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A Delicate Balance: Successful Navigation of the Tripartite Relationship

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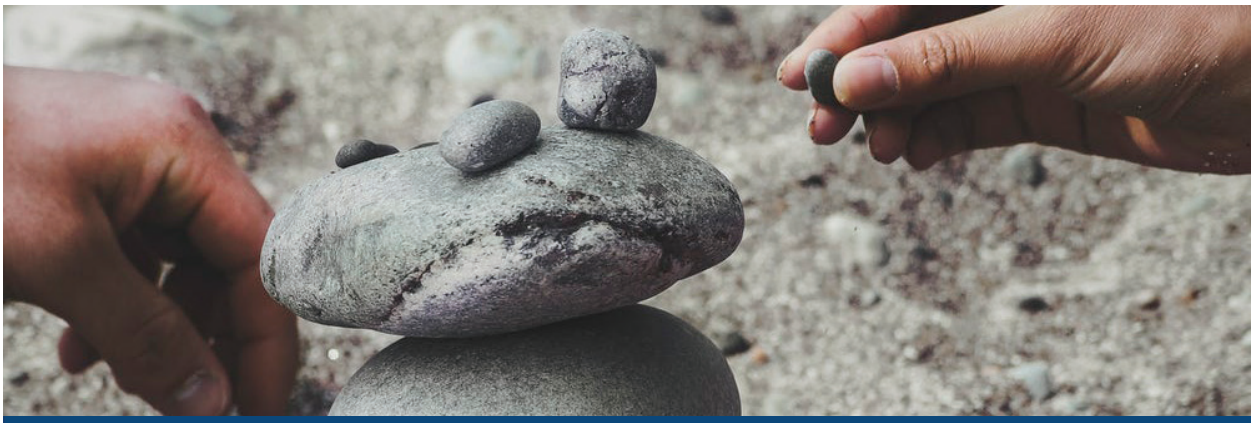

The term "tripartite relationship" describes the relationship that arises between and among an insured, the insurer, and defense counsel hired by the insurer to represent the policyholder. Specifically, the tripartite relationship arises out of the insurer's duty to defend the insured against claims asserted by third parties. This relationship has been described as "deeply and unavoidably vexing"[1] and is governed by an interconnected system of case and statutory law, contracts (both insurance policies and engagement letters), and ethical rules. Under the traditional (and majority view), insurer-appointed defense counsel has two clients, the insured and the insurer, and owes the full spectrum of attorney-client duties to them both. A minority of jurisdictions, including Arkansas, Colorado, Pennsylvania, Tennessee, South Dakota, Texas, West Virginia, and Connecticut, either provide that the insured is defense counsel's only client, or consider the insured the "primary client," implying that defense counsel has a lesser obligation to the insurer.[2]

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[1] Charles Silver, *Does Insurance Defense Counsel Represent the Company or the Insured?*, 72 Tex. L. Rev. 1583, 1584 (1994).

[2] *First Am. Carriers, Inc. v. Kroger Co.*, 787 S.W.2d 669, 671 (Ark. 1990); Colorado Bar Ass'n Ethics Opinion 43; *Atlanta Intern. Ins. Co. v. Bell*, 475 N.W.2d 294 (Mich. 1991); *CAMICO Mut. Ins. Co. v. Heffler, Radetich & Saitta, LLP*, 2013 WL 315716 (E.D. Pa. 2013); *Givens v. Mullikin ex rel. Estate of McElwaney*, 75 S.W.3d 383 (Tenn. 2002); *St. Paul Fire & Marine Ins. Co. v. Engelmann*, 639 N.W.2d 192, 200 (S.D. 2000); *Safeway Man. Gen. Agency, Inc. v. Clark & Gamble*, 985 S.W.2d 166 (Tex. Ct. App. 1998); *Barefield v. DPIC Cos., Inc.*, 600 S.E.2d 256 (W. Va. 2004); *Metro. Life Ins. Co. v. Aetna Cas. & Sur. Co.*, 730 A.2d 51 (Conn. 1999).

Many liability policies give the insurer the exclusive right to control the defense and settlement of claims against the insured. The insurer's ultimate control over the insured's defense, coupled with the sometimes competing interests between the insurer, the insured, and defense counsel, can create conflicts in a tripartite relationship. A conflict of interest between the insurer and its insured "occurs whenever their common lawyer's representation of the one is rendered less effective by reason of [the lawyer's] representation of the other."[3] Undoubtedly, insurer-appointed defense counsel should be mindful of the various ethical conundrums that can arise in the context of the tripartite relationship.

That said, the specter of potential conflicts should not detract from the fact that, in the context of a third-party claim against the insured, the insurer, and defense counsel share a common goal: to eliminate or minimize the third party's claim. Indeed, courts recognize that this shared motivation to defeat a common adversary is one of the foundational elements of the tripartite relationship.[4] When defense counsel, the insured, and the insurer view each other as teammates, all parties can benefit.

In addition to defense counsel, the insured, and the insurer, that team can also include brokers and monitoring counsel. The role of the broker and the insurer's representative/ monitoring counsel are often overlooked and misunderstood players in the tripartite arena. There is often ambiguity surrounding not only the broker's relationship with the insured, but, also, the broker's role in the handling of the insured's claims. In some coverage lines, you never hear from the broker and their role appears to be simply the procurement of insurance for the policyholder. However, in complex and specialty lines of coverage, and specifically professional lines, the insured's broker's involvement is much more substantial and the relationship between the broker and the insured is often very close. The insured's broker often has in-depth knowledge of the insured's business but also of the specific claims that can arise therefrom. The broker's role can be advantageous to the parties as they often bring expertise in a specific line of coverage and the claims handling process. Brokers serve as advocates for their clients (typically, the insureds) and facilitate communications between the parties, including assisting in the handling of the insured's claims. Additionally, the broker's expertise as to the client's insurance program and business is often relied upon in the formation of legal strategy in the underlying case. The broker can often help diffuse challenging situations that arise between the insured, insurer and defense counsel with their in-depth industry and claims knowledge and experience.

Monitoring counsel are typically hired by the insurer to evaluate the underlying claim against the insured, provide recommendations on the handling of that claim, and to advise the insurer on insurance coverage issues. In this role, monitoring counsel can facilitate the exchange of positions, ideas, and solutions between the various parties to the arrangement. Monitoring counsel's interests are, of course, aligned with the insurer and as a result, monitoring counsel works with defense counsel to achieve the most effective resolution of a claim. In the event that there are coverage issues, monitoring counsel

[3] *Spindle v. Chubb/Pacific Indem. Grp.*, 89 Cal. App. 3d 706 (1979); *see also* ABA Model Rules of Prof'l Conduct 1.7(a)(2) (noting that attorney has a concurrent conflict of interests when "the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.").

[4] *Am. Mut. Liab. Ins. Co. v. Superior Ct.*, 113 Cal. Rptr. 561, 571–72 (Cal. Ct. App. 1974).

will address those issues with the insured and usually will leave defense counsel out of these communications to avoid potential conflicts of interest. While we hope this summary is useful, we recognize that every situation is different and the roles of the various parties are not always clear. When all else fails, never hesitate to ask a party to clarify their role and who they represent.

This article will offer an overview of the tripartite relationship, focusing especially on the importance of communication between and among defense counsel, the insurer, and the insured, (as well as the brokers and monitoring counsel) and address issues regarding the attorney-client privilege and the work product doctrine that may arise in the context of those communications. It will then offer specific tips for defense counsel that can help ensure that not only will the insured receive a high-quality defense, but also that the insurer will receive a level of client service that will make the insurer more likely to send additional business to the attorney and his/her law firm.

PROTECTED COMMUNICATIONS IN THE TRIPARTITE RELATIONSHIP

Just as different players on a sports team each have different strengths, so, too, do the different parties in the tripartite relationship. Insurers are, in many ways, professional litigants, and their years of managing, litigating, and resolving third-party claims against their insureds give insurance companies unparalleled insights into the claims resolution process and certain defense strategies. The insured is oftentimes in the best position to provide information about the particular claim at issue, the availability and location of key documents and other evidence, and insights into the personalities of the individuals involved in the matter. Insurers place attorneys on their panels whose knowledge, skills, and judgment they trust and who have previously delivered strong client service and positive results. While insurers, and especially insureds, often look to counsel for guidance and to drive the matter towards the desired outcome, defense attorneys will be able to provide the best representation for their clients when the lines of communication go both ways. As anyone who has worked in a team environment before can attest, frequent and clear communication is the best way to develop cooperation and trust within the team.

Thankfully, the law provides two powerful tools that can help maintain the confidentiality of communications between attorneys and their clients about a legal matter and the documents they prepare to assist them in furtherance of the representation: the attorney-client privilege and the work product doctrine. While these concepts are familiar to many in the legal and insurance industries, there can be some confusion as to how these tools play out in the context of the tripartite relationship, when defense counsel has two clients and the insurer and insured also need to directly communicate about the claim.

The Attorney-Client Privilege

The purpose of the attorney-client privilege "is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice."[5] Accordingly, privileged communications will be protected from disclosure. To trigger the privilege, there must first be an attorney-client relationship, and, even then, the privilege will only protect confidential communications made for the purpose of obtaining legal advice.[6] The

[5] *Upjohn Co. v. United States,* 449 U.S. 383, 389 (1981).
[6] *United States v. Evans,* 113 F.3d 1457, 1461 (9th Cir.

formative question in the application of the attorney-client privilege is "who is the client"? In the insurance defense arena, the answer for appointed defense counsel in most jurisdictions is both the insured and the insurer. Thus, there should be little question that the attorney's communications with the insured and the insurer for the purpose of providing legal advice will be privileged.[7] An important exception to this rule is when the insurer has issued a reservation of rights as to coverage sufficient to necessitate the appointment of independent counsel for the insured.[8]

Moreover, most courts also recognize that direct communications between the insured and insurer made in connection with the underlying claim can also be protected attorney-client communications when made for the specific purpose of obtaining legal advice.[9] The typical justification for protecting such communications is the common interest doctrine. As one court has noted, "[t]he common interest doctrine permits parties whose legal interests coincide to share privileged materials with one another in order to more effectively prosecute or defend their claims."[10] Courts most often determine that the "common interest" arises within the tripartite relationship once the insurer retains counsel to defend the insured, which thus extends the attorney-client privilege to communications among the insurer, insured, and defense counsel.[11] It should be noted that there is not a per se insured-insurer privilege, so when the communications between the insured and

1997).

[7] Indeed, it is generally accepted that, regardless of whether the retained attorney and the insurer can be said to have a distinct attorney-client relationship, their "communications . . . concerning such matters as progress reports, case evaluations, and settlement should be regarded as privileged and otherwise immune from discovery by the claimant or another party to the proceeding." Restatement (Third) of Law Governing Lawyers, § 134(f).

[8] *Cont'l Cas. Co. v. St. Paul Surplus Lines Ins. Co.*, 265 F.R.D. 510, 515, 522–23 (E.D. Cal. 2010).

[9] *Soltani-Rastegar v. Superior Ct.*, 256 Cal. Rptr. 255, 256–58 (1989) (statements given to insurer for the purpose of defending against claims are protected by the attorney-client privilege); *Linde Thomson Langworthy Kohn & Van Dyke, P.C. v. Resolution Trust Corp.*, 5 F.3d 1508, 1515 (D.C. Cir. 1993) ("Certainly, where the insured communicates with the insurer for the express purpose of seeking legal advice with respect to a concrete claim, or for the purpose of aiding an insurer-provided attorney in preparing a specific legal case, the law would exalt form over substance if it were to deny application of the attorney-client privilege."); *Lamar Adver. of S.D., Inc. v. Kay*, 267 F.R.D. 568, 579 (D.S.D. 2010) (noting the majority rule that "where the communication between the insured and his insurance company is made for the dominant purpose of protecting the interests of the insured, the insured properly assumes (1) that the communication is made to the insurance company for the purpose of transmitting it to the attorney and (2) that the insurance company is under an obligation to defend the insured, so the communication will be protected by the attorney-client privilege.").

[10] *Am. Mgmt. Servs. v. Dep't of the Army*, 703 F.2d 724, 732 (4th Cir. 2013).

[11] *See N. River Ins. Co. v. Phila. Reins. Corp.*, 797 F. Supp. 363, 366–67 (D.N.J. 1992) ("The common interest doctrine has been recognized in the insured/insurer context when counsel has been retained or paid for by the insurer, and allows either party to obtain attorney-client communications related to the underlying facts giving rise to the claim, because the interests of the insured and insurer in defeating the third-party claim against the insured are so close that 'no reasonable expectations of confidentiality' is said to exist.") (citing *Carey-Canada, Inc. v. Aetna Cas. & Sur. Co.*, 118 F.R.D. 250, 251 (D.D.C. 1987). Defense counsel practicing in a minority jurisdiction that does not recognize an attorney-client relationship between the insurer and defense counsel may face an obstacle in this respect. After all, insurers will still require information and documentation to evaluate the allegations against the insured and to analyze the damages sought and potential exposure and value of the case. That said, if the applicable jurisdiction follows the minority view, it may not be wise to send the insurer counsel's written substantive legal analysis. The best option for side-stepping this issue is to avoid written communications and to provide substantive updates to the carrier via telephone. Other options include executing joint defense/common interest agreements between the insured and insurer or confidentiality agreements.

insurer are not explicitly made for the purposes of assisting in the legal defense of the claim, the communication may not be protected by the attorney-client privilege.[12] While these general principles are good rules of thumb, it must be noted that state law governs both the attorney-client privilege and the tripartite relationship, and whether a certain communication within the tripartite relationship is privileged will often be very fact-specific. Defense counsel should be intimately familiar with their jurisdiction's views on the attorney-client privilege and the tripartite relationship when communicating with the insurer and the insured and in responding to discovery during the litigation.

The Work Product Protection

In addition to attorney-client privilege, work product protection can extend to documents prepared by the insurer, insured, and defense counsel in connection with the third-party's claim.[13] Under the Federal Rules of Civil Procedure, "a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) . . . ."[14] The insurer's claim file may be of special interest to the plaintiff in discovery. Plaintiff's counsel may argue that claim files are discoverable because investigating claims is, after all, integral to an insurer's business and, therefore, the documents prepared during the insurer's investigation are prepared in the ordinary course of business and not in contemplation of litigation.[15] Fortunately for those in the tripartite relationship, courts are generally not receptive to such arguments in the context of third-party claims against insureds. While the point at which work product protection attaches can be difficult to establish in some instances, the general rule in federal courts is that claims files for third-party claims are subject to work product protection, as litigation can be anticipated from the outset of a claim against the insured.[16] State law protections regarding work product more or less follow this standard, although some courts will draw a distinction between materials that merely gather facts versus those that go beyond this point. [17] Thus, while work product protection is a separate legal doctrine that turns on different factors than the attorney-client privilege, it is a no less valuable protection for those in the tripartite relationship and affords insureds, insurers, and counsel potentially great cover as they communicate with each other and prepare the insured's defense against the third party's claim.

[12] *See Aiena v. Olsen*, 194 F.R.D. 134, 136 (S.D.N.Y.2000) ("Federal courts have never recognized an insured-insurer privilege as such."); *see also Varuzza v. Bulk Materials, Inc.*, 169 F.R.D. 254, 256 (N.D.N.Y.1996) (written statement by insured submitted to insurance company investigator prior to insurer's retention of counsel to defend the insured was not privileged).

[13] *See, e.g., Lectrolarm Custom Sys. v. Pelco Sales, Inc.*, 212 F.R.D. 567, 572 (E.D. Cal. 2002) (noting that tripartite relationship precludes waiver of attorney-client privilege and work-product doctrine by disclosure of communications to insurer).

[14] Fed. R. Civ. P. 26(b)(3).

[15] *See, e.g., Stephenson Equity Co. v. Credit Bancorp, Ltd.*, No. 99 Civ. 11395(RWS), 2002 WL 59418, at *2 (S.D.N.Y. Jan. 16, 2002) ("As many courts have noted, it often is difficult to determine whether documents prepared by an insurance company or its representatives are entitled to work-product protection because insurers are in the business of investigating and adjusting claims.").

[16] *Taylor v. Temple & Cutler,* 192 F.R.D. 552 (E.D. Mich. 1999); *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162 (N.D. Ga. 2013); *Lewis v. Ameriprise Ins. Co.*, No. 16-00111-B, 2017 WL 890101 (S.D. Ala. March 6, 2017).

[17] *See, e.g., Lowes of Georgia, Inc. v. Webb,* 180 Ga. App. 755,757 (1986) (recognizing that work product privilege applies to documents in an insurer's claims file if prepared for more than a "simple fixing of facts").

PRACTICAL TIPS FOR COMMUNICATING IN THE TRIPARTITE RELATIONSHIP

Even in jurisdictions that have a healthy regard for the attorney-client privilege and work product doctrine in the context of the tripartite relationship, steps should be taken to ensure that they are not inadvertently waived. Defense counsel, insurers, and insureds should consider adopting the following procedures when communicating with each other in the interest of preserving attorney-client privilege and work product protection.

- Properly label communications that meet the test for attorney-client communications. The document or email should be labeled as: "Attorney Client Communication—For Purpose of Legal Advice" or "Confidential, Subject to the Attorney-Client Privilege." Having this designation on documents and emails significantly helps during discovery as the documents/emails can be sorted by the key word "privilege" or other key word. If there is a document attached for review, label the document "Privileged and Confidential—Legal Advice/Review Sought."

- When the insurer or insured reaches out via email to counsel for legal advice or review, this request should be clearly stated either in the body of the email or via a header. Stating, "Can you please review this document", "request for legal advice" or "I need your legal review/advice" can more effectively preserve the privilege than more ambiguous phrases like "FYI" or "I have a couple of questions." Likewise, the responding attorney should also expressly state that he or she is providing legal advice/review and frame the substance of the communication accordingly.

- When sending a communication that is intended to be privileged, ensure the attorney is in the "to" line in the email or memorandum, as opposed to a "cc" line, so that counsel is the primary recipient of the communication.

- Special consideration should be given to those copied on an email or memorandum sent to counsel. While we are all conditioned to include our team members on emails to "keep everyone in the loop," ask yourself if those you intended to copy are necessary. Limit circulation of requests for legal advice and other privileged communications internally to those that truly need to know.

- Once confidential, privileged communications have been made, you must treat and maintain them as confidential in order to preserve the privilege going forward. Keep the communication confidential and do not permit the legal advice or counsel's substantive analysis to be circulated to those outside the tripartite relationship. [18]

- Be judicious with respect to claims of

[18] While the insured's broker may seem like a natural extension of the insured for the purposes of the tripartite relationship, courts find that this not necessarily the case and that and communications between defense counsel or the insurer to a broker can be discoverable. *See, e.g., Bovis Lend Lease, LMB, Inc. v. Seasons Contracting Corp.*, No. 00 Civ. 9212(DF), 2002 WL 31729693 at *9 (S.D.N.Y. Dec. 5, 2002) (finding insurer's communication to broker was a regular "status update" that would have been prepared regardless of whether any claims were (or were anticipated to be) in litigation); *see also SR Int'l Business Ins. Co. Ltd. v. World Trade Ctr. Props. LLC*, No. 01 Civ. 9291(JSM), 2002 WL 1334821 at *2 (S.D.N.Y. June 19, 2002) (holding that "communications between [the broker's] employees and the [law] firm were not protected by the attorney-client privilege").

privilege and work product when they are not applicable. Overuse of claims of privilege and work product on communications and documents that obviously do not qualify for these protections can dilute the effectiveness of truly valid claims, especially to a judge evaluating your response to the plaintiff's motion to compel.

- Additionally, exercise caution when communicating by email. Email chains can often veer off the privilege when intermingled with other business issues that do not have a legal purpose. Be wary of a lengthy back and forth email conversations and long email chains, as that often leads to people to stray off topic or potentially add new people to the conversation that may risk the privilege. Best practices for insured and insurers is to put legal discussions and non-privileged business discussions in separate emails.

- Insureds can consider how best to structure in-house risk management teams to try to centralize risk management and avoid any future arguments that privilege or protection of information has been waived or compromised due to the nature of the parties included in communications. Further, this approach can ensure that only those parties that are appropriately familiar with these issues are included on communications.

PRACTICAL TIPS FOR DEFENSE COUNSEL IN DEALING WITH INSURERS

A defense lawyer engaged by an insurer to represent an insured likely wants at least two things to arise out of the engagement: a successful outcome for the insured and repeat business from the insurer. Just as counsel has his/her own hopes and expectations for the engagement, so, too, do the insured and insurer. The insured typically just wants to defeat the third party's claim with minimal out-of-pocket expense and disruption to its business. While the insurer will also want to defeat or minimize the plaintiff's claim, insurers oftentimes want and expect more from counsel than just forcing a favorable settlement or writing a winning motion. Counsel should keep in mind that an insurer is just like any other company that has policies, procedures, and controls as to how it conducts its business. The other side of that coin is that defense counsel is a vendor to the insurer no less than the companies that provide office supplies or IT support. As noted above, a large part of insurers' business is managing claims against their insureds. To help keep this aspect of their business running smoothly, insurers depend on outside defense counsel to provide them with the necessary information. Thus, defense counsel should understand that the level of client service they provide to the carrier in this respect is often a key metric in how they are evaluated for future assignments.

A common grumble from defense counsel is that writing reports to the insurer takes them away from the actual litigation for they were retained. While we unfortunately do not have any tips to offer as to how to get out of writing reports, we can offer defense counsel advice on how to write better, more efficient reports that will give insurers the information they need and will make you stand out from other panel counsel.

Write with the Audience in Mind

Even if the claims handler to whom you report is an attorney, that handler is likely to forward your report along to supervisors

who may not be attorneys, or copy and paste sections of your report into an internal report. While tools like string citations, parentheticals, block quotations of case law, and extensive analysis distinguishing your case from the precedent may make a motion or brief more persuasive, they are oftentimes not helpful in reports to insurers and detract from the report's readability, especially for lay readers. That said, you will want to demonstrate that your proposed arguments are supported by relevant authority, so provide citations as needed there. Moreover, be mindful that you are reporting to insurance professionals. Even non-lawyers will rarely require extensive explanation of basic issues like negligence or causation unless there is some quirk in the applicable jurisdiction's law that merits special mention. Instead of including extensive case law and citations in a report to the claims adjuster, consider a paired down report with a succinct evaluation of exposure and damages and, instead, include the motions or briefs as an attachment.

Use a reader-friendly format for your report that makes extensive use of section headings so that the reader can easily locate the information they want. Write as concisely as possible, with respect to both your prose and the content you include. A report bloated with flowery prose and extraneous information can detract from your ability to show the carrier that you have a firm handle on the key facts and issues that will drive the outcome of the claim. While exceptions may be necessary, reports much over five pages are rarely required (or appreciated by claims handlers!).

Focus on the Introduction and Conclusion/ Recommendations Sections

Claim adjusters often manage a large amount of claims and may not have time to read a lengthy report. With this in mind, help the adjuster find the significant points quickly. Therefore, ensure that every report has a clear introduction that highlights the essential background information and contains the key developments since your last report. Every report should contain a conclusion, with an action plan, providing a roadmap of the next steps going forward and flagging any recommendations that require client approval. If all a client reads is the report's introduction and conclusion, he or she should be left with an understanding of the case's key developments to date and the plan for future action.

The Importance of Budgets and Reserves

It is essential to provide the insurer with a defense budget (at least through summary judgment) as soon as possible, along with your recommendation as to the case's exposure/ value. Insurers need this information in order to set appropriate reserves, which allow the insurer to pay defense counsel's fees above the policy's retention. At a basic level, reserves are an insurer's assets that it sets aside in order to ensure the ability to pay a given claim, taking into account all potential outcomes and associated costs and expenses. [19]Any funds the insurer sets aside as a

[19] *See Lincoln Gen. Ins. Co. v. Access Claims Adm'rs, Inc.*, No. CIV. S–07–1015 LKK/EFB, 2009 WL 161071 *17 (E.D. Cal. Jan. 22, 2009) (describing a reserve as "a sum of money set aside to pay a claim, with the purpose of guarding against insurer insolvency"); Signature Dev. Cos. v. Royal Ins. Co. of Am., 230 F.3d 1215, 1224 (10th Cir. 2000) (noting that a reserve is "merely an amount [the insurer] set aside to cover potential future liabilities.").

reserve for a claim are funds the insurer cannot use for investment or other profitable purposes. Moreover, regulators require insurers to maintain appropriate reserves, and insurers can be penalized for improperly reserving claims. The insurance industry craves predictability. An especially nasty surprise for insurers is a large increase in requested settlement authority or in the potential exposure evaluation on the eve of trial when counsel has previously taken the position that the case is defensible and presents low exposure. If you do not think the case is one that should be tried, let the insurer know that early and often. Unless there is a good reason for it, a sudden recommendation for a high-value settlement of a claim with a looming trial date may lead the insurer to conclude that the attorney just doesn't have the stomach for trial. Predictability goes a long way to fostering a positive relationship with the claims adjuster.

Other Miscellaneous Tips

While the above are big picture recommendations, there are also many "little" things counsel can do when communicating with insurers that will make things easier for everyone:

- Include the claim number on the heading of all reports and in the subject line of all emails;

- Notify the insurer of any upcoming key dates, such as mediations, hearings, and deadlines to help claims handlers calendar important case milestones;

- On that note, report well in advance of key events so that the insurer has time to react on its end (e.g. securing appropriate authority for a mediation);

- When giving an estimation as to the probability of an outcome, never say 50/50, the carrier has retained you for your expertise and your opinion—do not shy away from making a hard call;

- Invite the carrier to participate in all strategy and status update calls with the insured or even retained experts; and

- Stay in your lane—defense counsel should refrain from wading into coverage issues that could create a conflict between the carrier and the insured.

Following the above practices in their dealings with insurers will help ensure that not only will counsel be providing a high-quality representation to the insured in any particular claim, but will also be the type of lawyer that adjusters want to work with time and time again. Good service to one client in the tripartite relationship almost never has to come at the expense of good service to the other.