

LOS ANGELES COUNTY BAR ASSOCIATION
PROFESSIONAL RESPONSIBILITY AND ETHICS COMMITTEE
FORMAL OPINION NO. 464

February 11, 1991

DIGEST: **CONFLICTS OF INTEREST - INSURER AND INSURED -
CUMIS COUNSEL - ETHICAL DUTY OF LAWYER TO FOLLOW
INSURED'S INSTRUCTIONS IN CONDUCT OF LITIGATION.**
Independent counsel hired by insurance company
to represent insured under reservation of rights
is counsel for insured, not insurance company, and
may ethically withhold filing of summary judgment
motion at client's request.

**DUTIES OF LAWYER TO REPRESENT CLIENT - DUTIES OF
LAWYER TO COURT - FILING OF MERITLESS OR FRIVOLOUS
PLEADINGS.** Lawyer may ethically decline to file
cross-complaint on behalf of client if lawyer,
after full investigation of facts and law, concludes
in good faith that the pleading would be deemed
without merit and frivolous.

INTRODUCTION

Two separate questions are presented by this inquiry. First, does legal counsel for an insured who is being defended by an insurance company under a reservation of rights have an ethical obligation to file a meritorious summary judgment motion despite client's request that its filing be postponed? Second, is legal counsel ethically required to file a pleading at the request of the client when counsel reasonably believes, in good faith and after a review of the facts and law, that the pleading is untimely and without merit?

FACTS

Counsel represents Client who is a defendant in a civil action. Client is insured under a policy of liability insurance, but the insurer disputes whether plaintiff's claims against Client are covered by the policy. Accordingly, the insurance company has reserved all of its rights and has allowed the client to select independent defense counsel who is compensated by the insurance company. See San Diego Naval Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal.App.3d 358 (1984). The insurance carrier has its own counsel monitoring the action.

In the course of the representation, counsel prepares a motion for summary judgment that he believes has merit. Before that motion is filed, Client requests counsel to prepare and file a cross-complaint against the plaintiff. The time for asserting cross-complaints has expired. The trial court has previously denied as untimely a motion by a similarly situated co-defendant to assert a similar cross-complaint. The trial court's decision to deny the co-defendant leave to file a cross-complaint has been affirmed on appeal.

After reviewing the facts and the law, counsel is convinced that, under the circumstances, attempting to assert the cross-complaint would be deemed frivolous and without merit. Counsel

therefore declines to file the cross-complaint. Dissatisfied with counsel's decision, client instructs counsel not to file the summary judgment motion pending Client's search for new counsel.

Counsel wishes to know whether he owes the insurance carrier an ethical obligation to file the motion for summary judgment despite Client's request that it not be filed and whether Counsel is ethically obligated to seek leave to file Client's cross-complaint according to Client's wishes.

ANALYSIS

I. Counsel May Ethically Withhold Filing Of The Summary Judgment Motion At Client's Request.

In San Diego Federal Credit Union v. Cumis Insurance Society, Inc., 162 Cal.App.3d, 208 Cal.Rptr. 494 (1984), the Court held that a conflict of interest can arise where a lawyer is retained to represent jointly the insurer and insured. Under such circumstances, and in the absence of a written waiver of the conflict, the insurer must provide independent counsel to the insured. Id., 162 Cal.App.3d at 375. See also Rule 3-310(B), Rules of Professional Conduct.

Cumis went on to conclude that where a conflict exists, the insurer may not compel the insured to surrender control of the

litigation. Cumis, supra, 162 Cal.App.3d at 369 (citing Tomerlin v. Canadian Indemnity Co., 61 Cal.2d 638, 648, 39 Cal.Rptr. 731 (1984) and 375. See also Rule 3-310(E)(1), Rules of Professional Conduct. Explaining this point further, the Court quoted a passage from Executive Aviation, Inc. v. National Insurance Underwriters, 16 Cal.App.3d 799, 809, 94 Cal.Rptr. 347 (1971):

"[W]here a conflict of interest has arisen between an insurer and its insured, the attorney to defend the insured in the tort suit should be selected by the insured. . . . If the insured and the insurer are represented by two different attorneys, each of whom is pledged to promote and protect the prime interests of his client, adequate representation is guaranteed and the deleterious effect of the conflict of interest imposed on an attorney who attempts the difficult task of representing both parties is averted."

See also Employers Insurance of Wausau v. Albert D. Seeno Construction, 692 F.Supp. 1150, 1153-1160 (N.D. Cal. 1988) (independent counsel owes ethical duties to insured, not insurer).

Subsequent to the Cumis decision, California Civil Code Section 2860 was adopted. As pertinent here, Civil Code Section 2860 provides as follows:

"(d) When independent counsel has been selected by the insured, it shall be the duty of that counsel and the insured to disclose to the insurer all information concerning the action except privileged materials relevant to coverage disputes, and timely to inform and consult with the insurer on all matters relating to the action. . . .

* * *

(f) Where the insured selects independent counsel pursuant to the provisions of this section, both the counsel provided by the insurer and independent counsel selected by the insured shall be allowed to participate in all aspects of the litigation. Counsel shall cooperate fully in the exchange of information that is consistent with each counsel's ethical and legal obligation to the insured. Nothing in this section shall relieve the insured of his or her duty to cooperate with the insurer under the terms of the insurance contract.

In the hypothetical under consideration, Counsel is acting as the insured's independent counsel and thus Cumis and Civil Code

Section 2860 apply to the representation. If Counsel cannot demonstrate that the facts underlying the summary judgment motion and the preparation of the motion are "privileged materials relevant to coverage disputes", then counsel would be required to disclose to the insurer the unprivileged information concerning the motion and consult with the insurer under Civil Code Section 2860.

However, while Counsel may be required by statute to disclose to the insurer all unprivileged information relating to the summary judgment motion, he may ethically refuse to file the motion, even after a demand by the insurer, because Counsel acts as the insured's independent counsel and should not surrender decision-making control over the client's litigation to the insurance company. Any such surrender of decision-making control to the insurer could constitute a violation of Counsel's duty to act competently on behalf of the insured (Rule 3-110, California Rules of Professional Conduct) and a breach of Counsel's fiduciary duty owed to his client. See Clark v. State Bar, 39 Cal.2d 161, 246 P.2d 1 (1952) (lawyer owes client a fiduciary duty and must represent client's interests to the best of lawyer's ability).¹

¹ It is beyond the purview of this Committee to decide questions of law. However, the Committee does recognize that a legal question exists concerning whether Client's instruction to withhold filing of the summary judgment motion constitutes a breach of Client's contractual duty, owed to the insurer, to cooperate.

**II. Lawyer May Ethically Decline To Seek Leave To File
A Cross-complaint When Lawyer Believes In Good Faith
That The Attempt Would Be Frivolous And Without Merit.**

Counsel has an ethical obligation "[t]o counsel or maintain such actions, proceedings, or defenses only as appear to him or her legal or just . . ." and "[t]o employ, for the purpose of maintaining the causes confided to him or her such means only as are consistent with truth" Calif. Bus. & Prof. Code Sections 6068(c) & (d). See also Rule 5-200, California Rules of Professional Conduct. While Counsel must diligently represent the interests of his client, California Business & Professions Code Sections 6068(c) and 6068(d) prohibits Counsel from advancing totally meritless and frivolous positions. See also California Code of Civil Procedure Section 128.5; Rule 11, Federal Rules of Civil Procedure (providing for payment of expenses and sanctions for a party's bad faith actions or frivolous tactics).

If Counsel has concluded, in good faith and after thoroughly reviewing the relevant facts and law, that seeking leave to file Client's cross-complaint would violate these prohibitions, then Counsel may ethically decline his client's request.

This opinion is advisory only. The Committee acts only on specific questions submitted ex parte, and the opinions are based

only on the facts set forth in the questions presented.