



Road rage

Intentional acts, insurance/defendant friction, and creating collectability



Cooper

BY MILES B. COOPER

As the car intentionally kept edging over to close off the available road space to the adjacent bike messenger, the messenger deployed a long-used technique. Suddenly accelerating, the messenger dropped a hand down to side mirror level, gave a casual wrist flick while passing by, and popped the passenger side mirror backward. No damage, but annoying to pop back. As the messenger continued forward, the driver responded by chasing the messenger through downtown streets. The pursuit ended when the driver caught up to the messenger, rammed the bike from behind, and then got out to continue the assault before being stopped by passersby.

Cover me

Intentional acts like road rage might lead one to believe they exist outside insurance coverage. There's nuance, however. Many states, including California, allow alternate fact pleading. That means we can plead two inconsistent claims. First cause of action: The defendant negligently struck the bicyclist, causing injuries. Second cause of action: The defendant intentionally struck the bicyclist, causing injuries. Pleading the first puts the claim into coverage, creating friction between the insurance carrier and the defendant. Knowing this, and how uncomfortable it makes insurance companies, allows one to obtain compensation.

All that and a pound of flesh

Great. We now know we may be able to create a collectable environment. Since we need liability, damages, and collectability to succeed, we're off to the races, right? Nope. We need to know our potential client's goal. Civil lawyers obtain money damages. Intentional acts provide avenues for punishment, both through the criminal side and through personal financial obligations on the civil side. It is almost always easier to obtain insurance money than personal money though. Explaining this at the outset sets expectations and helps gauge the client's ultimate goal. There are some cases where the client's vengeance demands are so absolute that they run contrary to our ability to resolve the case. Identify this at the outset. If the client says it is not about the money but about time served, consider passing. Road-ragers rarely serve significant time, and the client's dissatisfaction will boomerang on the civil lawyer.

Interim assistance

Assuming the client's expectations are realistic, next consider their financial circumstances and an application to the California Victim Compensation Board. Under certain circumstances, crime victims can submit claims to the board. For those with limited means, this can provide helpful interim benefits for medical treatment or rent. If nothing is ever recovered, the client is not required to reimburse the funds. If funds are recovered, the California Victim Compensation Board's payments must be reimbursed.

Simultaneous pressure

Intentional acts frequently provide corollary criminal components. While outside the civil arena, they require attorney strategy and input. For example, many see driving as a right and necessity instead of a privilege. Law enforcement officers, who mostly see the world through a cruiser windshield, tend to be driver-centric. District attorneys charge based on the officers' reporting. While charges frequently depend on injury severity, district attorneys rarely know more about the injuries than what was initially provided by incident paramedics. We can close loops by providing the district attorney with medical records. Sometimes, the DA needs a nudge from the community. For example, a district attorney wobbling on charging or undercharging the case may find motivation when the community expresses outrage. Posting incident video on social media with a link to the district attorney's office and how to demand action can be one way to let the community provide feedback.

An important additional step is helping the client prepare a thorough victim's compensation package. This simultaneous pressure can create a negotiating opportunity. When the defendant's carrier fully compensates the client, the client can advise the district attorney that the client has been made whole financially and waive victim compensation.

Are we negotiating? Always!

With this knowledge and action in the background, build a traditional demand package. Within the demand, consider stating specifically that if the carrier compensates the client, the client will also waive any intentional act or punitive damage claims. Then address the demand to the defendant (care of the adjuster, if one is assigned). Include the summons and complaint. Use a *Running with the Bulls* cover letter, explaining to the defendant that the insurance company and the insurance company's assigned defense lawyer don't have the defendant's best interests at heart and list the names and contact information for three competent insurance bad faith lawyers. Semi-tangent: We've referenced Courtney and Nicholas Rowley's *Running with the Bulls* before but if you don't have it, get it and use it. Yes, it costs more than an average book, and it is worth every penny.

Outro

Back to our bike messenger. After maneuvering through the criminal and civil worlds, the lawyer was able to obtain a significant policy-limits offer from the insurance company. Given the limited personal collectability available from the defendant, the bike messenger determined that resolving the case was best, thus bringing the civil episode to an end.

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