**The Cumis Protocol**

**Introduction**

California law is clear. A **reservation of rights** is a liability insurer’s agreement to defend its policyholder against a third party liability dispute coupled with a conditional refusal to indemnify its policyholder for an adverse judgment, depending on how the case comes out. The **Cumis Rule** requires that when a reserving insurer appoints its chosen defense counsel (**dependent counsel**) to defend the interests of the insurer and to defend the policyholder, that dependent counsel must comply with Rules of Professional Conduct (**Rule**), Rule 1.7, prohibiting the representation of dual clients with certain conflicting interests.

**Rule 1.7**

Rule 1.7 prohibits a lawyer from representing dual clients with disqualifying conflicts of interests unless the clients give informed written consent. Disqualifying conflicts exist if; 1) the clients are directly adverse; 2) there is a significant risk that the lawyer’s relationship (or the lawyer’s own interest) will materially limit the representation. Dependent counsel may represent both clients only if s/he reasonably believes s/he can provide competent and diligent representation of both clients, and the representation is not prohibited by law, and the insurer is not asserting a claim against the policyholder.

The case law describing the **Cumis Test** determines whether Rule 1.7 disqualifies dependent counsel from representing a policyholder and a reserving insurer because the representation is prohibited by law and the insurer is asserting a claim against the policyholder.

**The Cumis Rule**

The Cumis Rule has two parts, one for dependent counsel and a second for a reserving insurer.

First, dependent counsel must always comply with Rule 1.7. “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.” (*San Diego Navy Fed. Credit Union v. Cumis Ins. Society, Inc.* (1984) 162 Cal.App.3d 358, 375.) If dependent counsel has a disqualifying conflict of interest and the policyholder does not give informed written consent to dependent counsel’s dual representation of both the insurer and the policyholder, then dependent counsel must not accept or continue the representation. “If the insured does not give an informed consent . . . , counsel must cease to represent both.” (*Ibid*.)

Second, absent the policyholder’s informed written consent, the insurer must fulfill its duty to defend by paying for defense counsel selected and directed by the policyholder, known as **in**dependent counsel. “Moreover, . . . where there are divergent interests brought about by the insurer’s reservation of rights, . . . the insurer must pay the reasonable cost for hiring independent counsel by the insured. The insurer may not compel the insured to surrender control of the litigation.” (*Ibid.*)

**The Cumis Test**

The Cumis Test is described by a large body of law that identifies what constitutes a disqualifying conflict of interest which requires dependent counsel to quit. “Cumis can be read to suggest that this conflict arises whenever the insurer asserts a reservation of its right to assert noncoverage, while still providing a defense to the liability action. This interpretation of Cumis would be erroneous. It is only when the basis for the reservation of rights is such as to cause assertion of **factual or legal theories** which undermine or are contrary to the positions to be asserted in the liability case that a conflict of interest sufficient to require independent counsel, to be chosen by the insured, will arise.” (*State Farm Fire & Casualty Co. v. Superior Court* (*Durant*) (1989) 216 Cal.App.3d 1222, 1231, fn.3 (*Durant*) (citations omitted, emphasis added).)[[1]](#footnote-0)

The Restatement of Liability Insurance § 16, The Obligation to Provide an Independent Defense, concurs with the holding in *Durant*: “When an insurer with the duty to defend provides the insured notice of a ground for contesting coverage under § 15 [reservation of rights] and there are facts at issue that are common to the legal action for which the defense is due and to the coverage dispute, such that the action could be defended in a manner that would benefit the insurer at the expense of the insured, the insurer must provide an independent defense of the action.”

**The Required Quality of Cumis Analysis**

Rules 1.0.1 and 1.4 require disclosure by dependent counsel to the policyholder of all information needed so that the policyholder can protect oneself from the reserving insurer and dependent counsel. The law requires that dependent counsel take the initiative to conduct a thorough investigation and objective analysis of all potential conflicts of interest between its two clients, the insurer and the policyholder. The investigation and analysis must include reviewing the third party liability complaint, the policy, the insurer’s reservation of rights letter(s), the logical commonality of coverage defenses and issues in the liability dispute, factual questions that might sustain or defeat coverage, the nature of the available evidence, the risk of policyholder prejudice from discovery of the evidence which tends to support or defeat coverage challenges, and thhe possible impact of a confidentiality order to protect the policyholder from prejudicial disclosure. (See, *Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980.)

**The Cumis Protocol - Always, Always, Always, Sometimes**

Taken together, The Cumis Rule, the Cumis Test, and the Required Quality of Cumis Analysis create a required Cumis Protocol. Whenever a liability insurer agrees to defend its policyholder under any reservation of rights and seeks to appoint dependent counsel to conduct the defense, dependent counsel must follow this Cumis Protocol:

1. Dependent counsel must **Always Thoroughly Investigate** potential conflicts of interest raised by an insurer reservation of rights, or otherwise;

2. Dependent counsel must **Always Thoroughly Analyze** potential conflicts of interest raised by an insurer reservation of rights, or otherwise;

3. Dependent counsel must **Always Make Written Disclosure** to the policyholder of its analysis of potential conflicts of interest raised by an insurer’s reservation of rights, or otherwise; and

4. Dependent counsel must **Sometimes Quit**. Dependent counsel must refuse or withdraw from the representation unless: 1) its analysis correctly determines that no disqualifying conflict of interest exists because there are no issues of fact or law common to the liability dispute and the each coverage defense reserved; or 2) the policyholder gives informed written consent.

1. About fourteen additional authorities support the Cumis Test. See, *The Cumis Test* at DutytoDefend.com. [↑](#footnote-ref-0)