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# The Cumis Counsel-Insurer Relationship

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The existence of the attorney-client relationship is often a necessary predicate to any potential claim of error or malpractice. Defining the parameters of the attorney-client relationship helps shape the course of the representation but also may assist with the management of risk. Because attorneys typically only ever have to defend a claim for malpractice or breach of fiduciary duty by a client, knowing who is (and who is not) a client is a basic yet powerful risk avoidance tool.

But what if someone other than the attorney's client pays for the legal services rendered? In those situations, the attorney generally has no legal obligations to the entity or person who is simply paying the bills. However, the answer is not always cut and dry.

When an insurance company is the one paying the bills, other considerations come into play. For example, if a defendant has insurance coverage for the defense of a third-party claim, the insurance company may be obligated to provide a defense, typically by hiring and paying defense counsel.

However, whether the insurance company is a "client" of the defense counsel firm often depends on the jurisdiction's approach to defining the attorney-client relationship in the insurance context. In some states where the insurer and insured agree on the bounds of coverage, the insurer, insured, and defense counsel may enjoy a "tripartite" relationship. In such a relationship, the attorney or law practice essentially has two clients: the insured being defended and the insurer that retains and pays counsel.

But a conflict among the parties may nevertheless arise if the insurer and insured disagree on the scope of insurance coverage. As a result, the insured maybe entitled to "independent counsel," also known as Cumis counsel after *San Diego Federal Credit Union v. Cumis Insurance Society*, 162 Cal.App.3d 358 (1984).

In those situations, usually the insurer pays defense fees while independent counsel can only withhold information from the insurer to the extent that the information bears on coverage.

Information related to key issues regarding the defense, such as those relating to settlement or trial strategy, must typically still be shared with the insurer. Ensuring that independent counsel truly is independent, while balancing the obligations to the insurer, can be a challenge.

## **Duties Owed to the Insurer**

While independent counsel's primary duties are to the insured, particularly in situations where a coverage dispute arises, that does not mean that independent counsel can completely cut off the insurer.

Many jurisdictions require independent counsel to disclose information to the insurer to allow it to make reasonable and informed assessments regarding the case, including potential exposure and likelihood of success. For example, the insurer is generally entitled to know about key developments in the case, including settlement demands, and to receive copies of discovery materials and other publicly filed documents. Although independent counsel is obligated to protect information that bears on the issue of coverage in most jurisdictions, independent counsel typically cannot wall off the insurer from information concerning the defense simply because there is a coverage dispute.

## **Reasonable and Necessary Billing**

It is equally important for independent counsel to be conscientious and accurate in its billing to insurers for work performed in defending an insured. Just because an insurer has agreed to provide a defense does not mean that the defense costs can be unreasonable or that the independent counsel does not have to comply with budgeting or other requests.

Many insurers will require independent counsel to comply with litigation billing guidelines. Courts routinely uphold the use of litigation billing guidelines, even with independent counsel, as a way to ensure reasonable and efficient billing, so long as the implication of the guidelines does not impact the independent counsel's judgment.

## **Insurers' Claims Against Independent Counsel**

The California Supreme Court has recently recognized claims for reimbursement for unjust enrichment based on quasi-contract in the insurance context. Specifically, the court has allowed restitution in "duty to defend" cases where the insurer challenges fees charged by Cumis counsel as "unreasonable and unnecessary."

In *Hartford Casualty Insurance v. JR Marketing*, 61 Cal. 4th 988 (2015), the insurer and its insured disputed whether there was coverage for a third-party claim, and the insurer accordingly provided Cumis counsel under California's relevant statute.

The insurer thereafter alleged that independent counsel padded their bills to the insurer by charging fees that were excessive, unreasonable, or even fraudulent. The insurer sought to bring a direct action against the law firm independent counsel, who argued that any rights the insurer had ran solely against its insured. Under independent counsel's theory, the insured could then have a right of indemnity from the independent counsel.

The California Supreme Court rejected independent counsel's argument and found that the insurer could directly sue and recover from independent counsel for any irregularities in the billing. The court focused on the following:

"If [independent] counsel, operating under a court order that expressly provided that the insurer would be able to recover payments of excessive fees, sought and received from the insurer payment for time and costs that were fraudulent, or were otherwise manifestly and objectively useless and wasteful when incurred, [independent] counsel have been unjustly enriched at the insurer's expense."

Thus, although independent counsel may not have a traditional attorney-client relationship with the insurer, it nevertheless has reasonable and necessary billing obligations that, if disregarded, could give rise to a direct claim by the insurer against independent counsel.

Law practices and attorneys acting as independent counsel need to be aware of all duties and obligations owed to the insurer while representing its insured. However, there are tools to defend against or prevent such a claim, largely within the independent counsel's control.

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