By Kurt L. Schmalz

DECONSTRUCTING CUMIS

RECENT APPELLATE COURT DECISIONS LIMITING THE USE OF *CUMIS* COUNSEL HAVE CREATED A CONFLICT BETWEEN THE LAW AND THE RULES OF PROFESSIONAL CONDUCT

IN 1984, THE CALIFORNIA COURT OF APPEAL decided *San Diego Federal Credit Union* v. *Cumis Insurance Society, Inc.*,[1] which gave insurers and defense counsel a clear rule to determine whether a disqualifying conflict of interest existed for insurer-appointed defense counsel. The court held that when the insurer reserves its rights to coverage, a divergence of interests arises between the insured and the insurer that makes representation of the insured by insurer-appointed defense counsel inappropriate.[2] Thus, when a potential coverage dispute exists between insurer and insured as the result of a liability lawsuit, *Cumis* holds that the insurer becomes obligated to pay the reasonable costs of independent counsel to defend the insured in that suit. This independent counsel is frequently referred to as *Cumis* counsel. *Cumis* focuses upon legal ethics and the attorney's duty to avoid actual and potential conflicts of interest.[3] However, in the past several years the ethical underpinnings that supported *Cumis* have become lost in the complexities and bitterness of insurance bad faith litigation.

Starting with the enactment in 1987 of Civil Code Section 2860, which is the California Legislature's attempt to codify the *Cumis* decision, and continuing through more than a decade of court of appeal decisions, the bright-line ethical rule that *Cumis* counsel be appointed whenever an insurer reserved its right to contest coverage has become blurred by exceptions. Most recently, several appellate cases have reached the startling conclusion that the *Cumis* counsel requirement does not apply when the insurer's reservation of rights raises a potential, rather than actual, conflict of interest.[4] These courts have reached the conclusion that *Cumis* does not apply to potential conflicts of interest, even though the Rules of Professional Conduct of the State Bar of California expressly prohibit lawyers from accepting representations in which there are actual *or* potential conflicts of interest unless all affected clients give their informed written consent to the conflict. The inconsistency between certain judicial and legislative interpretations of the *Cumis* counsel requirement on the one hand, and the Rules of Professional Conduct on the other, has created an ethical minefield for attorneys who try to defend insureds under

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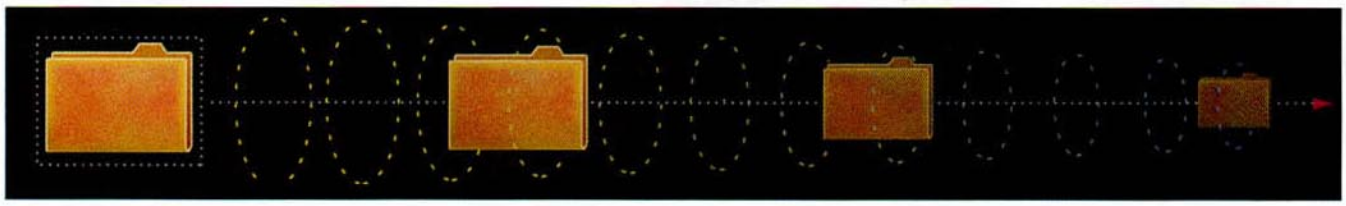
a reservation of rights by the insurer who appointed the insured's defense attorney.

In liability insurance, an insurer promises to provide the insured with a defense to a third party's lawsuit and to indemnify the insured for any damages awarded in the lawsuit that are covered by the policy.[5] Because the duty to defend is broader than the duty to indemnify, an insurer is required to defend claims that are potentially, but not necessarily, covered by the policy. Moreover, if there is only one covered claim in a multiclaim lawsuit, the insurer is still obligated to defend the insured for the entire action.[6] Thus, when the insurer agrees to defend a lawsuit in which one or more claims may not be covered, the insurer will inform the insured that it is defending the insured under a reservation of rights. This means that the insurer will indemnify the insured only for conduct covered by the policy and not for conduct that is not covered. If the insured is found to be liable on a noncovered claim, then the insurer is not obligated to indemnify the insured.[7]

Generally, most insurance policies give the insurer the right to appoint defense counsel for the insured and to control that defense. Defense counsel, which the insurer usually selects from its list of panel counsel, often has or has had an attorney-client relationship with the insurance company on a variety of other matters. The requirement for *Cumis* counsel arises when the insurer reserves its rights to coverage in relation to the insured and then attempts to appoint the defense attorney for the insured. *Cumis* holds that in this situation, a divergence of interests exists between the insurer and the insured that requires that the insurer permit the insured to hire its own defense attorney at the insurer's expense.[8] The essence of the conflict of interest is that defense counsel, who has obligations to both the insurer and the insured, may be tempted to steer the outcome of the case toward a noncovered claim to help the insurer or to a covered claim to help the insured. Unlike insurer-appointed defense counsel, the *Cumis* counsel represents only the insured and not the insurer. The *Cumis* counsel also has complete control over the insured's defense, with certain reporting requirements to the insurer.[9]

The rationale for *Cumis* is to protect the insured from conflicts of interest involving the insurer and its defense attorneys. *Cumis* directly addresses the issue of whether a potential conflict of interest is sufficient to trigger the independent counsel requirement. The court in *Cumis* found that potential conflicts *do* trigger the independent counsel requirement because "[r]ecognition of a conflict cannot wait until the moment a tactical decision must be made during trial."[10] *Cumis*, therefore, is based more on ensuring the integrity of the attorney-client relationship than on regulating the insurer-insured relationship.[11]

A conflict of interest exists when a lawyer's duty on behalf of one client obligates the lawyer to take steps that would be adverse to the interests of another client.[12] The California Supreme Court in *Flatt* v. *Superior Court* observed that a conflict of interest exists "when, in behalf of one client, it is [the attorney's] duty to contend for that which duty to another client requires [the attorney] to oppose."[13] The court in *Flatt* noted that the most troublesome conflicts are those in which the attorney concurrently represents two or more clients with adverse interests in the same matter.[14] This concurrent representation conflict is the same kind of conflict of interest that the *Cumis* counsel requirement was designed to prevent.



Actual or Potential Conflicts

Conflicts of interest are often referred to as being either actual or potential. An actual conflict of interest has been defined as a set of circumstances that strains or impairs the attorney's ability to fulfill his or her professional obligations to each client in the proposed representation.[15] A potential conflict of interest has been defined as a reasonably foreseeable set of circumstances that could strain or impair the attorney's ability to fulfill his or her professional obligations to each client in the proposed representation.[16]

Rule 3-310 of the Rules of Professional Conduct sets the primary standard for evaluating conflicts of interest involving California attorneys. Rule 3-310(C) provides in relevant part:

> A member shall not, without the informed written consent of each client:
>
> (1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or
>
> (2) Accept or continue representation of more than one client in a matter in which the interests of the client actually conflict; or
>
> (3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Rule 3-310(A)(2) defines "informed written consent" as "the client's or former client's written agreement to the representation following written disclosure." Rule 3-310(A)(1) defines "disclosure" as "informing the client or former client of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client."

The Rules of Professional Conduct thus proscribe both actual and potential conflicts of interest. Moreover, an attorney's duty to the client when confronted with either an actual or potential conflict of interest is the same. The attorney must either refrain or withdraw from the representation, or obtain each client's informed written consent to the conflicted representation.

Over the years, courts interpreting *Cumis* have pointed out that not all reservations of rights or coverage defenses create conflicts of interests that trigger the *Cumis* counsel requirement. For example, if the reservation of rights involved an issue that would not be determined or otherwise affected in the liability case against the insured, then the interests of the insured and the insurer would not diverge or conflict.[17]

Expanding upon this exception to *Cumis*, some courts have held that the *Cumis* counsel requirement is triggered only if the reservation of rights causes a situation in which the outcome of the coverage dispute can be controlled by the insurer-appointed defense attorney.[18] These decisions appear to have paved the way for some courts to conclude that the *Cumis* counsel requirement applies only when

there is an actual conflict of interest between the insured, the insurer, and the insurer-appointed defense counsel.

In *Lehto* v. *Allstate Insurance Company*,[19] Allstate offered the $50,000 limit of an automobile liability insurance policy to settle an accident claim against its insureds, a father and son. The plaintiffs in the accident case rejected this offer, then offered to settle with the father alone for the $25,000 per-person liability limit. The insurer and the insureds rejected this offer. The insureds and the plaintiffs in the accident case thereafter stipulated to entry of a judgment against the insureds for $2.5 million, along with an assignment to the plaintiffs of an insurance bad faith claim against Allstate. The court of appeal reversed a jury verdict of $3.5 million against Allstate in the bad faith case, holding that there had been no bad faith by the insurer.

In rejecting the plaintiffs' claim that the insurer committed bad faith by not appointing separate *Cumis* counsel for the father and son, the court noted that "so long as there existed only a potential conflict of interest between its two insureds, it was not required to retain separate counsel for father and son."[20] The court found that Allstate was in a no-win situation. Even if Allstate had provided the insureds with separate counsel, it would not have made any difference, because the liability plaintiffs would not have agreed to release both insureds. If Allstate had accepted the plaintiffs' offer and agreed to pay $25,000 to release the father, then the son could have claimed bad faith by Allstate for settling the case without releasing him. The insurer was clearly in a no-win situation that had little if anything to do with the *Cumis* counsel issue.

Lehto probably makes sense from the standpoint of insurance bad faith law. Allstate appeared to have acted reasonably and not in bad faith in rejecting the father-only settlement. However, from a legal ethics perspective, the case is not well reasoned. Defense counsel had a conflict of interest not only in the joint representation of the insurer and the insureds but also in the joint representation of the father and son.[21] Regrettably, the court in *Lehto* felt it was necessary to exculpate the insurer by pronouncing that there was no conflict of interest requiring *Cumis* counsel because the conflict was merely potential and not actual. The court could have refrained from the erroneous pronouncement on the conflict of interest issue and still concluded (as it ultimately did) that the insurer's conduct was reasonable under the circumstances and, therefore, not in bad faith.

Relying on *Lehto*, the court in *Dynamic Concepts, Inc.* v. *Truck Insurance Exchange*[22] carried the conflict of interest analysis even farther from the mainstream. In *Dynamic Concepts*, an insured under a general liability policy demanded that it be provided with independent counsel under *Cumis* after the insurer issued a reservation of rights letter stating that many of the claims brought against the insured were not covered. The insured's attorney demanded that *Cumis* counsel be immediately appointed or the insurer would be deemed to have breached its duty to defend. The insured then settled the litigation with its own attorney and without the insurer-appointed defense lawyer. In affirming the dismissal of the insured's bad faith claim against the insurer, the court of appeal criticized the aggressive tactics of the insured's lawyer by suggesting that counsel was setting up the insurer for the bad faith lawsuit.[23]

Although the court in *Dynamic Concepts* affirmed an award of $20,000 in *Cumis* counsel fees to the insured, the justices questioned whether *Cumis* counsel was required because there existed only a potential conflict and not an actual conflict of interest.[24] The court stated:

> The potential for conflict requires a careful analysis of the parties' respective interests to determine whether they can be reconciled (such as by a defense based on total nonliability) or whether an actual conflict of interest precludes insurer-appointed defense counsel from presenting a quality defense for the insured.[25]

The court then suggested that the problem with potential conflicts of interest involving uncovered claims could be eliminated if defense counsel would pledge to diligently defend both covered and uncovered claims for the insured client. The court in *Dynamic Concepts* noted that there was no evidence that the insurer-appointed defense counsel favored the insurance company client over the insured client or that defense counsel was "retained to act as 'coverage spies' to generate potential coverage defenses."[26]

The conflicts analysis offered by the court in *Dynamic Concepts* is not in accordance with the Rules of Professional Conduct or the original *Cumis* decision. In *Dynamic Concepts*, insurance defense counsel had only two alternatives to rectify the potential conflict of interest: 1) refrain from representing the insured or 2) obtain the informed written consent of both the insured and insurer after full written disclosure in accordance with Rule 3-310. The fact that defense counsel would have diligently protected the insured's rights in the face of the potential conflict of interest does not resolve the conflict problem unless the clients give their informed written consent to the representation.

An Ethical Minefield

The faulty conflict of interest analysis in *Lehto* and *Dynamic Concepts* was not material to the outcome of either case.[27] As such, the court's comments are probably dicta. However, the loose language in these decisions creates confusion among attorneys and trial courts about the proper standard for determining conflicts in the *Cumis* situation.[28] Defense attorneys are clearly exposed to potential liability for breach of fiduciary duty and legal malpractice if they ignore potential conflicts of interest. The State Bar could also bring disciplinary charges against a defense attorney for violating Rule 3-310(C). Moreover, the insurer also could be subject to a lawsuit by the insured for conspiracy to breach a fiduciary duty. Indeed, the recent case of *Mosier* v. *Southern California Physicians Insurance Exchange*[29] raises the specter of the insurer and defense counsel facing an action for breach of fiduciary duty and civil conspiracy because of a failure to rectify a potential conflict of interest in a situation that does or should involve *Cumis* counsel.

In *Mosier*, the insurer offered a noninsured physician a courtesy defense in a medical malpractice case. The insurer had its appointed defense counsel representing two other defendant physicians. The noninsured physician agreed to have the insurer's defense counsel rep-

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resent him at trial, and the counsel advised the noninsured physician to admit liability. The jury found the noninsured doctor to be 70 percent liable; the other two insured doctors were each found to be 15 percent liable. The defense counsel failed to get the noninsured physician's consent to a potential conflict of interest. The trustee in the physician's bankruptcy case sued the defense counsel for breach of fiduciary duty and the insurer for conspiracy to breach fiduciary duty. The attorney settled the lawsuit before trial, but the insurer took the case to trial and was hit with a multimillion-dollar jury verdict. Although the large jury verdict against the insurer was reversed on appeal because of a lack of causation and damages, the appellate court found that the evidence supported the liability of the insurer on the claim of civil conspiracy to breach fiduciary duty. The court compared the situation in *Mosier* to that of *Cumis* because when the insurer agreed to defend the noninsured physician, the insurer and defense counsel assumed all the obligations of the duty to defend.[30]

The insured's defense attorney, therefore, is faced with an ethical dilemma when he or she accepts representation of an insured in a lawsuit in which the insurer has issued a reservation of rights. This dilemma is further complicated if the insured declines to waive potential conflicts of interest. The only safe alternative for defense counsel is to turn down the engagement. An insurer's panel counsel who turns down engagements from the insurer, however, probably faces being dropped from the insurer's list of approved defense counsel. The economic pressure for defense counsel to accept the insurer's engagement may be so great that many attorneys will turn a blind eye to the conflict of interest problem. Indeed, the loose language in cases such as *Lehto* and *Dynamic Concepts* may lead defense counsel and insurers to think they can avoid having to face the conflict of interest problem. This could be a serious mistake.

What Should Defense Counsel Do?

The safest approach is for defense counsel to obtain the informed written consent of the insured to the engagement when a potential conflict exists. Insurers could make acceptance of its defense counsel more attractive to the insured by agreeing in advance that they would not seek reimbursement of defense costs from the insured for uncovered claims and by providing the insured with a wide selection of high quality attorneys who are not closely tied to the insurance company. These inducements might make the insured more willing to waive its right to *Cumis* counsel upon written disclosure and informed written consent.

The *Cumis* statute, Civil Code Section 2860, addresses how a *Cumis* conflict can be waived by the insured; however, Section 2860 does not appear to be consistent with the Rules of Professional Conduct on how an insured can consent to a conflict of interest. Under Section 2860(e), the insured may waive its right to select independent counsel (and thereby consent to a conflict of interest) by:

> [S]igning the following statement: "I have been advised and informed of my right to select independent counsel to represent me in this lawsuit. I have considered this matter fully and freely waive my right to select independent counsel at this time. I authorize my insurer to select a defense attorney to represent me in this lawsuit."

The above-described waiver does not meet the requirements of "informed written consent" as defined in Rule 3-310. The required disclosure necessary to waive a conflict must include a written statement "of the relevant circumstances and of the actual and reasonably foreseeable adverse consequences to the client or former client" of the potential or actual conflict. Compare the kind of detailed consent to a potential conflict of interest approved in *Zador Corporation* v. *C. K. Kwan*[31] with the conclusory waiver set forth in Section 2860(e). Not only should the disclosure to the client explain the conflict problem and how that situation could affect the client's legal matter and relationship with the lawyer but also it should fully disclose the defense counsel's relationship, if any, with the insurer. For example, if the insurer is one of the defense counsel's largest clients, then a written disclosure pursuant to Rule 3-310(B)(3) would probably be necessary.[32]

The defense counsel should also inform the insured about whether it has agreed to implement the insurer's "outside counsel guidelines" to the extent that these guidelines actually restrict the types of discovery, legal research, or case staffing (e.g., paralegals used for legal tasks instead of lawyers) that defense counsel can use. The court in *Dynamic Concepts* criticized these insurer-imposed guidelines, noting: "Under no circumstances can such guidelines be permitted to impede the attorney's own professional judgment about how to competently represent the insureds."[33] Defense counsel, therefore, should be very careful in accepting the insurer's more restrictive guidelines and should, in any event, disclose them to the insured before the insured decides to waive a conflict.

The insured should be advised in writing to seek independent legal advice before agreeing to waive his or her right to *Cumis* counsel. If independent counsel is necessary to enable the insured to make a proper decision on a waiver, then one might further argue that the insurer should pay for that independent counsel as a reasonable extension of the *Cumis* requirement and the insurer's duty to defend the insured.[34]

Thus, even if defense counsel relies on the express terms of Section 2860(e), it is unlikely that this minimal and conclusory waiver language would pass muster under Rule 3-310. Unless the attorney can successfully argue that compliance with Section 2860(e) is an ethical safe harbor for the attorney, the Section 2860(e) waiver does not constitute "informed written consent" as defined in the Rules of Professional Conduct.[35]

In addition, Section 2860 purports to define certain conflicts of interest in a manner that is inconsistent with the Rules of Professional Conduct. Section 2860(b) states that an insurer's reservation of rights for noncoverage of punitive damages or claims in excess of insurance coverage shall not be deemed to be conflicts of interest. Does this mean that insurance defense counsel is thereby relieved of his or her duties to meet the requirements of Rule 3-310(C) and the common law definition of an actual or potential conflict as to these two issues? For example, what if an insurer, who under California law cannot indemnify an insured for punitive damages, refuses to pay defense counsel to make a summary adjudication motion before trial to eliminate the punitive damage claim, even though such a motion would clearly be in the insured's best interests? Can the attorney claim that there is no conflict of interest when he or she acts against the interests of one client at the request of another client? Does Section 2860(b) excuse this conduct because under that provision there can be no conflict of interest between insurer and insured on the issue of punitive damages? This example presents a classic conflict of interest, which should be governed by Rule 3-310(C) and not Section 2860(b).

A conflict of interest often arises during settlement negotiations in which an underinsured policyholder is trying to settle, for the policy limits or less, a claim that is in excess of policy limits. When the settlement demand is at or near policy limits, the insurer has little if anything to lose by taking the case to trial. The insured, however, runs the risk of an uninsured excess verdict. Normally, the insurer is only going to have to indemnify the insured up to the policy limits.[36] The insured, on the other hand, could face potentially unlimited uninsured liability. There is a

clear conflict of interest between insurer and insured in such a case. Indeed, this kind of conflict was identified by the court in *Golden Eagle Insurance Company* v. *Foremost Insurance Company*.[37] Section 2860 is a statute to regulate the relationship between insurer and insured as it relates to the hiring of *Cumis* counsel. It is not an ethics statute or rule of professional conduct to define a conflict of interest or how a client can properly waive a conflict. Unfortunately, the statutory language of Section 2860 implies that it does both.

Interpretations of the *Cumis* counsel requirement and Civil Code Section 2860 should be consistent with the Rules of Professional Conduct. Defense counsel must comply with Rule 3-310(C) and not accept insurer appointments where potential or actual conflicts of interest exist, unless the clients give informed written consent to those conflicts. Contrary to certain judicial pronouncements, the *Cumis* requirement is triggered by potential conflicts of interest, and defense counsel and insurers in these situations should not casually assume that they are outside the ethics rules and free from tort liability for breach of fiduciary duty.

Defense attorneys should not rely on Section 2860 either as a safe harbor for their ethical and professional obligations to clients on conflicts of interest or as a guide to how a waiver of a conflict of interest is properly obtained. The Rules of Professional Conduct and well-established common law on the attorney's ethical duties clearly supercede the lower standards suggested in Section 2860. The courts, attorneys, and even the legislature should take a look at *Cumis* and Section 2860 from a legal ethics perspective to ensure that their interpretations of how to deal with conflicts of interest are in harmony with the Rules of Professional Conduct and the important public policy behind those rules. ■

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[1] San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358 (1984).

[2] *Id.* at 375.

[3] *Id.*

[4] Lehto v. Allstate Ins. Co., 31 Cal. App. 4th 60, 71 (1994); Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007 (1998).

[5] A good statement of the rationale for Cumis counsel can be found in Assurance Co. of Am. v. Haven, 31 Cal. App. 4th 78, 83-86 (1995).

[6] Horace Mann Ins. Co. v. Barbara B., 4 Cal. 4th 1076, 1081 (1993). However, the insurer may seek reimbursement from the insured for the costs of defending noncovered claims. Buss v. Superior Court, 16 Cal. 4th 35, 50 (1997).

[7] Buss, 16 Cal. 4th at 46.

[8] San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 374 (1984). The court in Cumis used the phrase "diverging interests" rather than the words "conflict of interest," implying that the Cumis counsel requirement may be triggered in a situation that does rise to the level of a conflict of interest.

[9] *Id.* at 375.

[10] *Id.* at 371 n.7. Eight years after Cumis, in 1992, Rule 3-310 of the CAL. RULES OF PROFESSIONAL CONDUCT was amended to proscribe both actual and potential conflicts of interest in the absence of the clients' informed written consent.

[11] *See* Moiser v. Southern Cal. Physicians Ins. Exch., 63 Cal. App. 4th 1022, 1041 (1998) ("*Cumis* is based on ethical standards, not on insurance concepts.").

[12] VAPNEK ET AL., CALIFORNIA PRACTICE GUIDE, PROFESSIONAL RESPONSIBILITY ¶4:1 (The Rutter Group, 1997).

[13] Flatt v. Superior Court, 9 Cal. 4th 275, 282 n.2 (1992) (citing the ABA's CANONS OF PROFESSIONAL ETHICS Canon 6 (1908)).

[14] *Id.* at 282-83.

[15] VAPNEK ET AL., *supra* note 12, ¶4:72, at 4-16.

[16] *Id.*, ¶4:63-64, at 4-14.

[17] McGee v. Superior Court, 176 Cal. App. 3d 221, 226 (1985) (noncoverage based on insurer's resident relative exclusion in automobile liability policy would not be determined in liability case); Native Sun Inv. Group v. Ticor Title Ins. Co., 189 Cal. App. 3d 1265, 1276 (1987) (Cumis counsel not required for litigation against state that was not related to coverage dispute). Other examples of insurer's coverage defenses that would not generally create an actual or potential conflict are a defense based on the failure of the insured to pay premiums and a liability case deciding whether the defendant was an insured. It is unlikely that the liability case would determine or otherwise affect these coverage issues.

[18] Golden Eagle Ins. Co. v. Foremost Ins. Co., 20 Cal. App. 4th 1372 (1993).

[19] Lehto v. Allstate Ins. Co., 31 Cal. App. 4th 60 (1994).

[20] *Id.* at 71. Significantly, and probably erroneously, the court in Lehto cited for this proposition a pre-Cumis case, Spindle v. Chubb/Pacific Indem. Group, 89 Cal. App. 3d 706, 713 (1979), which, the Lehto court argued, took the position that a potential conflict of interest was merely a divergence in interest and not a true conflict, which therefore did not require appointment of independent counsel. The Cumis court disagreed and held that potential conflicts required appointment of an independent counsel. San Diego Fed. Credit Union v. Cumis Ins. Soc'y, Inc., 162 Cal. App. 3d 358, 371 n.7 (1984).

[21] The insured father had an interest in accepting the plaintiff's offer and the insured son and the insurer had an interest in rejecting the plaintiff's offer. The father, therefore, should have had independent legal advice before he decided to reject the plaintiff's offer.

[22] Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999 (1998).

[23] *Id.* at 1011-12 ("Dynamic's shrill insistence upon [excluding insurer's attorney from settlement negotiations] strongly suggests an intent to promote a new lawsuit, rather than terminate an existing one.").

[24] *Id.* at 1010. The court avoided any inconsistency with Cumis by asserting, without any compelling support, that CIV. CODE §2860 had legislatively overruled the portion of Cumis that required appointment of Cumis counsel whenever the insurer reserved its rights to cover the insured. *Id.* at 1007 n.5. However, what the Dynamic Concepts court labeled as "the absolutist view" in Cumis is precisely the view of conflicts of interest reflected in the CAL. RULES OF PROFESSIONAL CONDUCT.

[25] *Id.* at 1008.

[26] *Id.* at 1008-09.

[27] For example, in Dynamic Concepts the trial court awarded the insured $20,000 in Cumis counsel fees. This award was affirmed on appeal even though the court of appeal made it clear that Cumis counsel was unnecessary because there was no actual conflict of interest between insurer and insured.

[28] *See* CROSKEY ET AL., CALIFORNIA PRACTICE GUIDE, INSURANCE LITIGATION ch. 7B, at 7B-64.7 to 7B-70.1 (The Rutter Group, 1998), which includes frequent citations to Dynamic Concepts on the question of conflicts of interest and when appointment of Cumis counsel is required.

[29] Mosier v. Southern Cal. Physicians Ins. Exch., 63 Cal. App. 4th 1022 (1998).

[30] *Id.* at 1047-48. Unlike Lehto and Dynamic Concepts, Mosier suggests that potential conflicts of interest require appointment of Cumis counsel. *Id.* at 1037, 1041-42.

[31] Zador Corp. v. C. K. Kwan, 31 Cal. App. 4th 1285, 1289-90 (1995). The disclosure and consent letter in Zador included the following warning:

> Multiple representation may result in economic or tactical advantages. You should be aware, however, that multiple representation also involves significant risks. First, multiple representation may result in divided or at least shared attorney-client loyalties. Although we are not currently aware of any actual or reasonably foreseeable adverse effects of such divided or shared loyalty, it is possible that issues may arise as to which our representation of you may be materially limited by our representation of the Co-defendants.
>
> Furthermore, because we will be jointly retained by both you and the Co-defendants in this matter, in the event of a dispute between you and the Co-defendants, the attorney-client privilege generally will not protect communications that have taken place among all of you and attorneys in our firm. Moreover, pursuant to this 'Joint Client' arrangement, anything you disclose to us may be disclosed to any of the other jointly represented clients.

See also VAPNEK ET AL, *supra* note 12, ¶4:76, at 4-16 to 4-17 (suggestions for how written disclosure of and consent to conflicts should be made).

[32] According to CAL. RULES OF PROFESSIONAL CONDUCT, Rule 3-310(B)(3):

> A member shall not accept or continue representation of a client without providing written disclosure to the client where.... (3) The member has or had a legal, business, financial, professional, or personal relationship with another person or entity the member knows or reasonably should know would be affected substantially by resolution of the matter.

[33] Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1009 n.9 (1998).

[34] There appears to be no reported decision that has extended the Cumis requirement or the insurer's defense duty in this manner.

[35] There are certain conflicts of interest that are so troublesome that they may not be waived or consented to by the client. Woods v. Superior Court, 149 Cal. App. 3d 931 (1983); Klemm v. Superior Court, 75 Cal. App. 3d 893 (1977); and Ishmael v. Millington, 241 Cal. App. 2d 520 (1966). The only safe alternative for the lawyer in such a situation is to refrain or withdraw from the representation.

[36] The insurer, of course, runs the risk that if it refuses a reasonable policy-limits settlement demand by the plaintiff and if the judgment in the liability case exceeds the policy limits, then the insurer could be held liable to the insured for any nonpunitive damages in excess of the policy limits in subsequent bad faith litigation brought by the insured. Communale v. Traders & General Ins. Co., 50 Cal. 2d 654, 659 (1958).

[37] Golden Eagle Ins. Co. v. Foremost Ins. Co., 20 Cal. App. 4th 1372, 1394-95 (1993).