

Jan 2023 | [Articles Blog: The Westchester Litigator](#)

## When to Hire Personal Counsel to “Shadow” Insurance Counsel

You find yourself in the following situation: you have been sued, and your insurance company has provided a lawyer to defend you, as stipulated in your insurance policy, per the insurer’s “duty to defend.” While this sounds like a great deal for you and often is, there are circumstances under which you should consider hiring your own counsel, in tandem with the insurance-provided defense, to ensure your rights are fully protected.

What are the circumstances when “shadow” insurance counsel is likely warranted? They fall broadly into two categories: (1) If there is a risk that the litigation could end with you personally responsible for some or all of the plaintiffs’ damages, and so your interests are not perfectly aligned with those of your insurer; or (2) the litigation is highly personal to you.

### You and Your Insurer Have Imperfectly Aligned Interests

The first situation that supports hiring shadow insurance counsel arises when one or more of a plaintiff’s claims or types of damages sought are not covered by your insurance policy, most notably when punitive damages are asserted. While this is rare, punitive damages can be significant as they are designed to punish or deter certain conduct, and it is against New York public policy for an insurance company to pay punitive damages on behalf of its insured, regardless of what the insurance policy says.

Because the insurance company knows it is not on the hook for punitive damages, in our experience, insurance defense counsel is not focused on getting punitive damages claims dismissed. Personal counsel, whose focus is on the risks you face personally, can push the insurance company and its counsel to litigate aggressively to get a punitive damages claim dismissed. This also holds true for claims such as fraud and other intentional torts, which are not covered by most insurance policies.

The second situation in which personal counsel can add meaningful value is when there is a possibility that the plaintiff’s damages will exceed your [insurance coverage](#), leaving you at risk of personal liability for an excess judgment (in other words, damages that are more than the insurance policy limits). As this is another situation that raises the question of incentives for the insurance company, it is prudent to have personal counsel pushing the insurance company to settle the case within the coverage limits. In fact, in certain cases, when the insurance company can settle litigation within the coverage limits and fails to do so, the company could be held liable to you for ‘bad faith’ if the plaintiff gets a judgment over the policy. In our experience, personal counsel can use the “threat” of a bad faith claim to effectively persuade insurance defense counsel to settle within policy limits.

Finally, there is a risk of personal liability when your insurance company agrees to defend you under what is called a “reservation of rights.” This is usually done through a “reservation of rights” letter and typically means that, while the insurance company is willing to defend you, it has not indemnified you (i.e., to pay any adverse judgment that the plaintiff may obtain

against you). When your insurance company issues a reservation of rights letter, it is important to consult legal counsel to understand your rights. A reservation of rights letter will often create a conflict of interest between you and your insurance company, hence another reason to retain personal counsel. In fact, under New York state law, when a reservation of rights letter creates a conflict of interest, you have the right to choose your own defense counsel at the insurance company's expense.

## **A Highly Personal Matter**

The other situation that may call for personal counsel is when a dispute is highly personal to you and/or the plaintiff's allegations accuse you of egregious conduct, and your reputation is on the line. Litigation can be about many things: money, revenge, hurt feelings, betrayal, etc. Understanding what drives the litigation for each party informs and helps formulate the most effective litigation strategy to accomplish a client's goals. For an insurance company, litigation is seldom personal; it is about money and little else. But, as anyone who has sued or been sued will tell you, litigation is always personal to those involved.

When an insurance company runs the defense, your case is likely one of the hundreds being handled by your insurance adjuster and insurance defense counsel. It is often difficult to get their attention and to feel like you have access to information or control over the situation. Personal counsel understands the process and speaks the same language as insurance defense attorneys, so they can help you feel more empowered, obtain access to information and strategy decisions, and have a say over the litigation.

## **It is Better to be Safe Than Sorry**

When your insurance company agrees to provide for your defense, consider whether the company is sufficiently incentivized to protect your rights and interests fully. While there are plenty of circumstances when the answer is yes, there are situations where you are well-advised to hire personal counsel to shadow the insurance company. Identifying these circumstances is not always easy as it often requires an understanding of your insurance company's legal obligations and the nuances of your insurance policy. Therefore, at a minimum, it is a good idea to seek legal advice about these issues to determine whether personal counsel makes sense in a particular situation. The good news is: Because your personal counsel would be shadowing rather than leading the litigation, the costs associated with hiring personal counsel are usually lower than typical defense costs and the benefits to you, in the long run, can far outweigh those costs.