

Michael Cowen:

This is Michael Cowen and welcome to Trial Lawyer Nation.

Speaker 2:

You are the leader in the courtroom and you want the jury to be looking to you for the answers.

Speaker 3:

When you figure out your theory, never deviate.

Speaker 4:

You want the facts to be consistent, complete, incredible.

Speaker 5:

The defense has no problem running out the clock. Delay is the friend of the defense.

Speaker 6:

It's tough to grow a firm by trying to hold on and micromanage.

Speaker 7:

You've got to front load a simple structure for jurors to be able to hold onto.

Speaker 8:

What types of creative things can we do as lawyers even though we don't have a trial setting?

Speaker 9:

Whatever you've got to do to make it real, you've got to do to make it real, but the person who needs convincing is you.

Voiceover:

Welcome to the award-winning podcast, Trial Lawyer Nation, your source to win bigger verdicts, get more cases, and manage your law firm. And now here's your host, noteworthy author, sought-after speaker, and renowned trial lawyer, Michael Cowen.

Michael Cowen:

Today on Trial Lawyer Nation, we have a fantastic lawyer who practices mainly in Albuquerque and Santa Fe, New Mexico, Deena Buchanan. Deena, how're you doing today?

Deena Buchanan:

I'm great, Michael. How are you doing today?

Michael Cowen:

I am wonderful. Before I get into what all we're going to talk about, I just want to say thank you and give a shout out to LawPods. LawPods produces our podcast. They make it so easy for me because all I have

to do, Deena, is talk to people like you and they record it and they edit it and they make the social media clips that we put out and all the graphics and everything else for me and make my life really easy. And if you all want to do your own podcast, which I highly recommend, I really recommend LawPods.

Deena, one of the reasons I asked you to be on there, not just because you're a great lawyer and you're a fun person, but you also have a background before you did plaintiff's work of working with excess insurance companies. And just talking to you, I've learned so much about what goes on the other side and how cases are valued and probably how much money I probably left on the table in my career by not knowing how all this worked. And it was just fascinating. So I wanted to get you on the podcast for two reasons. One, I thought the listeners should know this too, but two, I wanted to learn more. Every time I talked to you I want to learn more and more. And so, welcome.

Deena Buchanan:

Thanks. I'm so excited to be here. I listened to your podcast ever since I opened my firm a couple years ago.

Michael Cowen:

Oh, wow.

Deena Buchanan:

You've given me a lot of nuggets too.

Michael Cowen:

Well, good. Rising tide lifts all boats, right?

Deena Buchanan:

Exactly.

Michael Cowen:

Let's start by talking before we get into the meat of the matter, let's talk a little bit about your background. You weren't always a plaintiff lawyer. How did you get started?

Deena Buchanan:

I started in big law actually long time ago and practiced in Albuquerque and then in Philadelphia, Pennsylvania for eight years there, both in big law and a Fortune 500 in-house counsel. And then came back to New Mexico and I worked largely on the insurance defense side and ultimately representing big insurance companies handling excess cases, where what an excess case is, is you have a primary layer of coverage and then some companies have other layers of coverage beyond that. The layers above that are called excess coverage. And those insurance companies would hire a law firm sometimes to parachute in within months or weeks of trial to learn the case, try to address any issues, get it ready and potentially try it, taking it away from the primary attorneys a lot of times.

Michael Cowen:

That actually had to be kind of fun just to be able to just jump in there.

Deena Buchanan:

It was five years of very high adrenaline.

Michael Cowen:

I bet.

Deena Buchanan:

Let me tell you that.

Michael Cowen:

Why would an excess carrier want to get their own lawyers if the primary carrier already hired a lawyer?

Deena Buchanan:

A lot of law firms really have relationships with the primary carriers and those are those common carriers you see. A lot of law firms are set up to handle those cases that are valued up to about a million dollars. Most primary coverage expires, at least in trucking, if we talk about trucking or a big commercial, they expire about a million or \$2 million is about where that limit is. And so, a lot of work can be handled by those companies, those law firms, and they can get summary judgment sometimes. They can dispose cases, they can cheaply settle them. Insurance companies look for a certain kind of profile in those firms. They also tend to pay a lower hourly rate for whatever reason. I'm not sure why. But for excess counsel, they want to hire specialty attorneys who are really experienced in trying bigger cases and handling more complex litigation usually with a higher exposure because the difference between cases that get handled and settled for under a million dollars and then the cases that may have up to a hundred million or more in exposure, it's very different. The stakes are higher.

And so what I saw was these insurance companies would put together these small panels of excess counsel, the go to law firms that they felt, "If this is a high stakes trial, this is who I want to represent this defendant." And there's nothing against primary counsel, a lot of times we would work alongside them, but our firm had some incredible trial attorneys who had had really good success and so, they led our team and those are people that really had the confidence of those excess carriers without higher exposure.

Michael Cowen:

So before I get further into this, just one thing that I always get asked a lot is, how do you know when there is excess coverage?

Deena Buchanan:

That can be tricky. You need to ask in discovery early and often about the coverage. We see there's some tricks and tips about this. A lot of times people ask a very simple interrogatory and a very simple request for production saying, "Please provide all available insurance that could cover this accident." You think that's a simple question and get a simple complete answer. But what you often get, and this is usually primary counsel answering these things, is that they're talking about their layer. They're going to say, "This is what we think is available to cover this claim based on the facts of this case." And when you see language like that and you just see one policy offered, you need to think again because what that is, is the defense attorney saying, "Well, in my opinion your case isn't worth more than our primary level. So I don't feel like I need to tell you about the other layers because that's not relevant. It's not likely to lead the discovery of relevant evidence."

And so that's their judgment call, but that's not their obligation under the discovery rule. So you really need to push back. What I do in my request is I say, "Regardless of counsel's evaluation of the exposure in this case, we want to know all coverage that could ever be available to address a verdict or judgment of any amount in this case." And so, if you raised your questions more broadly like that, then when you go to the judge and you only get one and you have some sense, "This is a big company, why do they only have \$750,000 in coverage?" You can talk to the judge very honestly and say, "We want an affidavit saying that there's no other coverage. We want certification that there's no other coverage," and really put them on the spot and push back because then you've got a broad enough question that hopefully the judge will back you up on.

The other thing that you do when you get pushback like that is you depose the risk manager as one of your 30(b)(6) topics, either as a 30(b)(6) topic and/or depose the risk manager for the company. A lot of corporations have what they call a risk manager, a director of risk management, vice president of risk management. There's lots of potential terms, titles for that role, but that's the person for the company that is responsible for purchasing insurance and managing the risk of the company. That's the person that their whole job, includes things like purchasing insurance, evaluating how much insurance that the company needs, what kinds of insurance, what lines of coverage. They will work with the brokers, they'll do the applications, they'll do certifications, they'll know about all aspects of the coverage. And these people really know insurance.

They have other duties, too. Sometimes they're also responsible for safety, safety policies, various parts of compliance, but a huge part of their job is insurance. So if you have them in a deposition, it's really hard for them not to answer that question of, "What other policies are available above this?" And you can get lots of other good nuggets too. So definitely make that a part of either 30(b)(6) or just a separate deposition if you feel like there's really a lot more that you can get from the risk manager. This is a deposition that's not often taken but can produce gold for a plaintiff, especially with the big company because these people have statistics about safety records, they have statistics about their ratings and their experience with insurance, the claims that have been filed, the claims that have been paid, because they're responsible for then going to the next carrier the next round and renewing. So you can get a lot of information about corporate practices from the risk manager.

Michael Cowen:

I found that I think oftentimes defense counsel don't even ask their client, they just ask the adjuster to send me the policy, because I don't know how many cases I've had that actually came really close to settling for the limits of the primary policy. And then when we asked for an affidavit that there's no other coverage, suddenly, "Oh no, there's another..." Or mediation and the adjusters tells the council the first time, "Oh, by the way, there is an excess policy here since we made it man for all coverage available."

Deena Buchanan:

Yeah. I could show you email chains with lawyers where I'm pushing and asking multiple different ways and then suddenly I come up with five more policies.

Michael Cowen:

Yeah, it's crazy. So if you have a big case, don't just assume there's only the million dollars there. Now, if you see a \$50,000, \$100,000 policy, there's probably not another one on top of it, I would think.

Deena Buchanan:

In a car case or a small commercial case. But if you're talking a trucking case, they need to at least have the 750.

Michael Cowen:

Right.

Deena Buchanan:

And then potentially more. One way that I judge that in kind of just a down and dirty way is I look and see how many vehicles do they have. Look in the Safer website and I say, "How big is this company?" If they've got two trucks and they say they only have 750, I probably will accept that with an affidavit. But if there's a thousand or a couple thousand tractors or trailers or many thousands, then you push till you get the tower.

Michael Cowen:

Yeah, there's no way. You said tower. What is a tower?

Deena Buchanan:

A tower of insurance is if you think about the primary layer as the first million or two million and then each layer on top of that stacks, so each policy, say you have one from up to \$2 million and then you have a layer of insurance that will cover from 2 million to 10 million and then you might have 1 from 10 million to 20 million, we call that whole thing from top to bottom the tower.

Michael Cowen:

How do you find out in the tower? What is the order in what's those policies paid? Because I've sometimes been reading and reading and reading and trying to figure out, "Okay. Do I have one, two and five? Or one, five and two?" What is the order, because it can make a big difference in how I formulate my demand.

Deena Buchanan:

You want to closely look at the whole policy including any addendums, because typically there's a writer or an addendum that will define when that coverage kicks in. It's usually at the very back of the policy. There's a form that will say that this starts when, and it'll refer to the underlying layer of coverage, policy is exhausted and it'll say, "This policy is excess to," and it'll identify the policy below it. What you want to do is get all that paperwork and you want to line it up. I just take a piece of notebook paper and I just create my chart and that's how I figure out how much coverage there is.

Michael Cowen:

Great. Do you ever send subpoenas to the insurance broker or agent to see if they did anything else that procured any other coverage?

Deena Buchanan:

Yeah. Another great option if the risk management thing doesn't work out and you're getting resistance is subpoena the broker. Because if the defendant won't tell you and you're in a big long motion to compel fight... And here motions to compel can be pending your courts for a very long time. Unlike some jurisdictions, you can't set your motion hearing date when you file a motion so you just have to wait,

sometimes months. So you can just go ahead and send a subpoena to the broker who got the original application and potentially procured the coverage for the defendant. Along with that, you want to subpoena the applications and you want to subpoena the underwriting file, if you can, because there's a whole lot of information that could be helpful to our punitive damages in those files.

Michael Cowen:

What kind of information would be in the insurance application? Because we can't talk about insurance in most cases, so what kind of information would be available in there that would lead the admissible evidence that would help us in punitive cases?

Deena Buchanan:

There usually is the risk management person for the company is providing to the broker information about their safety history, including other accidents, other claims. Sometimes primary counsel, for whatever reason, they don't have the information, they haven't talked to the people to give them the information. They'll say, "There's no other accidents like this, but the risk manager disclosed one to get coverage." So that can give you good impeachment evidence, but it also can give you information about similar accidents that may have happened.

Michael Cowen:

And so how about when they just want to give you the deck sheet and say that's enough? Is that good enough or do you need to get the whole policy?

Deena Buchanan:

You need the whole policy including all amendments and all writers because there are conditions to when insurance applies and there is exclusions to coverage that you need to know about. If you have an excess policy that excludes intentional torts, and one of the things that you have pled is an intentional tort, you may have a reservation of rights letter at minimum addressing that claim. And you need to know about that before you push forward. It actually can help you shape how you plead your case or what claims to continue to press forward to make sure you have coverage because the last thing you want to do is plead or litigate yourself out of coverage.

Michael Cowen:

I agree. Sometimes you can also use... If you have some claims that are covered and some that aren't, or if you have related defendants and you have some entities that are covered and some that aren't, you can use that interplay to put pressure. Because I had one case where the subsidiary company was covered for some claims but then the parent company was not because of a pretty broad exclusion. The subsidiary company had a worker's exclusion for compensatory. But in Texas and a death, if you can prove gross negligence, you can get punitive damages because of employer. And then they had an excess policy that would cover that, but the excess policy for any other kind of claim other than a worker's comp related claim against an employer excluded any claim brought by any employee of any insured. And so the parent company did not have that. We still made a case against the parent company but that wouldn't have been insured. And so they not only helped fund the settlement, but they put a lot of pressure on the carrier to settle the covered claim.

Deena Buchanan:

Yeah, you always want to find, as we talked about... Last time we talked about this, you want to find the pressure points and you want to put pressure on those points to get your case into a settlement posture if you're thinking about settlement. I mean obviously if you're getting ready for trial, it's a great case, then it's not something you need to worry about.

Michael Cowen:

Well we say that, but our goal may be to try their great cases, but our clients have some say so too. It's their case, not ours. I at least want them to have a difficult decision to make. I wanted to have a good offer on the table so that they can decide whether to take it or not. I'd hate for, I didn't do my job right so they had to go to trial when maybe they wouldn't have. Because again, trials are fun for lawyers, they're not so fun for clients.

I worked in big law too, but we didn't do insurance work and so I've never been behind the scenes to see how insurance companies set the value of a claim. I used to always get so mad at an adjuster thinking the adjuster or the lawyer on their side was picking the value. How is it that they set value?

Deena Buchanan:

At least with the, I guess we'll say any commercial policy, so the lawyer, whether it's the primary attorney or the excess attorney, needs to report to the insurance company on a regular basis. Most insurance companies look for a quarterly report, some monthly. So there's going to be basically a big old letter, memo, that's being sent to the insurance adjuster that's getting loaded into their system and rated for lots of different things such as the quality of witnesses, the number of witnesses, the kinds of experts, the effectiveness of the experts, the medical bills, the plaintiff's current situation if they haven't passed away as a result of the accident. If there is a wrongful death claim, they're going to look at the likability and the number of beneficiaries that are going to be potentially testifying at a trial. And so all of those things go into the mix.

Another thing that's weighed is how aggressively is the plaintiff's attorney pushing the case? Are they doing discovery or have they just filed a complaint and they just sit on the complaint for months? Are they asking for depositions right away? Whose depositions are they asking for? What is in their 30(b)(6) notice? What are we worried about coming out that we know about that they don't know about yet?

So a lot of that stuff goes into the letter. And the letter is sent to the adjuster. The adjuster generally has a certain amount of coverage that they're allowed to use to settle a case or to fund the litigation of the case, both. Beyond that, if you're getting into a huge case, there's usually a committee, there's a round table that's going to happen with their superiors that other people within the insurance company need to sign off before that adjuster has additional authority. So if you are a mediation for example and somebody gets back to you and says, "There's no more authority," it doesn't mean that there's... Obviously, there's no more coverage and they can get more authority. But usually adjusters only have a certain amount that they can spend without getting somebody else's permission and sign off. And sometimes it's multiple people up the chain up to maybe VP level.

Michael Cowen:

Do you think they ever go to mediation and just they test people to see if they'll settle for less?

Deena Buchanan:

100%, yeah. So the amounts that I was allowed to settle cases for at the first mediation were a lot less than we would be talking about at a second mediation or even getting close to trial. And sometimes that didn't happen. Sometimes it was, "Well, plaintiff's counsel really hasn't developed anything more to

impress us or scare us and so we're not going to really change our evaluation of the case." But there were a lot of times that, especially with that first offer, when you get that first kick in the gut offer of \$5,000 on a wrongful death case, that is not usually anything related to what authority will eventually be offered to you, but it's a test to see how you react.

Michael Cowen:

I found that often on big money cases, we get a lot of our average cases settled either at the first mediation or after the first mediation or at a second mediation, but without having to go all the way. But I'm finding to get big, big money, it's the Friday before trial, the weekend before trial, after jury selection, after a week of trial. They just seem to either test us. Or maybe I just don't do a good enough job of impressing them before then. I don't know.

Deena Buchanan:

Oh, I think it varies on the insurance company and the adjuster and the team that works your region and all kinds of things. There are different teams assigned to different kinds of cases and different teams assigned to different regions. And so you might have a different team working in different parts of Texas so you might get different responses.

Michael Cowen:

Now, I guess one, it seems to me, problem we can have if we have a case that our client would like to get settled or at least we want to give the client the best possible offer so the client can have a real decision to make is it seems like we're dependent then on the defense lawyer getting it being competent reporting right. And then sometimes I think there's either such true believers in their case. They get fixated on something and they don't put everything else in. Or some of them just are overworked and they don't think they put the work in to really look at the case and see everything that's going on. Or they're too busy to talk to their associates that did the depositions and they don't realize how badly it went. Is there anything you can do as a plaintiff's lawyer to make sure that that information makes it to the adjusters?

Deena Buchanan:

Sure. First of all, the defense lawyer, just so everybody knows, I don't think I was clear about this, but the defense lawyer usually is not recommending a settlement range.

Michael Cowen:

What?

Deena Buchanan:

A lot of insurance companies, they don't let their lawyers talk about money in terms of, "We think it should settle for this," because that creates potential bad faith exposure for the carrier. And so carriers have moved away on the big cases anyway from evaluations from their attorneys. So don't blame the defense lawyer necessarily if you are thinking that your case is a 5 million case and you're not getting that from them. Now, defense lawyer can certainly influence the amount of settlement and they will have a conversation when there's offers and demands and things like that, but they're not usually the ones that are saying no. So then the other question you asked is, how do you deal with you've got a true believer defense lawyer, they're not reporting, they don't seem afraid enough based on your evaluation

of the facts and what you think could happen at trial because you're just not getting any traction in your discussions?

Michael Cowen:

Yeah, until someone goes and gets their teeth kicked in, they don't really know that it's possible. If you've only been handling things within your layer basically, if you've never been hit for over a million dollars, you never settled a case for over a million dollars and everyone's always taking your limits, you don't realize it's really possible for this to happen. You just don't take it that seriously. Or they just get fixated on one little... Sometimes something's even inadmissible, they'll find one little thing on the plaintiff and they're like, "Now I'm going to win this case," and they filter everything else out.

Deena Buchanan:

Yeah. Like cannabis metabolites. And you heard about that a lot of times from primary counsel, "Oh there are cannabinoid metabolites in their system." And I say, "Okay, well what does your toxicologist say was their level of impairment based on that amount of metabolites?" And they'll say, "Oh we haven't been able to find an expert to tell us that because they won't commit to that because there's no evidence of actual impairment." And I say, "Okay, so why is that a big scary thing?" And so sometimes cases get tied up with primary counsel and they don't get to access counsel because primary counsel's fixated on whatever fact it is that they don't really even push to report up to the excess layer.

So what you want to do is you want to ask for the name of the adjuster that is handling every layer of coverage. Say if you've got a case, you say you want the adjuster's names for the first 20 million in coverage or 50 million in coverage or whatever you think that might be a verdict range for you, and then you want to send your demand letter that's incredibly detailed and well reasoned. This is not just the, "He, pay me policy" limits, this is analyzing deposition testimony, analyzing admissions that come out in your case. "Hey, we have this smoking gun document that everyone's going to agree to and we have all these other accidents that are just like this in this area. And hey there's these other verdicts on this [inaudible 00:25:16]."

And so you want to send that to each of those adjusters and you really want to get in contact as much as you can with the adjuster for the top layer of coverage or the layer just above where you think your target is because they want to protect their layer. Their job is to not have a case come into their layer and invoke their coverage.

So say the target is just for fun, well say the target, you think you can get \$45 million. You want to really make friends with the adjuster at the \$50 million level and you want to start talking to them and have them write letters saying, "Hey, you've got an opportunity to settle this within your layer. Don't expose us because we're suing you. If you expose us because of bad faith and you know that this case is worth that much money night and day, you better settle it because there's going to be litigation." And I will tell you that I am very aware of cases that there were big verdicts in them. There was an opportunity to settle at a much lower layer, and those carriers are in deep litigation and federal court between each other about who did what to whom.

So it is a way to exert some pressure and that's a more sophisticated kind of higher level tactic. And they might give you some resistance about giving you the adjuster's names. But you can also ask, "Cool. Who's excess counsel for that layer?" And you can at least talk to excess counsel and they have an obligation to give it to their client.

Michael Cowen:

What if they won't tell you? Are there any other ways to figure out who the adjusters are for the other layers if the defense counsel won't tell you?

Deena Buchanan:

It is kind of tough. I think you have to get that information from defense counsel. You can ask for rights of reservation letters. That's often a way to find the name. And usually on these bigger cases with multiple layers, there is a reservation rights a letter. So whoever's the adjuster that sent that, then you might be able to find it that way. But the other thing you can do is get the names of who all is attending the mediation from the mediator. And a lot of mediators will provide you... I mean you have to know who's in the room. So if excess is there, and you insist by the way on excess being there, you do not have a mediation. If your case is legitimately something worth a lot of money, you do not proceed in a mediation with only the primary attorney and the primary adjuster because that primary adjuster has no ability to settle above their limits in most cases. They're usually not even at the same company as the other layers.

So you want to have everybody who needs to be there and make decisions in the room. And then that's a good place to start for building that relationship with the adjuster

Voiceover:

Each year, the law firm of Cowen Rodriguez Peacock pays millions of dollars in co-counsel fees to attorneys nationwide on trucking and commercial vehicle cases. If you have an injury case involving death or catastrophic injuries and would like to partner with our firm, please contact us by calling 210-941-1301 to discuss the case in detail and see where we can add value in a partnership. And now back to the show.

Michael Cowen:

And just any tips for how to talk to these people? I'm always more comfortable talking to lawyers and an adjuster for some reason. I don't know why.

Deena Buchanan:

A lot of adjusters are lawyers, so there's always that. And you can call them. And just honestly I would suggest don't be cute, don't be a bully, don't be obnoxious. Be just straight up and just have a conversation with the adjuster. I think that adjusters have heard it all. Don't think that your case is special and unusual to the adjuster. This is what they do every day. And especially at the access layers, they deal with catastrophic cases. Their whole job is catastrophic cases around the country. So don't think that when you call them that you're going to be particularly scary or particularly intimidating or anything else. Really what you want to have is a full and frank discussion, "Hey, I've got this case, I just don't think that various adjusters and attorneys are looking at this the way we're seeing it. Can I talk to you a little bit about this? Can I send you some information?"

Honestly that kind of approach is probably going to get you a heck of a lot more traction, because realize that these adjusters are evaluating you as a lawyer in that conversation. So if you come across as a jerk, they're going to think that the jury's going to see you as a jerk and they're going to kind of write you off. But if you come across as a real person who just is a good communicator, you're very well prepared, you really know your stuff, you really know this case, it might change things for you.

Michael Cowen:

Something as you had mentioned earlier, that there's things they look at as far as what we're doing as plaintiff lawyers when there's valuing the case and deciding frankly whether they're scared of a [inaudible 00:30:21], or scared of the way we're working up the case or not. What are the things that we can do to let them know that we're serious to drive up the value in their mind?

Deena Buchanan:

I serve discovery with my complaint. In my jurisdiction there's not a waiting period. So even if we don't serve it with the... We try to serve it soon after we file. We also continue to push on discovery with motions to compel. We don't just accept their answers especially when there's some boilerplate objections. We push, we file motions, we do good faith letters. We also notice depositions early. We give a 30(b)(6) notice. That's usually the first deposition I try to take is the 30(b)(6). Different people have different ideas about that, but I really like it because you can get a lot of information that then you can take and talk to with the other specific witnesses responsible for those functions within a company.

The other thing I do is sometimes I'll take the driver first, but I really do like to take the 30(b)(6) early. And if they see that you're taking action on your case, about at least once a month is my goal, is something is happening in that case, certainly at least once a quarter there's got to be something for the defense lawyer to report. If the defense lawyer is basically not updating their report and is telling the adjuster, "Hey I've got nothing to report, nothing's happening," that's not a great sign for the plaintiff, at least in terms of settlement value.

It doesn't mean that you're not going to get a great verdict someday when you pull it all together, but you want to be doing some things to make them work because that does a couple things. It shows the adjuster that you're really into this case and you're making things happen. The only exception is discovery is closed. Motions for summary judgment are pending. So there's not much you really can do and you're just waiting for rulings on summary judgment motions. I mean, that's a different situation. But if you're in the discovery period of the case, things should be happening on your end. And so they also see this as a cost for them because remember this adjuster is not only managing the risk, they're in terms of what they pay to the plaintiff eventually or what they might have to pay, they're also managing the cost of the case and that's something that they have to answer for.

So if you're really racking up the cost of the case by making defense lawyers work and taking a lot of depositions and you have a lot of experts that they need to respond to, then they value the case differently because they see this as a higher exposure case in the gross. So just remember that what the adjuster is evaluating is not just exposure to plaintiff, it's also the cost of the case. So adjusters usually aren't super intimidated by demands that you settle for cost of defense, whatever, because they say, "Look this is the cost of our doing business." But realize that if it is a very expensive case, there is a point at which I think that that comes into play.

Michael Cowen:

Yeah, I also think when defense counsels are fighting, fighting, fighting over stupid things and they keep losing, not only are they racking up a huge bill but then they have to report bad news after every hearing. I think that that has helped us in the past get them-

Deena Buchanan:

It's demoralizing for the defendant but...

Michael Cowen:

Also I think it gets them to trust the defense counsel and their evaluation a little less because they're telling them, "Hey pay me money to do X, Y and Z," and then X, Y and Z is not bearing any fruit.

Deena Buchanan:

Mm-hmm. Yeah. And when I was a defense lawyer, to the extent possible, I did not engage in battle when it wasn't required. So if there was a motion to compel issue, we tried to work things out. It saved the insurance client money, they appreciated it. It was less harassment for our actual client, the defendant. And it gave us more credibility across the board. But not every firm is set up that way. There are firms and lawyers out there who just want to fight every single battle and they don't realize that actually in the long term the judge starts looking at you funny every time he sees you or she sees you because you haven't said anything that's really convinced him so far that you're doing things reasonably.

Michael Cowen:

Yeah, I remember I had a discussion about five, six years ago with a defense lawyer. We were just fighting, fighting, fighting over things and he is like, "You know, you got to just start settling with me because we're fighting all this stuff and I'm getting paid by the hour and you're not and you're doing all this extra work." And I said, "Dude, if you keep billing them all this money and I keep kicking your ass, sooner or later they're going to get tired of it and you're going to lose the whole client."

I mean, I am mostly going to lose one case, I'm going to make up the next one. You're going to lose a client that's going to be one of your big clients. And, "Oh no, they love me. They'll never do that." And three years later, guess what? That firm got fired by the insurance company. It was a huge hit to their bottom line because it's hard to keep relationships with the adjusters sending you a bunch of cases, you can only handle so much. And so when you lose one of your main clients, especially one that was letting you build a hell of them, that's a huge blow to that lawyer and that firm.

Deena Buchanan:

And realize too that management changes within the insurance companies. And so while there might be a great referral relationship between the head adjuster who's running claims and that one star defense lawyer, that can change over time. And relationships break down. So yeah, I do think for any defense lawyers out there, it is very shortsighted to fight every battle if you don't have a good faith basis to do so. It really just backfires on you both in terms of your client relationship and your relationship with judges. And then that can actually hurt you at trial. So even though the short term money might be great, the long term consequences to your reputation and to your effectiveness in general is not good.

Michael Cowen:

What are some things that when you're on their side, you saw plaintiff's counsel do that ended up, in your opinion, having them leave money on the table, ended up settling cases for less than they were worth, getting lower offers than they could have had otherwise?

Deena Buchanan:

Well, one is plaintiff's lawyers who don't typically handle this kind of case, they get their one big case, they litigate it and they go to mediation and they do not have a sense of either what they could have done in discovery to make their case scarier to the defendant and more effective with a jury. Or they don't know how to value the case because they've never had a case like this. And so they might think... I mean I had one case where I won't give too many specifics, but I was prepared, in that situation I had a discussion with the adjuster about ranges informally. We were looking at this case as a 10, 20, \$30

million or more case. Terrible facts. Very sympathetic plaintiff. The plaintiff's lawyer came to the mediation and they jumped at a couple million dollar settlement. Once we got to a million, they're like, "Ooh, I can retire now."

And I said, "This is not..." We were happy to settle for the number that we finally settled at, which was in the low seven figures, but I really felt bad for both that attorney and for their clients because they did not know. And what they could have done, and this is what I recommend, is start talking to lawyers who handle big cases. If you get your first big case, you want to make friends with lawyers who are out there who've handled a lot of big cases, call Michael Cowen. Call any one of us in ATAA, call people who do the bigger cases and just brainstorm with them or co-counsel with them and bring them in. Because you know what? If this one lawyer had co-counsel with somebody who was an effective and experienced big case lawyer, they probably would've gotten tens of millions of dollars. And even if they paid him a 50% referral fee to co-counsel, everybody would've done better, especially the client.

Michael Cowen:

Right. Yeah, I've had that happen a lot where we've settled cases with significantly higher than demand that was on the tape when we got in. But at the same time, I mean I think a lot of people, it's their one big case and they're worried someone's just going to come in and then sell it for about what they could have gotten and take half their fee and they're going to be worse off. But I will tell you that most of us will talk to you and brainstorm with you. We like doing it. Actually, I love brainstorming cases without them do any of the work or having any of the responsibility.

Deena Buchanan:

I love it too.

Michael Cowen:

It's fun for me. And so most of us will talk to you even if you don't want to bring us in on the case, that's fine. Just be upfront about it. What I don't like is when someone calls intimating that they want bring me in on the case and I get all excited and then they just want free information. That bothers me. But if you just say, "Look, I just want to brainstorm with you," I'll brainstorm with you. I don't mind.

Now I think one time I moved family plans around and spent 7:00 PM to 10:00 PM to talk to somebody, whereas if I knew we were just going to brainstorm it probably would've been a week later during office hours. That would be the difference. But that's okay. I mean, like I said, but I don't mind. Like I said, it's not the fact that I have to... I make plenty of money. I don't have to make money off your case. That's fine. I don't need that. If I share with you, the universe gets back to me. It doesn't bother me. And it's not just me. I was going to try a different kind of jury selection in a case. It worked out really well, but I was... I'd been trained on how to do it, I'd practice how to do it, but I never did it in a real courtroom within a real trial. And so Joe Fried got on the phone with me for 45 minutes and held my hand and talked me through it. He didn't ask-

Deena Buchanan:

Joe Fried is amazing that way.

Michael Cowen:

Yeah. He didn't ask for any money. He just did it. Joe's just a really good friend, but I can name a hundred other lawyers that have done that for me and then I'll pay it forward for them. So please, if you have a

big case, you can call Deena, call me, anyone that you've met. Or just email somebody and reach out to them. And you'll be surprised. I mean, all they can do is say, "No, it can't hurt." But how many people will sit down, have lunch, have a cup coffee? I know my partner Mallory's doing that today. Someone's got a trial. Frankly, they sent us, they showed us a case saying, "You want to help us try the case?" And we said "No, we absolutely don't. But we're more than happy to share everything we have." It's just not the right case for us. But we hope and wish them every success. And like I said, our time, our knowledge, our forms, our documents, anything we have, we share. And I know you're the same way.

Deena Buchanan:

Yeah. In fact, I will look at people's 30(b)(6) notices. I will look at discovery requests and give suggestions. I'll chat with them about, "Hey, let's prepare for mediation. This is what I think you should think about." I love brainstorming. Like you said, especially when it's not my case and I don't have to do all the work, I do, I'm always happy because I also learned from these conversations even though they might call me for my input, which is just wonderful if I can do anything to help. But a lot of times I also learn, I'll ask a lot of questions. They'll say, "Oh yeah, we did this and this, we got this from a depo," and I'll think, "Oh okay, that sounds great."

Michael Cowen:

Yeah. So Deena, what kind of work are you doing now?

Deena Buchanan:

So I switched to the plaintiff side in 2019. Probably the best decision I've ever made in my life. I'm a much happier person and fulfilled person in every way. And now I focus on trucking cases and we do employment cases too. We do some employment, not as much as we did. But I'm really focusing on wrongful death, catastrophic injury and I love trucking. So I've been doing as much as I can to really expand my knowledge and expertise in trucking because that's what we did a lot on the excess side. And that's what I love the most.

Michael Cowen:

And if someone wants to find you either because they just want to talk to you and brainstorm with you or because they have that big trucking case and they want to work with you on it, how can people find you in the world? We'll put this in the show notes too, but since a lot of people just listen in the car or while they're running, I want to have it out there.

Deena Buchanan:

You can look at my website, which is buchananlawnm.com, but my email is deena@dbuchananlaw.com. That's a great way to reach me. And it's B-U-C-H-A-N-A-N, law.com. And then you can also give me a call, so 505-900-3559 is our main number. I do love chatting with people. You can also reach out to me through LinkedIn or Facebook. We've got presence there. Sometimes people message me through those.

Michael Cowen:

Great. Well it was great talking to you today. I look forward to the next time we see each other. I'm sure it will be soon at our next ATAA or AHA event. Or I'll just probably just need to call you next time I'm on Albuquerque since I'm there every month.

Deena Buchanan:

Yeah, just we'll have lunch. I can take you somewhere and we'll have a healthy lunch since I know we're both working on fitness.

Michael Cowen:

Absolutely.

Deena Buchanan:

I love to see how much you're running and everything these days. It's awesome, Michael.

Michael Cowen:

Well, thank you. I'm happy I'm going to be able to get back to running this Friday. Some of the people may have heard, some may not, I had a little fall when I was speaking in Las Vegas, but luckily everything checked out. My brain's working, my heart's working and I'm getting back. I'm walking now. I'm going to be back to running this week. And so a little scary, but thank God everything's okay. It was just one of those things that happens sometimes.

Deena Buchanan:

Sometimes you just need to learn it's good to take a break and do things in moderation.

Michael Cowen:

Yeah, I'm not very good at moderation.

Deena Buchanan:

Me neither. I'm working. It's a daily lesson. But I'm glad to see that you're out at it. So yeah, come have lunch with me in Albuquerque next time you're here.

Michael Cowen:

All right, sounds great.

Deena Buchanan:

All right, take care guys.

Michael Cowen:

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Voiceover:

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