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Show me the money

Evaluating, pursuing, and mediating personal-contribution cases


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By Miles B. Cooper

The lawyer thought about the case. Two cyclists struck from behind at 45 miles per hour by a driver with dementia. On a clear day, with a straight road, the meandering driver drifted across the fog line, plowing through the riders. The driver told the investigating officer that the riders spontaneously fell, and he had slowed down to ask them why they were "being silly." Minimal insurance, seven figures in assets, and catastrophic injuries. Time for a personal-contribution discussion.

It's personal

One considers personal contribution in many cases. Are the injuries significant enough that the available policies, including any potential underinsured motorist coverage, are insufficient to compensate a client? If yes, it is time to evaluate personal assets and then discuss the pros, cons, and mechanics of personal contribution. Sometimes this is simple. Some clients want only insurance proceeds. Others are furious, demanding a pound of flesh. Be cautious when taking these clients on – some can never be satisfied. Their displeasure then shifts toward the handling lawyer. But most exist in the gray between, requiring a pros and cons conversation.

The pros include potentially more compensation. The cons? Nuanced. Personal money is personal, making a defendant loath to part with it. Presuming the defendant has insurance, the defendant gets an unlimited free defense. The insurance defense counsel must take the case through trial while the insurance carrier covers the case costs. And while an injured client's fees don't stack by the hour, the case costs mount. Meanwhile, if the verdict is significant, the defendant will evaluate bankruptcy to shelter assets. One is negotiating a home purchase from a gas-and-matches-armed arsonist. Settle early or the arsonist burns it all. The challenge is finding the friction point without torching the client's upside potential with trial case costs.

An additional wrinkle in states like California, where underinsured motorist coverage does not stack, is evaluating the available UIM coverage vis a vis the potential personal contribution. The hard-earned cash a defendant contributes is deducted from the UIM maximum payment. If there's a large UIM policy, it takes significant personal contribution to exceed the UIM benefit. This can feel unsatisfying to some clients. A both/and solution? Let the defendant know they are being let off with a warning, that to be a good citizen they must increase their limits to $500,000 (or whatever amount seems appropriate for their asset profile), and that as a settlement term they must provide a copy of their declarations page renewal for the next 3 years or pay ($20,000) liquidated damages.

Negotiating with arsonists

Presuming the cursory asset profile exceeds any UIM coverage, one needs more information for effective negotiation. A detailed asset search, Google stalking, and bankruptcy protection analysis helps guide the conversation. Commission the detailed asset search before opening the torpedo-tube doors. If the assets start moving after initiating settlement demands, one can then use this as grist for a fraudulent-transfer cause of action. Fraudulent transfer is a dish best served in the underlying litigation rather than waiting for a subsequent collection lawsuit. Beyond the efficiency of one case versus two, it bolsters the liability position (why hide if you aren't responsible?) and increases juror displeasure if the jury thinks a defendant is trying to hide money.

Most personal contribution cases benefit from early mediation with assigned counsel, including prior to filing. Ask defense counsel if they need anything beyond the demand like a medical examination. Work with a trusted mediator who does extensive pre-mediation groundwork. This includes making sure personal counsel is involved, that the defendant has ready access to trust-but-verify asset information like bank and brokerage statements, and that the defendant understands this will be a "How much?" conversation.

Most defendants balk at turning over financials directly to the plaintiff's lawyer and client. But they will often agree to allow the mediator to see it. This allows for that trusted mediator to evaluate the information and help one determine if the defendant's poverty argument holds water. Throughout a personal-contribution negotiation, consider counseling one's client to show a modicum of mercy. This can be the right thing to do and simultaneously increase the settlement chances if the defendant gets to keep something. Do all personal asset cases settle? No. If the arsonist is determined to burn it all, evaluate the best path with the client. Presuming that is trial, try it efficiently and then execute the resulting judgment with extreme prejudice.

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Back to our lawyer and cyclists. The lawyer worked with opposing counsel to select a mediator both sides trusted. The mediator did the advance work and brought the sides together through a detailed process that took more than a single session. A bonus? Since one of the cyclists had a decent UIM policy, the cyclists agreed to put more personal contribution in the hands of the one without UIM coverage, thus increasing the overall size of the collectable pot in the case.

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