Demands for Independent Counsel:
History, Analysis, and Strategies for Managing Disputes

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  - Presents unique challenges
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Introduction:

This booklet is submitted in conjunction with an October 2006 seminar by Jeffrey S. Bolender, Esq., of the law firm, Bolender & Associates, A Professional Law Corporation.

The seminar relates to situations in which a policyholder demands that its liability insurer provide the policyholder with independent counsel instead of the insurer's panel counsel to defend against a lawsuit in which the insurer has agreed to defend under a reservation of rights.

This booklet's focus is upon situations in which as insurer's reservation of rights creates a disqualifying conflict of interest under California law, thereby entitling the policyholder to independent counsel. California rules do not govern claims for independent counsel in other states. But California's experience with this difficult issue, including a fairly well developed body of case law, provides insights into such demands by policyholders in other states. These insights may be useful in dealing with demands for independent counsel in other states.

The seminar and this booklet seek to provide the following:

- an overview of the applicable legal rules;
- a method of identifying and analyzing possible conflict situations; and
- a strategy for managing disputes concerning a policyholder's demand for independent counsel.

Page 3 describes the key concept of this seminar: control of the defense. **Page 4** addresses terminology issues and explains some key terms. **Pages 5 and 6** discuss the original Cumis case and illustrates graphically the classic Cumis scenario. **Page 7** summarizes the new California rule that not only limits and clarifies the original holding in the Cumis case, but also governs and regulates the insurer-policyholder relationship when independent counsel must be hired. Page 8 sets forth an analytical checklist that can be used to identify whether a disqualifying conflict of interests may exists. **Page 9 through 11** set forth certain hypotheticals, which are loosely based on actual case rulings. **Page 12** sets forth a true-and-false quiz for the purpose of identifying certain myths or erroneous assumptions about claims for independent counsel. **Pages 13 and 14** set forth the actual text of the California rule, which is embodied in Section 2860 of the California Civil Code. **Pages 15 through 18** sets forth a somewhat dated study of those jurisdictions that apparently recognize the dual-client status in the tripartite relationship.

Key Concept: Control of the Defense

Whenever a policyholder demands independent counsel, the real issue usually concerns who is going to **control the defense**. Ordinarily, the insurer has the contractual right to control the defense, including the decision to select a particular attorney and make important decisions concerning litigation decisions. Controlling the defense via panel counsel enables claims handlers to manage many claims in an economic fashion. An insurer's control of the defense is a cornerstone of the insurer-policyholder relationship.

However, courts have recognized that an insurer may not be entitled to control the defense in certain, narrow circumstances. When an insurance company retains an attorney to defend a lawsuit against the policyholder, the attorney is considered in many states as representing the policyholder as well as the insurer. This relationship is referred to as a **tripartite relationship** between the insurer, defense counsel, and policyholder. When a coverage dispute between the insurer and insured arises, defense counsel may have a disqualifying conflict of interest. In the vast majority of instances, the conflict arises from the insurer's agreement to defend coupled with a reservation of the insurer's right to dispute coverage. If an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by the assigned defense counsel, the insurer **may** be obligated to provide independent counsel to the policyholder.

The policyholder's preferred attorney is "independent" in the sense that it is the policyholder, not the insurer, who selects the attorney and controls litigation decisions. Courts have found that the insurer's contractual duty to defend must be free of disqualifying conflicts of interest. Therefore, the insurer's contractual right to control the defense is, in effect, superseded by the policyholder's entitlement to defense counsel who is independent of the insurer. Experience shows that independent counsel often excessively litigate cases, thereby incurring large defense expenditures. Such defense fees may dwarf the value of the lawsuit. Further, history shows that an insurer's attempts to settle are often hindered when independent counsel are involved.

The negative aspects of hiring independent counsel often outweigh the benefits of reserving rights, at least to those reservations that trigger a conflict of interests. Often, the insurers prefer to waive coverage defenses in order to retain control of the defense. Consequently, claims for independent counsel often evolve into negotiations over what coverage defenses, if any, the insurer is willing to waive in order to resolve the dispute concerning the policyholder's demand for independent counsel. If not handled correctly, a dispute between the insurers and policyholder can escalate, making it difficult to adjust the claim swiftly and economically. Therefore, it is critical to properly identify and analyze conflict of interests, as well as managing demands for independent counsel.

Terminology

Term	Definition	Preferred Term
Cumis counsel	The term "Cumis counsel" (pronounced Koo-miss) originates from the appellate court opinion issued by the California Court of Appeal in 1984 entitled, San Diego Federal Credit Union v. Cumis Insurance Society, Inc. (1984) 208 Cal. Rptr. 494. However, the Cumis case is no longer the legal standard in California for determining whether a disqualifying conflict of interests exists.	Independent counsel
Cumis dispute or conflict of interests	A dispute that arises when a policyholder asserts its entitlement to independent counsel, and the insurer disagrees that its reservation of rights triggers the policyholder's entitlement to independent counsel.	Claim or demand for independent counsel
Cumis conflict	A conflict of interests that disqualifies an insurer's appointed defense counsel from rendering a conflict-free defense due to the insurer's agreement to defend under a reservation of rights.	Disqualifying conflict of interest on the part of appointed panel counsel. [**Note**: do not confuse a disqualifying conflict of interests with a divergence of interests as between the policyholder and the insurer.]
Tripartite relationship	Relationship between the insurer, policyholder, and assigned defense counsel.	N/A
Alignment of primary interests	Although an insurer and its policyholder may have a natural divergence of interests, their primary interests are usually aligned. This is because the insurer, policyholder, and defense counsel share a common, primary objective: to avoid liability and minimize damages.	N/A

History of the Original Cumis Case

In Cumis, the court recognized that in some instances, an insurance company must surrender its contractual right to select defense counsel and control litigation decisions. The court was primarily concerned with the common situation in which an insurer retains panel counsel to defend its policyholder, while reserving its right to later deny payment of the policy's indemnity benefit.

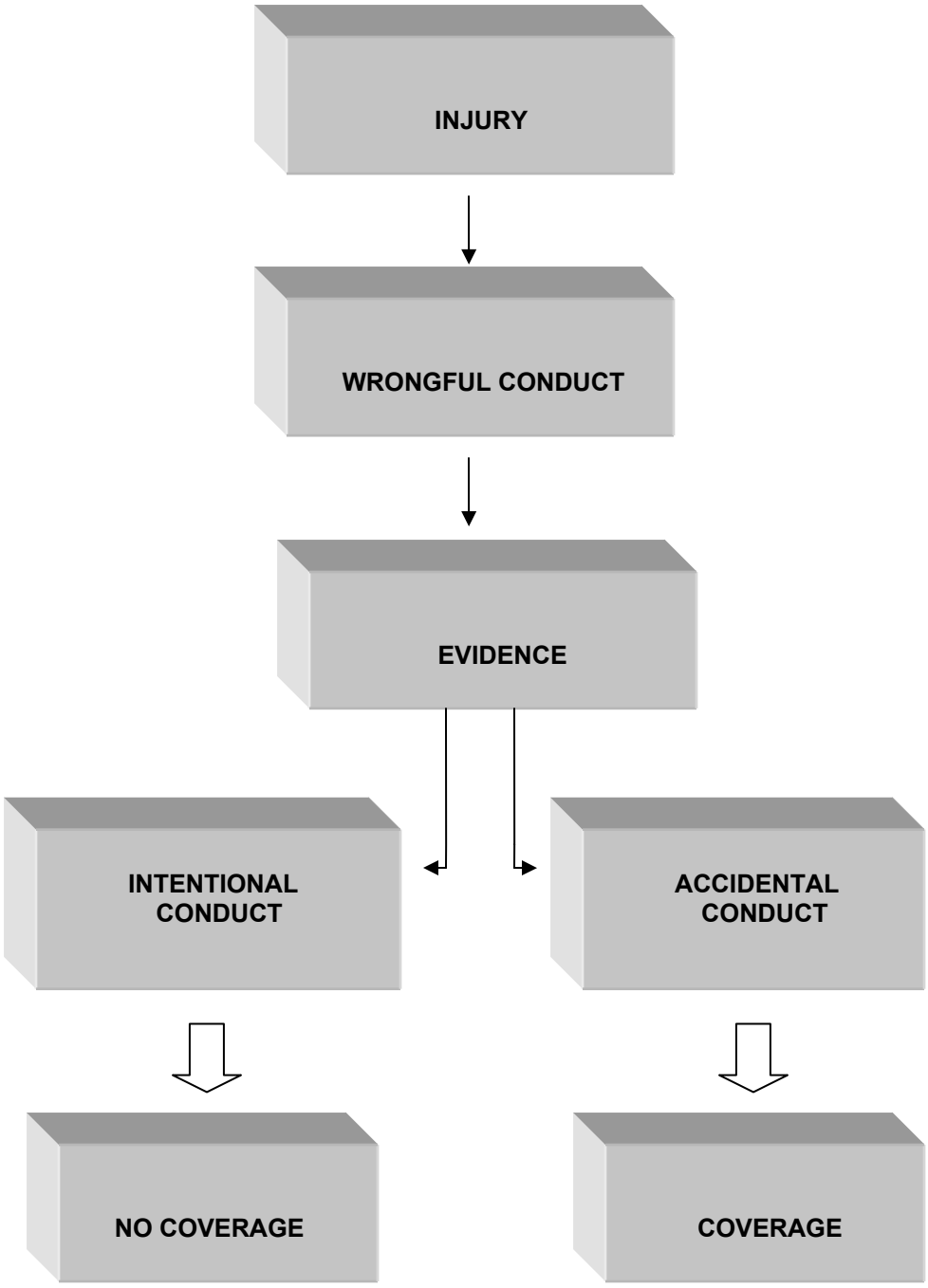
The Cumis court felt that when a coverage dispute exists, the insurer's defense counsel cannot effectively represent the interests of both the insurer and policyholder. The Cumis court ruled that under such circumstances, the insurer must pay the reasonable legal fees charged by the attorney whom the policyholder selects and controls, commonly referred to as "Cumis counsel" or "independent counsel."

In reaching its conclusion, the Cumis court assumed that the insurer's defense counsel would favor the interest of one client (the insurer). This assumption rest upon the fact that panel counsel typically has an ongoing economic relationship with the insurer, who is paying for legal services. More specifically, the rationale is that, since panel counsel wishes to continue receiving new files from the insurer, he or she will be naturally motivated to favor the insurer.

Unfortunately, the ruling in the Cumis case was very broad. Some courts and many lawyers interpreted the Cumis case as requiring independent counsel whenever the insurer reserves its rights. Attorney for policyholders began demanding that insurers hire them as "Cumis counsel," even in the absence of actual, substantial conflict of interest.

Consequently, insurers routinely faced a dilemma: (i) hire the policyholder's attorney, whose handling of the litigation cannot be effectively monitored or controlled, or (ii) withdraw their contractual right to deny indemnification for uncovered claims and damages in order to avoid a conflict of interest. As explained on the following page, the legislature decided shortly thereafter to place limits on the Cumis holding by way of a comprehensive statutory scheme.

The Classic Cumis Scenario



The California Rule

In 1987, the California state legislature enacted a statute to clarify and limit the basic rule in the Cumis opinion. Cal. Civil Code § 2860.

The statute governs certain aspects of the relationship between insurers and policyholders in potential Cumis situations by:

- Defining the standard for determining when a disqualifying conflict of interests arises
- Permitting the insurer to demand that independent counsel possess sufficient experience and malpractice insurance
- Limiting reimbursable legal fees to the hourly rates ordinarily paid by the insurer to its counsel in similar cases in the local area
- Mandating arbitration to resolve disputes regarding the amount of legal fees and the hourly rate paid by the insurer
- Allowing the insurer to retain its own defense counsel to participate in every aspect of the lawsuit including settlement
- Requiring the policyholder and its own independent counsel to confer and cooperate with the insurer and its counsel on all matters, as well as disclosing most information regarding the lawsuit

Under California's statutory standard, "when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest **may** exist." Cal. Civil Code § 2860, subd. (b).

The statute's other provisions expressly state that no disqualifying conflict of interests exists as to the following:

- Allegations of punitive damages;
- Allegations or facts for which the insurer denies coverage; or
- Solely because an insured is sued for an amount in excess of the insurance policy limits.

Analytical Checklist

☐ Is the agreement to defend subject to any rights to deny the policy's indemnity benefit to the policyholder?

- ➢ List the rights expressly and implicitly reserved
- ➢ Identify the nature of each right reserved
  - State of mind
  - Type of judicial relief
  - Type of injury or damage
  - Causation
  - Insured qualification
  - Legal status
  - Other

☐ Does the complaint allege more than one injury, and if so, does the complaining party seek recovery under multiple causes of action?

- ➢ List each theory of liability seeking recovery for the same injury

☐ What are the disputed factual issues relating liability and damages?

- ➢ List the elements of each theory of liability
- ➢ Identify which elements are actually in dispute

☐ Could the resolution of any factual issues determine the outcome of any coverage issues raised by the reservation-of-rights letter?

- ➢ List the corresponding factual and coverage issues
- ➢ Identify the type of evidence that will likely be needed to prove and disapprove each factual issue

☐ Identify and describe defense counsel's motive and ability, if any, to shape the case so that the resolution of the factual issue exposes the policyholder to uninsured liability instead of insured liability?

Hypotheticals

Hypothetical No. 1

A bank obtains a commercial general liability policy and is subsequently sued by one of its former employees. The complaint alleges five causes of action: tortious wrongful discharge, breach of the covenant of good faith and fair dealing, wrongful interference with and inducing breach of contract, breach of contract, and intentional infliction of emotional distress. Plaintiff seeks general damages and punitive damages. The insurer retained defense counsel, but also issued a reservation of rights letter on the issues of breach of contract and punitive damages. In light of the reservation of rights letter, the bank hired its own independent counsel, but the insurer refused to pay all of the independent counsel's fees.

Is there a disqualifying conflict of interests?

Is the insurer obligated to pay all reasonable past and future expenses incurred by the independent counsel retained to represent the bank in the third party action?

Answer to Hypothetical No. 1

Yes. The complaint alleges both covered and non-covered claims. Additionally, coverage of those claims is dependent on the defense of the bank in the third party action. For example, if the bank's conduct in the third-party action is found to be willful and punitive damages are awarded, then there is no coverage under the policy. It is in the insurer's best interest for the defense counsel to conduct the case for such a finding. However, it is in the bank's best interest for defense counsel to conduct the case for a contrary finding.

Yes. The insurer must pay for independent counsel's fees when a third party action alleges both covered and non-covered claims and the outcome of the coverage dispute can be controlled by the defense counsel retained by the insurer. San Diego Navy Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal.App.3d 358.

Hypothetical No. 2

The owner of a car brings an action for negligence against its driver for injuries she sustained while riding as a passenger. The plaintiff's insurer provides a defense to the defendant driver subject to a reservation of rights based on a claim that coverage is excluded under a resident-relative exclusion in plaintiff's policy. The defendant driver affirms the authority of his insurer-appointed defense counsel and there is nothing showing any desire on his part to the contrary. However, Plaintiff passenger argues that there is a Cumis conflict of interest because her insurer is paying for the defendant's legal fees under a reservation of rights.

Is there a disqualifying conflict of interest?

Does plaintiff passenger have standing to assert a disqualifying conflict of interests?

Answer to Hypothetical No. 2

No. The defendant driver affirmed the authority of his insurer-appointed defense counsel "and, indeed, there is nothing whatever in the record indicating any desire on his part to the contrary." McGee v. Superior Court, 176 Cal. App. 3d 221, 227 (Cal. Ct. App. 1985). The interests of defendant driver and the insurer in establishing that he was not negligent and is thus not liable for plaintiff's injuries are identical. Moreover, the insurer's reservation of rights is not founded on the possibility that coverage will be affected by the nature of defendant's conduct. Rather, the reservation of rights is based on a relationship between plaintiff passenger and defendant driver that might trigger the resident-relative exclusion in the policy. That is an issue extrinsic to and independent of the issue of defendant's liability for plaintiff's injuries.

No. Here, the purported conflict is between the insurer and the defendant driver, not the insurer and plaintiff passenger. The right to independent representation paid for by the insurer in the circumstances found in the Cumis decision was expressly stated by the Cumis court to be a right belonging to the policyholder. McGee v. Superior Court, 176 Cal. App. 3d 221, 228 (Cal. Ct. App. 1985).

Hypothetical No. 3

A homeowners' association sues a general contractor for defective construction. The general contractor's insurer agrees to defend subject to a reservation of rights that certain damages are not covered by the CGL policy. The insurer and insured agreed that the contractor bears the risk of repairing or replacing faulty workmanship, while the insurer bears the risk of damage to the property of others. However, the general contractor contends that the reservation of rights creates a conflict of interest that requires the insurer to pay for an additional independent counsel. The general contractor sues its insurer for breach of contract and bad faith for failing to provide independent counsel.

Is there a disqualifying conflict of interests?

Should a judge or jury decide whether independent counsel is required?

Answer to Hypothetical No. 3

No. Where the policyholder produces no evidence to show in what specific way the defense attorney could have controlled the outcome of the damage issue to insured's detriment, or had incentive to do so, there is no basis for requiring independent counsel. An unspecified possibility of a conflict is not enough to establish a Cumis conflict. Blanchard v. State Farm Fire & Casualty Co., 2 Cal. App. 4th 345, 350 (Cal. Ct. App. 1991).

Judge. In the absence of dispute over some underlying fact, the existence of a conflict is a question of law for the trial judge to decide, not the jury.

Hypothetical No. 4

A computer software company obtains a commercial general liability policy and is subsequently sued. The complaint contains six causes of action. Only one claim (a libel cause of action) is covered by the policy. The insurance company accepts the tender of defense under a reservation of rights. The insured refuses to accept the defense unless the insurer "clearly and uncondi-

tionally" withdraws its reservation of rights letter and agrees to indemnify any resulting judgment, regardless of coverage. The insurer states it would pay independent counsel's defense fees, pending coverage counsel's review "to clarify the Cumis issues." The insured hires independent counsel and quickly settles, excluding the insurer from participating in negotiations.

Is an insurer in an action involving covered and uncovered claims automatically obliged to provide independent counsel pursuant to Civil Code section 2860, subdivision (b)?

Does the insurer breach its duty to defend when it assigns competent outside counsel pending a further analysis of the Cumis issue?

Can the policyholder recover money damages for bad faith?

Must an insurer immediately determine whether a Cumis conflict exists?

Answer to Hypothetical No. 4

No. Civil Code section 2860, subdivision (b) specifically provides that 'a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage. It further uses the permissive conflict of interest **may** exist, rather than the mandatory shall. The statute does not clearly state when the right to an independent counsel vests. Dynamic Concepts, Inc. v. Truck Ins. Exch., 61 Cal. App. 4th 999, 1007 (Cal. Ct. App. 1998)

No. No reason exists to allow insureds who face the prospect of no defense or indemnity for uncovered claims to 'set up' insurers by making Cumis demands with unreasonably short deadlines, especially where the issues listed in the underlying litigation do not coincide with the issues raised in the reservation of rights and where the insurer agrees to provide a full and complete defense without regard to coverage.

No. The insurer did not breach any legal obligation to defend the policyholder when it offered to fully defend at its own expense through appointed counsel pending further coverage analysis of the Cumis issue. A carrier is subject to tort liability for bad faith only where it unreasonably fails to provide benefits due under the policy or the law.

No. Insurers are entitled to a reasonable period of time to analyze a situation requiring a coverage decision.

The Dynamic Concepts court explained its rationale as follows:

> "[I]nsurer-appointed defense counsel, owed their primary obligations to Dynamic to provide the same level of competent and ethical representation 'as if [it] had retained [them] personally.' There is no basis on the record to presume they would have violated their stringent ethical responsibilities to completely defend Dynamic for all allegations of the entire complaint, covered or uncovered. There similarly is no support for the proposition Truck intended to offer merely a token defense for uncovered claims or that either Sheehy or Koeller were retained to act as 'coverage spies' to generate potential coverage defenses."

Facts versus Myth

	TRUE	FALSE
1. The duty to furnish independent counsel arises whenever an insurer agrees to defend under a reservation of rights.	☐	☐
2. The rule in the Cumis case is the recognized standard for determining an insurer's duty to furnish independent counsel.	☐	☐
3. An insurer must furnish independent counsel to its policyholder whenever the respective interests of the insurer and policyholder diverge.	☐	☐
4. Where there is a potential disqualifying conflict of interest, the conflict need not be substantial in order to trigger the insurer's duty to furnish independent counsel.	☐	☐
5. A policyholder's entitlement to independent counsel arises whenever the defending insurer reserves its right to deny indemnification for uncovered causes of action.	☐	☐
6. An insurer can never avoid triggering the duty to provide independent counsel by instructing its selected panel counsel to defend the lawsuit without regard to coverage issues.	☐	☐
7. Reserving the right to seek reimbursement of defense cost for uncovered claims automatically triggers the policyholder's entitlement to independent counsel.	☐	☐
8. When the insurer agrees to furnish independent counsel, the insurer not only loses control over the defense, but is also prohibited from settling the lawsuit if the policyholder objects.	☐	☐

CALIFORNIA CIVIL CODE SECTION 2860

Subdivision (a)

If the provisions of a policy of insurance impose a duty to defend upon an insurer and a conflict of interest arises which creates a duty on the part of the insurer to provide independent counsel to the insured, the insurer shall provide independent counsel represent the insured unless, at the time the insured informed that a possible conflict may arise or does exist, the insured expressly waives, in writing, the right to independent counsel. An insurance contract may contain a provision that sets forth the method of selecting that counsel consistent with the section.

Subdivision (b)

For purposes of this section, a conflict of interest does not exist as to allegations or facts in the litigation for which the insurer denies coverage; however, when an insurer reserves its rights on a given issue and the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim, a conflict of interest may exist.

No conflict of interest shall be deemed to exist as to allegations of punitive damages or be deemed to exist solely because an insured is sued for an amount in excess of the insurance policy limits.

Subdivisions (c)

When the insured has selected independent counsel to represent him or her, the insurer may exercise its right to require that the counsel selected by the insured possess certain minimum qualifications which may include that the selected counsel have (1) at least five years of civil litigation, and (2) errors and omissions coverage.

The insurer's obligation to pay fees to the independent counsel selected by the insured is limited to the rates which are actually paid by the insurer to attorneys retained by it in the ordinary course of business in the defense of similar actions in the community where the claim arose or is being defended.

This subdivision does not invalidate other different or additional policy provisions pertaining to attorney's fees or providing for methods of settlement of disputes concerning those fees.

Any dispute concerning attorney's fees not resolved by these methods shall be resolved by final and binding arbitration by a single neutral arbitrator selected by the parties to the dispute.

Subdivision (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. Any claim of privilege asserted is subject to in camera review in the appropriate law and motion department of the superior court. Any information disclosed by the insured or by independent counsel is not a waiver of the privilege as to any other party.

Subdivision (e)

The insured may waive its right to select independent counsel by signing 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 a defense attorney to represent me in the lawsuit.”

Subdivision (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 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.

Jurisdictions Recognizing Dual-Client Status

In The Tripartite Relationship

Alabama	Mitchum v. Hudgens, 533 So. 2d 194 (Ala. 1988) (when insurance company retains attorney to defend action against insured, attorney represents insured as well as insurer in furthering the interest of each party).
Alaska	Home Indem. Co. v. Lane Powell Moss & Miller, 43 F.3d 1322 (9th Cir. 1995) (insured and insurer are both represented by the attorney as long as there is no conflict of interest).
Arizona	Paradigm Ins. Co. v. Langerman Law Offices, 303 Ariz. Adv. Rep. 27, 2 P.3d 663, 666 (Ariz. Ct. App.1999) ("We hold that, if there is no conflict, an attorney-client relationship can be created between an insurer hiring an attorney to represent its insured….").
California	Gulf Ins. Co. v. Berger, Kahn, Shafton, Moss, Figler, Simon, & Gladstone, 93 Cal. Rptr. 2d 534 (Ct. App. 2000) ("Attorney has two clients: the policyholder and insurer.").
Delaware	Hoechst Celanese Corp. v. Nation Union Fire Ins. Co., A.2d 1118(Del. Super. Ct. 1992) (discussing the relationship among different defendants to determine whether documents were privileged; court suggests attorney may represent both the insurer and insured).
District of Columbia	National Union Fire Ins. Co. v. Aetna Cas. & Sur. Co., 384 F.2d 316 (D.C. Circuit 1967) (attorney acted as insurer's representative while defending insured).
Florida	In re Rules Governing conduct of Attorneys in Florida, 220 So. 2d 6 (Fla. 1969) (both salaried and non-salaried insurance attorneys may represent insurer and insured if there is no conflict).
Georgia	Coscia v. Cunningham, 299 S.E.2d 880 (Ga. 1983) (recognizing an attorney represents both the policyholder and insurer).
Hawaii	Finley v. Home Ins. Co., 975 P.2d 1145 (Haw. 1998) (attorney cannot represent both insurer and insured when there is a conflict, and citing authority that attorney represents them both when there is no conflict).
Idaho	Pendlebury v. Western Cas. & Sur. Co., 406 P.2d 129 (Idaho 1965) (attorney may represent both; when there is a conflict, the attorney may be in an awkward situation, and cannot take a position adverse to the interest of his client).

Illinois	Waste Management, Inc. v. International Surplus Lines Ins. Co., 579 N.E. 2d 322, 329 (Ill. 1991) ("[W]hen insurer retains attorney to defend insured, attorney represents both insured and insurer in furthering the interest of each.")
Indiana	Cincinnati Ins. Co. v. Wills, 717 N.E.2d 151 (Ind. 1999) (attorney may represent both the policyholder and insurer; dual representation permissible even when the attorney was in-house counsel for the insurer, because their interests are aligned).
Iowa	Henke v. Iowa Home Mut. Cas. Co., 87 N.W.2d 920 (Iowa 1958) (attorney represented both the policyholder and insurer, and the fact that another selects and pays for the attorney does not control the attorney-client relationship), cited approvingly in Squealer Feeds v. Pickering, 530 N.W.2d 678 (Iowa 1995).
Kansas	Glenn v. Fleming, 781 P.2d 1107 (Kan. Ct. App. 1989) (insured's attorney represented insurer as well, and insurer had a right to control and direct the litigation), aff'd in part & rev'd in part, 799 P.2d 79 (Kan. 1990).
Louisiana	Hodges v. Southern Farm Bureau Cas. Ins. Co., 433 So.2d (La. 1983) (attorney represented both the insurer and insured); Brasseaux v. Girouard, 214 So.2d 401 (La. Ct. App. 1968) (an attorney may simultaneously represent the policyholder and insurer).
Maryland	Fidelity & Cas. Co. v. McConnaughy, 179 A.2d 117 (Md. 1962) (attorney can represent insured and insurer unless a conflict develops).
Massachusetts	McCourt Co. v. FPC Properties, Inc., 434 N.E.2d 1234 (Mass. 1982) ("The law firm is attorney for the policyholder as well as the insurer.")
Minnesota	Shelby Mut. Ins. Co. v. Kleman, 255 N.W.2d 231 (Minn. 1977) (no conflict of interest in the representation of an insurance company and an insured by a single law firm).
Mississippi	Moeller v. American Guar. & Liab. Ins. Co., 707 So.2d 1062 (Miss. 1996) (attorney has two separate and distinct clients, the policyholder and the insurer); Hartford Accident & Indem. Co. v. Foster, 528 So.2d 255 (Miss. 1988) (recognizing attorney represent the policyholder and insurer, insured's interest are paramount if a conflict arises.
Missouri	In re Allstate Ins. Co., 722 S.W.2d 947 (Mo. 1987) (attorney may represent the policyholder and insurer).
Nebraska	Hawkeye Cas. Co. v. Stoker, 48 N.W.2d 623 (Neb. 1951) (stating attorney can not represent both insurer and insured when their interest conflict); Shahan v. Hilker, 488 N.W.2d 577, 581 (Neb.1992) ("[C]ommunication made by an insured to his liability insurance com-

	pany , concerning an event which may be made the basis of a claim against him covered by the policy, is a privileged communication, as being between attorney and client, if the policy requires the information or assistance of the attorney in so defending him."').
Nevada	Cambell v. Maestro, 996 P.2d 412 (Nev. 2000) (explaining that a "dual agency" relationship between the policyholder, insurer, and attorney, and the insurer has the right to control the litigation); Stubli v. Big D Int'l Trucks, Inc., 810 P.2d 785 (Nev. 1991) (Rose, J., dissenting) (recognizing attorney represents insured and insurer).
New Hampshire	Dumas v. State Farm Mut. Auto. Ins. Co., 111 N.H 43, 274 A.2d 781 (N.H. 1971) (communications between insurer and the attorney were not privileged as between them because they were both clients of the attorney in the previous action).
New Jersey	Lieberman v. Employers Ins. of Wausau, 419 A.2d 417 (N.J. 1980) (recognizing attorney has two clients, the policyholder and insurer unless a conflict arises, then the attorney may not continue to represent both); Gray v. Commercial Union Ins. Co., 468 A.2d 721 (N.J. Super. Ct. 1983).
New York	Goldberg v. American Home Assurance Co., 439 N.Y.S.2d 2 (App. Div. 1981) (stating attorney represented both insurer and insured).
Ohio	Netzley v. Nationwide Mut. Ins. Co., 296 N.E. 2d 550 (Ohio Ct. App. 1971) ("We hold that both Nationwide [the insurer] as well as… its insured, were clients of the legal counsel retained by Nationwide.").
Oregon	In re Conduct of O'Neal, 683 P.2d 1352 (Or. 1984) (referencing dual representation of insurer and insured as example situations where attorney can represent multiple clients if it is obvious the lawyer can represent interest of each client without conflict).
Pennsylvania	Sweldoff v. Philadelphia Trans. Co., 187 A.2d 152 (Pa. 1963) (referring to the insurance company and the policyholder as clients of the attorney); Molitoris v. Woods, 618 A.2d 985 (Pa. Super. Ct. 1992) (recognizing attorney can represent both an insured and insurer's subrogation interest).
Rhode Island	Employers' Fire Ins. Co. v. Beals, 240 A.2d 397 (R.I. 1968) (if there is no conflict, or the policyholder consents, attorney may represent both the policyholder and the insurer), abrogated on the other grounds by Peerless Ins. Co. v. Viegas, 667 A.2d 785 (R.I. 1995).
South Carolina	Chitty v. State Farm Mut. Auto. Ins. Co., 36 F.R.D 37 (E.D.S.C. 1964) (recognizing attorney represented insurer and insured, therefore, communications were not privileged).

Vermont	In re Illuzzi, 632 A.2d 346 (Vt. 1993) (plaintiff's attorney violated ethics rules by speaking directly to insurer instead of communicating through the attorney hired to defend insured; dissent as to sanction affirms that, at the beginning of the litigation, an attorney may represent both an insured and insurer, but if a conflict arises, he may only represent the policyholder).
Virginia	State Farm. Mut. Auto. Ins. Co. v. Floyd, 366 S.E.2d 93, 97 (Va. 1988) ("During their representation of both insurer and insured, attorneys have the duty to convey settlement offers to the policyholder…"); Norman v. Insurance Co. of N. Am., 239 S.E.2d 902 907 (Va.1978) ("[A]n insurer's attorney, employed to represent an insured and insurer, but if a conflict arises, he may only represent the policyholder).
Washington	Barry v. USAA, 989 P.2d 1172 (Wash. Ct. App. 1999) (normally an attorney operates on behalf of two clients, the insurer and the policyholder).
Wisconsin	Roeske v. Deifenbach, 226 N.W.2d 666 (Wis. 1975) (recognizing the attorney represented both the policyholder and insurer, but on appeal this was not appropriate because there was a conflict of interest.).
Wyoming	Suchta v. Robinett, 596 P.2d 1380 (Wyo. 1979) (suggesting an attorney represent insurer and insured; "Both clients, the paying one and the one who had the attorney assigned to him …").

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