

Simple Truths

Insurer's Duty to Defend

“An insurer must defend its insured against claims that create a potential for indemnity under the policy.” (*Scottsdale Ins. Co. v. MV Transp.* (2005) 36 Cal.4th 643, 654.) “[T]he insurer’s unconditional defense . . . constitutes . . . an estoppel of the insurer to” deny coverage. (*Miller v. Elite Ins. Co.* (1980) 100 Cal.App.3d 739, 754.)

Insurer's Reservation of Rights

“Where an insurer reserves its right to claim noncoverage under the policy, notice of the reservation must be given to the insured [of] the reservation.” (*Ibid.*) “[E]very insurer shall immediately, but in no event more than forty (40) calendar days later, accept or deny the claim, in whole or in part . . . in writing and shall provide . . . the factual and legal bases for each reason given for such denial.” (Cal. Code Regs. § 2695.7(b)(1).)

Insurer's Reservation Always Creates Conflicts of Interest

“When coverage is disputed, the interests of the insured and the insurer are always divergent.” (*San Diego v. Cumis Ins. Soc. Inc.* (1984) 162 Cal.App.3d 358, 375.)

Dependent Counsel's Relationship With the Insurer

“As a practical matter . . ., the insurer’s attorneys may have closer ties with the insurer and a more compelling interest in protecting the insurer’s position, whether or not it coincides with what is best for the insured” (*Purdy v. Pacific Auto. Ins. Co.*(1984) 157 Cal.App.3d 59, 76), “Insurance companies hire relatively few lawyers and concentrate their business. A lawyer who does not look out for the Carrier’s best interest might soon find himself out of work.” (*Cumis, supra*, 162 Cal.App.3d at 364). “[D]efense counsel and the insurer frequently have a longstanding, if not collegial, relationship” (*Gulf Ins. Co. v. Berger, Kahn etc.* (2000) 79 Cal.App.4th 114, 131 (*Berger, Kahn*)). “In California, an attorney may usually, under minimum standards of professional ethics, represent dual interests as long as full consent and full disclosure occur.” (*Lysick v. Walcom* (1968) 258 Cal.App.2d 136, 147 (*Lysick*); See, also *Ishmael v. Millington* (1966) 241 Cal.App.2d 520, 528; *Industrial Indem. Co. v. Great American Ins. Co.* (1977) 73 Cal.App. 3d 529, 537.) Thus, insurer appointed lawyers are known as “dependent counsel.”

Canons of Ethics Impact Dependent Counsel

“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.” (*Id.* at 375.) “A lawyer shall not, without informed written consent . . . [start to] represent a [policyholder] if there is a significant risk the lawyer’s representation of the [policyholder] will be materially limited by the lawyer’s responsibilities to or relationships with . . . a third person”, such as an insurer. (Canons of Ethics, Rule 1.7(b).)

Dependent Counsel's Relationship With the Policyholder

“One of the principal obligations which bind an attorney is that of fidelity, the maintaining inviolate the confidence reposed in him by those who employ him, and at every peril

to himself to preserve the secrets of his client. This obligation is a very high and stringent one. It is also an attorney's duty to protect his client in every possible way, and it is a violation of that duty for him to assume a position adverse or antagonistic to his client without the latter's free and intelligent consent given after full knowledge of all the facts and circumstances. [A]n attorney is precluded from assuming any relation which would prevent him from devoting his entire energies to his client's interests." (*Anderson v. Eaton* (1930) 211 Cal. 113, 116.)

Dependent Counsel Has the Burden of Conflict Analysis

"[T]he law places all of the burden of disclosure and consent on the attorney, where it belongs. ¶ Thus, the burden was on (the insurer appointed lawyer) to avoid creating a conflict." (*State Farm v. Federal Ins. Co.* (1999) 72 Cal.App.4th 1422, 1435.) "The conflict situation [placed] a duty squarely on the attorney for the insurer to withdraw from representation or make full disclosure to both clients in the event of a conflict between them, or risk exposure to liability for harm resulting from his failure so to act, as well as to a charge of professional misconduct." (*Purdy v. Pacific Auto. Ins. Co.* (1984) 167 Cal.App.3d 59, 77.)

The Attorney Must Do a Careful Conflict of Interest Analysis

"The potential for conflict requires a careful analysis of the parties' respective interests." (*Dynamic Concepts, Inc. v. Truck Ins. Exchange* (1998) 61 Cal.App.4th 999, 1007). "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.)

A Detailed Analysis Is Required

A proper analysis should include: "(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." (*Haskel, Inc. v. Superior Court* (1995) 33 Cal.App.4th 963, 980.) "An insurer does not have the right to receive any information of the insured that is protected by attorney-client privilege, work-product immunity, or a defense lawyer's duty of confidentiality under rules of professional conduct, if that information could be used to benefit the insurer at the expense of the insured." (Restatement of Liability Insurance § 11(2).)

Insurers and Dependent Counsel Must Answer Questions

"Upon receiving any communication from a [policyholder] . . . every [insurer] shall immediately . . . furnish the [policyholder] with a complete response." (Cal. Code Regs. § 2695.5(b).) "It is the duty of an attorney: To respond promptly to reasonable status inquiries of clients." (Bus. & Prof. Code § 6068(m).) Dependent counsel "owed a duty to [the policyholder], under Civil Code, section 2860, to disclose potential conflicts of interest between [the insurer] and [the policyholders]." (*Canton Poultry & Deli, Inc. v. Stockwell, Harris etc.* (2003) 109 Cal

App 4th 1219, 1224.)

Liability for Breach

“[W]hen an attorney attempts dual relationship without making the full disclosure required of him, he is civilly liable to the client who suffers loss caused by lack of disclosure.”
(*Lysick, supra*, 258 Cal.App.2d at 148.)