



Basics: Working up a motor-vehicle accident case

A look at the process from case intake through the settlement demand

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Beginning a career in the practice area of personal injury can feel like drinking from a fire hose; it can be overwhelming and intimidating; new attorneys do not know where to begin. A simple motor-vehicle accident will have numerous issues that must be addressed that are never taught in law school. Consistent focus on a mastery of the basics is often imperative to success.

But what are the basics we should be aware of? Presenting a common hypothetical

situation will assist in demonstrating how the methods put forth in this article will apply to real personal-injury cases. Let's say that a person is rear-ended and is experiencing neck and back pain. After you have gathered an initial account of the incident and determined that you will be accepting representation, what steps should be taken next? This article will outline what practices and points each attorney should know when representing a plaintiff for a personal-injury action arising out of a motor-vehicle accident, including how to properly perform fact-gathering, conduct an investigation,

identify evidence sources, contact the liable parties and insurers, and prepare a pre-litigation settlement demand.

Investigation of potential evidence

Information to be obtained from your client

After you have taken the initial statement from the client and decided to represent them, arrange a time to meet with the client and go over their case again. Ask for a statement of the facts of the accident, a list of all injuries caused by the event, their past medical history, all medical providers and treatment locations related to this event, any wage/



income loss, other incidental losses, and the effect on household services.

Although this may initially feel like an unnecessary use of time, often having the client perform a second retelling brings out more information that was not relayed during the first rendition. In addition to gathering further information, you can also use this time with your client to assess factual holes and clarify unclear aspects of their statements. At the end of this second meeting you should have a good understanding of the facts of the incident and your client's injuries.

Factors reducing client's claim

While gathering additional information from your client, it is important to determine whether your client's own actions may minimize or deny recovery. Various legal principles may function to reduce your client's potential claim.

Under California Proposition 213, drivers who are uninsured and injured in an accident are barred from collecting non-economic damages, regardless of fault. Although economic damages are still available, this may decrease your client's potential recovery significantly.

California is a comparative fault state. This means that although your client may not be the cause of the accident, if they are determined to be partially responsible for their injuries, their settlement or judgment will be reduced by their percentage of fault. Commonly, comparative fault is recognized when your client's negligence contributed to the accident and/or their injuries. This may arise when your client was speeding, failed to wear a seat belt, or violated some other California Vehicle Code provision. While comparative fault will not completely deny the opportunity for compensation, the assigned percentage of fault may significantly reduce the amount. Thus, whether your client possesses the proper insurance and whether they may be liable for comparative fault is imperative to analyze during these initial conversations.

Vehicle information and/or data

In motor-vehicle cases, it is necessary to draw attention to the evidence that electronic data may provide. Often, attorneys do not realize the utility of electronic data, especially in cases where liability is contested.

For instance, in a recent case, our client stated that the defendant driver had struck the rear wheel well of her vehicle and side-swiped her. The defendant asserted that our client struck the side of his vehicle. On examination of the vehicle data, it was shown that the impact had indeed occurred as our client said it did. This irrefutable data fast-tracked the conclusion of our case by making it impossible for the defendant's insurer to deny liability.

Electronic data from vehicles is generally located in a "black box," which, depending on the model of the vehicle in question, can record the few seconds prior to, during and after a crash. Certain vehicles may record additional data; it will be important to fully research the breadth of information that the specific vehicle's at issue may contain.

Additional electronic data systems that may commonly be at issue in personal injury cases are advanced driver systems. These systems include autonomous braking systems, backup cameras, forward collision warning, and rear cross-path detection. Not every vehicle will be equipped with these systems, but newer models are more likely to include them. For instance, Tesla vehicles are generally outfitted with cameras that are constantly recording and accessible to the owner of the vehicle. As stated, the available data will differ based on the make, model and year of the vehicle, but the data may provide significant evidence for your client's claim.

It is also important for attorneys to be aware of the issues that may arise with these systems, allowing for potential product defect, manufacturing defect, and design defect claims. Important questions to ask when advanced driver systems may be a potential cause of the incident should focus on the status of the system

at the time of impact and whether the system reacted properly. This will allow you to assess whether an advanced driver system may be at issue in a motor-vehicle accident.

Identifying and gathering additional evidence

After you and the client go over their factual assertions, it is then necessary to identify potential evidence sources that may bolster or mitigate the veracity of your client's claims. This includes asking about the existence of photographs and/or videos of the incident, including potential security footage, whether anyone witnessed the incident, whether a police report was composed, whether news reports of the incident may exist, and whether electronic data may exist.

Depending on the specifics of the particular claim, another potentially helpful tool is the "way back machine." This website provides a compiled archive of the internet by taking screen shots of large swaths of websites at a certain time and saving these past web pages. Therefore, it may be possible to view the past content of a liable party's web page regardless of whether edits have occurred. This tool may be particularly useful when dealing with online warranties, statements or advertisements that may relate to the cause of your client's harms.

When you have identified the entities that may possess this pertinent evidence, send a letter that requests the evidence be preserved and outline the various legal duties that require evidence to be maintained. Remember, should a party intentionally destroy or hide evidence, CACI Jury Instruction 204 allows for the jury to view the evidence in a light unfavorable to the party that destroyed the evidence. This is a powerful jury instruction designed to punish bad action and may result in a significant boon for the plaintiff during trial.

Collectability – investigation of the liable party and insurance

Following evidence gathering, the next big piece to devote attention to is



who or what you can potentially collect from related to your client's harms. After representation begins, it is of vital importance to quickly identify who the responsible parties may be, what insurance may apply and the amount of available coverage.

Gathering asset information on liable parties

Should the liable party lack insurance coverage or be underinsured in relation to your client's harms, insight into the liable party's personal assets may be needed. When the identity of the liable parties is established, there are various tools that will allow you to evaluate their assets.

Information about potential personal assets can often be easily discovered by performing a "PeopleMap" or "Public Records" search, hosted on Thomson Reuters and LexisNexis, respectively. These searches may be free, depending on your subscription plan, and will provide a comprehensive list of information on the liable party's public presence and recorded assets.

Third-party insurance

Most private parties that a plaintiff's attorney will encounter possess some form of insurance. With regard to automobile drivers, under California Vehicle Code financial responsibility laws (CA Veh. Code sections 16000-16560) drivers are required to maintain the minimum amount of liability insurance coverage related to motor vehicle accidents. In California, the minimum amount of liability coverage for private passenger vehicles is \$15,000 per person, \$30,000 per occurrence.

Generally, your client will have exchanged contact and insurance information with the liable party at the scene of the accident. This exchange of information after a motor-vehicle accident is required under CA Vehicle Code section 16025, unless a driver is incapacitated. (Veh. Code, § 16025(a).) Should insurance coverage be unknown or another need arise, an attorney should not be afraid to cautiously contact the liable

party in accordance with California Rules of Professional Conduct, rule 2-100(a). Under California Rules of Professional Conduct, rule 2-100(a), an attorney may not directly contact a party known to be represented, unless the party's attorney has provided consent. Usually, the liable party is unlikely to be represented before litigation begins and may be contacted to discuss liability, whether liability is contested, whether they will agree to release policy information, and whether their insurance company has been notified of the accident.

After insurance coverage has been identified, the next step in resolving a case is to contact the insurer. It is important to put the insurer on notice that an incident has occurred and that a claim will be asserted in the future. This initial contact should include an introduction, an explanation of the representation relationship, a brief explanation of the facts, a request to maintain pertinent evidence accompanied by legal citations regarding spoliation of evidence, and, should it be necessary, a request for a vehicle inspection. Whether a vehicle inspection is needed largely depends on the specific facts of the case; in situations where liability is accepted, these inspections are unlikely to be necessary. But should the cause be contested and/or the cause of the incident relate to a defect with the vehicle, an inspection may be required.

First-party insurance – UIM coverage

In addition to a letter to the liable party and their insurer, it is also good practice for an attorney to alert the client's insurer that they have assumed representation in the matter. This contact should also include an introduction, explanation of the attorney-client relationship, a brief explanation of the facts, and request any evidence related to the incident. Moving forward, this will require the client's insurer to solely contact the attorney related to this case and will trigger the insurer's duty to defend their insured from potential liability.

Additionally, in some situations, a client may claim compensation for

their damages against their own insurer. Referred to as a first-party claim, should your client's damages exceed the available third-party insurance or should the liable driver be uninsured or unknown, first-party uninsured motorist coverage may be available. Uninsured/underinsured motorist (UIM) coverage can allow for a person injured in an automobile accident to recover against their own insurer for the damages they have incurred.

UIM coverage operates as overflow coverage. Should a third party have insurance, the injured party is first required to receive the policy limit of the liable third party. Liable drivers will usually possess enough coverage to compensate your client's damages, but should their harms exceed the third party's policy limit, the injured party can then claim their excess UIM coverage to additionally compensate them. It is important to note that the third-party policy limit amount already accepted by the injured party must be subtracted from the available UIM coverage; the remaining amount is then available for the first-party claim.

Medical pay coverage

Some insurance policies also provide for payments for medical treatment that may be needed due to a motor vehicle accident. Medical pay coverage applies regardless who is at fault for the accident and covers medical bills for the insured and passengers in the vehicle. Usually, medical payment coverage is relatively minimal, offering around \$5,000-\$10,000 of coverage normally. Although, depending on the injuries, this coverage may not fully cover your client's medical treatment, it is still best practice to use medical pay coverage to minimize your client's out-of-pocket expenses.

Continued contact with insurer

Following these initial introductions, it is equally important for the attorney to remain in regular contact with the insurers, particularly the liable party's insurer. Giving periodic updates and discussion related to your client's harms and treatments prepares the adjuster for the upcoming settlement



demand and introduces the difficulties faced by your client due to their insured's actions.

As the demand is being prepared, it can also be good practice to request that the liable party execute a Stipulation admitting liability and a Declaration of no other assets. Although some will refuse to execute these documents, execution of these documents can be in the liable party's best interest because it makes their insurance company singularly responsible to settle the claim against them. Further, the execution of these documents may act as the foundation for a subsequent insurance bad faith claim if the insurance company improperly refuses to settle for a reasonable settlement demand within the policy limits. Finally, these documents are relatively easy to prepare and can vastly simplify the settlement process should they be executed.

Preparing a demand

Liability

Generally, a demand is composed of two main parts: liability and damages. Asserting the insured's liability is the first aspect that should be addressed in a settlement demand. In personal injury actions involving a motor-vehicle accident, there are four different causes of action that tend to be implicated. This includes negligence, negligence per se, premises liability, and product liability.

Negligence cause of action

Negligence, the most common of the causes of action, is present when a person fails to act with reasonable care and in doing so causes the harm at issue. In motor-vehicle accidents, negligence is present when a driver fails to act as a driver exercising reasonable care, such as speeding, not paying attention, and failing to abide by the right of way.

Negligence per se cause of action

Negligence per se allows negligence to be presumed, with few exceptions, if the liable party was in violation of a statute and this violation resulted in the harm at issue. In motor-vehicle accidents, liable parties frequently are

in violation of California Vehicle Code provisions. Should a statutory violation be present, negligence is presumed against the liable party who then bears the burden of refuting it.

Premises liability cause of action

Premises liability is a claim against the owner or controller of an area where harm occurred and the harm was caused by a dangerous or unsafe condition on said premises. Within the framework of motor-vehicle accidents, premises liability regularly arises when the area where the accident occurred may have been defectively designed, missing signage, or improperly maintained.

Product liability cause of action

Product liability is present when a harm is caused by an issue with a product, including a defect in its manufacture, design or failure to warn. With regard to motor-vehicle accidents, product liability generally revolves around issues with the involved vehicles. Due to the complicated nature of products generally involved in motor-vehicle accidents, definitively determining if there is product liability may require an inspection by a mechanical engineering expert.

Asserting applicable causes of action

Particularly in cases with less straightforward liability and/or product liability claims, expert analysis may be required to establish liability. Within motor-vehicle accidents, biomechanical engineers and accident reconstructionists are commonly used. A biomechanical analysis can show the cause of injuries by analyzing the forces necessary to result in those injuries while an accident reconstruction re-creates the incident itself using available evidence. Although not inexpensive, these expert analyses may conclusively establish liability. A summary of these findings and the supporting report can be included within your demand should the situation require.

In some cases multiple causes of action may be applicable, for instance negligence and negligence per se are both commonly present in motor-vehicle accidents. It is good practice to include all of the applicable causes of action within this

liability discussion to demonstrate the various ways the insured is at fault. Should a police report exist, their findings can also help establish liability of the insured, and citing to the report would be appropriate within this section of the demand.

Following the specific assertions of liability, an attorney should lay out how the liable party caused the harm. Generally, this can be as simple as applying the facts to the cause of action and asserting that had the liable party not performed this action, the harm would not have occurred.

Damages

In order to support your demand amount, various records indicating your client's damages should be provided. This section should be divided into two subcategories; special damages and general damages. Special damages should be supported by records, whereas general damages will necessitate a discussion of the pain and suffering incurred by your client.

Special or economic damages

Special damages, also referred to as economic damages, are particular harms that have an established economic cost. Generally, these economic costs are demonstrated by various records, including medical, wage, and other incidental damages. On a practical note, due to the difficulty in accessing medical records from slow-moving providers, you will want to order records as soon as your client reaches an appropriate point in their medical treatment.

When the timing is proper depends on the specific aspects of each case. As a customary rule, if the matter is a large case concerning more severe harms, order one round of records immediately to assess the extent of your client's injuries and medical treatment costs thus far. This allows you to submit an early demand that asserts the liability of the insured and puts the insurer on notice of your client's harms and costs incurred so far. Within this initial demand, it is important to indicate that the demand



will be supplemented in the future with additional records and billing as it becomes available. As the client reaches a stable treatment point or if the statute of limitations approaches, a second round of records should be requested, provided to the insurer, and accompanied by an updated settlement demand that reflects this more current injury information and treatment costs.

Conversely, if the matter will likely include a smaller amount of damages with relatively minor injuries, it is usually best to wait to order the records until your client is done treating. Once the client is done treating, order the records and prepare to provide them to the liable party's insurer to support the demand. However, if the client's treatment does not easily resolve, be sure to order these records at least six months before the expiration of the statute of limitations to allow for enough time to receive the records, compose a demand and negotiate the settlement.

Past medical records also serve as supporting evidence for a client's claim for anticipated future medical care. A plaintiff may recover the "reasonable cost of reasonably necessary medical care that [they] are reasonably certain to need in the future." (CACI 3903A.) Thus, providing some foundation for what future medical care will be necessary is regularly required. Supporting statements by treating physicians regarding future care, regular continuing treatment modalities, and other evidence may be used to establish what future medical care will be needed. This treatment information can then be used to identify the anticipated costs of receiving this treatment in the future.

In addition to the medical records and billing, wage loss documentation may be important to show the full scope of loss incurred by your client. These may include pay stubs from prior to the incident to now, totaling the time your client was forced to miss work to attend treatment multiplied by their hourly wage, and calculating the loss of overtime opportunities that your client may have been unable to accept due to the incident.

Clients may also recover for their loss of performing household services. Per the California Civil Jury Instructions (CACI), a plaintiff may recover for their loss of the ability to provide household services after proving "a reasonable value of the services [they] would have been reasonably certain to provide to [their] household if the injury had not occurred." (CACI 3903E.) To adequately assert this loss, the client should provide details of what tasks they used to perform, what they have been unable to do, how many hours per day this limitation added to their performance of household tasks, and how long their performance was affected. An attorney can then utilize the prevailing minimum wage to calculate how much the client should be reasonably compensated.

Other incidental special damages may exist depending on the circumstances of each case. Additional special damages may include the cost of ride-share services, house cleaning services, and child care, as well as other expenses.

General or non-economic damages

Finally, the client can recover for general damages, including their pain and suffering. This can include a myriad of suffering due to the incident, including the client's worry, stress, anxiety, pain, and concern surrounding their future prospects. In this section of the demand, it is important to relay your client's personal experience following the incident.

Particularly within this section, it should be your goal to humanize your client and make it clear that they have suffered particularized harm due to the actions of the liable party. In this section, it can be especially powerful to include photographs of your client. These photographs can show the injured person performing activities they enjoyed but can no longer take part in, or in the case of wrongful death, family activities that previously included the deceased. Including the aforementioned visual aids within the demand can further establish the emotional toll incurred by your client due to the liable party.

Client consent for demand

After these areas have been addressed, a total demand amount can be prepared. Prior to presentation to the insurer, an attorney should discuss the proposed settlement demand amount with their client and obtain their consent. A client has unilateral control to accept or deny a settlement amount, therefore, an attorney should confirm that the client consents to the settlement amount prior to presenting it to the insured. (*In Matter of Guzman* (Cal. Bar Ct., May 12, 2014) 5 Cal. State Bar Ct. Rptr. 308, 314-315; Bus. & Prof. Code, § 6068(m).) Thus, only after a client has been presented with the proposed demand amount and has accepted, should the demand be submitted to the liable insurer.

Negotiating a settlement

The majority of personal-injury cases resolve prior to litigation by reaching a settlement agreement. Settlement offers should be relayed to your client as they are received. An attorney must keep their clients "reasonably informed about significant developments relating to the employment or representation." (Rules Prof. Conduct, rule 3-500.) Thus, if a settlement offer is presented, an attorney should discuss this matter with their client without unnecessary delay. Conducting an in-depth discussion of the proposed settlement amount can also demonstrate to the client how much effort their attorney is devoting to their case, garnering further trust and understanding in their legal matter.

Although insurers often want to settle, basic negotiation tactics apply. To refute an offer that is too low, rely on common sense. Discuss the strength of your client's case, including the liability of the insured, your client's medical treatment, anticipated future treatment, pain, needs and concerns, as well as how each of these are affected by the actions of the liable party. Additionally, it can be helpful to discuss the anticipated strength of your client as a plaintiff should they be particularly eloquent, likeable and/or sympathetic.



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Avoiding expensive and unpredictable litigation is often the goal of each party involved, therefore a reasonable settlement offer will often result. In the rare situation that no settlement offer is acceptable, an attorney must prepare for litigation. Although warning an insurer that litigation is forthcoming may be the final push necessary to effectuate a settlement, an attorney should only do so if they are actually prepared to litigate the matter.

Conclusion

Becoming an adept legal practitioner throughout the pre-litigation phase is an achievable ambition for all plaintiffs' attorneys. Developing a thoughtful system for gathering facts and evidence, conducting proper investigations, presenting persuasive settlement demands, and negotiating will provide even the greenest attorney the proper framework for success. Although personal-injury cases may differ in the facts, liability, and damages, the central concepts and methods presented herein should be applicable to almost all situations. By utilizing this structure proposed above, plaintiffs' attorneys can be sure they provide the zealous advocacy and maximum recovery injured people require.



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