A “C” of Issues: Cumis Counsel, Competence, & Capacity in California

Kimberly Barton
University of Nebraska College of Law
J.D. Candidate, Class of 2020
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A. Ms. Best’s Ethical Obligations

1. Inform Mr. Able and MII in writing of Mr. Able’s right to independent counsel

A tripartite relationship exists between an insurer, the insured, and counsel appointed by the insurer to defend the insured. (Am. Mut. Liab. Ins. Co. v. Superior Court (1974) 38 Cal.App.3d 579, 592.) This joint representation is permissible because the insurer and the insured’s interests are aligned towards the claim’s defense. (Ibid.) If a conflict of interest arises between the insurer and the insured, this joint representation is prohibited unless the attorney issues a written disclosure and obtains both parties’ informed written consent. (Cal. Rules of Professional Conduct, rule 1.7.)

When an insurer raises or reserves a coverage issue, a potential conflict is triggered. (Unigard Ins. Group v. O’Flaherty & Belgum (1995) 38 Cal.App.4th 1229, 1236-1237.) The insurer must examine whether they have a duty to provide independent counsel to the insured, also known as Cumis counsel. (Civ. Code, § 2860; see generally San Diego Federal Credit Union v. Cumis Ins. Society, Inc. (1984) 162 Cal.App.3d 358.)

Independent counsel is necessary if 1) the insurer reserves its rights on a given issue, and 2) the outcome of that coverage issue can be controlled by counsel first retained by the insurer for the defense of the claim. (Civ. Code, § 2860, subd. (b).) An insurer’s reservation of rights alone is insufficient to create a conflict of interest necessitating independent counsel. (Hartford Casualty Ins. Co. v. J.R. Marketing, L.L.C. (2015) 61 Cal.4th 988, 1012.)

Mr. Able’s right to independent counsel has been triggered because MII issued Mr. Able a reservation of rights letter. MII reserved its rights on two issues: to deny Mr. Able coverage for 1) amounts he may have wrongly taken from the Green estate, and 2) attorney’s fees paid to Mr. Able by the Greens and the estate.
The outcome of at least one of these coverage issues is controlled by Ms. Best. The Green children assert two claims: malpractice and breach of fiduciary duty. Defending the breach of fiduciary duty claim necessarily includes asserting Mr. Able did not wrongly take money from the trust or estate and is owed his fees as executor and trustee from 2015 to 2018. Defending the malpractice claim necessarily includes asserting Mr. Able rightfully earned his attorney’s fees from Mr. Green for estate planning services in 2010.

These necessary defenses raise an actual conflict. It may be in MII’s best interest to settle the claims by agreeing to reimburse the Greens for all of Mr. Able’s attorney’s fees. MII, having reserved their right not to reimburse Mr. Able for attorney’s fees, would only have to pay Ms. Best’s legal fees while passing on the settlement amount due to Mr. Able. This settlement may not be in Mr. Able’s interest because he may be better served by going to trial to prove he did not divert funds from the trust. Doing so would protect his law license and reputation in the community, both of which are not monetarily valued by MII.

Therefore, Ms. Best should disclose to MII and Mr. Able that due to MII’s reservation of rights there is a significant risk she will not be able to exercise loyalty and independent judgment. (See Cal. Rules of Professional Conduct, rule 1.7, comment 4.) She should inform MII and Mr. Able that Mr. Able has a right to select independent counsel at MII’s expense and Mr. Able may waive these rights with written consent. (See Civ. Code, § 2860.) Ms. Best should also inform Mr. Able that he may be liable to MII for attorney’s fees for defense of any claims not covered by MII. (See Buss v. Superior Court (1997) 16 Cal.4th 35, 39-40.) Ms. Best must fully inform MII and Mr. Able of this conflict and she must do so in writing (See Cal. Rules of Professional Conduct, rules 1.7, subd. (b) & 1.0.1, subds. (e) & (e-1).)
2. Obtain written consent from both parties to continue the joint representation

Ms. Best may continue to represent both MII and Mr. Able despite Mr. Able’s right to independent counsel. To meet the statutory requirement to waive his right, Mr. Able must be informed of his right and then waive it in writing by signing a statement (See Civ. Code, § 2860, subds. (a) & (e).) This requirement fulfills the California Rules of Professional Conduct requirement for Ms. Best to obtain informed written consent from Mr. Able to waive the conflict. (See Cal. Rules of Professional Conduct, rule 1.7, subd. (b).) Ms. Best must also obtain informed written consent from MII to waive the conflict. (Ibid.)

Ms. Best’s letter to Mr. Able and his lack of response cannot be construed as informed written consent to the conflict. Ms. Best’s letter is written but not “informed” because it does not explain to Mr. Able the material risks or adverse consequences presented by joint representation. (See Cal. Rules of Professional Conduct, rule 1.0.1, subd. (e).) It does not mention his right to independent counsel or the conflicts posed by the joint representation. Ms. Best cannot take Mr. Able’s silence as consent because his consent as well as her disclosure must be written. (See Cal. Rules of Professional Conduct, rule 1.0.1, subd. (e-1).) The letter is also not informed written consent from MII because it is from Ms. Best and does not speak to the conflict.

Even if Mr. Able is willing to waive his right to independent counsel, Ms. Best must consider whether she can competently represent both parties. (See Cal. Rules of Professional Conduct, rule 1.7, subd. (d).) If Mr. Able wishes to assert a contractual claim against MII related to his policy, Ms. Best will not be able to continue representing both parties simultaneously. (Ibid.) Ms. Best must also be on alert for new issues that arise and their potential for conflict so that she can obtain additional informed written consent if needed. (See Cal. Rules of Professional Conduct, rule 1.7, comment 2.)
3. Keep Mr. Able’s depression confidential and consider withdrawal

Because Ms. Best learned of Mr. Able’s severe depression while acting as his lawyer, she is required to keep this information confidential. (See Cal. Rules of Professional Conduct, rule 1.6, subd. (a). See also Bus. and Prof. Code, § 6068, subd. (e)(1).) Mr. Able may waive confidentiality and allow Ms. Best to disclose his depression by giving his informed consent (written disclosure and written waiver not required). (See Cal. Rules of Professional Conduct, rule 1.6, subd. (a).) The only confidentiality exception is for preventing a criminal act likely to result in death or substantial bodily harm. (Cal. Rules of Professional Conduct, rule 1.6, subd. (b).) Mr. Able’s depression is unlikely to approach a criminal act unless he tells Ms. Best he has a plan and means to commit suicide or cause life-threatening physical harm to another person. (See Cal. Rules of Professional Conduct, rule 1.6, comment 3.)

Even if Mr. Able obtains independent counsel, Ms. Best has a duty to keep his depression confidential, including from MII. Ms. Best “…may not (i) do anything that will injuriously affect [her] former client in any matter in which [she] represented the former client, or (ii) at any time use against the former client knowledge or information acquired by virtue of the previous relationship.” (Cal. Rules of Professional Conduct, rule 1.9, comment 1.) If Ms. Best were to disclose Mr. Able’s depression to MII, Mr. Able could be injured because MII could use this knowledge to insulate itself from covering the malpractice claims against Mr. Able.

Therefore, if Mr. Able retains independent counsel and Ms. Best wishes to continue to represent MII in the matter, she should obtain Mr. Able’s informed consent to disclose his depression to MII pursuant to California Rules of Professional Conduct, rule 1.6 on confidentiality and rule 1.9 on duties to former clients. However, if Mr. Able does not consent to the disclosure, Ms. Best is in a double-bind. She risks injuring her former client Mr. Able if she does disclose his
depression to MII, and incompetently representing MII if she does not disclose his depression for use in MII’s case. Ms. Best may need to withdraw from representing MII entirely. (See Cal. Rules of Professional Conduct, rule 1.16, subd. (b)(9).) Ms. Best need not withdraw if Mr. Able’s depression is unrelated to the suit against him or MII’s defenses; however, given that the depression is one of the reasons Mr. Able refuses to settle, it likely is a related matter.

**B. Mr. Able’s Legal Options**

4. **Contact the California State Bar Lawyer Assistance Program**


   Ms. Best or her successor should advise Mr. Able to contact the California State Bar Lawyer Assistance Program (“LAP”) regarding his depression. LAP provides advice and resources to attorneys, including on mental health topics. (http://www.calbar.ca.gov/Attorneys/Attorney-Regulation/Lawyer-Assistance-Program.) LAP consultations are confidential. (Bus. and Prof. Code, § 6234.) Ms. Best should inform Mr. Able that he may be subject to disciplinary action by the California State Bar if he lacks the competence necessary to fulfill his professional obligations. (See Cal. Rules of Professional Conduct, rules 1.0, comment 1 & 1.1.) Ms. Best has no affirmative duty to report Mr. Able’s possible competency issues to the State Bar nor may she do so because
she is bound by current or former client confidentiality. (See Cal. Rules of Professional Conduct, rules 1.6, subd. (a) & 1.9, subd. (c), supra.)

5. **Assert a statute of limitations defense for both claims**

The statute of limitations for legal malpractice is one year from actual or constructive discovery or four years from the date of the wrongful act, whichever occurs first. (Code Civ. Proc., § 340.6.) The same statute of limitations applies to a claim that an attorney breached a fiduciary duty while acting as a professional. (Prakashpalan v. Engstrom, Lipscomb & Lack (2014) 223 Cal.App.4th 1105, 1121.) Fraud claims are excepted from the Code of Civil Procedure section 340 and have a three-year statute of limitations that begins with actual or constructive discovery. (Code Civ. Proc., § 338(d).)

Trustees have a duty to notify beneficiaries of the existence and terms of a trust when it becomes irrevocable due to the sole settlor’s death. (Prob. Code, § 16061.7, subds. (a)(1) & (b)(1).) Beneficiaries here includes contingent beneficiaries who will take as a class. (Prob. Code, § 15804, subd. (a)(1).) If a beneficiary receives notice of the trust, they may contest it within 120 days. (Prob. Code, § 16061.8.)

Trust beneficiaries who received an accounting may bring related claims within three years of the date of receipt. (Probate Code, § 16460.) If the trustee did not provide an accounting, the statute of limitations is three years from the constructive date of receipt. (Ibid.) Because Mr. Able’s alleged legal malpractice occurred in 2010 and the alleged breach of fiduciary duty occurred 2015 to 2018, some or all of the claims may be barred by the one-year or four-year statute of limitations. If the alleged missing trust funds relate to the conditions of the trust, those related claims are likely barred by the statute of limitations unless Mr. Able failed to provide notice. If the alleged missing trust funds relate to accountings, those related claims may also be barred depending on the date of
those accountings. The court will likely be more lenient with the statute of limitations if the Green children imply fraud given the delayed discovery rule.

6. Assert plaintiffs lack standing to bring the malpractice claim

In a legal malpractice claim, plaintiff client must prove defendant attorney owes them a duty of care. (*Chang v. Lederman* (2009) 172 Cal.App.4th 67, 76.) The court has allowed non-clients not in privity with the attorney-client relationship to sue for malpractice. (*Id.* at 76-77.). The court’s decision is based on the six *Biakanja/Lucas* factors:

1) the extent to which the transaction was intended to affect the plaintiff,
2) the foreseeability of harm to him,
3) the degree of certainty that the plaintiff suffered injury,
4) the closeness of the connection between the defendant's conduct and the injury,
5) the policy of preventing future harm, and
6) whether the recognition of liability would impose an undue burden on the profession.

(*Id.* at 83, fn. 7.)

Whether Ms. Green was Mr. Able’s actual client rather than a third-party is unclear. Mr. Able met only with Mr. Green, but he also drafted and executed a will for Ms. Green. Ms. Green could have had contact with Mr. Able directly or through Mr. Green, possibly as her conservator. Ms. Green is still alive and could sue on her own behalf or through her conservator, if any. Her claims, including for duty and damages, are stronger than her children’s because she directly or indirectly received legal document preparation from Mr. Able, was Mr. Green’s spouse and presumed co-owner of community property, and is the primary intended beneficiary of Mr. Green’s estate and trust. In contrast, the Green children likely must seek court approval to sue on their own behalf as a third-parties in the malpractice suit. The attorney-client relationship between Mr. Able and Mr. Green was intended to benefit them, but only as contingent beneficiaries. Although Mr. Green shows intention by naming the children specifically as a class, their claim
is general and prospective. Fewer assets may pass to them than if Mr. Able had not been negligent, but they were never promised a set sum. It is possible Ms. Green could deplete the trust entirely, leaving the children nothing regardless of Mr. Able’s advice, thereby defeating proximate causation in the malpractice action.

7. **Concede plaintiffs have standing to bring the breach of fiduciary duty claim**

Trustees have duties to administer the trust, be loyal, and preserve trust property. (Prob. Code, §§ 16000, 16002, 16006.) Trustees must account to beneficiaries currently receiving an income from the trust at least once per year unless waived by the trust instrument or the beneficiary. (Prob. Code, §§ 16062, 16064.) The term beneficiaries includes persons with contingent future interests. (Prob. Code, § 24.)

Trust beneficiaries may bring a proceeding against a trustee including for failure to perform their duties, committing a breach of trust, and compelling redress of a breach of trust by payment of money. (Prob. Code, § 16420.) Remedies for breach of trust are only in equity. (Prob. Code, § 16421.)

Both Ms. Green and the Green children are likely beneficiaries under Probate Code even though the children only take after Ms. Green’s death and may not be affirmatively owed an accounting. The Green children likely have standing to bring a proceeding under Probate Code, whether they do so on their own behalf or Ms. Green’s.

8. **File a demurrer because plaintiffs lack legal capacity to sue for Ms. Green**

Ms. Best should file a demurrer pursuant to Code of Civil Procedure section 430.10, subsection (b), because it is unclear on whose behalf the Green children are suing. They allege Mr. Able committed malpractice because he should have advised Mr. Green to transfer the bulk of his
estate in 2010 to a trust to directly benefit the children. Doing so, they believe, would have qualified Ms. Green for Medicaid assisted living coverage.

It is unclear whether the Green children have any legal authority to act for Ms. Green’s benefit. Adults are assumed competent unless a court finds otherwise and appoints a conservator. (Prob. Code, § 810.) Ms. Green is not suing in her own name, no conservator has been identified, and the Green children do not assert power of attorney. Furthermore, although Mr. Able is the trustee of a trust benefitting Ms. Green, he is not necessarily Ms. Green’s personal or estate conservator or her attorney-in-fact. Therefore, given the Green children’s lack of legal capacity to sue on Ms. Green’s behalf, Ms. Best or her successor should file a demurrer.

9. **File a demurrer because plaintiffs need to request an accounting**

A beneficiary may bring a proceeding to compel an accounting if the trustee has failed to submit an account within 60 days of a written request and no account has been made six months prior. (Prob. Code, § 17200, subd. (b)(7)(B).) There is no reason to believe Mr. Able has not provided an annual accounting to Ms. Green or the Green children or that the Green children have requested such an accounting from Mr. Able prior to filing suit.

As above, Mr. Able is not required to provide an annual accounting to the Green children if they are not currently receiving trust income. However, the Green children are still beneficiaries and are entitled by Probate Code section 16061 to request information from the trustee, including an accounting. (See *Esslinger v. Cummins* (2006) 144 Cal.App.4th 517). Therefore, this matter is likely premature unless the Green children have formally requested an accounting from Mr. Able.