CAUSE WHY A  
PERMANENT INJUNCTION SHOULD NOT BE ISSUED**

The application for an order to show cause by Plaintiff, &Client& came on regularly for hearing on &Date& in Department \_\_\_ of the Los Angeles Superior Court, the Hon. \_\_\_, presiding. &IC& appeared for Plaintiff, &Client&. &DC& appeared for defendants, &DC&. &Blank& appeared for defendant, &InsCo&. Having considered the moving and opposing papers and the oral argument of counsel, the court hereby grants the application.

Defendants, &DC& is ordered to appear in Department \_\_\_ of the Los Angeles Superior Court at 8:30 a.m. and show cause why it and as well as all officers, directors, shareholders, members, employees and agents, and all persons acting on their behalf should not be permanently enjoined

Plaintiff's Points and Authorities Temporary Restraining Order

1 from:

- 2 1) representing &Client& in the &Victim& action;
- 3 2) accepting compensation from &InsCo& to represent &Client& in the &Victim& action;
- 4 3) representing any policyholder in any third party liability action pending in California on behalf  
5 of any liability insurer that has issued a reservation of rights without first complying with Rule  
6 1.7; and
- 7 4) accepting compensation from any liability insurer that has issued a reservation of rights to  
8 represent any policyholder in any third party liability action pending in California without first  
9 complying with Rule 1.8.6.

10 Defendant, &InsCo& is ordered to appear in Department \_\_ of the Los Angeles Superior  
11 Court at 8:30 a.m. and show cause why it and as well as all officers, directors, shareholders,  
12 members, employees and agents, and all persons acting on their behalf should not be permanently  
13 enjoined from:

- 14 1) paying compensation to &DC& to represent &Client& in the &Victim& action;
- 15 2) appointing any counsel to represent any policyholder in any third party liability action when it  
16 has issued a reservation of rights unless its chosen counsel first complies with Rule 1.7;
- 17 3) compensating any counsel to represent any policyholder in any third party liability action  
18 when it has issued a reservation of rights unless its chosen counsel first complies with Rule  
19 1.8.6.

20 &Client& is ordered to serve this order to show cause on Defendants, &DC& and &InsCo&  
21 by \_\_\_\_\_ no later then \_\_\_\_\_, and deliver to this court a proof of service of this  
22 Order to Show Cause.

23 Defendants, &DC& and &InsCo& shall file and serve their opposing papers by  
24 \_\_\_\_\_. &Client shall file and serve its reply brief by \_\_\_\_\_.

1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8  
9  
0  
1  
2  
3  
4  
5  
6  
7  
8

2  
3  
4  
5

6  
7  
8  
9  
0

- 1
- 2
- 3

- 4  
5  
6  
7  
8  
9  
0  
1

2  
3

- 4  
5  
6  
7  
8



1 pending in California when it has issued a reservation of rights unless its chosen counsel first  
2 complies with Rule 1.8.6.

3 October \_\_, 2020

4  
5 \_\_\_\_\_  
6 Judge of the Superior Court  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28