



Insurance Defense Tips Newsletter

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Fall 2013

CALIFORNIA SUPREME COURT DE- PUBLISHES COURT OF APPEAL CASE WHICH TWISTED INSURANCE DEFENSE COUNSEL'S ETHICAL DUTIES

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In June, the Court of Appeal decided the case of *Schaefer v Elder* which disrupted more than 20 years of precedent regarding the ethical duties of defense counsel appointed by insurers to represent their insureds. In the *Schaefer* case, Schaefer sued Elder for a variety of claims arising out of a construction defect action. Elder tendered the defense of the action to its insurer Castle Point, which appointed defense counsel subject to a reservation of rights, as some of the claims were not covered under the policy. Castle Point filed a separate declaratory relief action against Elder to determine whether the insurance policy provided coverage for the claims Schaefer made against Elder. Elder hired a different law firm and moved to disqualify insurance defense counsel and to determine Elder's right to *Cumis* (independent) counsel. The trial judge disqualified insurance defense counsel and determined that Elder had a right to *Cumis* counsel at the insurer's expense. The insurer appealed. The Court of Appeal not only affirmed the trial judge's holdings, but also held that insurance defense counsel representing an insurer's insured had an ethical duty to establish facts that would assist the insurer in defeating coverage. One of the issues in the *Schaefer* case was whether Elder's workers were employees or independent contractors. The Appellate Court held that insurance defense counsel not only had an ethical duty to establish that the workers were employees (to Elder) but at the same time had an ethical duty to Castle Point to establish that the workers were independent contractors. This conflict supported the trial court's determination that Elder had the right to *Cumis* counsel and that the insurer provided attorneys were properly disqualified.

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Mercifully, the California Supreme Court granted a petition to de-publish this opinion. The Court of Appeal in *Schaefer*, in holding that insurance defense counsel has an affirmative duty to establish facts to eliminate insurance coverage created an ethical obligation not consistent with defense counsel's primary obligation to fully and zealously represent the interests of an insured. Avoiding coverage issues is one of the prime directives of insurance defense counsel. Participating in discovery which would defeat coverage, especially in circumstances where a reservation of rights letter has been issued, is contrary to protecting an insured's interests. Had the *Schaefer* opinion remained published and therefore precedent, the obligations of insurance defense counsel would have changed to such an extent that it would arguably make it impossible for defense counsel to accept the defense of any case where there might be a coverage question. For now, however, insurance defense counsel in California can continue to rely on the *Cumis* counsel statute and 20 years of case law defining ethical obligations in order to fully represent their clients while simultaneously servicing insurers.



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