

CASE EVALUATION AND DAMAGES FOR SETTLEMENT OR TRIAL

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I. CASE EVALUATION

The first rule in any case is to trust your instincts. If your gut feeling is that there are problems with your client or the case, you will usually be proven right.

Client and Defendant Background

Before you have accepted a case or shortly after you take the case, you need to learn all you can about your client. You can be assured the defendant's attorney and insurance carrier will. As you no doubt know from experience, you cannot always rely on what the client tells you about their background. Therefore, do civil and criminal searches on your client and also on the potential individual defendants. You may be surprised at what you can find just by checking on the courthouse computers. Checking public records and going to various Internet web sites may access additional searches for background information on your client and any corporate defendants.

Some Helpful Web Sites:

1) The web site : <http://www.publicdata.com> will provide you (for a fee) with the means to check for criminal, sex offenders, driver's license, voter, civil court, DMV – license plate and vehicle ID, and professional licensing in some states.¹

2) Westlaw has access to public records for a fee from WestlawPRO Public Records in which you can access records in the following categories:

- Aircraft, watercraft & stock locator
- Adverse Filings
- Asset Locator
- Bankruptcy records
- Business Finder records
- Corporate Records & Business Registrations
- Doing Business As records
- Lawsuit records
- Litigation preparation records
- Motor Vehicle records

¹ In Colorado you can only check for Colorado sex offenders and criminal records. In other states, Texas for example, information can be accessed for all of the categories. Unfortunately, information cannot be obtained for many states from this web database.

People Name tracker
Real Property Assessor's records, transfers, refinances & foreclosures
UCC, Liens & Civil Judgments

3) LexisNexis has fee for services for skip tracing and a locator service called Batchtrace, as well as a Directory of Corporate Affiliations that provides information on parent companies, affiliations, subsidiaries worldwide.

4) You may want to check public sources for settlements/verdicts in cases similar to yours. Sources available include the Jury Verdict Reporter of Colorado (published weekly) located at 7396 South Garfield Court, Centennial, CO 80122-2201. Phone: (303) 779-4073, Fax: (303) 779-5311. An annual subscription is \$295.00. They can also do advanced computerized searches for you for an additional fee.

II. CASE EVALUATION FOR SETTLEMENT OR TRIAL:

Colorado Tort Reform

Tort Reform and Current Colorado Law limit some of the damages that can be collected in your case. Be sure to look at this in determining the potential settlement and jury value of your case. As you are aware, Colorado has strict caps that apply on noneconomic damages.²

Offer of Settlement under Colorado Law

Keep this in the back of your mind even at the initial client interview, especially if it may be a lower-end damage case. Be sure to advise the client in writing, preferably in the fee contract, about the risk of an adverse offer of settlement.

COLO. REV. STAT. ANN. §13-17-202. (West. 2003).

Award of actual costs and fees when offer of settlement was made

(1)(a) Notwithstanding any other statute to the contrary, in any civil action of any nature commenced or appealed in any court of record in this state:

(I) If the plaintiff serves an offer of settlement in writing at any time more than fourteen days before the

² In a civil action, that is not medical malpractice, the cap for noneconomic damages is \$250,000.00 (two hundred and fifty thousand dollars, unless the court finds justification by clear and convincing evidence. In no case shall the amount of the noneconomic loss or injury exceed \$500,000.00 (five hundred thousand dollars). See COLO. REV. STAT. § 13-21-102.5, §13-21-203, and §13-64-102 (2003). In medical malpractice actions, see COLO. REV. STAT. § 13-64-302. Effective July 1, 2003, the damages limitation in medical malpractice cases was increased to \$300,000.00 (three hundred thousand dollars) for noneconomic damages for acts or omissions occurring on or after July 1, 2003. See also, 2003 Colo. Legis. Serv. Ch. 271 (H.B. 03-1007) (West) regarding the noneconomic damages for physical injuries in medical malpractice actions. Please be aware that for acts or omissions occurring after January 1, 2005, COLO. REV. STAT. §13-64-302 (2004) limitation on liability –interest on damages will change. See 2004 Colo. Legis. Serv. Ch. 165 (S.B. 04-166, (West). Disfigurement and physical impairment are not capped in Colorado per Heidi Boersteler & Scott Nolte, *Colorado Nursing Homes: Litigation and Public Policy Issues Concerning Abuse and Neglect*, 29-SEPT. Colo. Law 93, (September 2000), *Preston v. Dupont*, 35 P.3d 433,434 (Colo. 2001) [medical malpractice case] and *Herrera v. Gene's Towing*, 827 P.2d 619, 620-21 (Colo App. 1992) [non-medical negligence case].

commencement of the trial that is rejected by the defendant, and the plaintiff recovers a final judgment in excess of the amount offered, then the plaintiff shall be awarded actual costs accruing after the offer of settlement to be paid by the defendant.

(II) If the defendant serves an offer of settlement in writing at any time more than fourteen days before the commencement of the trial that is rejected by the plaintiff, and the plaintiff does not recover a final judgment in excess of the amount offered, then the defendant shall be awarded actual costs accruing after the offer of settlement to be paid by the plaintiff.

(III) If an offer of settlement is not accepted in writing within fourteen days after service of the offer, the offer shall be deemed rejected, and the party who made the offer is not precluded from making a subsequent offer. Evidence thereof is not admissible except in a proceeding to determine costs.

(IV) If an offer of settlement is accepted in writing within fourteen days after service of the offer, the offer of settlement shall constitute a binding settlement agreement, fully enforceable by the court in which the civil action is pending.

(V) An offer of settlement under this section shall remain open for at least fourteen days from the date of service unless withdrawn by service of withdrawal of the offer of settlement.

(VI) An offer of settlement served at any time fourteen days or less before the commencement of the trial shall not be subject to this section, and evidence thereof is not admissible for any purpose.

(b) For purposes of this section, "actual costs" shall not include attorney fees but shall mean costs actually paid or owed by the party, or his or her attorneys or agents, in connection with the case, including but not limited to filing fees, subpoena fees, reasonable expert witness fees, copying costs, court reporter fees, reasonable investigative expenses and fees, reasonable travel expenses, exhibit or visual aid preparation or presentation expenses, legal research expenses, and all other similar fees and expenses.

(2) When comparing the amount of any offer of settlement to the amount of a final judgment actually awarded, any amount of the final judgment representing interest subsequent to the date of the offer in settlement shall not be considered.

(3) When the liability of one party to another has been determined by verdict or order or judgment, but the amount or extent of the liability remains to be determined by further proceedings, the party adjudged liable may make an offer of settlement, which shall have the same effect as an offer made before trial (except with respect to costs already incurred) if it is served pursuant to subsection (1) of this section.

III. MEDIATION/SETTLEMENT

Think Outside the Box

The reality is that all of us fall into the same trap of doing the expected and using the same old routine.

A case appears to have merit, so therefore you accept the case. You receive some preliminary information, which confirms your suspicion (and hope). Depending upon the potential of the case, including a review of both liability and damages, you do one of the following:

- a. Write a notice letter to the potential defendant(s) and receive a reply from the liability carrier;
- b. Prepare a demand package/letter to the insurance adjuster;
- c. Negotiate with the adjuster; and
- d. Eventually settle the claim or file a lawsuit.

This approach may be adequate for a smaller damage case, but it leaves much to be desired if the case you are pursuing has any significant potential (yes, the term “significant potential” is a relative term.)

So what do we normally do if the case has significant potential? We probably consider doing the following:

- a. Put the liability carrier on notice and start negotiating with a demand letter (Remember, the vast, vast majority of the time you will have a low level adjuster with extremely limited authority responding to demand letters);
- b. Eventually, whatever “negotiations” take place will probably lead to the filing of a lawsuit; or
- c. You simply proceed to file a lawsuit after appropriate investigation, and plan on eventually negotiating with the defense attorney. (This frequently involves bringing up settlement discussions or mediation by the Plaintiff’s attorney, sooner than later, and usually at an inappropriate time.)

So what should we consider doing in a case with potentially significant damages? Obviously, liability is an equally important factor, but this part of the discussion focuses on significant damages cases.

Dealing with an adjuster early on is usually of little or no benefit in these types of cases. Remember, the carrier has to “justify” paying out large sums of money. This is rarely justified any time soon after the carrier has been placed on notice of the claim or lawsuit. Certainly, there are exceptions, such as those cases in which there is limited insurance that is obviously inadequate to pay the full measure of potential damages.

Additionally, you are likely to be dealing with a low level adjuster who will have significant difficulty obtaining additional authority which will “justify” these significant damages.

Although none of us want to file a lawsuit unless it is truly necessary, frequently cases with significant damages require nothing less. If you know that a lawsuit is likely to be necessary, it raises a question as to whether there is likely to be any benefit “negotiating” with an adjuster or a defense attorney before or soon after the lawsuit is filed. In fact, attempting to negotiate or even mentioning settlement or mediation may send the wrong message, even if it is done inadvertently.

Insurance carriers love consistency and certainty. They do not like inconsistency and uncertainty. A Plaintiff lawyer who shuns settlement negotiations, quite frankly, is inconsistent with what the majority of carriers see and experience. Don’t be in too big a hurry to enter into negotiations. This means you have to be in a position of knowing the strengths and weaknesses of the case prior to negotiations, and ultimately be willing to try the case if necessary. Yes, this sounds very basic, but how many cases have been knowingly settled for less than their settlement value (not trial value)?

The point of the above suggestions is simply to not act (or be) too eager to enter into negotiations too early.

Timing is Everything

Believe it or not, the timing of mediation is frequently overlooked or under-emphasized by the Plaintiff's lawyer. There are times when many factors come into play regarding the potential settlement of a case.

For example, the client may be desperate to get the case resolved for financial or other reasons. There may be extremely detrimental information/discovery yet unknown to the Defense which requires the case to be settled. (Of course, there are situations where it's the Defense which does not want detrimental information/discovery revealed, and they are the ones pushing for settlement. Or the Defendants may want to avoid the negative publicity which may likely accompany ongoing litigation.) The dynamics of the case may be such that a particular set of circumstances requires any and all attempts to settle a case. (A favorable adjuster may be on the verge of leaving the insurance carrier, as an example.) And, some lawyers have been known to determine that a case is ready for mediation primarily on the basis of the lawyer's cash flow needs. That doesn't mean that the lawyer is always going to put his/her needs above the client's needs, but it can result in the lawyer making a bad decision regarding the timing for mediation.

Insurance carriers and defense attorneys love to be in a position where there is little doubt that the Plaintiff or the Plaintiff's lawyer, or both, are known to be eager to settle the case. What a built in advantage this automatically gives the defense! So how would the defense know that the Plaintiff or the lawyer is eager to settle?

Let's think about what we do as Plaintiff's lawyers. How often do we write demand letters before filing a lawsuit for a claim which we feel has significant damage potential? Insurance carriers have to justify paying a significant amount of money on a case. This justification is primarily to withstand any future audit, as well as to provide substantiating information to a superior who has higher claims authority. Generally speaking, it is the exception to the rule for a significant damage case to be settled with a demand letter but without a lawsuit.

Areas to Consider When Going to Mediation:

- Strength of the Mediator
- Reputation of Opposing Counsel
- Are the key decision makers for Defendant going to be there?
- Does the Defendant have to give consent to settle?
- Is it a wasting policy?
- Is the Defendant self-insured?
- Are there excess carriers?
- Does the Defendant have personal counsel?
- What settlement negotiations have been done up to this point?
- Is it a court ordered mediation?
- Did the parties mutually select the mediator?

- What are the policy limits?
- What is the financial solvency/condition of the insurer?
- What is the financial solvency/condition of the Defendant?
- Does the Defendant/insurance company have any incentive to get this off their books this year?
- Are there settlement credits that will apply to other Defendants?
- Is the Defendant publicly traded? Are there any mergers or acquisitions pending?

If you have decided or agreed with opposing counsel upon a time for mediation, there are a few additional things to consider before the mediation actually takes place. For example, you may want to consider writing a letter to opposing counsel (and enclosing a duplicate original signed by you) which strongly suggests personal counsel be retained for an individual defendant. This may be necessitated because of the potential of an excess verdict, or damages being claimed not covered by the policy, e.g. exemplary damages. This may not result in personal counsel being present at mediation, but it will be a document in the carrier's file, and will hopefully have prompted some discussion between the defense attorney and his/her actual client, the defendant. The best of all worlds is that it results in the defense attorney writing a demand letter to the carrier on behalf of the defendant and/or personal counsel being present at mediation. Don't get your hopes up, though.

How important is the actual mediator? The reality is that the carrier has probably allowed a certain amount of authority to be paid on your case. The question is whether the mediation (and the mediator) actually gets to that amount. No, all mediators are not created equally. If the carrier wants to settle the case at mediation (or at least offer the full amount of its authority), does it really matter who the mediator is? More often than not, it is more important to an insurance carrier who the mediator is than it should be to the plaintiff's attorney.

Remember, it really doesn't matter that much where the mediation begins. What really matters is where the parties are toward the end of the mediation, especially at its conclusion.

Most of us may get written permission from the client for specific authority on the initial offer of settlement made before mediation. Once mediation begins, however, we tend to do almost everything verbally beyond that point until something is put in writing if the case settles. A friendly suggestion is to have something written regarding each offer of settlement authorized by your client (and signed by the client), along with something written regarding each offer of settlement extended by the defendant. This has a built-in advantage of protecting the attorney should any question arise later. It is a little inconvenient, but it also has the effect of truly getting the client involved in the mediation process. It is also suggested that you allow the mediator to let the defendant and the adjuster know that your client is literally signing off on every offer of settlement. This way the other side will know that it is not just the lawyer calling the shots, and that the plaintiff is willing to proceed to trial.

Since defense attorneys and carriers seem to be using initial mediations more and more frequently simply as a free discovery tool, give some thought to your presentation. Are you really going to impress and convince the opposition with a full-blown “dog and pony show” when all you may be accomplishing is giving a free road map for future discovery to the other side? Granted, there may be times when a full presentation is necessary; however, the other side is expecting you to show all of your cards. Once again, this comment is intended to at least get you to think about the big picture instead of blindly following your instinct to “blow the other side away” at mediation.

Some cases may be much more appropriate for no presentation, whether there is a general session with the opposition or whether the mediation begins with individual caucuses. If there is a general session there is no better way to send the message that you are dealing from a position of strength than to walk in with a blank legal pad and simply tell the mediator and the opposition that you feel certain that they have carefully reviewed all of the information and discovery in the case, and you would be happy to answer any questions they have. Period. End of presentation. About 45 seconds. That’s all. This will probably have the effect of totally flustering the other side. Once again, this would be unexpected; therefore, uncertainty for the opposition begins to exist. If you decide to employ this approach, do not let the mediator sway you or convince you that you need to give a full presentation. The mediator should be given confidential background information before the beginning of the mediation. Stand your ground. You can always allow a general session later in the day to make a limited presentation, if the dynamics call for this.

Consider not allowing a general session. You may wish to tell the mediator that neither you nor your client are willing to have a general session, and that the mediation simply needs to begin with individual caucuses. Once again, this may fluster the other side by “denying” them their opportunity to present their defensive arguments directly to your client. Stand your ground, if this is the approach you decide upon, even if the defense demands a “general session.”

There may be cases in which a defendant “coincidentally” files a dispositive motion shortly before the mediation in order for it to be pending at the time that the mediation is taking place. This is sometimes a tactic to create uncertainty for the plaintiff. Remember that the plaintiff is not prohibited from filing a dispositive motion in a case if such a motion is justified, whether it relates to a no evidence summary judgment motion (depending upon your jurisdiction) or the qualifications of an expert or the reliability of his/her opinions. Consider the timing that your motion should be filed.

Be aware if the defense starts to “bracket” the plaintiff. This means that the defense starts to negotiate in a way to get both parties to move identical or similar amounts with each move, ultimately culminating in reaching an amount desired by the defense. If this becomes apparent, you can simply stop the bracketing by not following the same pattern of incremental movements.

Consider proposing that the plaintiff will drop to a particular amount if the defendant will offer a particular amount. If the defendant refuses, then you have done nothing more than make a proposal, not an offer of settlement. Just make sure that the particular amount for the plaintiff in this approach is not too low.

If you and your client feel comfortable, and if the circumstances allow it, consider giving a “bottom dollar” or “final offer of settlement” to the other side at the conclusion of the mediation. A word of caution, however, is in order. If you do this, be prepared to maintain your credibility by sticking to your guns. The biggest mistake you can make is to give a “bottom dollar,” have the case not settle, and then continue to negotiate at a later time from that “bottom dollar.” What message do you think that sends to your opposition? They will probably remember your weakness on the next case, as well.

Only you will know if you can trust your mediator. Some mediators rely on a significant amount of repeat business from particular defense firms and/or insurance carriers. Try to find out in advance if your mediator routinely mediates for defense counsel and/or the carrier.

No one can put in a paper all of the particular advantages and/or disadvantages of settling with just one defendant in a particular multi-party case. Each situation has to be judged on its own merits and the potential applicable law of your particular jurisdiction, e.g. settlement credits, etc. Settling with one or more defendants in a multi-defendant case may put additional pressure on the remaining defendant, as well as allowing the continuation of your case to be funded.

One other thing to take into consideration is the solvency of the liability insurance carrier, and possibly the defendant. This is becoming more and more of an issue in settlement negotiations. It is not uncommon to see carriers refusing to negotiate fairly based in part on their own financial problems, especially if they are perilously close to either rehabilitation or receivership.

Lastly, consider allowing the mediator to take to the defendant (although it may be shown to the adjuster) a signed settlement authorization from the Plaintiff indicating that the causes of action will be dismissed in consideration of “x” number of dollars, plus taxable costs of court. If the Plaintiff is anticipating structuring any part of the settlement, indicate that the Defendant will be given instructions on how any part of the settlement is to be made payable. For example, Plaintiff and Plaintiff’s counsel would reserve the right to structure any part of the recovery with the Plaintiff’s choice of structured annuity vehicle and carrier, and no part of the recovery is to be paid for punitive damages. All the recovery is for personal injuries as defined by IRS rules and regulations. Be sure to put in a deadline for funding to be received by Plaintiff’s counsel.

Part of the settlement may be paid directly to a structured settlement carrier or a 468B qualified settlement fund if any part of the settlement is to be structured by a structured settlement carrier of the Plaintiff’s choice. In other words, you don’t want to be forced to use a structured settlement carrier that the insurance liability carrier “requires” to be used.

Think about it – there is a reason why the liability carrier may be adamant that any structured settlement is to be done by one of their wholly owned subsidiaries, or by a company on the liability carrier’s “approved” list. This is discussed more fully later in the paper. At a minimum, only agree to a sharing of the annuity commission between the plaintiff broker and defense broker.

IV. SETTLEMENT

A settlement that is fair and adequate should mean that the case settles for an amount equal to that which a jury would award if the case had been tried, with a discount given for the saved litigation expenses, uncertainty and delay.³ This discount may be very significant or minimal, depending upon the facts and applicable law.

Some Factors Affecting Settlement of Case:

- Amount in controversy
- Amount of any liens
- If the party has to give consent
- How much discovery has been completed
- How plaintiff and/or defendant will present at trial
- Strength of witnesses, and experts
- Venue of case
- Experience and reputation of attorneys involved
- When trial date is
- Facts of individual case

When a case is settled, the plaintiff’s attorney needs to obtain written authorization from their client regarding the settlement, and whether there is going to be any structured settlement.

Use of focus groups:

Preferably, focus groups and/or mock trials should be completed prior to settlement negotiations and mediation. Focus groups and/or mock trials are often helpful in large damages cases to help the plaintiff’s attorney and his/her client see the weaknesses of their case, as well as the range of likely damages a jury would award. It is surprising how often a properly facilitated focus group picks the correct range that a later trial verdict encompasses, although such results should generally not be relied upon to determine an accurate value of the case. If you have good results from your focus groups, don’t hesitate to share with the other side the simple fact that you have had focus group research performed. This does not necessarily mean sharing the specific results. A good way to use this information is to state in writing or in mediation that you are certain that the defendant has also done focus groups, and that you are confident that they have obtained the same results that you have, assuming that their focus group studies were done objectively and correctly.

³ Fred Misko, *The Videotape Settlement Brochure*, at <http://www.misko.com/library/videobroch.PDF> (last visited June 4, 2004).

Settlement Brochure:

A written and/or videotaped settlement brochure may be effective in presenting the strongest elements of your case. You may want to include the strongest documentary evidence obtained in discovery and through investigation of your case in your brochure. A video brochure is especially helpful in allowing the adjuster to see and hear how persuasive and what a good impression your witnesses will make, especially independent witnesses or treating healthcare providers. In addition, you can utilize the defendant's own witnesses and experts who make a bad impression and edit the brochure to highlight these witnesses' weaknesses, inconsistencies and poor credibility factors. A settlement brochure will assist the plaintiff's attorney in trial preparation should the case not settle, as you have to focus on the entire case and look at the strengths and weaknesses in preparation of the brochure.

V. DAMAGES:

INTRODUCTION

Damages often determine the direction of your case at settlement and trial. If you have a case involving large past and future medical expenses, your emphasis will be on the medical expenses. If your case involves small past and future medical expenses, but large loss of earnings, your emphasis will shift to the lost earnings damages. Each case will have unique facts and unique damages and your approach should be tailored to your individual case.

A. FOUR BASIC PRINCIPLES OF DAMAGES:

According to David Ball,⁴ there are four basic principles of damages that jurors utilize in making decisions about money in a case:

- Harm (The degree of harm)⁵
- Worthwhileness (The worthwhileness of the money to make a difference)⁶
- Jurors' job (The juror's job is to fix, help and make up for what cannot be fixed or helped.)⁷
- Time (The proportion at trial spent on harm and money should be significant. David Ball⁸ suggests the following time for discussing harm and money with the jury:
 - i. ½ or more of your time in voir dire
 - ii. 1/3rd of your time in opening and direct testimony
 - iii. significant chunk of time on cross-examination
 - iv. as much as ½ of your closing argument)

⁴ DAVID BALL, DAVID BALL ON DAMAGES: A PLAINTIFF'S ATTORNEY'S GUIDE FOR PERSONAL INJURY AND WRONGFUL DEATH CASES, at 1-3 (NITA 2001).

⁵ *Id.* at 1.

⁶ *Id.*

⁷ *Id.* at 2.

⁸ *Id.* at.3.

B. TYPICAL DAMAGES FOUND IN PERSONAL INJURY CASES

- Past and future medical expenses
- Past and future loss of consortium
- Past and future mental anguish and pain & suffering
- Scarring, disfigurement, limitations in daily activities
- Past and future physical impairment
- Past and future lost wages
- Loss of inheritance
- Exemplary/Punitive Damages⁹
- Lost chance
- Funeral expenses

C. BIGGEST 10 VERDICTS IN COLORADO FOR 2003¹⁰:

1. Silvia v. Penrose Hospital	\$ 10 million
2. Loughbridge v. Goodyear	\$ 8 million
3. Ho Thu Thi v. Nhu Lai Temple	\$ 4.8 million
4. Dillon Cos. V. Hussman	\$ 3.8 million
5. Barton v. Stratford Lakes	\$ 3.6 million
6. Elliott v. Turner Construction	\$ 2.4 million
7. Antolovich v. Brown Group	\$ 2.3 million
8. Anstine v. Brown Group	\$ 2.1 million
9. Grundstrom v. Jensen	\$ 2.1 million
10. Carillo v. Vaughn	\$1.05 million

The highest jury verdict award in 2002 was for \$22.7 million in Vista Resorts Inc. v. Goodyear Tire and Rubber Company.

SEE CHART ATTACHED AS APPENDIX “A” AT PAGE 27 OF PAPER FOR MORE INFORMATION ON LARGEST COLORADO VERDICTS IN 2003.¹¹

D. WHEN TO INTRODUCE DAMAGES

In evaluating your case for settlement or determining your trial strategy you will need to decide when you will introduce your damages.

⁹ See, Lee Tarte Wallace, *The Three Rs Of Punitive Damages How To Maximize Punitive Damages In Your Cases*, ATLA’s 2002 Annual Convention, Reference Materials, 2387 at 2397-2398 where maxims for punitive damages are given, including: show that the defendant knew there was a problem and chose not to do anything; show the defendant hid the problem; show the defendant has no remorse; and show the defendant has had similar incidents.

¹⁰ Reprinted with permission from Nora Caley, *Biggest 10 Verdicts*, Law Week Colorado, (Feb. 23, 2004) and information compiled by Jury Verdict Reporter of Colorado.

¹¹ Chart included as Appendix “A” at page 27 of this paper created with information from Nora Caley, *Biggest 10 Verdicts*, Law Week Colorado, (Feb. 23, 2004) and information compiled by Jury Verdict Reporter of Colorado.

1. Use of experts

Life care planners, economists, physicians (health care providers) and rehabilitation experts may be necessary for your case. In addition, accountants, vocational rehabilitation experts, and other experts may be utilized.

Life care planners should be retained when you have catastrophic injuries and future medical costs will be one if not the biggest damage you will be arguing. Life care planners will assist the jury to understand the range of projected treatment and equipment necessary and the cost of the services. Be sure the jury understands that the life care plan is the minimum amount necessary for the patient. The non-necessities are not included in the life care plan but should be argued to the jury. Usually a life care planner will want to review the medical records of the patient, contact their current health care provider and even examine the patient and talk with their family. Once the life care planner determines what the needs of the patient are and likely will be, the life care planner will contact agencies, pharmacies and institutions in the patient's area to determine the present cost for such services. (The economist can then take those numbers and project the costs of those needs over the patient's life expectancy.) Persons with an appropriate medical background will often be utilized to serve as a life care planner. Your life care planner may want to come up with two locations for your catastrophically injured client to be placed for long term medical needs to provide the jury with a choice, i.e. 24 hour home care or institutional care.

An economist will take the figures from the life care planner and calculate the costs for such services for the life expectancy of the individual and also put it in the costs of present day value. The economist will need to explain inflation and how it will impact the figures. Since 1950, medical costs have risen over 1,500 percent.¹² Plaintiff's economists will often use the government mortality tables.¹³ These government tables are provided by the U.S. government and encompass all people in the United States.¹⁴ These government tables look at a person's

¹² Robert W. Johnson, *When the Money Runs Out: Presenting Multimillion Dollar Medical Expenses Conservatively*, ATLA's 1999 Annual Convention, Reference Materials, 1007 at 1008.

¹³ Arias, Elizabeth: *United States Life Tables, 2001. National Vital Statistics Reports*; vol. 52, no14. Hyattsville, Maryland: National Center for Health Statistics: February 18, 2004.

¹⁴ *The National Vital Statistics Report* can be obtained from the U.S. Department of Health & Human Services at the Centers for Disease Control & Prevention, National Center for Health Statistics, 6625 Belcrest Road, Hyattsville, Maryland, 20782-2003 or from the website <http://www.cdc.gov/nchs/products/pubs/pubd/lftbls/life/1966.htm> (last visited June 3, 2004), *United States*

overall life expectancy based upon their age and race, and incorporate persons with any and all health conditions.

A new report, “Health, United States, 2003, at www.cdc.gov/nchs/hus.htm¹⁵ sets out health trends showing an increase in life expectancy, as well as an increase in overall health care costs associated with longer life spans. Your expert(s) may wish to incorporate at least a general reference to this new governmental report confirming what all of us already know: The longer the lifespan, the more costly the medical expenses will be, and that health care costs continue to escalate.

Physician experts, especially the patient’s own treating physician, home health nurse or other treating health care providers are invaluable for assisting the jury in seeing the patient’s current condition, the future medical condition and prognosis. Have the treating health care providers walk the jury through a typical day for the injured patient. In addition, have the health care provider describe in detail the limitations and effect of the injuries on the daily needs of the patient. Use of specific examples of how the patient is effected on a day to day level is often some of the most powerful, persuasive testimony at trial and will provide understanding for the jury of the physical, emotional, and mental toll the injuries have placed.

Often these physician experts will provide you with life expectancy for the injured patient that will help to counter the defendant’s life expectancy experts.¹⁶ Further, a physician rehabilitation physician expert (physiatrist) you retain can also show areas of necessary treatment that may be missed by the general family practice physician/internist taking care of your patient’s overall health.

Life Tables, 2001, NVSR Volume 52, Number 14, and is DHHS Publication No. (PHS) 2004-1120 (2/04). The document is certified as an official Federal document and is fully admissible in Federal court under Federal Rule of Evidence 902.

¹⁵ <http://www.cdc.gov/nchs/hus.htm> (last visited June 4, 2004).

¹⁶ Most of the medical literature does not have significant life expectancies for the catastrophically injured patient, especially if there is an inability to hold up the head, lack of voluntary movement, or inability to feed oneself or take oral nourishment. The most important thing to recognize is that you should look for differences in the conditions described in the particular medical article(s) used by the defense compared to the condition of your client, as well as determining whether the group forming the basis of the study was large or small. Don’t simply take the results of a medical article as gospel. Many of these studies have flaws, or fail to take into consideration the fact that optimum medical care would potentially make a difference in the life expectancy. In other words, many of the patients in these studies were not receiving optimum medical care, so it would be an invalid comparison between the situation you are striving to achieve for your client and the situation of most of those in the studies.

Life expectancy experts: How to bolster and argue life expectancy for the plaintiff:

As a plaintiff's attorney it is important to develop the damages fully in your case and for a catastrophically injured client, to show what they had achieved in the past and what they desired and what their potential was for the future.

The following life expectancy areas will have to be overcome for a jury to award significant damages: an elderly client¹⁷; not having a projected normal life expectancy; chronic health problems; and/or severe neurological impairments.

A double-edged sword is the way that we frequently characterize our own clients and cases. The more you state or emphasize "catastrophic brain damage," "neurological devastation," or similar type of phrases (even through expert testimony), the more you may actually be playing into the defense's argument of limited life expectancy. There is no absolute, clear-cut way to approach this. It is something that simply needs to be remembered when using descriptive phrases. You may want to consider simply characterizing the condition as a "permanent brain injury," and the evidence regarding the condition of the patient will speak for itself.

Always start from the presumption of a full life expectancy. To most juries, life expectancy translates to future medical expenses more so than any other type of damage in most cases. A standard jury argument that lets the jury know that they will essentially determine how long the plaintiff will live by how much or how little they award in medical expenses is often effective. If the jury believes that the life expectancy will be shortened based on evidence provided by the defense (and thereby will probably award less in future medical expenses), consider arguing that the defendant is seeking to benefit by the very fact that he/she/it has caused the harm and shortened a person's life. If full future medical expenses are not awarded, then the equivalent of such medical expenses should be placed in other areas of damage, e.g., impairment, disfigurement, consortium, and etcetera.

If a defense expert gives an opinion regarding a shortened life span, use this testimony against the defendant. For example, "If there is evidence in this case that the negligence of the defendant caused the Plaintiff's injuries, then what you are telling this jury is that the defendant has also caused the Plaintiff to lose "x" years of

¹⁷ *But see*, David S. Shrager, *Proof of Damages on Behalf of the Elderly*, ATLA's 2000 Annual Convention, Reference Materials, at 1051-1054 in which the author believes vulnerable, elderly clients' claims are often badly under-evaluated and may have significant damages potential.

his life. You will probably get an objection to this question, but the point will be made.

Another question to ask a defense expert is whether the expert will agree to be responsible the plaintiff's future medical expenses should the plaintiff outlive the expert's shortened life expectancy. You will also probably get an objection to this question, but the point will be made.

In Colorado, it is the jury's function to place a dollar amount on pecuniary losses suffered by Plaintiff(s) when their family member has passed away. The jury should base their dollar award on all evidence available, including the deceased's life expectancy, the deceased's health and age, and his/her ability to earn. See *Morrison v. Bradley*, 655 P.2d 385, 388-389 (Colo, 1982). The Statutory Mortality Table¹⁸ will be received into evidence along with relevant evidence concerning the habits, occupation, health and constitution of the person whose life expectancy is at issue.¹⁹ The Mortality Table is not conclusive.²⁰

Accountants, vocational rehabilitation experts, and the patient's own boss can help a jury understand the economic impact of the injury. Limitations on returning to work, or complete inability to work account for significant damages, especially for high wage earners.

2. Use of lay, fact witnesses can bolster your client's claims of pain & suffering, mental anguish, impairment, and effects on the day to day life of your client. Having an effective fact witness to support your damages gives a personal face to your client and provides the jury with real-life examples to which the jury can relate. Never underestimate the power of a fact witness who has no financial stake in the outcome of the trial testifying on your client's behalf.

3. Use of medical records & billing records should be utilized in cases of personal injury. Introduction of past medical records and bills are usually conclusive proof to a jury as to the severity of injury and help support your life care plan for the future needs of your client.

4. Use of personnel records are helpful to show a person's work & earnings history, job performance and type of person the client is. Obviously, if your client has a poor job performance and/or work history you may choose not to enter these records into evidence.

¹⁸ COLO. REV. STAT. § 13-25-103 (2003).

¹⁹ Fortios Burtzos, *The Other Rules of Evidence*, 24 Colo. Law. 2169 (September, 1995).

²⁰ *Id.*

5. Use of W2 tax records show the client's past wages and support your damages for past and future loss of earning capacity.

6. Use of models, videotape(s) and/or photographs assists the jury in personalizing your client and explaining the damages. These visual aids become increasingly important in a case in which your client is deceased or unable to be at trial due to his/her injuries. In essence, in a death case these visual aids are recreating the deceased/injured person and allowing the jury to see whom the deceased/injured person was prior to the incident.

VI. SPECIFIC TROUBLE AREAS

The Unlikable Plaintiff

It is always an awkward situation when your case is strong except for your own client! Try to maximize the positives about your client and minimize the negatives. If there are negatives about your client that you know are admissible and the other side is going to introduce, you may be better off to introduce the negatives during your voir dire, opening and direct examination to take some of the taint and surprise the jury may feel if the other side introduces the evidence first. Juries do not want to feel that the truth is being hidden from them. Even if someone is unlikable, that does not give someone else the right to injure him or her.

Adult Children

Asking for damages for adult children who are financially independent of their parents is difficult. In a death case, you don't want to appear greedy and weaken the claims of the surviving spouse or estate and you also do not want to minimize a close relationship that the adult child may have had with the deceased parent. Often juries are reluctant to award large amounts of damages to adult children. In some cases you may want to obtain the adult children's agreement to waive their claims in favor of their surviving parent and/or have the adult children agree that any recovery given to them will be given to their surviving parent.

Obviously, if an adult child is disabled and was dependent upon the deceased parent for his/her financial and care needs then the disabled adult child's damages will usually be viewed differently from an independent adult child. The full spectrum of what the disabled child received from the deceased parent will need to be fully explored with the introduction of extensive evidence to the jury on what the deceased parent provided.

Small Actual Damages, Large Non-Economic Damages

When the actual damages are small, you will have to focus on the non-economic damages. If you have egregious conduct by the defendants you need to really emphasize this aspect, especially physical impairment and disfigurement.²¹ It is often difficult for a jury to award large damages for non-economic damages unless they

²¹ Due to the Colorado caps on noneconomic damages previously discussed at Footnote 2, *supra*, you want the focus to be on the noneconomic damages that won't be capped.

have a reason, i.e. they are mad at the defendant and want to make a point to the defendant.

Minor Children and Loss of a Parent

“Since the mental anguish of children ordinarily subsides over time, evidence of loss of society and companionship should be center-stage in the proof of loss in wrongful death cases involving minors. The degree to which children are compensated for the loss of society of their parent and the mental anguish they endure depends on the extent to which the trial lawyer is able to “re-create mom” in the courtroom.” Michael F. Colley, *Wrongful Death: “Recreating Mom” in the Courtroom*, ATLA’S 1999 Annual Convention, Reference Materials, 263 at 272.

Minor Children

The loss of a minor child is not limited to the economic value the child would have to the family, but is related primarily to the noneconomic value and loss of consortium value the child brings to the family.²²

Elderly Client

Through the last few years there have been significant damages awarded to elderly plaintiffs in nursing home malpractice cases around the country. Juries are more likely to see the elderly in the role of victim. In representing an elderly plaintiff, “paint a pretty picture” by showing how the elderly plaintiff continues to merit love and care and that their remaining days are a precious commodity and thus, are more valuable. J. Michael Solar, *Proving Difficult Damages*, Medical Malpractice, Medical Device and Pharmaceutical Litigation: University of Houston Law Foundation Reference Materials (March-April, 2001) 1-36, at 27. Look for aggravated liability facts, needless suffering, over-medication and effects of drugs in cases involving the elderly client. *Id.*

VII. MOTIVATING THE JURY TO AWARD DAMAGES

VOIR DIRE:

Telling the voir dire panel from the start that your case is a big case and a case involving serious and permanent injuries is important to help eliminate those who cannot award large damages or, if applicable, punitive damages. Ask the jury if the evidence supports findings for the categories of damages in your case if the voir dire panel member could award damages. Challenge for cause the panel member who indicates they could not award damages under any circumstance for an area of damages in your case. Eliminating these people early is important. Tort reform is rampant throughout our country and you don’t want people on your jury who feel that caps on damages should apply no matter what the facts of a case are.

Be wary of people that are traditionally conservative – i.e. accountants, physicians/health care personnel, military officers, insurance industry personnel, and

²² See, Todd A. Smith, *What is the Value of a Child?*, ATLA’s 2000 Annual Convention, Reference Materials, 1075-1080.

those that identify themselves with tort reform issues and are in favor of damage caps, limits on damages and see all personal injury lawsuits as frivolous. Remember that you can't always stereotype people, especially in this day and age. Certain backgrounds simply warrant extensive questioning.

Open-ended questions work best. Example: What problems would you have in awarding damages for mental anguish?... pain and suffering?

Use the charge and jury instructions in voir dire to see if any of the potential jurors admit that they don't agree with the law and what they think about some of the key definitions and instructions.

CLOSING ARGUMENT:

Often, the jury will have made up their mind who they are going to select to win a case prior to closing argument. But, this does not negate the strength of a strong closing argument. Closing argument is your time to summarize the evidence and show why damages should be awarded to your client. Use the testimony of the witnesses in the case and the evidence to support your position. Now is the time to close any loose ends that the jury may see and to cohesively present your case. Be sure to save time for rebuttal if allowed in your jurisdiction to refute arguments made by the defendant and to insure that your position is the last one the jury hears.

D. WHAT TO SAY AND NOT TO SAY IN CLOSING ARGUMENT

WHAT TO SAY:

Depending on your jurisdiction, you may suggest a specific amount of damages for categories you are seeking in closing argument. Be sure that the evidence supports your suggestion if you choose to do this. You may choose to give the jury a range of damages you suggest and leave it to them to pick what they see as the most reasonable value.

It is for the jury in their discretion to award damages and the amount of damages. Remember, that for each element of damages you are seeking you need to show the jury the foundation in the evidence for awarding damages for that category. Review what the Plaintiff's experts say about the damages and try to discredit the defendant's experts view on what they say the appropriate damages are.

Some jurisdictions will allow you to ask for intangible damages using a per diem basis. If your jurisdiction allows this, you may want to try asking for a daily rate x the number of days in a year x number of years the plaintiff is expected to live for the intangible damages. It gives the jury a model of how to come up with intangible damages.

Remind your jury in closing argument that a refusal to take responsibility and pay what is owed for an injury is a one form of greed.²³ Sometimes jurors expect

²³ Richard D. Lawrence, *What Good Will Money Do?*, Sept. TRIAL 28, at.30 (2002).

significant sums to be asked for, so don't disappoint them if the evidence and nature of the case justifies large amounts.

Recently, David Ball has suggested that the plaintiff's attorney should not be afraid to offend and over-ask for the damages in a case.²⁴

WHAT NOT TO SAY:

Don't talk about any caps that may apply on damages in your jurisdiction.

Don't tell the jury an exact amount your client must get or expects to get. (You don't want to appear greedy.)

VIII. TAX CODE – on Personal Injury Awards

I.R.C., § 104(a)(2) (West 2002) relates to Compensation for Injuries or Sickness. The I.R.C. rule states in Sections 104(a)(1)(2) & (3) (West 2004) in pertinent part:

(a) In general.

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include –

- (1) amounts received under workmen's compensation acts as compensation for physical injuries or sickness;
- (2) **the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness;**
- (3) amounts received through accident or health insurance (or through an arrangement having the effect of accident or health insurance) for personal injuries or sickness (other than amounts received by an employee, to the extent such amounts (A) are attributable to contributions by the employer which were not includible in the gross income of the employee or (B) are paid by the employer).
(emphasis added)

What is and is not taxed? Generally, payments for physical injuries are not taxed and payments for punitive damages are taxed. Your client should be given the opportunity to consult with a CPA or tax attorney of their choice prior to settlement of a case and after a verdict to fully explore tax consequences of a verdict or settlement.

²⁴ David Ball, A Trial Consultant's View of Traumatic Brain Injury (audiotape from ATLA Traumatic Brain Injuries Litigation Group, 2002)

IX. SPECIAL NEEDS TRUSTS/SUPPLEMENTAL CARE TRUSTS

Special needs trusts allow severely disabled persons to have a trust and remain on governmental entitlement benefits, i.e. Medicaid. Check with your state to determine if your statutes allow the creation of a special needs trust.

Special needs trusts are authorized by 42 U.S.C.A. §1396p (d)(4)(A) (2004) and allow for a disabled person under the age of sixty-five (65) to have a trust established by the disabled person's parent, grandparent, legal guardian or a court IF the State will receive all amounts remaining in the trust upon the death of the disabled person up to an amount equal to the total medical assistance paid by the State plan on behalf of the individual.

EXAMPLE: If your disabled client was on Medicaid and had a special needs trust set up, and had \$250,000.00 worth of medical expenses that the State's Medicaid program paid, then on the death of your disabled client, the estate of the disabled client must repay the State \$250,000.00 for the medical expenses previously paid under Medicaid. Thereby, the special needs trust delays the payment to the state of the Medicaid expenditures until the death of the disabled person.

Specialized Language that Must be Included:

Specialized language must be included in any structured settlement if a special needs trust is being utilized. Be sure to check your state's requirements.

Please note that if your client is purchasing an annuity, the life expectancy remaining for your client must equal or exceed the stated life of the annuity. A penalty will be assessed to your client based upon the transfer of assets that is considered to have occurred at the time the annuity was purchased, minus any principal paid to the client prior to the filing date for Medicaid benefits. Therefore, an annuity purchased for a person with a poor life expectancy (i.e. an elderly client) may not be in the client's best interest as the projected payout may be less than the client's life expectancy.

X. STRUCTURED SETTLEMENTS

In Black's Law Dictionary (6th Ed. 1990) structured settlements are defined as:

“Type of damages settlement whereby Defendant agrees to make periodic payments to injured Plaintiff over his or her life. Commonly such settlement consists of an initial lump-sum payment with future periodic payments funded with an annuity.”

Probably the biggest reason Plaintiffs choose structured settlements are that there are tax benefits to a structure that are not available with a lump-sum payment. So long as there is no actual or constructive receipt by the Plaintiff of the periodic payments, the Plaintiff (or their estate) can claim that the payments are excluded from gross income under the I.R.C. §104(a)(2) (West 2004) and Revenue Ruling 79-220.

In a structured settlement the interest earned for the lifetime payout are currently tax-free. Many plaintiffs choose structured settlements because it forces the plaintiff to obtain the money over a period of time, where there is less likelihood of the plaintiff going on a spending spree and dissipating their award. All too often statistics have shown Plaintiffs having little remaining of large cash recoveries after three to five years.

What to Look for in Selecting an Annuity Company:

When selecting an annuity company, factors you may want to look at include:

- a. price of the annuity
- b. cash refund option at the death of the measuring life
- c. high rated age

Structured settlements may be useful in cases involving death, guardianship cases, reduced or lost retirement benefits, catastrophic injuries, inadequate policy limits or where there is questionable liability.

You can devise structured settlements that pour over into special needs trusts.

3 Step Process for Structured Settlement:

1. The parties to the settlement agreement agree that the Defendant will pay Plaintiff periodic payments as part of the negotiated settlement.
2. The Defendant transfers the obligation to make the periodic payments to a third party Assignee by means of a qualified assignment.
3. The Assignee purchases and owns a qualified funding asset (annuity) to fund the stream of future periodic payments.

Pit-falls to Avoid in the Drafting of Structured Settlement Documents:

1. It should not be stated that the plaintiff is purchasing the annuity. The defendant, its liability carrier, or its assignee is purchasing the annuity.
2. The cost of the annuity is not consideration being paid to the plaintiff (releasor) and should not be mentioned as such in the structured settlement documents.
3. Punitive damages should not be part of the document. Allocate that the amount being paid is for compensatory damages only.
4. Watch out for conflicting language in the terms of the structured settlement and the Settlement Agreement and Release.

E. Structuring Attorney's Fees

An attorney can structure earned fees by a structured settlement and purchasing an annuity for the attorney's fees. In doing this, the income is taxed as the periodic payments are received, and not on the entire lump sum at one time. This may be helpful to the attorney to spread the income over several years and to defer (not avoid) the income taxes for a later time, especially if the attorney suspects he or she may eventually may be in a lower tax bracket.

XI. ANNUITIES

Defense attorneys often designate individuals with annuity backgrounds as defense experts (usually seen are economists, life care planners, statisticians, and/or life expectancy experts) in order to try to slant the jury to award less money for the plaintiff's long term needs. Obviously, this defense tactic is just another way the defense carrier is trying to save themselves from paying a larger award. The defense annuity expert will tell the jury that the plaintiff's needs could be met by an annuity with a lower present value than the plaintiff is seeking. Be prepared to counter these attempts during any settlement discussions or mediations.

XII. Section 468B QUALIFIED SETTLEMENT FUND:

Section 468B of the Internal Revenue Code of 1986 and the underlying Treasury Regulations are the laws governing the qualified settlement fund ("QSF").

26 U.S.C.A. §468b (West 2004) provides:

(a) In general.--For purposes of [section 461\(h\)](#), economic performance shall be deemed to occur as qualified payments are made by the taxpayer to a designated settlement fund.

(b) Taxation of designated settlement fund.--

(1) In general.--There is imposed on the gross income of any designated settlement fund for any taxable year a tax at a rate equal to the maximum rate in effect for such taxable year under [section 1\(e\)](#).

(2) Certain expenses allowed.--For purposes of paragraph (1), gross income for any taxable year shall be reduced by the amount of any administrative costs (including State and local taxes) and other incidental expenses of the designated settlement fund (including legal, accounting, and actuarial expenses)--

(A) which are incurred in connection with the operation of the fund, and

(B) which would be deductible under this chapter for purposes of determining the taxable income of a corporation.

No other deduction shall be allowed to the fund.

(3) Transfers to the fund.--In the case of any qualified payment made to the fund--

(A) the amount of such payment shall not be treated as income of the designated settlement fund,

(B) the basis of the fund in any property which constitutes a qualified payment shall be equal to the fair market value of such property at the time of payment, and

(C) the fund shall be treated as the owner of the property in the fund (and any earnings thereon).

(4) Tax in lieu of other taxation.--The tax imposed by paragraph (1) shall be in lieu of any other taxation under this subtitle of income from assets in the designated settlement fund.

(5) Coordination with subtitle F.--For purposes of subtitle F--

(A) a designated settlement fund shall be treated as a corporation, and

(B) any tax imposed by this subsection shall be treated as a tax imposed by [section 11](#).

(c) Deductions not allowed for transfer of insurance amounts.--No deduction shall be allowable for any qualified payment by the taxpayer of any amounts received from the settlement of any insurance claim to the extent such amounts are excluded from the gross income of the taxpayer.

(d) Definitions.--For purposes of this section--

(1) Qualified payment.--The term "qualified payment" means any money or property which is transferred to any designated settlement fund pursuant to a court order, other than--

(A) any amount which may be transferred from the fund to the taxpayer (or any related person), or

(B) the transfer of any stock or indebtedness of the taxpayer (or any related person).

(2) Designated settlement fund.--The term "designated settlement fund" means any fund--

(A) which is established pursuant to a court order and which extinguishes completely the taxpayer's tort liability with respect to claims described in subparagraph (D),

(B) with respect to which no amounts may be transferred other than in the form of qualified payments,

(C) which is administered by persons a majority of whom are independent of the taxpayer,

(D) which is established for the principal purpose of resolving and satisfying present and future claims against the taxpayer (or any related person or formerly related person) arising out of personal injury, death, or property damage,

(E) under the terms of which the taxpayer (or any related person) may not hold any beneficial interest in the income or corpus of the fund, and

(F) with respect to which an election is made under this section by the taxpayer.

An election under this section shall be made at such time and in such manner as the Secretary shall by regulation prescribe. Such an election, once made, may be revoked only with the consent of the Secretary.

(3) Related person.--The term "related person" means a person related to the taxpayer within the meaning of [section 267\(b\)](#).

(e) Nonapplicability of section.--This section (other than subsection (g)) shall not apply with respect to any liability of the taxpayer arising under any workers' compensation Act or any contested liability of the taxpayer within the meaning of [section 461\(f\)](#).

(f) Other funds.--Except as provided in regulations, any payment in respect of a liability described in subsection (d)(2)(D) (and not described in subsection (e)) to a trust fund or escrow fund which is not a designated settlement fund shall not be treated as constituting economic performance.

(g) Clarification of taxation of certain funds.--Nothing in any provision of law shall be construed as providing that an escrow account, settlement fund, or similar fund is not subject to current income tax. The Secretary shall prescribe regulations providing for the taxation of any such account or fund whether as a grantor trust or otherwise

Other Information on QSFs:

These QSFs are utilized when deciding where to put the settlement money and the defendant is ready to pay. An escrow account or fund is set up and the defendant is then

released from liability. The plaintiff is not considered to be in “constructive receipt” of the settlement funds. Under §130, a physical injury tort claim is the only cause of action where damage payments may be assigned. A fund administrator, on behalf of the qualified settlement fund, settles claims against the defendant and the defendant pays the agreed upon settlement amount into the fund, which then extinguishes any alleged liability of the defendant. When the settlement funds are paid out to plaintiffs, lien holders, the attorneys, or to a third party assignee, the fund then closes, and the administrator files a final tax return. Usually the qualified settlement fund exists for only a short duration.

XIII. SELF DEALING BY INSURANCE COMPANIES:

In some cases you will see the defendant insurance company try to broker the settlement and then try to use only their affiliated annuity company or “approved” companies for funding any structured part of the settlement. What this potentially does is to allow the insurance company to recoup some of the settlement money through their affiliated company or “approved” company. It may be a type of shell game. They may make your client believe they are offering a certain amount to settle the case, and then the defendant’s insurance company says you have to use one of their affiliated annuity companies or “approved list” companies. Why do the insurance companies do this? In almost all cases, it is to save money, and those savings may actually represent money out of your client’s pocket. The defendant’s carrier may get a considerable present discount using future periodic payments. “Present value” from the defense is often based on an estimated number from their annuity broker, and may be subject to manipulations according to what assumptions are used. Be aware that sometimes the “approved” companies and brokers give monies back to the insurance carriers for using them, and other times the defendant’s carrier may be sending your money in fees back to themselves in a subsidiary that does structured settlements.

A recent Supreme Court case from Connecticut, *Macomber v. Travelers Property and Cas. Corp.*, 804 A.2d 180 (CT., 2002) addresses the self dealing and rebating issues. In *Macomber*, Travelers Casualty provided a structured settlement annuity to the Plaintiffs in which Travelers Casualty used insurance brokers that had an affiliation or other special relationship with them whereby Travelers Casualty got 25-75% of the commission back. The Connecticut court found that the payment plan that the plaintiffs had agreed to was “induced by a representation as to its cost, and that the cost was not accurately reported to the plaintiffs in good faith.” *Id.* at 187. The court stated, “The key to the plaintiff’s argument, is that, once Travelers Casualty made a representation as to how much the annuity would cost for it to purchase, Travelers Casualty had a duty to disclose any rebates or other schemes that would reduce the final cost of the annuity to Travelers Casualty.” *Id.* at 191.

Make sure that the financial ratings of the insurance company used is strong, and have your broker check several different insurance companies’ proposals to insure that your client is receiving the most competitive rates available on the market. Often times the defense’s approved companies have an unfavorable rated age for the plaintiff when compared with other companies. This is especially true if lifetime benefits are wanted.

Using a Plaintiff's structured settlement broker will help (but not guarantee) that the appropriate medical information is highlighted or emphasized when sent to a structured settlement insurance company for purposes of obtaining a quote (based on a rated age).

Further, the defendant will release themselves and the selected structure from all future liability, including liability for them picking a flawed structured settlement vehicle. This is another reason why you want to make sure that the structured settlement carrier has a high rating.

Some insurance companies that have appeared in the past to have requirements to use their own structured settlement brokers and/or affiliated life insurance companies include: Travelers; AIG; St. Paul; CNA; and Hartford. In these situations, you have some choices:

- a. Allow the defendant's insurance company to pick the structured settlement company. (In some cases, the defendant's structured settlement companies may have the best rates available with well-rated annuity companies that you would want your clients to use, but you need to independently confirm this with a plaintiff's broker who is also checking for structured settlements.)
- b. Have a co-broker for the plaintiffs work with the defendant's insurance company. Be aware, however, that often times the plaintiff's co broker is going to share fees with the defendant's broker/insurance company. This means that the liability carrier may actually end up receiving part of your client's settlement money, since the commission for a structured settlement is ultimately going to come out of your client's portion.
- c. Have a 468b qualified settlement fund established by filing motions with the court, and then having the settlement money held in escrow until the court determines the proper distribution. (This option will probably cost somewhere in the neighborhood of \$4000.00, but could be well worth it for your client when the insurance company is dragging their feet or trying to strong arm your client into working ONLY with their brokers/approved list companies.)
- d. Try the case and not use the defendant's structured settlement company.
- e. Consider looking at Treasury Bond settlements as a real option.
- f. Also, consider requesting the broker (yes, even the Plaintiff's structured settlement broker) to reduce the normal 4% commission to 2% or 3%. They are able to obtain quotes based upon a 2% or 3% commission, and this should especially be considered if it is a mega-settlement.

Words of Caution in Structuring Settlements:

A prudent plaintiff's attorney will have the input of structured settlement specialists and probate/trust attorneys, as these areas of law are often outside the common knowledge of most plaintiff's attorneys. The rules and regulations surrounding tax issues can change and the client should be advised to consult with a certified public accountant/tax attorney to answer any questions they might have concerning tax implications of their settlement proceeds prior to the plaintiff selecting their best

option. Your client should seek independent tax advice from a tax professional, as well.

Additionally, if you are representing a husband and wife in a tort action, advise each of them in writing to seek the advice and counsel of a family law attorney regarding any type of marital/family law issues regarding the recovery.

Structured Settlements are normally for a certain number of years guaranteed, meaning that the annuity income stream will continue for that guaranteed number of years, even if the plaintiff dies during that time period. A potential problem may develop if the plaintiff dies and the IRS places a valuation on the remainder of the income stream. In this case, the IRS may well require the immediate payment of the present value of the income stream. What happens if the plaintiff's estate does not have enough cash to pay the claim levied by the IRS? These are the types of questions that you don't want to have to be addressing. The IRS has even been known to place a levy on the house occupied by the surviving family members, notwithstanding the fact that there are monthly payments still coming in. The IRS usually doesn't want to be paid on a monthly basis. A way to avoid this is to request a "Commutation Clause" in the annuity. The Commutation Clause can be for any percentage of the remaining periodic payments. For example, a 50% Commutation Clause means that should the plaintiff die within the guaranteed payment period, 50% of the remaining payments will be immediately converted to cash. This is usually sufficient to provide any necessary cash required from an estate tax perspective. Once again, it is another aspect of a structured settlement to consider.

XIV. CONCLUSION: A well-known and respected trial attorney, Ira Leesfield, is credited with the following statement which is known to be oh-so-true in the Plaintiff lawyer's practice, "TRIALS MAKE THE BLOOD FLOW, BUT SETTLEMENTS MAKE THE CASH FLOW!" Whether you settle or try your case, be sure to evaluate your case early for settlement potential, your costs and your likely success at trial.

APPENDIX “A” - Largest Verdicts in Colorado in 2003

CASE	AMOUNT	DATE	TYPE OF CLAIM	PLAINTIFF'S ATTORNEY	DEFENSE ATTORNEY	JUDGE
Silvia v. Penrose-St. Francis Hospital	\$10 million (5 million actuals, 5 million punitives)	Nov. 17-24, 2003	Breach of Contract	Lloyd Kordick, III, Greg Walts	Christopher Cipoletti	Kirk Samelson
Loughbridge v. Goodyear & Heatway	\$ 8 million	??	Product Liability (Entran II Hoses)	William Maywhort, David Black	David Lenvo, Roger Thomason, Matt Holmes, Randall Herrick Stare	Lewis Babcock
Ho Thu Thi, et al. v. Le Cuong Kim, The Vietnamese Buddhist Congregation of Colorado a/k/a Nhu Lai Temple, et al.	\$4.8 million	Aug.-Sept. 2003	Multiple claims – defamation, sexual assaults	Susan M. Hargleroad, John C. Haas	Colin C. Campbell, Anthony Clapp, Jane Bendle Lucero, Robert E. Goodwin	Shelley Gilman
Dillon Companies d/b/a King Soopers v. Hussman Corporation	\$3.819 million (Pl. demanded 7.5 million & Def. offered 6.0 million prior to trial)	Sept. 15-23, 2003	Negligence	Kevin Caraher, Colin C. Campbell	Mark R. Davis	Richard P. Matsch
Lee C. Barton v. Stratford Lakes Master Association, Inc., Rick Borders d/b/a Lawn Express	\$3.6 million (Case was appealed and parties settled for 2 million)	Oct. 20-22, 2003	Slip and Fall	Benton J. Barton	Barbara A. Duff, Jane Bendle Lucero	C. Vincent Phelps
Eugene Elliott v. Turner Construction Co. & B & B Steel, Inc.	\$2.419 million prior to statutory caps being applied	Feb. 24-28, 2003	Negligence	Holly Baer Kammerer, David Teselle	Douglas W. Poling, Ann Holewinski	Marcie S. Krieger
Carol Antolovich, et al. v. Brown Group Retail, Inc. & Redfield Rifle Scopes, Inc.	\$2.288 million (Verdict widely viewed as defense victory as jury gave less than 1% of damages Plaintiffs allege)	Sept.-Dec, 2003	Class Action by 925 residential property owners, Negligence, Nuisance, Trespass	Kevin Hannon	Karen H. Wheeler, Thomas P. Johnson, Gale T. Miller, Gale L. Wutzler, Lee D. Foreman	Herbert Stern III
Glen Anstine, U.S. Bankruptcy Trustee for Builders Home Warranty v. Andrew Jelonkiewicz, et al.	\$2.123 million	Feb.-March, 2003	Breaches of fiduciary duty, and legal malpractice.	Dennis J. Bartlett, Marc R. Brosseau	Hershel J. Shapiro, Susan M. Hargleroad	Robert S. Hyatt
Scott Grundstrom et al. v. Lori Jensen, M.D. and Ross Leibovitz, M.D.	\$2.093 million (Defense verdict for Jensen)	July-Aug., 2003	Wrongful death from medical malpractice	Baine Kerr, Kimberly Hult	Elizabeth Starrs, Valerie Garcia	Carol Glowinsky
Tessa L. Carillo v. Michael R. Vaughn & New Prime, Inc.	\$1.956 million	Nov. 17-24, 2003	Auto/Tractor Trailer collision	Joseph Kiel	Gary Cowan	Richard P. Matsch

