LITIGATION

The newsletter for the TBA Litigation Section

Letter from Chair

The Litigation Section has been busy this year launching a new CLE format. In the past, we have sponsored a series of Litigation Updates held in the Spring in Chattanooga, Knoxville, Nashville and Memphis. This year the Executive Committee decided to try a new teleseminar format.

Thanks to the hard work of Executive Committee member Joseph Koury, we have developed a series of four teleseminars covering topics of interest to the trial lawyer. The first teleseminar was held on October 18th. Chancellor Carol McCoy from Nashville and Litigation Section Chairman-Elect Gary Shockley presented a one hour seminar on Appeal and Error, Civil Procedure and Evidence. The teleseminar included an excellent discussion of recent developments in all three areas.

The next teleseminar is scheduled for Wednesday, December 15th at 12:00 Noon (Central). Past Section Chairman Steve Collins will discuss recent developments in Workers Compensation and Employment. Dialing in to these teleseminars from your office is an easy way to earn CLE credit and keep abreast of important new developments. In March, we will cover Commercial Law and Consumer Protection, Contracts and Insurance. Finally, at the convention in June, the Section will produce a two-hour seminar on Property, Torts and Ethics.

I urge each Section member to take advantage of these valuable CLE opportunities. I am also interested in receiving your feedback regarding our new teleseminar format. Again, I would like to thank Joseph Koury for his hard work in producing this quality CLE. I would also like to thank Bryan Smith for his work in gathering the articles for this newsletter.

Happy Holidays to everyone!

Overton Thompson

WINTER 2004

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A Fine Line We Walk

Professional responsibility considerations: Counseling clients about the "form" of settlement

By Matthew Garretson[i]

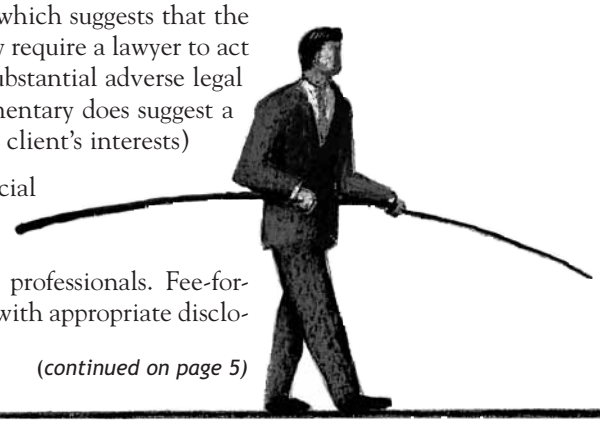
What is the proper scope of client counseling? Model Rule of Professional Conduct 1.2 (or its counterpart in the Model Code[ii]) is a logical starting point for discussion. It states that the lawyer is required to "abide by the client's decisions concerning the objectives of the representation" and to "consult with the client as to the means by which they are to be pursued."[iii] The rule also states that "a lawyer shall abide by a client's decision whether to settle a matter."[iv] In this author's experience, and contrary to admonitions to abide by a client's decision, many attorneys do not consult their clients about one very critical aspect of representation: the "form" of settlement (as opposed to the "substance" or dollar amount).

Hundreds of thousands of civil cases are filed each year in America, but 97.1% of them never go to trial.[v] The percentage of bodily injury cases settled out of court is even more staggering.[vi] If settlement is the principal method of resolving civil litigation in our country, the bargaining process is arguably the paramount facet of law in action. Since an attorney must know his client's preferences to bargain effectively, client-counseling skills are some of the most important a lawyer can develop.

Communication with the client tends to break down in two areas of discussion: 1) structured settlements;[vii] and 2) the impact of accepting settlement proceeds on the client's eligibility for government benefits like Medicaid, which have strict financial eligibility limits. Lawyers often presume these topics cross the line between "legal" advice and "financial" advice. In fact, structured settlements and special needs trusts[viii] (to preserve government benefit eligibility) are "of the law" (Sections 104(a)(2) and 130 of the Internal Revenue Code[ix] and 42 U.S.C. § 1396p(d)(4)(A)).

Because these subjects are "of the law," a lawyer's silence can run afoul of Model Rule 1.4, which states, "[a] lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation" and "shall reasonably consult with the client about the means by which the client's objectives are to be accomplished."[x] When a client takes constructive receipt[xi] of settlement proceeds, his options regarding structured settlements and government benefit eligibility are often eliminated or severely complicated, so if it is not the lawyer's role to discuss these subjects with the client, then whose is it?

Other ethics statements that support client counseling on structured settlements and special needs trusts are Model Rule 1.3, which speaks to "diligence" in handling interests of the client that can be adversely affected by the passage of time,[xii] and the commentary to Rule 2.1 (Advisor), which suggests that the duty to communicate with the client under Rule 1.4 may require a lawyer to act when the client's course of action is likely to result in substantial adverse legal consequences. (While not squarely on point, this commentary does suggest a duty to "speak up" when remaining silent may harm the client's interests)



Much has been written about lawyers providing financial planning services to clients within the context of the hotly debated Multidisciplinary Practice (MDP),[xiii] or by way of fee-for-referral arrangements with financial professionals. Fee-for-referral arrangements are allowed in many states if done with appropriate disclo-

(continued on page 5)

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Avoid A Bitter Lesson: Less Is More

By Steve Collins

Michael Gort was tired. His pals were gone. He would be with them at the café were it not for Paul Pott. Gort had been dreading his meeting with Pott, all day. Pott insisted the meeting be held late on Friday so he did not have to take time away from his business. Gort poured the thick black liquid of day's end into his Styrofoam cup and pressed it to his lips. It was bitter.

He opened the conference room door and before he could speak, a venomous fusillade spilled out between Potts' canines. Gort would rather not be here. He would rather be anywhere. He had so much to do. He could be working on the new Channing case for Green Grocer Foods. Ah, that was an appreciative client.

But no, he was with Pott. Gort's head spun as Pott ranted on about the claim he wanted the law firm to handle. He could just make out Pott's insistence on unreasonable deadlines, pounds of flesh and deep fee discounts. Gort could not concentrate. Although he heard the sounds, in his mind, Gort comprehended the words spewing through Potts' viperine sneer only as, "Take me as your client and I will make your life miserable."

All lawyers want to build their practices and take on new cases and new clients. Part of the art of law practice, however, is to "separate the wheat from the chaff." One bad case or client can make a lawyer's life miserable. Much is written about the quality of life for lawyers. Avoiding the problem case and the problem client is a good balm for the improvement of the practitioner's quality of life. In matters of case and client selection, it is submitted the presence of too many of the following red flags should result in a "no" to the question, "Will you take my case?"

- The prospective client makes an appointment only on the eve of the expiration of the statute of limitations.
- There is no reasonable probability of significantly improving the client's pre-retention position.
- The filing of a lawsuit will likely draw a counter-suit or a motion for sanctions, fees or costs.
- The case is outside of the lawyer's current experience and competency.
- The lawyer has other pressing current obligations to existing clients.
- The prospective client expresses unrealistic expectations.
- The prospective client has fired, or has been fired, by other lawyers.
- The prospective client has multiple prior claims.
- The prospective client has a poor employment history.
- The prospective client appears untrustworthy or unsympathetic.
- The prospective client exaggerates injuries, damages and losses.
- The prospective client exhibits a willingness to do anything to win.
- The prospective client attempts to impose/demand unreasonable deadlines, results or budgets.
- The prospective client will not follow advice.
- The prospective client will not accept the law as it exists and is hostile to you as the bearer of bad news.
- The prospective client is too fee sensitive and wishes to negotiate or argue about fees before any have been incurred, presented in a fee statement or paid.

Head still spinning after the meeting and showing Paul Pott the door, Gort stumbled back to his office and fell into the coolness of his green Gunlock leather chair. Gort wanted more cases and more clients but he was very uncertain about Pott. The red light voice mail message signal on his phone was blinking.

Gort picked up the phone and pressed the voice mail button. "Mike, this is Allison at Green Grocer and I just wanted to tell you how pleased everyone here is with the results in the Wolfe case. I have already taken your fee statement to accounting and had the check cut. It should be in your office next week. We are so happy we found you and also have you as our lawyer on the Channing file. Thanks again for all you do." Allison and Green Grocer, now there was a client. Green Grocer was a solid company, who followed our advice, paid our bills and even said thank you!

It was then Gort noticed the steaming cup on his desk. His colleagues had thought of him. He picked up the cup and drank heartily. Ah, hot, sweet white chocolate mocha, that's better, not bitter.

Gort picked up the Dictaphone and spoke, "Dear Paul Pott: No thanks." Life is good. Less is more.

Steve Collins practices with the firm of Burroughs Collins & Jabaley in Knoxville. He is a former chair of the TBA Ligitation Section.

The Top 5 Advantages Of Mediation

by Richard Strauss

Over the past 15 years, mediation has expanded from the labor unions to virtually all types of personal injury and wrongful death cases. Because of the success of the mediation process in helping parties resolve disputes, many judges will order parties to mediate their cases, or in the alternative, refuse to grant a trial setting without mediation having taken place. Because of this, the ability to utilize the mediation process successfully will become as important a part of a trial lawyer's practice as developing their skill set in conducting discovery and trying cases.

This article will address the top 5 Advantages of Mediation.

(5) History based on hundreds of thousands of cases has taught us that no matter what type of case is being mediated, or where the mediation is taking place, 70%-80% of all cases settle at mediation. Of the 20%-30% of those cases that don't settle at mediation, many settle shortly thereafter. In those situations, what happens is after a mediation the Plaintiff may take into account what they learned that day (it may be just learning what the Defendant is willing to pay to settle the case), reevaluates their position, and perhaps might be willing to accept less money to settle the case. The Defendant takes into account what they learned that day (it maybe just learning what the Plaintiff is willing to accept to settle the case), reevaluates their position, and perhaps they're willing to pay more to settle the case.

KEY POINT: The math is easy on this one, for if 70%-80% of cases settle at mediation, yet only 2%-3% go to trial, we can all conclude that just about all other cases in-between that 70%-80% and 97%-98% settle.

(4) Everyone in attendance has made a commitment to attend the mediation for the same reason-to settle the case that day. It's a very unique opportunity for (a) the decision makers are either in the room or available with one phone call, and (b), it isn't like if the case doesn't get settled hat day that everyone is going to reconvene the next day to try it again, as everyone has other commitments on their personal and professional calendars. Everyone is asked to be sensitive to the uniqueness of the opportunity to settle the case that day.

KEY POINT: Everyone is at mediation focused towards the same goal-settle the case that day. Given all the responsibilities we have in our lives, this should not be underestimated.

(3) One of the major advantages of mediation is that it allows all participants to speak more openly and freely than the legal process normally allows.

For the plaintiffs, this means that although they may have been deposed prior to the mediation, that deposition is basically a question and answer session, subject to the objections of the attorneys. Likewise, if the case doesn't settle at mediation, or post-mediation, and represents one of the 2%-3% of all cases in this country that go to trial, they'd undergo another question and answer session at trial, again, subject to the objections of the attorneys. That question and answer process doesn't allow the plaintiffs to speak about what they want to talk about. Mediation provides them with a forum to "air it out" should they choose to do so.

KEY POINT: Many times after a mediation, a party has approached me, thanking me for the opportunity to speak openly via the mediation process, especially in those cases where a number of years have gone by from the date of incident to the time of mediation.

(2) For the parties themselves, to the extent that their involvement in the legal process has caused them any degree of stress, anxiety, worry and a host of other negative emotions, and a failure to settle the case that day will result in a continuation of those negative feelings, a settlement shuts down the legal process for them, and allows them to move forward with their lives as best they can. Among other responsibilities counsel has to their clients, they are obligated to keep their clients updated as to the developments in their lawsuit, but all that does is pull them back to the incident or incidents that are the basis of the lawsuit. A settlement shuts all those reminders down, and allows them to really begin moving forward with their lives.

KEY POINT: This is a very important point, for although the parties are adversaries for how they sit in the lawsuit, Plaintiff and Defendant, they actually have common incentive to work hard in mediation, settle the case, and move on with their lives.

(1) The biggest advantage of mediation is that it allows the parties to control their own destiny. They will never have greater control over the outcome of their case than in mediation, where the decision makers are present, or at worst, one phone call away.

If the case doesn't settle at mediation or post-mediation, and represents one of the very few cases that do go to trial, two things we know for certain:

(a) We have no idea what the result will be, for the participants in mediation will be punting the decision making responsibility to a group of people in a particular county, with no idea who they are going to be, and

(b) By virtue of going to trial, we already know that one side, both sides, some combination of the parties, and perhaps everyone, will be unhappy with the result.

If the case goes to trial and a defense verdict is rendered, the Plaintiff will be very unhappy.

If the case goes to trial and a plaintiff's verdict is rendered, perhaps the Plaintiff is not pleased with the jury's award, so they will be unhappy, and perhaps the Defendant will be too.

If the case goes to trial and a Plaintiff's verdict is rendered and the Plaintiffs are pleased with the jury's award, they will be happy, but chances are the Defendant will not be.

> One of the major advantages of mediation is that it allows all participants to speak more openly and freely than the legal process normally allows.

KEY POINT: What I see most often as a neutral in the process is that the parties may not be able to negotiate the exact settlement they want to as we begin the process, but they do have the power to control the negotiation process, and negotiate a resolution on terms and conditions they can deal with.

CONCLUSION

Hopefully, this brief article will provide you with some insights as to why the mediation process has proven to be successful in the past, and almost certainly will for any participant in the future.

Richard M. Strauss, Esq. is a mediator formerly from Nashville, who has a national mediation practice, specializing in medical malpractice, long term care and other personal injury and wrongful death cases. More information regarding his service can be located at www.RichardMStrauss.com.

A Fine Line We Walk *(continued from page 2)*

sure and client consent.[xiv] The analysis, pro and con, tends to focus on Model Rules 1.7(b) (Conflict of Interest: Current Clients); 1.8(a) (Conflict of Interest: Current Client: Specific Rules); 2.1 (Advisor); 5.4 (Professional Independence of a Lawyer); and 5.7 (Responsibilities Regarding Law-Related Services). Each of these rules cautions attorneys to exercise independent professional judgment. The assumption is that MDP or referral arrangements can impair the lawyer/client relationship or the lawyer's professional judgment.

The ethics of MDP's or cooperative business arrangements are not the subject of this article. However, we can draw two conclusions from the commentary concerning these arrangements. First, the questions concerning the boundaries of the practice of law are not confined to structured settlement or special needs trust issues. Second, an eventual affirmation of the MDP concept would lead to new and revised Model Rules.[xv]

In short, the rules of the game are changing and the practitioner must take steps to ensure that he understands the impact of those changes across all aspects of his practice.

It is the author's opinion that the "hands-off" approach historically taken by attorneys is not what is called for in the Model Rules. This article reviews the themes of various complaints filed against attorneys for alleged malpractice concerning structured settlements and government benefits. It then introduces the reader to a model approach to client counseling on those topics. Finally, it discusses the practicality of the 468B Qualified Settlement Fund for ensuring proper client counseling, communication, and diligence.

THE LAWSUIT

The American Bar Association Standing Committee on Lawyers' Professional Liability recently studied twenty-five practice areas and found that fully one-fourth of legal malpractice claims were filed against plaintiffs' attorneys, for the alleged mishandling of personal injury cases.[xvi] Fourteen types of legal activities were investigated. The highest rate of claims was related to procedural aspects of the personal injury case, but alarmingly, when the number of claims related to "advice" and "settlement/negotiation" are combined, they become the second highest area of vulnerability for attorneys.

Themes of "advice" and "settlement/negotiation" complaints revolve around not offering information or advice regarding structured settlements and/or special needs trusts; improper documentation to preserve tax-free benefits; improper calculation of fees; misrepresentation of the present value of the settlement offer; and improper information regarding the taxation of damages.

The Model Rules, as originally adopted in 1983, were not intended as a basis for civil liability. However, the Ethics 2000 Commission proposed, and the House of Delegates adopted, a modification to the portion of the Scope section that discusses the effect of a rule violation on a lawyer's substantive legal duty. This change was in recognition of the weight of judicial opinion in malpractice litigation that a violation of the rules may be admissible as evidence of a breach of the duty of care.[xvii] As exemplified below, most malpractice complaints filed against attorneys do allege some form of negligent breach of the standard of care owed by the attorney to the client.

A Fine Line We Walk (*continued from page 5*)

1. Texas (Not reported, TX 2001): Complaint filed against the plaintiff attorney for not offering client information on a structured settlement annuity or special needs trust after underlying personal injury claim settled for $2.5 million.

Plaintiff was given cash proceeds and instructions to place the money in a Section 142 Trust to buy annuities that were not tax-free. A lawsuit was filed against the plaintiff attorney for "negligence, gross negligence and deceptive trade practices, as those terms are understood in the law and because of defendants' fraud, breach of fiduciary duty and breach of contract." This claim was settled for $1.6 million. A settlement was also reached with the court-appointed guardian ad-litem for an additional $2.5 million.

2. Ohio (Not reported, OH 2000): Complaint alleging failure to advise, filed against plaintiff attorney after dissipation of settlement proceeds. Claimant alleged such failure violated the standard of care required of attorneys practicing law in Ohio.

Claimant would have been eligible for Medicaid if the proceeds of his settlement ($618,322.30 net) had been placed in a Special Needs Trust. The guardian in the case repeatedly questioned the plaintiff's attorney about the use of a trust to obtain government benefits, but was rebuffed until only $200,000 of the settlement remained. Thereupon the attorney stated he had received permission to establish such a trust, but only if it was established for $200,000. The trust was established and the claimant began receiving government benefits the same month.

3. Illinois (Naqvi v. Rossiello, 321 Ill. App.3d 143 (Ill. App. 1 Dist. 2001)): Complaint filed against the former attorney and law firm when the claimant was charged substantial taxes, interest, and penalties on his settlement proceeds from a retaliatory discharge action against his employer. Claimant alleged his attorney negligently gave erroneous tax advice.

The attorney told his client the settlement would be tax-free. The fact as to whether all of it would be tax-free is in dispute. The attorney said the client was being taxed based on the 1995 change in the tax code and his settlement would have been tax-free based on the 1989 rulings. The trial court agreed with the attorney, but the appellate court did not. The appellate court stated that the differences in the tax code only pertained to punitive damages, which were not taxable in a personal injury case until 1995, and while that may be an issue in this case, the problem was with the written language of the settlement agreement. The summary judgment in favor of the attorney was reversed and the case remanded back to the circuit court.

4. Many States: There is a group of cases pertaining to the calculation of attorneys' fees when a structured settlement is used. In most instances, the defense provided the annuity and did/would not give information pertaining to the cost.

In Ratcliff v. Boydell, 674 So.2d 272 (La. App. 4 Cir. 1996), the trial court stated that there were only three ways to correctly value the contingent fee associated with a structured settlement: 1) the actual cost, 2) the present value of the annuity, or 3) the actual amount paid with payments going to the attorney in periodic payments. The court said the best way to determine the amount would be the actual cost and it should be determined using an economist, actuaries, or other structured settlement brokers. The court made the point that it should be someone with knowledge of structured settlements.

The attorney made his own determination of the cost associated with the structured settlement ($112,000) and obtained an interest rate from his CPA, who would make the present value of the annuity the figure he wanted. The court stated that the CPA did not have any knowledge of the interest rates or actuarial tables used. Accordingly, the CPA's figure was determined to be inaccurate. The cost was eventually shown to be $45,465, not $112,000. The attorney's fees were recalculated using the lower amount and adding interest.

5. New York (Lyons v. Medical Malpractice Ins. Ass'n, 730 N.Y.S.2d 345 (N.Y.A.D. 2 Dept. 2001)): Complaint filed against both the plaintiff and defense attorneys as well as the insurance company alleging fraudulent, intentional, or negligent misrepresentation.

A structured settlement was offered and accepted based on the valuations given by the defense. The claimant was an injured three year old child who had been given a rated age of fifty-four by at least one life insurance company. The present value of the annuity (approximately $675,000) was determined using a Normal Life Expectancy of 80 years. With the child's reduced life expectancy, however, the present value of the annuity would only be $410,000 (approximately $265,000 difference from the original present value of the annuity). The defense's misrepresentation was not disputed at trial. In dispute was whether the defense had

> …until the lawyer effectively "counsels" the client, the lawyer cannot know which settlement scenario (or form thereof) will provide maximum benefit, because the lawyer does not yet understand the client's unique value system.

fraudulently, intentionally, or negligently misrepresented the cost and whether plaintiffs' reliance was reasonable. The court determined the misrepresented proposal was to be used for a particular purpose and the plaintiffs were known parties who would rely on the misrepresentation. Judgment was granted giving the plaintiffs the difference between the actual present value and the proposed present value.

Judgment was also obtained against the plaintiff attorney for fees associated with the annuity. The difference in the fee that was calculated, as opposed to what it should be, was over $88,000.

> Communication with the client tends to break down in two areas of discussion: 1) structured settlements and, 2) the impact of accepting settlement proceeds…. Lawyers often presume these topics cross the line between "legal" advice and "financial" advice.

A MODEL APPROACH TO CLIENT COUNSELING

Although other scholars have described the client counseling process, Professors Binder and Price present the model that is most "Model Rule" comprehensive and universally accepted. Their "client-centered" model provides the analytical foundation for current law school curriculum on interviewing and counseling processes.[xviii] It stresses that until the lawyer effectively "counsels" the client, the lawyer cannot know which settlement scenario (or form thereof) will provide maximum benefit, because the lawyer does not yet understand the client's unique value system.[xix]

However, Binder and Price also say that clients frequently find it difficult or impossible to quantify and articulate their preferences, and attorneys have difficulty ascertaining the importance the client places on each alternative. For instance, would the client trade the loss of control, the possibility of audit by agencies, and the limitations of distributions inherent in a special needs trust for the mechanism's ability to preserve Medicaid eligibility when the cost of future care exceeds the settlement.

Proper client counseling, according to Binder and Price, has the following characteristics:

1. Lawyer and client work together to identify all possible alternative solutions to the client's problem.

2. Lawyer and client then consider all consequences of each alternative. The lawyer has primary responsibility for predicting the "legal" consequences of each proposed course of action; the client takes the lead, in response to the lawyer's prompting, in identifying the economic, social, and psychological consequences of each alternative.

3. Lawyer articulates these identified consequences into "advantages" and "disadvantages" so client can better weigh the available alternatives. (Binder and Price expressly warn the lawyer to remain neutral when describing available alternatives)

4. Lawyer asks client to evaluate each alternative, a process that needs to be freed as much as possible from emotion, optimism and bias in order to reach a decision.[xx]

Despite its widespread acceptance, the Binder and Price model is intentionally simplified for teaching purposes and does not offer the personal injury practitioner much guidance for counseling clients regarding the quality of result they may be seeking from a settlement. The quality of result (i.e., lifestyle) ideally optimizes the advantages and disadvantages of devices such as structured settlements and special needs trusts. To achieve such effective counseling in personal injury cases, assistance may be required from attorneys/professionals experienced with 468B Fund creation and administration, trusts to preserve government benefit eligibility, the taxation of damages, structured settlement brokerage, and, in some instances, modeling the probability of various settlement options for meeting the future cash flow requirements called for in a life care plan.

The lawyer must envision a role for an "advocate" that goes beyond proving liability and damages, preparing for trial and/or negotiating settlement. Quite simply, the lawyer may need his/her own advocate.

INTRODUCING YOUR ADVOCATE

"A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." Model Rule 1.1 (Competence)

Claimants are confronted with many complex issues during litigation, and people who have sustained catastrophic injuries already feel overwhelmed with questions. Personal injury lawyers quickly realize that for their clients, confusion and frustration burden the litigation process. This author has conducted extensive interviews and focus groups with injured people, caregivers, and attorneys to better understand their frustrations. In broad generalizations, the interviews and focus groups revealed that injured persons want:

- A way to resolve immediate post-injury concerns, such as paying for medical bills, under-

standing health insurance and government benefits, modifying the home, special equipment needs, transportation;

- A process that addresses all the issues brought about by the injury (physical, psychological, social, legal and financial);
- A relationship with advisors they trust, one that extends to some degree beyond the settlement;
- Personal autonomy and empowerment.

In light of the Model Rules, malpractice themes, and the typical client's disposition, lawyers representing the critically injured should start with the fundamental assumption that they have a duty to secure advice for their clients regarding government benefits, structured settlements, and taxation of damages. This is not just the author's opinion; an Ohio ethics opinion goes so far as to declare that a lawyer has a fiduciary duty to refer a client to appropriate resources when the lawyer ascertains that a client needs financial services.[xxi]

When introducing an advocate, the client should be told expressly that his/her plaintiff lawyer will not provide financial advice, but is instead simply introducing an advisor to ensure that the client is receiving proper education regarding all options available. The client is free and encouraged to speak with other advisors. It is imperative, however, that the advocate be introduced prior to settlement, because many options are eliminated upon constructive receipt of settlement proceeds.

For many attorneys, the notion of a "plaintiff advocate" for structured settlement purposes requires a paradigm shift from sole reliance on the defense's liability insurance carrier. Many plaintiff lawyers have traditionally relied on the broker introduced by the defense to draft the release language and additional documentation required for a valid structured settlement. Lawyers should rethink this reliance. The defense's first priority is a full and final release that is created and maintained by a validly executed settlement agreement and release, and, with structured settlements, a qualified assignment pursuant to section 130.[xxii] An advocate for the plaintiff lawyer can certainly protect these interests. And given the changing landscape, plaintiff attorneys now have more at stake than the defense in this transaction.

Since most malpractice complaints allege some negligent breach of the standard of care owed to the client, the financial professional brought in as advocate/educator should be associated with a financial services firm that requires a standardized approach to planning for injured individuals.[xxiii] Hence the attorney is not introducing the client to an individual; he is introducing the client to a process, executed by an individual, which is overseen by some corporate or fiduciary authority and is the same in all parts of the country.

Lawyers should also memorialize the educational process by requiring clients to sign acknowledgements declaring that they were presented (and understood) the advantages and disadvantages of structured settlements and special needs trusts.

468B SETTLEMENT FUNDS: BRINGING ORDER TO CHAOS

Designated Settlement Funds (DSFs) and Qualified Settlement Funds (QSFs) are useful for ensuring proper client counseling before, during, and even after settlement. They introduce a degree of breathing space after settlement that is valuable for determining several key factors: allocation of funds; the appropriate role of a structured settlement annuity; the need to preserve governmental entitlement benefits; the need for the establishment of a special needs trust; and a host of other decisions that can best be made without the pressure associated with the litigation itself. 468B funds are the only vehicles that facilitate placement of a structured settlement annuity without requiring the signature/participation of the defense.

CREATION OF DSFS AND QSFS

DSFs were created when the U.S. Tax Reform Act of 1986 inserted §468B into the U.S. Internal Revenue Code. It established a safe harbor by spelling out terms under which the defendant in a tort claim can make qualified payments into a designated settlement fund and be certain that the Internal Revenue Service would deem economic performance to have occurred. This is important to the defendant and his insurers because the payment cannot be deducted until there has been economic performance.[xxiv]

QSFs were created by Regulations relating to §468B, which became effective on January 1, 1993.[xxv] Unlike a DSF,[xxvi] a QSF is not restricted to tort claims.[xxvii] Although there are some other differences between a DSF and a QSF, they operate very similarly. Generally speaking, the Regulations issued under 468B apply the 468B Statute to a broader range of settlement funds. Henceforth, this article will refer generically to a "468B Fund."[xxviii]

Since their creation, 468B Funds have been a useful tool in resolving present and future claims arising out of personal injury, death, or property damage. They have been used in settlements ranging from mass torts like asbestos or Fen Phen to cases involving a personally injured claimant with a derivatively injured spouse, child, or parent.

ADVANTAGES OF A 468B FUND

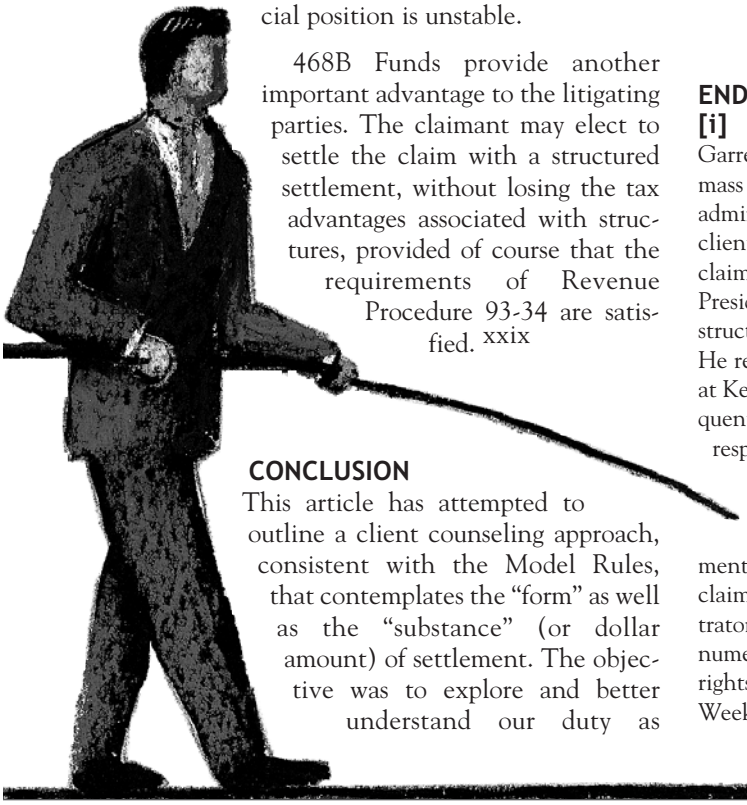
The main reason an alleged tortfeasor would request the

creation of a 468B Fund is to disengage from the litigation and qualify for economic performance. Payment is made by the alleged tortfeasor in exchange for a release from the present claimant(s) and possible future claimants. Once payment has been made to the 468B Fund, the litigation process ceases for the tortfeasor, thereby reducing legal costs and freeing resources tied up in litigation.

There are also major advantages to the claimants. The 468B mechanism provides a temporary shelter for the assets that eventually will be distributed to the claimants. While temporarily held in the 468B, the assets are not "constructively received" by any claimant, as that doctrine is set forth in Treasury Regulation Section 1.451.2. This kind of "breathing space" is valuable to the claimants and their advisors in making a final determination on the allocation of the award. The time can be used to decide how best to preserve government entitlement benefits; the need for the establishment of a special needs trust; spousal allocation of funds; and a host of other decisions.

Another advantage to claimants is that the tortfeasor is removed from the process. Often a degree of acrimony has built up during the litigation. The administrator is now responsible for making the payments out of the 468B Fund. Furthermore, monies are available to settle claims and are not subject to the tortfeasor's creditors. This is a particular advantage if the defendant's or his insurer's financial position is unstable.

468B Funds provide another important advantage to the litigating parties. The claimant may elect to settle the claim with a structured settlement, without losing the tax advantages associated with structures, provided of course that the requirements of Revenue Procedure 93-34 are satisfied. [xxix]



CONCLUSION

This article has attempted to outline a client counseling approach, consistent with the Model Rules, that contemplates the "form" as well as the "substance" (or dollar amount) of settlement. The objective was to explore and better understand our duty as lawyers to provide counseling on such topics as structured settlements and special needs trusts. More succinctly, to better understand the line between advice that is "legal" and that which is "financial." Such understanding is needed to improve client-lawyer dialogue about settlement options.

> …In short, the rules of the game are changing and the practitioner must take steps to ensure that he understands the impact of those changes across all aspects of his practice.

More finely honed client counseling skills would enable many lawyers to comprehend not only the client's desire to settle (the immediacy of the here and now), but also the client's fundamental concerns for the future (a settlement inadequate for all future care, the need for government benefits, etc.). To accomplish this enhanced kind of counseling, lawyers may find it necessary to form relationships with advocates who have the appropriate qualitative and quantitative skills: attorneys and/or professionals experienced with 468B Fund creation and administration, trusts to preserve government benefit eligibility, the taxation of damages, structured settlement brokerage, and, in some instances, modeling the probability of various settlement options for meeting the future cash flow requirements called for in a life care plan.

Given the themes of many malpractice complaints being filed by disgruntled, uninformed clients, it is only logical for lawyers to re-examine their approach to educating their clients about certain settlement options that are "of the law."

ENDNOTES

[i] Matt Garretson is the founding partner of The Garretson Law Firm (Cincinnati, Ohio), which provides mass tort / class action settlement allocation and fund administration services. In addition, the firm assists lawyer-clients with resolving Medicare & Medicaid reimbursement claims in individual and mass tort settlements. He also is the President of The Settlement Services Group, which provides structured settlement and settlement-related trust services. He received his BA from Yale University and his law degree at Kentucky's Salmon P. Chase College of Law. Matt is a frequent speaker at CLE seminars about lawyers' professional responsibilities in individual and mass tort settlements and has published several articles on this topic. Matt is an adjunct professor at Salmon P. Chase College of Law, where he teaches a course on law practice management with an emphasis on how to avoid professional liability claims. Matt serves as the special master and / or administrator of settlement funds throughout the country. His role in numerous high profile church-related sexual abuse and civil rights settlements contributed to his selection by Lawyers Weekly as 1 of 5 "Lawyers of the Year" in Ohio for 2003.

A Fine Line We Walk *(continued from page 9)*

[ii] Paragraph (a) of Rule 1.2 has no counterpart in the Disciplinary Rules of the Model Code. EC 7-7 stated: "In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client …."

[iii] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (2002) (emphasis added).

[iv] Id. (emphasis added)

[v] See Marc Galanter & Mia Cahill, Most Cases Settle: Judicial Promotion and Regulation of Settlement, 46 Stan. L. Rev. 1339 (1994).

[vi] Samuel Issacharoff et al., Bargaining Impediments and Settlement Behavior, in THE ECONOMICS OF LEGAL RELATIONSHIPS 51, 62 (Nicholas Mercuro ed., 1996). A 1994 insurance industry report states that only about six-tenths of 1 percent of all bodily injury claims are decided by a judge or jury.

[vii] "Structured settlement" describes compensation for a personal injury claim where at least part of the settlement is paid over time, rather than with a single lump sum. The claimant receives a promise from some entity to make future payments according to an agreed upon schedule. The hallmark of structured settlements is their treatment under 104(a)(2) of the Internal Revenue Code, which designates structured settlement payments and any income they produce as tax-free.

[viii] A Special Needs (Medicaid Payback) Trust is a trust arrangement that allows an individual with disabilities to have funds available for his or her needs without the funds counting as a financial asset for benefit eligibility purposes.

[ix] A series of Revenue Rulings established that a personal injury claimant could receive a future stream of payments and appreciate the same tax-exempt status afforded lump sum settlements of personal injury claims under Section 104(a)(2) of the Internal Revenue Code, provided certain criteria were met, including that the claimant has no control over the investment that secures the obligation to make the future payments (a.k.a., Constructive Receipt).

[x] MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (2002). Rule 1.4 has no direct counterpart in the Disciplinary Rules of the Model Code. DR 6-101(A)(3) provided that a lawyer shall not neglect a legal matter entrusted to him. EC 7-8 stated that a lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations.

[xi] Treasury Regulation Section 1.451.2 states that income, "although not actually reduced to a taxpayer's possession, is constructively received by him in the taxable year during which it is credited to his account, set apart for him, or otherwise made available so that he may draw upon it at any time, or so that he could draw upon it during the taxable year if notice of intention to withdraw had been given."

[xii] The Model Code's comparable sections include: DR 6-101(A)(3), which required that a lawyer not neglect a legal matter entrusted to him and EC 6-4, which stated that a lawyer should give appropriate attention to his legal work. Canon 7 stated that, "a lawyer should represent a client zealously within the bounds of the law." DR 7-101(A)(1) provided that, "a lawyer shall not intentionally…fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules…." DR 7-101(A)(3) provided that, "a lawyer shall not intentionally…prejudice or damage his client during the course of the relationship…."

[xiii] Large accounting firms want to offer "one-stop-shopping" for legal, financial and other professional services. Debate centers on lawyers splitting fees with non-lawyers within these MDP's. Critics fear business/profit motives will conflict with the core professional values of the legal profession, and that MDP arrangements may encourage the unauthorized practice of law.

[xiv] For a summary of the state and local bar association ethics opinions on these arrangements, see Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2000-1 (2/11/00).

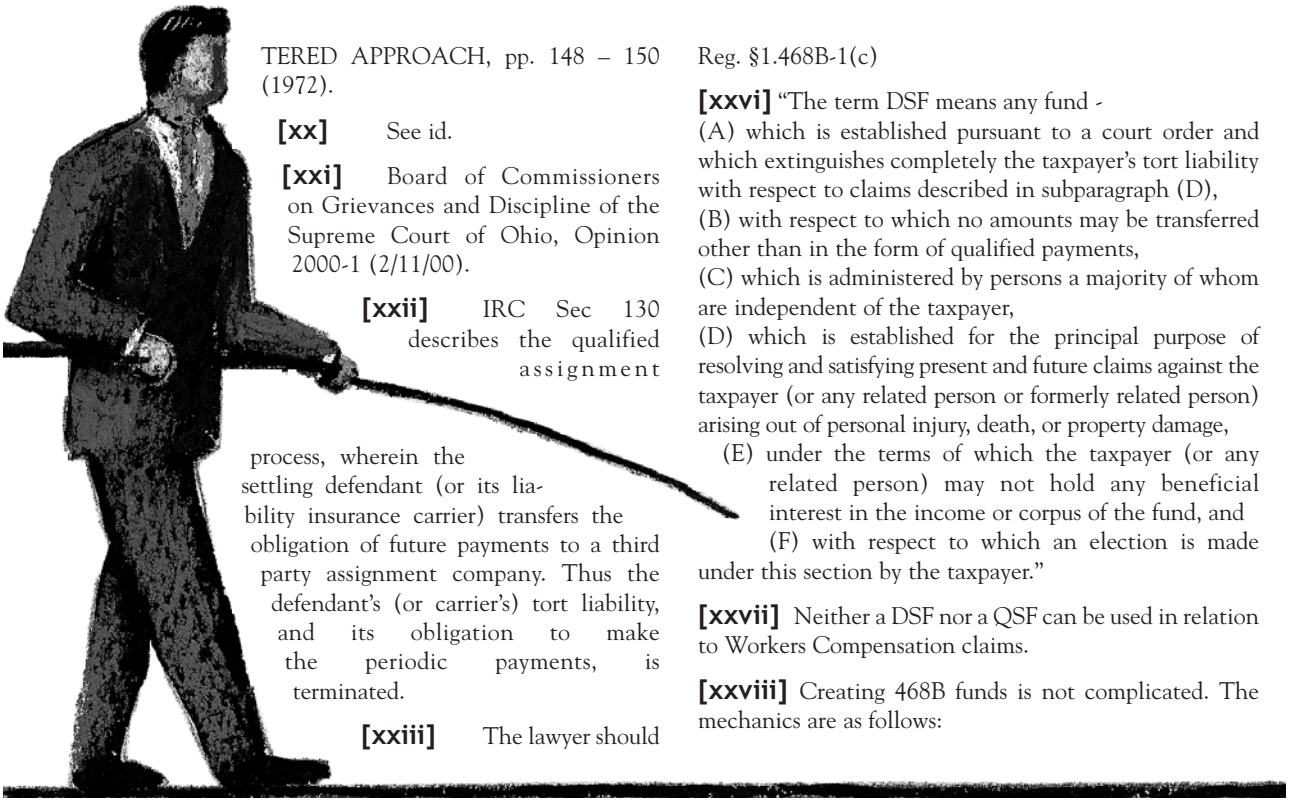
[xv] The American Bar Association established the Commission on Evaluation of the Rules of Professional Conduct ("Ethics 2000 Commission") to examine ethical precepts in light of the developments since the Model Rules' adoption in 1983. The Commission reported its recommendations in 2000.

[xvi] American Bar Association Standing Committee on Lawyers' Professional Liability, PROFILE OF LEGAL MALPRACTICE CLAIMS (2000).

[xvii] MODEL RULES OF PROFESSIONAL CONDUCT (2002), Scope, Comment [20].

[xviii] Donald G. Gifford, The Synthesis of Legal Counseling and Negotiation Models: Preserving Client-Centered Advocacy In The Negotiation Context, 34 UCLA L. Rev. 811, 813 (1987).

[xix] D. BINDER & S. PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CEN-



TERED APPROACH, pp. 148 – 150 (1972).

[xx] See id.

[xxi] Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio, Opinion 2000-1 (2/11/00).

[xxii] IRC Sec 130 describes the qualified assignment process, wherein the settling defendant (or its liability insurance carrier) transfers the obligation of future payments to a third party assignment company. Thus the defendant's (or carrier's) tort liability, and its obligation to make the periodic payments, is terminated.

[xxiii] The lawyer should request a letter to this effect.

[xxiv] IRC §461(h)

[xxv] Reg. §1.468B-1. Only three requirements for QSFs are listed.

"A fund, account, or trust satisfies the requirements of this paragraph (c) if—

1. It is established pursuant to an order of, or be approved by, the United States, any state (including the District of Columbia), territory, possession, or political subdivision thereof, or any agency or instrumentality (including a court of law) of any of the foregoing and is subject to the continuing jurisdiction of that governmental authority;

2. It is established to resolve or satisfy one or more contested or uncontested claims that have resulted or may result from an event (or related series of events) that has occurred and that has given rise to at least one claim asserting liability –

(i) Under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (hereinafter referred to as CERCLA), as amended, 42 U.S.C. 9601 et seq.; or

(ii) Arising out of a tort, breach of contract, or violation of law; or

(iii) Designated by the Commissioner in a revenue ruling or revenue procedure.

3. The fund, account, or trust is a trust under applicable state law, or its assets are otherwise segregated from other assets of the transferor (and related parties)."

Reg. §1.468B-1(c)

[xxvi] "The term DSF 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."

[xxvii] Neither a DSF nor a QSF can be used in relation to Workers Compensation claims.

[xxviii] Creating 468B funds is not complicated. The mechanics are as follows:

1. Either litigating party petitions the Court seeking an order approving the setting up of a 468B Fund.

2. The 468B Fund is established and then overseen by a court appointed Administrator.

3, The tortfeasor pays the agreed compensation into the 468B Fund and is released from the liability associated with the particular action.

4. The 468B Fund assumes the liability for the action and settles the claims with the individual claimants. Settlement can include cash as well as structured settlements with qualified assignments pursuant to IRC Section 130.

5. Once the 468B Funds have been exhausted, the 468B Fund is dissolved.

[xxix] The requirements are:

1. The claimant must agree in writing to the qualified assignment.

2. The assignment is made with respect to a claim involving a physical, personal injury or sickness for which the Fund has been established.

3. Each qualified funding asset purchased by the assignee relates to the liability of a single claimant.

4. The assignee is not related to the transferor to the Fund.

5. The assignee is neither controlled by, nor controls, directly or indirectly, the Fund.

6. All the other requirements of section 130 are met.

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