CLM CLAIMS & LITIGATION MANAGEMENT ALLIANCE™

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2014 CLM Annual Conference

April 9, 2014 – April 11, 2014

Boca Raton Resort
501 E. Camino Real
Boca Raton, FL 33432

Roundtable 2: Thursday, April 10, 2014 (11:30 am – 12:30 pm)

Claims And Litigation Strategies For Defending Catastrophic And Mild Traumatic Brain Injury Cases

The timely creation of an interdisciplinary team is critically important to the effective identification, evaluation, defense and resolution of a traumatic brain injury (TBI) case. In addition to claims and legal professionals, the team should include seasoned liability, medical and economic consultants who can help clarify causation issues, explain the nature and expected sequellae of the injury and project future damages. We advocate a proactive approach to handling these cases. Impeccable preparation is essential.

Given the enormity of this topic this handout cannot be exhaustive. Rather, our aim is to provide the reader with a thumbnail sketch of the medical legal issues these claims raise and suggest best practices for defending and resolving these matters. In view of the ever increasing size of future life care plans we suggest ways to creatively leverage structured settlements to decrease exposure. Knowledge is power. We trust the observations we make herein will empower you to better defend your next TBI case.

Understanding the Medicine

The Anatomy and Function of the Brain

The brain is the most complex organ of the body, containing billions and billions of nerve cells. Specific areas of the brain control the functioning of the various parts and systems of the human body. The severity of a TBI, the chances for recovery and sometimes even the validity of an alleged TBI can often times be assessed by determining the specific portions of the brain that were impacted as a result of the traumatic event.

Claims professionals and attorneys must know what portions of the brain control what areas of the body. Armed with this knowledge a plaintiff's subjective complaints can then be analyzed to determine if a particular injury is even physiologically capable of producing the symptoms alleged. For example, a plaintiff who sustained blunt trauma to the occipital lobe is not likely to have short-term memory loss or problems with equilibrium. In evaluating such a claim it would be critical for the defense team to know that these complaints are highly subjective and can be due to a number of organic conditions unrelated to trauma. A diagram entitled, **Anatomy and Function Areas of the Brain,** and published at www.cern-foundation.org is annexed to this handout as Exhibit "A" and should be referred to when attempting to identify the body functions or areas that an injury to a particular part of the body would implicate.

Classifying Traumatic Brain Injuries

Head trauma is classified in the first instance as closed or penetrating. Closed head injuries are the most commonly confronted type of brain trauma and typically involve claims of concussion or hematoma due to a blow or blunt trauma to the head. Penetrating head injuries, by contrast, occur where the brain is actually perforated as a direct of the trauma . Health care professionals who specialize in the assessment and treatment of head trauma further classify these conditions by looking at when the injuries are manifested and by categorizing the sequellae as primary or secondary. Primary brain damage for instance produces discrete tissue distortion and destruction in the post injury period. Secondary brain damage by contrast stems from post- accident alterations in cell function that in turn lead to the disruptions of the autonomic nervous system.

Physical Manifestations of Primary and Secondary Brain Injuries

The physical findings associated with a primary brain injury can include skull fractures, contusions, epidural (between the skull and brain) or subdural (inside the brain) hematomas, lacerations, loss of consciousness, hearing loss, headache, seizure, dizziness, nausea & vomiting, blurred vision, decreased senses, difficulty waking up, to name a few. Secondary physical symptoms occur overtime, and may include but are not limited to, edema, intracranial pressure or infection, seizures, fever, elevated or decreased BP, anemia, cardiac, respiratory, and nutritional changes.

Both primary and secondary brain damage can result in long term disability or permanency, depending on the severity (mild, moderate, severe). For example, although most people recover within weeks of a concussion, it can cause symptoms that may last from 3 – 12 months.

Cognitive Sequellae

Cognitive symptoms of a TBI can include difficulty in thinking, communicating, understanding, speaking, concentrating, short term recall, and emotional instability and affect. It is important to note when evaluating these claims that long term memory is generally not affected as a result of a TBI.

The cognitive impairments caused by a real TBI, can be overwhelming and devastating to a plaintiff, and his or her family, both emotionally and financially. Testing for cognitive sequellae needs to be closely evaluated when same is being alleged. Resolution of these cases should always be considered via structured settlements.

Medical Tests Used to Establish a TBI

The most common radiological diagnostic tests used to detect physical manifestations of a TBI are: **CT Scans**, which diagnose fractures, bleeds and clots; **MRI's**, which, although a good diagnostic tool for TBI, are not the preferred test in an emergency as it is too time consuming; **3-D MRI's**, used to examine the volume of gray and white brain matter and **EEG's**, which evaluates brain waves.

Absent radiological evidence of a TBI or strong clinical corroboration for the existence thereof, claimants will often attempt to prove the existence of these injuries by neuropsychological testing. These tests typically purport to measure neurocognitive ability together with functional status in the domains of cognition, executive functioning/attention, learning/memory, language (receptive and expressive), visual processing, visual motor integration and behavioral/emotional functioning.

Commonly used neuropsychological assessments include: the Wechsler Adult Intelligence Scale-4th Edition (**WAIS-IV**), Wechsler Intelligence Scales for Children-4th Edition (**WISC-IV**) and Wechsler Memory Scale-4 th Edition (**WMS-IV**), the Minnesota Multiphasic Personality Inventory-2nd Edition (**MMPI-2**), Thematic Apperception Test (**TAP**) Rorschach test, Wisconsin Card Sorting Test (**WCST**) Boston Diagnostic Aphasia Examination (**BDAE**) Clock Drawing Test (**CDT**); Standardized Mini-Mental State Examination (**SMMSE**); Dizziness Handicap Inventory (**DHI**) Scoring; Epwroth Sleepiness Scale (**ESS**); Multidimensional Assessment of Fatigue (**MAF**) Scale; Neurobehavioral Symptom Inventory (**NSI**); PTSD Checklist, and: the Vineland Adaptive Behavioral Scales (**VAB**).

The problem with this type of testing is that although these tests can ostensibly identify areas of neurocognitive impairment they cannot establish the etiology of any performance variations. Moreover, the interpretation of many of these tests is highly subjective and idiosyncratic. The reliability of these tests may be further undermined where the claimant affirmatively tries to skew his or her responses. Finally, accepted statistical problems with this type of testing limit their reliability and validity in a legal medical context.

Tips for Conducting the Legal Medical Record Review

A comprehensive neuropsychological medical review is essential where a questionable TBI case is suspected. Claims of latent brain injury should be carefully scrutinized. As with all injury assessments, medical evidence must be secured as early as possible, taking note of initial complaints and witness statements. Police, EMT and ER records should be methodically reviewed for observations made about the claimant's immediate post-accident presentation and functioning.

The most important initial screening tool for a TBI is the Glasgow Coma Scale (**GCS**). The GCS will be repeated numerous times by emergency medical personnel in the field and in the hospital. This test is used to track the progress or deterioration of a patient's cognitive status. This score (15 is normal) is based on **Eye Response** to verbal commands, pain and/or spontaneity; **Verbal Response** and whether or not it is oriented, confused or existent, **and Motor Response** as to how the patient respond to pain and commands.

Questioning Witnesses to Develop Legal Medical Defenses

All eye witnesses to an accident should be interviewed to determine if the claimant physically struck any portion of his or her head, had a loss of consciousness or experienced an alteration in his or her mental status. It is critical for the defense team to be able to ascertain if there was a documented seizure or other physical complaint in the immediate post-accident period. Suspicions should be aroused where the plaintiff is able to remember the specific amount of time he or she was unconscious or dazed.

Legal Strategies for Defending a TBI Claim

Securing the Evidence

In order to effectively defend a traumatic brain injury case, be it catastrophic or minimal (MTBI), defense counsel and claims professionals must identify and obtain the plaintiff's pre and post-accident medical, employment, educational, financial and social media records. These records are essential if one is to form an accurate baseline understanding of the plaintiff's pre accident and post-accident functioning.

With respect to post accident medical records it is clear that the ambulance call report, emergency room, hospital and rehabilitation records must be obtained directly from the health care provider to insure that the records have not been tampered with. All radiological studies be they x rays, MRI's, CT scans, PET Scans, fMRI's, SPECT or DTI imaging must be secured and independently reviewed by the defendant's radiologist. In the case of a MTBI claim, defense counsel should not rely upon the narrative reports of a plaintiff's neurologist regarding the results of an electroencephalograms (EEG) or qualitative electroencephalograms (QEEG). The actual tracings for any such test should be procured and analyzed by the defense's neurologist. Finally it is imperative that the defense demand and obtain the raw data from any psychological or neurocognitive testing. This type of testing routinely produces results which are subject to varying interpretations.

Some of the most important tools for evaluating the legitimacy and/ or severity of a TBI claim are the party's pre accident medical records. A plaintiff's regular family physician's records are often times critical where an MTBI is claimed. Health insurance claim history records should likewise be examined with a fine tooth comb to identify non disclosed conditions that could account for the party's present complaints. Given the prevalence of "loss of enjoyment of life" claims counsel should demand discovery of all legal files and medical records relating to prior lawsuits, no fault or workers compensation claims. Scans and raw data from prior radiological, neurological, psychological and neurocognitive testing should be obtained and compared with testing conducted in the context of the subject TBI litigation. Finally, in the case of the "young" plaintiff defense counsel should secure the mother's ob-gyn records together with the child's birth and pediatric records to determine whether or not the infant plaintiff suffered from a neo-natal/ birth insult or developmental disability unrelated to the trauma or exposure alleged in the TBI lawsuit.

In the appropriate case defense counsel should also consider obtaining a party's educational transcripts. Thanks to the *Individuals with Disabilities Education Act* (*IDEA*) children today are routinely assessed for developmental disabilities and obtain special education services to address these deficits. Inquiry should be made as to whether or not the party was ever assessed by or received services from an Early Intervention Program [(EIP) – birth to 3 years], Committee on Preschool Education [(CPSE)- 3-5 years] or Committee on Special Education [(CSE) - 5-21]. Assessments and individualized educational

plans (IEP's) generated by these programs provide a treasure trove of information. College students as well may self-identify as a person with a disability and may request academic accommodations pursuant to Section 504 of the Americans with Disability Act (ADA). Such requests must be supported by neurocognitive testing and should be obtained to establish the plaintiff's premorbid baseline functioning.

Employment and union records must also be assessed. Employment related physicals, evaluations and attendance records also shed light on a party's claim of compromised functioning. Defense counsel should similarly be sure to inquire if a request was ever made either pre accident or post-accident for a workplace accommodation pursuant to the ADA.

One of the most effective ways of gauging a party's level of functioning is to conduct an internet, blog and social media search. Many claimants who attempt to milk the system are narcissistic and shamelessly post their comings and goings on social media web sites such as Facebook and Myspace. Public postings to these sites as well as Tumblr, Instagram, Twitter, YouTube and Linked In should be routinely monitored. Counsel, claims professionals and their agents must be careful not to inadvertently friend or communicate with a plaintiff when inspecting these sites. In the event that incriminating public postings are found counsel should move for a Court order permitting discovery of private postings. Such an Order will ease the defense's burden of proven the authenticity of the postings at the time of trial.

Selecting and Using Expert Consultants

Identification of appropriate expert consultants is indispensable to the effective defense of a TBI claim. Depending on the allegations of injury and damage the defense team may wish to retain the services of a neurologist, neuropsychologist, psychologist, psychiatrist, radiologist, neuro-radiologist, biomechanical expert, vocational rehabilitation expert, life care planner, economist and /or structured settlement specialist. Defense expert consultants are integral members of the defendant's TBI team and should be retained as soon as possible in high exposure cases.

An expert witness must not only be properly credentialed in all areas in which he or she will offer an opinion, he or she must also be a great communicator and teacher. Defense counsel and claims professionals should consult with their peers and the plaintiff's bar to take the pulse of a proposed expert's reputation in the legal community. Jury verdict searches should be conducted and transcripts of prior testimony should be obtained. "Damaged goods" should be avoided like the plague.

The defendant's expert consultants should actively collaborate with the defense team in formulating causation defenses and case themes. Like any good teacher the defense expert should be clear and approachable. The consultant must be willing to review all records and confer with the team on an "as needed" basis. A good expert will help identify peer accepted literature and testing as well as assist in the preparation for depositions and *Frye*/*Daubert* Hearings.

Depositions

The decision to depose or not to depose a particular witness should be highly intentional. No witness should be deposed simply to "obtain" information. Information can be obtained via the defense team's investigator. Depositions preserve testimony. Don't make the mistake of preserving in perpetuity "bad" deposition testimony.

Once the decision is made to depose a particular witness the defense team should identify what the goals of the deposition are. Depending upon the witness the goal may be to establish that the plaintiff suffered from a preexisting neurocognitive condition; that the symptoms complained of are merely a continuation of that unrelated neurocognitive condition; that the plaintiff was not a well-functioning person prior to the alleged TBI; that the alleged TBI did not decrease the plaintiff's level of functioning, or; that the plaintiff's expert failed to obtain critical information when forming his or her diagnosis. The defense may thus use a deposition to flesh out the plaintiff's pre event history and develop alternate causation theories. A deposition can also be used to identify additional fact witnesses, assess the plaintiff's damages case and evaluate the deponent's jury appeal.

Where the defense team has reason to suspect that the plaintiff is feigning a TBI strong consideration should be given to videotaping the deposition. It takes a lot of effort to stay in character for so long. If malingering is suspected the questioning of the plaintiff should be exhaustive. Questions should be crafted that require higher levels of calculation and stress recall of earlier testimony.

In jurisdictions that permit the deposition of expert witnesses the defense team may wish to depose the plaintiff's mild TBI expert. Defense counsel conducting such a deposition should initially seek to secure admissions. Each and every normal finding should be covered and highlighted. The difference between objective and subjective complaints should be discussed and emphasized. Defense counsel should thereafter obtain a concession from the expert that if the plaintiff's history was inaccurate the expert's opinion may likewise be incorrect. The expert should then be confronted with omitted medical facts. Conflicts between the expert's opinion and generally accepted opinion in the discipline should be underscored by reference to authoritative texts. Similarly the expert should be confronted with prior inconsistent testimony. Where a psychological injury is alleged the DSM-V should be utilized to discredit the expert. Finally, any such deposition should be concluded with a traditional impeachment that demonstrates the doctor's bias, establishes the relationship between the doctor and the plaintiff's lawyer and attacks the expert's credentials.

Motions in Limine

Whether preparing for trial or mediation the defense team should consider the viability of a motion in limine to exclude the plaintiff's expert's testimony as unreliable. This attack should be considered wherever a plaintiff is relying on novel tests to establish a TBI. The plaintiffs' bar, for instance, is increasingly attempting to use functional neuroimaging, such as SPECT, PET and fMRI's to "prove" subjective claims of a mild TBI at trial. Defense counsel must be prepared to argue that the medical literature on functional neuroimaging and its applications to mild TBI cases is scientifically weak, sparse in quality publications and lacking in well-designed controlled studies. The same types of arguments should be advanced wherever a plaintiff seeks to invoke new neurocognitive tests or neurological tests such as QEEG's. The standard a court will ultimately apply in deciding such a motion depends upon whether a case is being litigated in the federal courts, a *Frye* state or a *Daubert* jurisdiction.

FRE 702 governs cases litigated in the federal courts and provides in relevant part that "[a] witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if: (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue; (b) the

testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case."

In states employing the *Daubert* standard counsel must be prepared to attack the integrity of the expert's methodology by demonstrating (1) the theory or technique upon which the expert relies has not been tested; (2) the theory or technique has not been subjected to peer review and/ or publication; (3) there is no known error rate associated with the particular theory or technique; (4) the lack of standards controlling the technique or theory's operation; and (5) the failure of the relevant scientific community to generally accept the theory or technique as reliable. *See,* Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579 (1993).

The proponent of scientific evidence in a *Frye* jurisdiction, by contrast, must demonstrate that the proffered evidence is generally accepted in the relevant scientific community. *See,* Frye v. U.S., 293 F. 1013, 1014 (D.C. Cir. 1923). Opposing counsel must be prepared to demonstrate that the proffered testing: (a) is not generally accepted in the relevant scientific community; (2) that the procedures utilized by the expert do not produce reliable, replicable and accurate results; and (3) that the particular procedure utilized was not conducted in such a way as to yield an accurate result.

Regardless of whether a case is being litigated in the federal courts, a *Frye* state or a *Daubert* jurisdiction, defense counsel should be prepared to demonstrate that the proffered evidence has not been sufficiently tested, subjected to peer review and publication and /or established to have a known or potential error rate. Alternately, counsel should attack the validity of the testing by showing that the expert has (1) employed a methodology that is inherently flawed, (2) failed to adequately account for obvious alternative explanations or (3) unjustifiably extrapolated from an accepted premise to an unfounded conclusion. These types of motions force plaintiffs to lay bare their proof and permit the savvy defense team to preview the plaintiff's experts and proof.

Day-in-the-life videos are typically presented in court to demonstrate the severity of a plaintiff's injuries and the impact those injuries have on the plaintiff's daily living activities. If your state permits a representative of the defendant to attend the filming, do so. When confronted with this type of evidence the defense team must put plaintiff's counsel to the test and require that he or she demonstrate that the video is an accurate portrayal of the events it depicts. This foundation must be laid by someone having personal knowledge of the videotape and its contents. The foundational witnesses will typically be the plaintiff and a representative of the legal video production company. All film including outtakes should be demanded. Defense counsel must further argue that the prejudicial impact of the video outweighs its probative value. Day-in-the-life videos should not contain any music or prejudicial narration, obvious exaggerations, self-serving behavior or scenes which serve little purpose other than to create sympathy or inflame the jury's passions. If the court will not preclude the entire video move to preclude those parts that are clearly prejudicial and request a limiting instruction.

General Trial Considerations

In order to effectively defend a TBI case defense counsel must be able to credibly communicate the defense themes. These themes must be vigorously tested and developed before the very first deposition. Beware of the danger of group think among the defense team when formulating these

arguments. Formal and informal methods of jury research should be utilized to assess the persuasiveness of the defense's proposed themes. Questions asked and arguments advanced in jury selection, opening, witness examination and summation must all be crafted so as to incorporate the anticipated jury instructions while advancing the defense themes.

It is imperative in all cases that the jury view defense counsel as credible. Establishing credibility begins the second the jury files into the selection room. Everything trial counsel and the client do, can and will be seen by the jury. Defense counsel must project an aura of confidence while being respectful and forthright. Whatever fabric of good will defense counsel possesses should not be blown by adopting indefensible positions or engaging in rude or inconsiderate behavior.

Attempts by plaintiff's counsel to employ a "Reptilian" trial strategy should be immediately identified and rebuffed in discovery and jury selection. Where appropriate suggest to the jury that the case is being driven not by a need to right a societal wrong but by the plaintiff's attorney's greed. Put the plaintiff's attorney and experts on trial to the extent possible. Defuse the reptile by admitting liability where there is no viable defense and / or expressing remorse for the unavoidable accident where a liability defense exists. Where the only issue is damages say so! The ultimate goal of defense counsel in jury selection is to identify and select jurors who are skeptical of law suits in general.

The decision as to whether or not to cross examine a fact witness should be driven by whether the witness has harmed the defense case and must be impeached or will admit a fact that will affirmatively advance the defendant's position. If a fact witness has done you no harm why cross the witness. If a fact witness has hurt the defense conduct a simple and respectful cross-examination demonstrating the witness' bias or inability to properly perceive the facts testified to. Where the witness is an expert the jury will expect a vigorous cross-examination. Just as in a deposition, defense counsel must secure admissions, demonstrate bias and financial interest and expose fallacious assumptions and opinions.

When determining what experts to produce at trial it is best to be guided by the old adage that less is generally more. Every time the defense puts on another expert it opens the defendant up to an additional attack. Be intentional in determining which experts you will put on the stand. Consider limiting your case in chief. A meandering defense can be deadly. Optimize the defense's chances for success by telling a succinct and compelling story that invites the jury to reach a right, just and moral verdict.

Advanced Tactics for Boosting your Chances of Success at Mediation and/or Trial

Always Prepare as if you are Going to Trial

It is often said among the plaintiff's bar that if you prepare the case for settlement you will end up trying the case and conversely, that if you prepare the case for trial you will get the case settled. In a traumatic brain injury (TBI) case, whether the injured individual is a minor, adult, or elderly, one must recognize the significance of the claim early in the development of the case and prepare it as though it were going to trial. TBI cases present particular and unique challenges because of the complexity and nature of the injuries, the need for expert testimony, and in the cases of "mild" TBI's, due to the invisible

nature of the injury. In a complex TBI case, there are two constants; first, the plaintiff will hire medical/damages experts and second, these experts will unequivocally support plaintiff's injury and damages evaluation. This highlights the importance of being prepared.

Picking the Right Tools

Few will disagree to the importance of retaining the proper defense counsel with cases involving TBIs. Given the complexity of the issues, the number of experts involved and the potential high stakes damages you must have defense counsel who not only have the right experience, but who also will garner the respect of your adversary and the court. Counsel should have noteworthy trial experience in high severity claims and not be afraid to try a case. The last thing you need is someone who is aggressive throughout discovery and, on the eve of trial, is suddenly concerned about the outcome of a trial. Strong defense counsel will demonstrate to your adversary that the trial will not be easy. The same can be said for respected appellate counsel in cases involving issues which will result in an appeal for either side.

Experts too must be chosen with equal consideration. An expert can make or break a case. Experts must have experience in the particular discipline for which they are hired and for the specific subject that they will address. Experts must be retained in all areas where expert opinions will be necessary – You don't want to be found short at trial – or at mediation. Experts must be vetted to confirm there are no conflicts, conflicting opinions, or any other bias that may color their effectiveness. Most importantly, if you have never used the expert speak with a colleague who has had the expert testify at deposition and/or trial and verify what kind of witness they make. An expert who looks great on paper is no good if they cannot stand up on cross examination.

Although there are two schools of thought on selecting a mediator and the importance of same – it is always preferable to have an experienced, thoughtful mediator that all parties respect and trust – and not just a messenger. And, someone creative that can find neutral ground when the parties reach an impasse. The same can be said for structure brokers. Get someone you trust and who works well with defense counsel, plaintiff's counsel and can communicate directly with claimants to explain in uncomplicated terms what are structures, the use of structures and benefits of the products. This can be an aid and may influence a plaintiff to more easily accept a settlement offer.

Start Early – And Do Not Forget about Liability!

Given that a TBI claim is a significant "damages" case, your liability investigation becomes vital. This may be one of the most important ways to mitigate what will be significant damages and boosting your chances of success at mediation and/or trial. Hire an accident reconstruction expert, get him/her out to the scene, conduct interviews of witnesses, and obtain all police and investigative reports as soon as possible. It will not be surprising to most that details and statements given to the police or EMS personnel often change once an attorney is involved. Furnish this information to your experts immediately. Do the same with your medical and damages experts.

Getting your consultants/experts on board early will pay dividends. Once you have your expert team in place, meet these consultants and have them "teach" you the case, whether it be how or why the accident happened, or the medicine or psychology behind the nature of the injury. More importantly,

when you hire a professional who is well-respected and a leader in his/her field, because you hired him/her first, you have now conflicted this expert out of working for a co-defendant, in a multi-party case – or the plaintiff. Being prepared will minimize the need to seek extensions from the Court or opposing counsel for various deadlines, which in dangerous venues with hyper-aggressive attorneys in catastrophic cases, are often unlikely.

Timing Can be Everything

It is always vital to start defending a significant claim as soon as it is assigned and prepare it as if it is going to trial. People move, memories fade, and minds can be changed. It is never too soon.

During the claim process it may not always be necessary to wait until litigation is commenced to consider settlement or mediation. This may be particularly true with a significant TBI injury where it is undisputed that the claimant will require 24/7 care for the remainder of his or her life. If you have the right experts to help you evaluate the damages – it may be advantageous to discuss early settlement or mediation. This could work to your advantage whether there are liability issues or not. This, of course, is dependent upon a number of factors most importantly a reasonable adversary.

Preparation, Preparation, Preparation - – the need to be more prepared than the other side.

Not enough can be said of being prepared whether for trial or mediation. Defense counsel must know the file inside and out. The trial attorney who may or may not be handling the day to day on a file is of little use if not completely familiar with the file. Likewise, the claims professional must know the file – that means reviewing deposition transcripts; looking at medical records; and reading expert reports. You cannot simply rely on counsel. Research the claimants as well as opposing counsel. Know the strengths and weakness of your case. Think like your adversary and be prepared to counter any arguments made.

The importance of being prepared at mediation cannot be understated. Mediation gives you the only opportunity you will have to speak directly to the claimants and let them know the arguments you will make at trial. It may also be the only opportunity for the claimants to recognize the risks that they have which are not always spelled out by their counsel. If there are legal issues or arguments i.e. on admissibility of evidence – come prepared with case law to support your arguments. If there is deposition testimony that supports your position come prepared with transcripts and have them marked to show the mediator. The claims professional must be prepared to personally negotiate without the aid of counsel – speak independently and directly with the mediator, plaintiff's counsel and under certain circumstances the claimants. Find your style for negotiation and plan your strategy – know the end game.

Mock Trials and Jury Research

In the right circumstances mock trials and jury research can be excellent tools to prepare both for mediation and trial. They can be used for specific issues such as liability or for understanding what type of juror will be more amenable to your damage arguments.

Evolving areas – things to keep in mind - the potential use of the Affordable Care Act.

While the Affordable Care Act is new it is an area that should be explored in the context of both mediation and trial.

Life Care Plans and Structured Settlements for Claims

What is a Structured Settlement?

The Internal Revenue Code, under sections 104(a) and 130(c), allow for defendants/insurers to be creative in their negotiation process by allowing for claimants to receive their settlement dollars as a stream of future periodic payments. Section 104(a) allows for income tax free periodic payments. Section 130(c) allows the defendant/insurer the ability to assign away the obligation to make the future periodic payments through the use of qualified assignments. A structured settlement allows for tax advantages to the claimant and savings to the defendant/insurer.

The annuity payments are flexible and can be designed to meet a claimant's specific needs. Payments may be scheduled for any length of time and may continue for a claimant's lifetime. Payments may be immediate or deferred and may be made in equal installments or may vary over time:

-Period Certain - Payments are made at specified intervals for a guaranteed period of time.

-Temporary Life – Payments are made for a specified period of time, but only if the claimant is living.

-Life Only - Payments are made until death. There is no guaranteed benefit.

-Period Certain and Life – Payments are made until death. In the event the claimant dies within a guaranteed period, payments for the balance of that period are paid to a beneficiary.

-Joint and Survivor - Payments are made and continue throughout both annuitant lifetimes. Upon death of either annuitant, a selected percentage of the benefit, designated at time of purchase, is paid to the surviving annuitant.

-Lump Sum Payments - Guaranteed lump-sum payments are paid to the claimant on specified dates.

*What is a Life Care Plan***?**

A life care plan is a tool that is used in evaluating the cost of future medical care for a claimant. Life Care Planners rely on medical records, research, data analysis, and published standards of practice to develop a concise plan for future medical needs for individuals who have either experienced a catastrophic injury or have chronic health care needs. Once this plan is developed, costs can be applied to the future medical care needs of the claimant.

Typically, there are four critical areas of a life care plan. Future medical needs include routine and aggressive medical care, testing, home/facility care, medications and supplies. Rehabilitation Needs includes evaluations, therapeutic modalities, orthopedic needs and aids for independent function. Psychological Needs include the various counseling necessary for the mental health of the individual and Case Management includes the case manager and conservator.

Purpose of a Life Care Plan

Life Care Plans are essential in presenting damages in a clear and concise manner. They provide plaintiff attorneys with a means to validate the demand made for medical care. In addition, the defense team is able to utilize a life care plan dispute a demand or to justify the value of an offer being made. A good life plan will draw direct links between the medical records available and the recommendations that are being made.

Future Medical Damages and How They Differ

Future medical damage calculations, whether Plaintiff or Defense, are based on speculation. In most cases involving the use of life care plans and economic reports there is a discrepancy between the calculations of one side versus the other. These discrepancies appear in three different forms: life care plan, economic report and life expectancy.

When comparing Life Care Plan reports between Plaintiff and Defense the most significant difference is the cost of care. The plaintiff's experts will argue that the Plaintiff will need the most hours of care at the most expensive rate. Defense expert will represent just the opposite, that Plaintiff will need minimal hours of care at a less expensive rate. The difference between rates will be based on the level of health care provider needed: RN v. CNA v. HHA v. Facility Care. Another discrepancy is usually the type and frequency of therapies needed. Defense will indicate that there will be offsets that will decrease the cost of providing therapies. One such offset is schools providing injured children with a certain amount of therapies. Plaintiff's experts usually do not acknowledge such offsets as their goal is to highlight the high cost of future medical care.

Economic reports are considered to be the most speculative when calculating future damages. This is due to the fact that an Economist's projections are based on assumption and those assumptions can be tailored to meet their client's expectations. Economists have two tools to meet these expectations. These tools are discount rates and growth rates. Plaintiff's economist will project high growth rates and a low discount rate to increase the present value of the damages, while the defense economist will project just the opposite.

The last point of disagreement between the Plaintiff and Defense experts will be life expectancy. In traumatic injury cases life expectancies case vary wildly between experts. Plaintiff's expert will try to represent a normal life expectancy while Defense's expert will represent a reduced life expectancy. However, life expectancy projections can undermine indications made within the Life Care Plan. If Plaintiff's experts represent a normal life expectancy but project extreme amounts of care within the Life Care Plan these two projections contradict each other. The same can be said for a Defense plan that has a reduced life expectancy but a minimal amount of care.

Validating the Life Care Plan

In order to help bridge the gap between plaintiff and defense life care plans, it is helpful to validate certain key projections within both Life Care Plans. Simple steps such as researching actual cost, reading depositions, using social media and obtaining lien information can resolve discrepancies before mediation is even attempted.

Actual costs of projected items can be obtained by using such readily available information as the Bureau of Labor Statistics, the MetLife Market Survey of Long Term Care Costs or by just simply picking up the phone and making inquiries. An example would be calling multiple care facilities within the Plaintiff's area to obtain an accurate range of costs. Moreover, costs can be mitigated by reading a Plaintiff's deposition and understanding what care is currently being provided versus what is being projected. Social media sites such as Caring Bridge and Facebook can also help match need to projection. Past lien information can also provide a good gage on what the claimant's medical care costs are.

The Purpose of Annuitizing a Life Care Plan

Rather than paying for the claimant's future care with a lump sum settlement, it is more cost effective to price the claimant's future medical needs with an annuity. Annuitizing a life care plan provides an actual cost to buy the claimant's future medical needs and can aid a risk manager/adjuster in black boarding damages to aid in setting reserves. In addition, allows a risk manager/adjuster to justify his/her offers in a well-defined breakdown. Once the costs of the life care plan are met, it allows the negotiating parties to remove medical care from the settlement equation and focus on the true motive of the demand. It also provides the risk manager/adjuster a strategic way to stretch a limited policy or price a portion of the plan when coverage or liability is in question. On the claimant side, it will afford the claimant the comfort of knowing that the settlement dollars do in fact cover the cost of future medical needs.

How Does a Rated Age Add Value to a Life Care Plan?

Further bringing down the cost of a life care plan, and costs in general, is the process of underwriting. Underwriting is the process of determining the life expectancy of a claimant through a review of medical records. Structured settlement brokers can submit claimant medical records to the various life insurance companies to obtain "rated ages". A rated age is an adjusted age to reflect the life expectancy of a claimant which is based on current trends in medical care, the care the claimant receives, mortality studies and the medical records provided. For example, a 20 year old female would have a 62 year life expectancy. A 20 year old female with a rated age of 52 would have a 30 year life expectancy.

Typically, the medical records that prove valuable are current hospital admission and discharge summaries, rehab reports, IME's, life care plans, cardiology reports and neurology reports. Pertinent injuries include neurological injuries, TBI's, spinal cord injuries and burns. Health conditions that are not related to the injury will also impact the rated age and should be considered. Some of these conditions include hypertension, cancer, obesity, high blood pressure, sleep apnea, mental illness, recurrent illness and substance abuse.

A rated age can also add value by increasing the benefit when working with a specific cost factor. For example, $500,000 will buy the following for a 20 year female: $1,750 per month for life, guaranteed for 20 years. That same cost will buy $2,140 per month for life, guaranteed for 20 years, to a 20 year old female with a rated age of 52. The rated age provides the claimant with an additional $390 per month.

Pricing Methodology of a Life Care Plan

The way a life care plan is priced can itself be a negotiation tool. The annuity can be priced to payout for the remainder of the claimant's life or it can be priced based on an exact life expectancy provided by an expert. Pricing the Life Care Plan based on a reduced life expectancy will reduce the cost of the annuity to provide those benefits. Another useful method of pricing annuities would be to guarantee a either a portion or all of the future benefits. This may help ease a Claimant's mind about financial uncertainties if the claimant passes away. Cost of living adjustments (COLAs) can also be incorporated into the pricing of annuities to help ease inflation risk that a claimant may experience. Each of these annuity pricing methods can be used separately or in conjunction with one another to help negotiate a settlement.

Once a rated age is obtained, it can add value to lifetime annuity pricing. The rated age can decrease the cost to provide a specific benefit. For example, in order to provide $1,000 per month for life, guaranteed for 20 years, to a 20 year old female, it would cost $285,000. It would cost $234,000 to provide that same benefit to a 20 year only female who had a rated age of 52. The rated age provides a $51,000 savings to the defendant/insurer.

The Dark Art of Valuing TBI claims

Getting Started - necessities of the trade – getting the picture

The first step to evaluating any claim including one involving a TBI is information gathering. You must understand both liability and damages. If you start investigating your claim immediately you will be gathering the necessary materials. And, if you have the right defense counsel they will know what to seek.

You need to get as a complete picture of the medical including the pre-injury records, EMS, ER, and hospital admission reports. Know if there is a true coma or unconsciousness or if it is medically induced. In certain circumstances a significant head or other injury may result in a patient being placed in a medically induced coma to keep the patient stationary. Counsel may attempt to argue that a brain injury is more severe and point to the time a claimant is unconscious. This, however, may be the result of medical strategy rather that a specific brain injury.

In addition to the claimant's medicals you may look at expert reports, life care plans, and economist reports. These can be produced by both the claimant and the defense. Retain a structure broker to cost out life care plans (especially in cases here liability is an issue).

Additional considerations in evaluating TBIs or Any Other Claim

Although not as tangible further considerations in evaluating claims include the venue, the trial judge, plaintiff's counsel, the applicable state law (caps on damages, joint and several liability, contributory negligence), appellate courts in the state, the claimant (age, family, work, sympathy factor etc.); your own client; co-defendants and responsible third parties.

The Value of Past Experience – "been there done that"

Nothing is as valuable as experience. This, of course, can be personal experience but also acquired through the use of jury verdict and settlement research offered in a legal publications and legal search engines. But what is also important and may be overlooked in a society where people are working from home is communication with colleagues. This can take place with colleagues in your own company as well as defense counsel; particularly counsel who handle these significant types of cases. If you have questions – or simply need a sounding board – ask!