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CASE ASSESSMENT IN HIGH EXPOSURE CASES

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Introduction

High exposure cases involve catastrophic personal injuries or one or more fatalities. They differ from lower to moderate exposure cases, both in the level of sophistication of the defense required for their competent handling, as well as the zeal with which plaintiff's lawyers will prosecute such cases. Typically, the amount of resources at your disposal for the defense of such claims will be greater, and given the high level of exposure associated with these cases, you may find yourself bounded only by the limits of your skill and imagination.

Among the things that should be done during the course of defending a high exposure case are: the retention of a jury consultant; the early retention of an accident reconstruction expert; the retention of experts in heavy truck mechanics and/or maintenance; the retention of biomechanical engineers, and an expert in economics; and, in those cases involving plaintiffs who have survived, a vocational rehabilitation expert, and experts in the various fields of medicine which are relevant to the plaintiff's claimed injuries.

This paper deals with legal, and discovery issues, which may assist you in evaluating high exposure cases, which normally will acquire a vigorous defense.

I. The Basics

A. Why Removal to Federal Court is Valuable to Case Management

The relevant requirements and process for a federal court's jurisdiction are outlined in 28 *U.S.C.* § 1332. Pursuant to that statute, federal courts have jurisdiction over claims in which there is complete diversity of citizenship between the plaintiff(s) and the defendant(s), and the amount in controversy exceeds $75,000. In order to remove a case to federal court, there must be *complete*

diversity. If even one defendant is a citizen of the forum state, or is a citizen of the same state as a plaintiff, diversity jurisdiction does not exist.[i]

Removal can be obtained pursuant to 28 *U.S.C.* § 1441(b). In order to remove a case to federal court, the removing defendant must file a Notice of Removal within thirty (30) days of being served with the complaint. All named defendants should consent to the removal. If any defendant fails to consent to the removal, remand to state court might be ordered.[ii]

In my experience, plaintiffs' attorneys very frequently add a non-diverse party, however tenuous that party's liability may be, in order to prevent removal. Plaintiffs who do this have been known to drop the non-diverse party on the eve of trial, as that party was never meant to be a legitimate defendant to begin with. Fortunately, such fraudulent joinder will not defeat removal. [iii] Thus, one should consider removing a case to federal court at the earliest opportunity, even if a nominal defendant might defeat diversity jurisdiction.

The advantages to the defense of removing a matter to federal court are myriad and can level the playing field, because in federal court, legal rulings are more predictable. Moreover, many plaintiffs' lawyers although not all, of course, are not used to, or comfortable with working under the detailed and strict rules in federal court. Therefore, one may find oneself at an advantage during the course of the litigation when dealing with a plaintiff's counsel who is not familiar with the Federal Rules of Civil Procedure, and any Local Rules of the U.S. District Court. A plaintiff's counsel inexperienced at working in federal court will find himself at a disadvantage against experienced defense counsel.

Additionally, litigating in federal court typically requires much more writing, and more sophisticated motion practice. Motions in federal court are usually decided based on the merits of

the written submissions, and not based on clever or emotional arguments made before a trial judge in a five-minute hearing in chambers. One may, therefore, find that a carefully crafted legal argument, supported by case law, which has been carefully read and considered by the District Court Judge, carries much more weight than a similar submission might carry in state court. Federal courts are, by their nature, courts of limited jurisdiction, therefore, federal judges frequently take more time in considering submissions made to them, and have more support staff to assist them, than their state court counterparts.

Furthermore, among the advantages to litigating in federal court, is the fact that expert disclosures under Rule 26(a) are much more detailed and come much earlier in the case, than in most state courts. In many state courts, expert witness disclosures need not be as detailed as expert witness disclosures under *Fed.R.Civ.P.* 26(a), and need not be made as early in the case as Rule 26(a) mandates. This leaves many questions open until the last minute and, thus, makes early evaluations more difficult. Federal court, therefore, gives one the advantage of discovering much more information on the opponent's expert evidence, much earlier in the case, than would typically be permitted in many state courts. Cases are, therefore, prepared early.

Litigating in federal court also limits voir dire of the jury venire to less than what is permitted in many state courts. In Florida, for example, voir dire in civil cases has been permitted by judges to last for hours, during which time the plaintiff typically attempts to cull from the panel any prospective jurors who seem disinclined to consider extremely high personal injury awards, and to argue his case. Federal courts, however, typically allow extremely limited voir dire of prospective jurors, which prevents the plaintiff from meticulously going through the panel and eliminating anyone who he/she feels is unlikely to award an exorbitant verdict. This brings the process back to

the real purpose of "jury selection," as opposed to making it but another opportunity for the plaintiff to argue his case first. Depending on the voir dire rules of the particular state in which one practices, one may find that selecting a jury in federal court offers a much more level playing field to both the plaintiff and the defense.

Other advantages obtained from removing a plaintiff's claim to federal court include: a more established appellate system; more jurors on the panel due to the fact that alternates must also deliberate; and non-elected judges (all federal judges are appointed by the President of the United States). Removals to federal court should, therefore, be considered whenever legally feasible.

B. Discovery and Settlement Negotiations

When evaluating a catastrophic case, it is extremely important to get as much discovery in the matter, as early as possible. This type of discovery is not just that discovery which can be obtained from the plaintiff, but also that information which one must obtain from one's client. To that end, aside from filing requests for the needed discovery from the plaintiff, an attorney should, in all cases, visit the scene of the accident, personally inspect the vehicle which the client was operating at the time of the accident, and have an investigator or the attorney, if possible, interview, as early as possible, those police officers at the scene, fire rescue personnel, and other key witnesses who can be identified. Obtaining statements from these witnesses is important, as it may be useful evidence to impeach the witness later, should the witness change his or her story at a later date. This information will also assist you in determining whether there are any factors known to you, but unknown to the plaintiff, which will assist you in obtaining an early settlement of the matter, before that information comes to light.

In catastrophic cases, the money that can be saved by the client by effecting an early

settlement prior to negative information being learned in discovery by the plaintiff, can be enormous. While some plaintiffs' lawyers will not enter earnest settlement negotiations prior to obtaining certain basic information from the defendant, many, when faced with early settlement offers, will find themselves pressured by their clients to accept the offers without undertaking additional lengthy discovery.[iv]

Thus, early information gathering on your side of a case or claim, coupled with a realistic assessment of what your client's posture would be, assuming all discoverable information known by you were also known by the plaintiff's counsel or jury, can greatly assist in reducing the exposure in a catastrophic case.

C. Insurance Considerations

When undertaking settlement negotiations, whether at mediation or pre-mediation, an attorney will often find himself attempting to balance the competing interests of his client, the client's primary insurer, and any excess carriers. Typically, trucking companies have high self-insured retentions. Frequently, the first $500,000.00 to $5,000,000.00 in damages is solely the responsibility of the trucking company. The representatives of the company providing the layer of coverage above the SIR, frequently are eager to see the matter settled within the SIR, however high the demand or dubious the liability may seem to the insured.

Likewise, excess insurers have an interest in seeing that a matter settles within the primary insurer's layer of coverage, lest the excess insurer's funds be at stake. For the attorney, it must be borne in mind that the trucking company is his or her client, and the concerns of the insurers should not be permitted to interfere with his or her duty to the trucking company. The "evaluation," therefore, must be of quality, be accurate, and be realistic. If, for example, the outer-limit of a

reasonable settlement in a given case is $700,000.00, however, the plaintiff demands $1,000,000.00 in settlement, when dealing with a trucking company with a $1,000,000.00 SIR, one should remain steadfast at one's estimate of the outer limit of a reasonable settlement, even when the defendant's insurer desires the matter to settle within the SIR. To be sure, if the outer-limit of a reasonable settlement were $700,000.00, the possibility would always exist at trial that the plaintiff could obtain a verdict in excess of $1,000,000.00 and thereby implicate the primary insurer's funds. This should not, however, be an overriding consideration for defense counsel, if defense counsel has a good faith belief that the outer limit of the recommended settlement range ought to be the above-mentioned $700,000.00.[v] The pressure, bear in mind, on the company can be great to pay all SIR or primary limits. This should not impact an attorney's judgment.

What should, however, be of concern to defense counsel is the spectre of a bad faith action or an unrealistic evaluation. If an evaluation is accurate, an evaluating attorney can be confident that he or she is correct and should not give way. Insurance companies, as you know, very often rely on the advice and recommendations of defense counsel's evaluation in setting reserves, and in making settlement offers. Should a case be unreasonably under-evaluated, and a verdict be obtained implicating an excess insurer's policy, which would not have been at risk had the matter settled within the primary limits of coverage, the excess insurer may maintain an action for bad faith against the primary insurer.[vi] The primary insurer, then might seek redress against the attorney upon whose advice and evaluation it relied.[vii] It is important to carefully balance the risk of under-evaluating a catastrophic case, with the risk of appearing beholden to excess insurers or excess coverage lawyers, and suggesting that your client settle at unreasonable, or fact "possible" figures, albeit within the SIR or the primary layer of insurance, just to avoid implicating the funds of an insurance company

farther up the line.

One method an attorney should try to attempt to balance these seemingly competing interests, is to carefully review jury verdict reports for damages awarded at trials for injuries similar to the injuries or damages claimed by the plaintiff. Clearly, if the overwhelming majority of cases in a given jurisdiction show that damages well in excess of one's evaluation to the defendant trucking company are typically awarded in similar cases, that might create the *prima facie* appearance that the attorney is grossly or unreasonably under-evaluating the risk to the client.

Removing a case to federal court reduces the exposure to the client to some extent. Nevertheless, other jury verdict awards in both state and federal court should be examined for similar cases, once basic information on the plaintiff's purported damages is obtained. This evaluation should be reported to the client and all layers of coverage, and a reasonable settlement range should be decided upon as early as possible.

II. Beyond the Basics

A. Claimant's Counsel's Contingency Fees and Their Impact on Case Assessment

It is my belief that the contingency fee structure allowed to plaintiff's lawyers in a given jurisdiction has an impact on the likely settlement range of a catastrophic case. Currently, most states have no set sliding scale for contingency fee agreements. (See Table 1) The plaintiff's lawyer is often largely in control of his client's decision to accept a settlement offer.

Many states, however, have set sliding scales above which any plaintiff's contingency fee is presumptively excessive. (See table below.)

Table 1

JURISDICTION	FEE
Alabama Alaska Arizona Arkansas Colorado Delaware District of Columbia Georgia Hawaii Idaho Illinois* Indiana Iowa Kansas Kentucky Louisiana Maine Maryland Minnesota Mississippi Missouri Montana Nebraska Nevada New Hampshire New Jersey New Mexico New York* North Carolina North Dakota Ohio** Oregon Pennsylvania Rhode Island South Carolina South Dakota	No set sliding scale. The court considers a reasonable fee based on the following factors: 1. The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly. 2. The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer. 3. The fee customarily charged in the locality for similar services. 4. The amount involved and the results obtained. 5. The time limitations imposed by the client. 6. The nature and length of the professional relationship with the client. 7. The experience, reputation, and ability of the lawyer or lawyers performing his services. 8. Whether the fee is fixed or contingent. A contractually agreed upon fee will be enforced, absent unconsionability. Typically, fees of 33 1/3% to 40% are enforced, depending on the facts of a given case.
Tennessee*	

Texas Utah* Vermont Virginia Washington West Virginia Wisconsin Wyoming Wisconsin Wyoming	
California	40% of first $50,000 33% of next $50,000 25% of next $500,000 15% of anything over $600,000
Florida	33 1/3% of any recovery, regardless of amount prior to filing of suit 33 1/3% of any recovery up to $1,000,000 through the time of filing an answer or the demand for appointment of arbitrators 40% of any recovery up to $1,000,000 through the trial of the case 30% of any recovery between $1,000,000 and $2,000,000 20% of any recovery in excess of $5,000,000 If the defendant admits liability at the time of filing an answer and requests a trial on damages, 33 1/3% of any recovery up to $1,000,000 from that defendant through trial 20% of any recovery from that defendant between $1,000,000 and $2,000,000 15% of any recovery from that defendant in excess of $2,000,000
Massachusetts	40% of first $150,000 33 1/3% of next $100,000 30% of next $200,000 25% of anything over $500,000
Michigan	33 1/3% flat rate
New Jersey	33 1/3 on first $500,000

	30% on second $500,000 25% on next $500,000 20% on next $500,000
Oklahoma	Up to 50% of the net recovery

*These states have, however, have implemented sliding scale fee restrictions in medical malpractice contingency fee agreements. Additionally, the Supreme Court, Appellate Division, First, Second, Third and Fourth Departments of New York, have imposed a cap of 33 1/3% on contingency fee agreements.

**Sliding scale fee restrictions on contingency fee agreements are pending in the Ohio legislature.

The settlement demand of a claimant's lawyer, and therefore the likely range in which a case will settle, is affected by a given state's contingency fee laws. For example, consider three hypothetical accidents:

a. An accident occurs on interstate 5 in Southern California. In this accident, the plaintiff is rear-ended by a tractor-trailer causing him extensive physical injuries. His medical bills total $250,000.00. The plaintiff desires to have his medical bills paid, to net $250,000.00 in additional proceeds for his pain, suffering, and lost wages, and, of course, he desires to pay his attorney whom he has retained on a contingency fee basis. In California, a settlement in the amount of approximately $672,353.00 would have the result of permitting the plaintiff to net $250,000.00, while still paying his doctors, and his attorney the statutorily capped contingency fee in California. (Costs are not considered in this hypothetical example, or any of the following, as they are too subject to variation. Moreover, set-offs and expenses are not considered,

for ease of calculation.)

b. Consider next the same accident if it occurred on the Florida Turnpike in central Florida. Again, the plaintiff's medical bills are $250,000.00, and the plaintiff desires to net $250,000.00 for lost wages, pain and suffering. In Florida, to effect this result via settlement, a settlement in the amount of approximately $833,334.00 would be required.

c. Consider next this same accident if it occurred on Interstate 70 in Kansas. Kansas, like the majority of states, does not have a sliding scale above which plaintiff's lawyers may not venture in contingency fee agreements. Nevertheless, Kansas, like most other states with no set sliding scales, has upheld the legality of contingency fee agreements in the 33 1/3% to 40% range. *Musse v. Allstate*, 31 Kan. App. 574, 68 P.3d 165. (2003) (35% contingency fee held reasonable). In Kansas, if the plaintiff were subjected to a 35% contingency fee agreement, a settlement in the amount of approximately $769,231.00 would be required to effect the plaintiff's desires. (As above, costs and expenses are not included in the calculation.)

Thus, as you can see, the state law in the jurisdiction in which an accident occurs impacts the amount of money that an insurer or trucking company would need to settle identical cases with identical damages, with a plaintiff who desired to net an identical amount of money. In other words, the needs of the claimant and the evaluated settlement range, should not be considered without regard to the contingency fee method of compensation for the plaintiff's attorney in a particular jurisdiction. A defense attorney should be familiar with his state's contingency fee statutes and

should communicate this information to his client as part of the evaluation. The reality of the situation is that plaintiffs usually decide the reasonableness and acceptability of a settlement offer not based on its gross amount, but rather on how much they will net. Oftentimes in a catastrophic case, the amount owed to the plaintiff's attorney will exceed the amount owed to medical care providers. Thus, one should consider the attorney as one would any other lienholder in assessing in what range a case is likely to settle.

One should also consider the plaintiff's attorney's contingency fee in assessing the level of zeal with which a plaintiff will pursue a given case. In the above examples, an attorney litigating for the plaintiff in the state of California would stand to make roughly $172,000.00 as a fee on a $672,353.00 settlement. By contrast, an attorney representing the same claimant in Florida, would stand to make over $300,000.00 as a fee, for providing the same net recovery to his client. This large gap in compensation may effect the amount of resources that the claimant's attorney is willing to put into a case, as well as the amount of risk that he will take with a dubious liability, but high exposure case. Thus, in assessing plaintiff's counsel one should also consider assessing the likely fee the plaintiff's attorney could generate with a successful jury verdict. It has been shown that the probability of a matter going to a jury trial increases with the generosity to a plaintiff's attorney of the contingency fee agreement.[viii]

In short, in assessing the likelihood of a matter going to trial, the zeal with which plaintiff's counsel will pursue the matter, and the range in which a matter is likely to settle, one should always consider a given state's contingency fee structure.

B. <u>Special Considerations in Wrongful Death Cases</u>

If early and thorough discovery, and claims investigation relating to the plaintiff's claim, is

important in a catastrophic injury case, it is doubly crucial in a wrongful death case. This is simply because the decedent is often something of an enigma. One's discovery on the decedent will have to be via his or her survivors, or others who knew the decedent. Of particular importance, might be discovering evidence of marital discord, infidelity, or other evidence impacting on a surviving spouse's past and future claim for pain and suffering.

For example, in one wrongful death case I recently handled, the decedent was a Florida sheriff's deputy who was killed when his police cruiser was slammed broadside by my client's truck. While the evidence was clear that the police officer was making a u-turn in front of the oncoming truck, without his overhead lights on to warn oncoming traffic, I was still deeply concerned that a jury might sympathize with the officer's widow and four surviving children, due in part to the fact that the decedent was a police officer charged with protecting members of the local community, including the jury pool.

Upon extensive investigation of the deceased police officer, it was learned that he was something of a philanderer, who kept a mistress and had an illegitimate child. It could never be explained why the officer was so far away from his duty station at the time of the accident. There was talk of a divorce. While I hoped to vindicate my client on the liability issue, if damages were to be tried, I was prepared.

As it happened, the jury returned a zero liability verdict, based on the officer's negligently having turned in front of the oncoming truck while talking on his cell phone. However, had there been a finding of liability, the pain and suffering of the widow would have been severely reduced in our view given the officer's marital indiscretions, and the wife's apparent knowledge of them.

The point is, information regarding the decedent in a wrongful death case, particularly with

regard to his character and the full nature of his relationship to those claiming damages, is critical. Obviously, the claim of a philandering husband, or an absentee father who had barely, if any, relationship with his surviving children in the years prior to his death, is less valuable than that of a devoted family man. It is incumbent upon the defense attorney to uncover, and attempt to move into evidence as much relevant evidence as possible bearing on the claims of the survivors. Obviously, this must be done delicately, lest the defense attorney be perceived as engaging in character assassination upon a deceased who is no longer able to defend himself. Nevertheless, it cannot be overlooked.

When the evidence is clear that the claimants are overstating the extent to which they suffered a loss of close and permanent ties to the decedent, this evidence must be obtained and addressed. In the same vein, it is important to obtain as much vital information as possible on the manner in which the decedent died, and the amount of conscious suffering he may have endured, prior to his death. While Florida does not permit recovery for conscious pain and suffering prior to death, some states may. In the example cited above, involving the deputy sheriff, the deputy died instantly, incurring no significant medical bills, and had no consciousness of his impending death. In those states, however, where consciousness of impending death, or pain and suffering pending death are permitted, both the quality of the decedent's life, as well as the circumstances of his death, are vital to the plaintiff's case, and therefore necessary for the defense to evaluate.

One should also not accept at face value that the surviving spouse was indeed the spouse of the decedent, or for that matter, that the surviving children were, in fact, the decedent's children. In Florida, as in all states, wrongful death actions are governed by statute. Only the legal spouse of the decedent may make a claim, regardless of how anyone else may have been with the decedent, or

how close their relationship may have been. Likewise, only the biological children or legally adopted children of the decedent may bring a claim.[ix] If there is any doubt as to the lineage of the decedent's purported surviving children, this issue should be addressed and excised from the case pre-trial via motion.

Similarly, if there is any doubt as to the validity of the marriage between the decedent and the surviving widow or widower, this issue should be challenged pre-trial, as quickly as possible. The possibility may exist that the marriage was bigamous, or in some other manner, invalid.

In another case I recently defended, the surviving widower of a 31-year-old decedent, brought a wrongful death claim on behalf of the estate, himself, and the decedent's two surviving children. During the course of discovery, it was learned that the widower had never properly recorded any sort of valid marriage between himself and the decedent, at any time during the almost 17 years they were together prior to her death. The pair were purportedly married in Guatemala, although Guatemalan authorities, at the outset of the litigation, had no record of any marriage between the two.

Obviously, summary judgment was sought on the claim of the widower, alleging that he had no right to bring a claim for the death of the decedent, albeit they had been together for 17 years and had two children together, due to the fact that he was not legally married to the decedent. At the eleventh hour the plaintiff's counsel produced voluminous and suspicious documentation from Guatemalan authorities, all dated after suit was filed, and after the issue of the deceased's lawful marriage to the claimant was being called into question, all purporting to show a duly recorded marriage.

After a full day's evidentiary hearing on the issue, in which legal expert testimony was taken,

the court held that there was sufficient evidence that the pair were married to permit the widower to assert a claim. This was in spite of an admission by the widower in his deposition that they were not married. The widower subsequently received a judgment for his damages in excess of $1,000,000. The matter is currently on appeal.

Should the appellate court reverse the trial court's finding on the issue of the validity of the marriage, or had the judge sided with us at the hearing on our motion for summary judgment, slightly over $1,000,000 in damages would have been, or will be saved, simply by virtue of our having challenged the validity of the decedent's marriage to her purported husband. Thus, if any doubt arises during the course of litigation as to the validity of the decedent's marriage to the surviving spouse, this issue should be challenged vigorously. This is particularly important in marriages purportedly entered into in some foreign countries, where records of marriages are not as precise as one would find in the United States, and where fraud in official documents may be rampant.[x]

In short, in a wrongful death case, where millions of dollars could be at stake, it is not unusual to find claimants painting the deceased as a much more devoted father or husband than he may have been, and in some cases, even claiming to have been lawfully married to persons with whom they shared no legal marital bond. These issues should be carefully evaluated by defense counsel, given the staggering verdicts that can result from wrongful death cases.

C. Appellate Counsel in the Courtroom at Trial

In high exposure cases, a jury consultant is highly recommended. He or she can assist in determining which jurors would be more favorable to the defense, and whether the jury as a whole appears to be biased or unbiased.

However, a sometimes overlooked participant in the trial is competent appellate counsel. In a high exposure case, where damages are likely to run into the seven figures, having the attorney who will handle the appeal present at the trial is sometimes helpful. By witnessing the trial firsthand, he or she may be more objectively attuned to appealable issues earlier. If the trial results in a verdict for the plaintiff and is appealed by the defense, appellate counsel can often prepare a brief more efficiently and cost effectively, and wade through a lengthy trial transcript more quickly, if the appellate counsel knows in advance exactly what errors are contained in the record. Appellate counsel can also assist trial counsel with issues and side bar arguments to the court as they develop. While as a rule I would not suggest appellate counsel actually sit at the defense table, lest the defense give the impression with too many attorneys that it is "ganging up" on the pitiable plaintiff, having appellate counsel in the courtroom can be a useful tool in trial. While it may be an additional trial expense for a client, having appellate counsel in the trial court can prove to be invaluable and ultimately a cost saver. Appellate counsel can assist in obtaining favorable rulings as the trial unfolds, and can assist in determining the likelihood of reversal during a trial (as opposed to later). He or she can also effectively sit as an additional evaluator of the entire case.

D. Assessing Your Client

Integral in the process of assessing a catastrophic case, is assessing how your client will be perceived by the jury. It is not sufficient to merely assess the plaintiff's side of the case. One must also assess how the jury will view one's own client. Your client will likely consist solely of the trucking company, and the driver, or safety director or other employees such as mechanics.

With regard to the trucking company, one must consider what safety violations may have existed on the entire vehicle involved in the collision, how these safety violations may have

contributed to the accident, and the overall state of the company's maintenance of its trucks, training of its drivers, and the condition of its fleet and maintenance records. Obviously, jurors will be more likely to look unfavorably upon a company that places vehicles on the road in such a condition as to cause an unreasonable risk to the public, or a company that has poor records on the drivers or on maintenance. In such a case, punitive damages can even result. Thus, during the assessment process, one must look impartially and critically at one's client.

Drivers present another issue. During my years in trucking defense litigation, I have seen drivers with physical disabilities that ostensibly would make them a danger to other motorists, truck drivers with felony convictions, and truck drivers who overall would make a profoundly poor impression upon any reasonable jury. If a driver is alleged to have been acting negligently or even criminally at the time of the accident, he may be particularly unwilling to divulge information, or generally may perceive his position as at odds with the trucking company. This is particularly true in large exposure cases, when the spectre of serious criminal charges against the driver often looms large.

It is important to gain the confidence of the driver early in the case, and to assure him that you intend to zealously protect him, as well as the trucking company. If, indeed, the interests of the trucking company and the driver are at odds, as they may well be if the driver acted with gross negligence or criminal culpability at the time of the accident, you may have to obtain separate counsel for the driver. Barring that, however, you and your investigator, when interviewing witnesses, should keep in close contact with your driver in an effort to obtain the relevant information and cooperation from him regarding case assessment. To assess liability in the matter, you will need to have several, face-to-face meetings with the driver. You may have to "convince"

him you are on his side.

By way of example, I can recall a case in which our driver purportedly rear-ended a minivan full of young, migrant farm workers, on an interstate in Florida. The minivan was knocked from the roadway, overturned, and at least one person in the minivan was killed, with the others sustaining ghastly personal injuries. The driver in that matter was at first extremely stoic, and perhaps even hostile to the trucking company, as he felt the trucking company was "throwing him to the wolves" with regard to possible criminal charges. It was only after we assuaged these concerns that the driver became a viable defense witness and a partner in the defense of the claim.

Any assessment of a high exposure case will necessarily involve an assessment of how the client will be perceived before a jury, and how good a witness the driver will make.

Consider attempting to resolve these matter prior to any damning information being disclosed to the plaintiff.

E. <u>The Dangers of Per Diem and Lump Sum Damages Arguments at Trial</u>

At trial, plaintiff's counsel will very likely attempt to argue that his client is entitled to a per diem award, based on a fixed dollar amount suffered per day by his client, or in the alternative, he may suggest that a massive lump sum award is appropriate. Demands for large lump sum payments can have the effect of anchoring the jury's assessment of a proper damage award, close to the figure demanded by the plaintiff.[xi] These suggestions apply to plaintiff's claims for non-economic damages in closing argument.

Per diem arguments allow a plaintiff with a fairly young claimant, to suggest an astronomical damage figure, based on a seemingly small amount per day in damages carried over the plaintiff's remaining life expectancy. The daily amount may seem small to the jury, given that many will

spend $20 a day or more simply on a combination of niceties such as lattes, the latest magazines, lunch, or cigarettes. However, when calculated at a daily rate multiplied over 30 or 40 years or more, the total amount demanded can be quite high.

One should evaluate, in defending a high exposure case, whether you can bar the plaintiff from making lump sum or per diem arguments in closing argument, if legally feasible within one's jurisdiction.[xii]

As an example, a young plaintiff was badly injured, when her vehicle was rear-ended by a tractor trailer. In the crash, her body was propelled forward, and the side of her face was crushed against the b-pillar of her Chevrolet. The impact left her with a crushed eye, which later had to be removed, and disfigurement to the left side of her face.

At trial, she sat quietly before the jury as her attorney made his closing argument. The attorney requested the jury award her a fixed amount of money per day, for the rest of her life, for the mental anguish and disability she would suffer as a result of being blind in one eye, and having a disfigured appearance. Objecting to this testimony, we reminded the jury in our closing argument, that what an attorney says is not evidence. Indeed, we had the jury instruction stating that the words of an attorney is not evidence, blown up and placed before the jury. While the court permitted the plaintiff to make his per diem argument, as court's will do in many jurisdictions, placing one's objection before the court, even if only for appellate purposes, is a wise maneuver. Per diem arguments, particularly with a young claimant with a long life expectancy, can result in very high verdicts. Lump sum arguments can also result in excessive verdicts by anchoring the jury to a particular large number.[xiii] One should attempt to block any such arguments. If, however, the court allows such arguments, the jury must be reminded that the words of the attorneys are not evidence,

and in the case of lump sum arguments, the jury should also be reminded that the purpose of a compensatory award is not to punish the defendant. In this vein, one should also object to any arguments suggesting that the public good will be served by a high lump sum award.[xiv]

In combating the force of a lump sum argument, one might also consider reminding the jury of the value of money or "the dollar."

In another example, the plaintiff's attorney, who represented the widower and the two surviving children of a woman killed in a tractor trailer accident, stood before the jury and in closing argument, asked for $10,000,000.00 in damages to compensate the decedent's three survivors. This was allowed in spite of no foundation for this amount other than the attorney's suggestion. In my closing argument, with liability having been already established in a separate trial, I conceded that the survivors were entitled to fair compensation. While I was somewhat restricted by the court in advising the jury of precisely what items I would suggest would be useful to the survivors, and what their costs would be, I did state to the jury that my client would have no objection to providing private schools for the decedent's surviving children, a new home, vehicles, and a substantial lump sum payment to boot, all to compensate them for their loss. I finished by stating that the things I had suggested, that might assist this family in moving forward, could all be obtained for between $1,000,000.00 and $2,000,000.00. Thus, I believe I succeeded in both making my client appear reasonable, and sympathetic, while at the same time reminding the jury of the value of money, and that virtually everything that this family could need to move forward with their lives at this point, could be purchased for a price well below $10,000,000. The jury, the next day, awarded a verdict far closer to my suggested level of compensation than to the plaintiff's $10,000,000 demand. This is the problem with non-economic damage claims. There is no exact standard in law, as is stated in

Florida's Standard Jury Instructions.

Reminding the jury of the value of money, by specific examples, can greatly assist in obtaining a verdict far below the plaintiff's demand. This technique may have particular influence with those members of the jury who may have come from humble beginnings, and suffered their share of misfortune in their lives, for which no one was offering private schools or palatial estates. The jury should be reminded that money cannot bring back a loved one, or as in another case mentioned above, return sight to a shattered eye. All money can do is buy things. Within the limits imposed on you by the trial judge, reminding the jury of what a given sum of money can actually buy, and reminding them that a given sum of money is not simply an intangible idea, but translates into the ability to acquire those things which the claimants may need, can be a useful tactic in connecting a jury's verdict to reality. Some states do not permit such arguments, and this would be part of your overall case assessment. See e.g. *N.J. Rules of Court* 1:7-1(b) (2004).

F. The Taxability of Personal Injury Awards

Related to the idea that a jury's award of a fixed amount of money as not merely a concept, but something concrete that will allow the plaintiff to acquire tangible items, is the proposition that the jury should be advised, in those jurisdictions where permitted, that certain proceeds from a personal injury award may not be taxable income to the plaintiff.[xv]

In one voir dire I was involved in, certain sophisticated and informed members of the panel expressed their concern that the plaintiff's attorney would likely take 33% to 40% of the plaintiff's recovery. They voiced dissatisfaction with this fact, although they were admonished to disregard any such concerns. It is my belief that many jurors are sophisticated and are vaguely aware that most personal injury or wrongful death cases are brought pursuant to contingency fee agreements,

and that the plaintiff's attorney will collect a large share of the recovery. It is my belief that juries sometimes adjust their damage awards upward, in order to ensure that the plaintiff nets a certain level of compensation.

I see no reason to believe that jurors might not also consider the tax implications of a jury verdict award, and therefore raise their verdicts in contemplation of a tax liability. In one case I tried, a juror passed a note to the judge asking whether the plaintiff's recovery would be taxable. This is further evidence that juries consider such things as attorneys' fees and liens and IRS liens in assessing an award. In those jurisdictions where permitted, an attempt should be made to put an instruction before the jury advising them that personal injury awards may not be taxable by the federal government. I believe this maneuver will assist in reducing the exposure to one's client.

G. The Importance of Focus Groups

In a high exposure case, the importance of focus groups in the trial locality cannot be underestimated. It is often difficult to guess as to the political bent, or social conservatism, of a given venue. The best way to test the waters is to have a focus group, with mock juries who are composed of citizens of the plaintiff's chosen venue. Focus groups conducted by a trained jury psychologist can greatly assist in determining what parts of one's case are actually the most important to jurors, and whether one's assessment of damages and liability is in line with what members of the local community will believe.

In a case I handled, the plaintiff was rear-ended on a two-lane highway, and his vehicle was propelled forward into a concrete light pole. The plaintiff's face hit the a-pillar at high speed. The injuries to the plaintiff were massive. The plaintiff suffered severe nerve damage to his face, leaving him unable to taste or smell, numerous broken bones to his face which required surgery, memory

loss, and at least according to his lawyer, brain damage. The plaintiff appeared to be completely without fault in the accident. The plaintiff's attorney demanded in excess of $2,000,000.00 to settle the case. He argued, among other things, that his client had suffered severe brain damage. He also emphasized his client's continuing disfigurement to his face, in spite of reconstructive surgery to make him look more aesthetically pleasing. My client believed the demand to be outlandish, given the fact that the plaintiff had returned to work, was able to perform the duties that he had been performing prior to the accident, did not suffer from any significant physical disfigurement, and most importantly, that the plaintiff was partially at fault for his damages for failing to wear his seatbelt. Whether the plaintiff was, in fact, wearing his seatbelt was hotly contested, and experts were to give testimony on both sides of the issue.

Prior to trial, the client trucking company authorized a focus group in the county where the trial would be held. Numerous persons from the local venue were brought to the focus group, and a full mock trial was held secretly. The expense was great, however, well worth it given the risk involved.

To my client's surprise, the focus groups, at the conclusion of all of the evidence, and even considering the seatbelt defense, awarded damages on average of in excess of $4,000,000. When questioned about which portions of the defense they found most compelling, none listed the seatbelt defense as significant in their assessment. Basically, they did not care one bit whether he was belted or not. While in Florida, a court would have reduced the verdict by the percentage of negligence attributed to the plaintiff for failure to wear his seatbelt, given the magnitude of the verdicts, even with such a reduction, the plaintiff would very likely have recovered more than his attorney was demanding. In a worse case scenario, he could have recovered four times the amount his attorney

was demanding. The case was quickly settled for a figure slightly over $1,000,000.00, after the seatbelt defense was dropped right before trial. Thus, the defense kept credibility by dropping a questionable defense where the accident was clearly the fault of our driver.

The point is, focus groups can assist one enormously in determining "which way the wind blows," in a given venue, and also in determining what elements of one's defense ought to be emphasized, or discarded completely. I highly recommend competently orchestrated focus groups whenever catastrophic injuries are involved, and one's client will permit.

H. Damage Caps and Joint and Several Liability

As discussed *supra*, contingency fee structures, and caps on attorneys' fees, can have a large impact on the settlement range of a given case. The same is true for caps on damages. Many jurisdictions have capped damages in personal injury or death cases. (See Table 2) The below table illustrates those states that have capped damages in death cases. Depending on the state where an accident occurred, the value of the case may be significantly decreased based on statutory caps.

Table 2*

JURISDICTION	LIMITS
AL	Punitive damages capped at three times the compensatory damages or five hundred thousand dollars ($500,000), whichever is greater. AL St § 6-11-21.
AK	The non-economic damages awarded for a wrongful death action, resulting in a single injury or death, may not exceed $400,000 or the person's life expectancy in years multiplied by $8,000, whichever is greater. Punitive damages are also capped. See AK § 09.17.010.
AZ	No limits.
CA	Damages recoverable in wrongful death action are capped at those not recoverable in a survival action.
CO	$250,000, but may be increased to $500,000 if clear and convincing evidence. Co § 13-21-102.5.
FL	Punitive damages capped only. Three times the amount of compensatory damages, or the sum of $500,000. FL St § 768.73.
GA	Punitive damages capped at $250,000. GA St § 51-12-5.1.
HI	Non-economic damages capped at $375,000. HI § 663-8.7.
ID	Non-economic damages limited to $400,000 with certain exceptions. ID § 6-1603.
IL	No limits.
IN	Loss of consortium capped at $300,000. IN St § 34-23-1-2.
IA	No limits.
KS	Non-economic damages capped at $250,000. Punitive damages are capped as well. KS § 60-19a02.
ME	Loss of consortium limited to $400,000. ME St tit 18-A § 2-804.
MD	Non-economic damages limited to $500,000. MD § 11-108.

MO	No limits.
NH	Loss of consortium limited to $150,000. NH St § 556:12.
NJ	Damages are restricted to pecuniary losses. NJ St 2A:31-5.
OH	No limits.
OR	Non-economic damages limited to $500,000. OR § 18.560.
SC	Unlimited.
TX	Punitive damages capped at two times the amount of economic damages; plus an amount equal to any non-economic damages, not to exceed $750,000; or $200,000, whichever is greater. TX St § 41.008.
WA	Based on WA § 4.56.250, which requires calculation.
WI	$500,000 per event for a deceased minor, $350,000 per event for a deceased adult, for loss of society and companionship. WI St § 895.04.

*See "Focus Group Testing of Damages: Why do it, What are you really testing, and how to get it done" by J. Laffey, E. Meier, of Whyte, Hirschboock, Dudek, S.C., Milwaukee, WI, published in Transportation Megaconference IV, 2003, for complete table of National Liability Limits.

Likewise, the status of joint and several liability in a given state, can also greatly impact the value of a high exposure case. (See Table 3)

Table 3**

JURISDICTION	STATUS
AL	J&S liability.
AK	No J&S liability.
AZ	No J&S liability, unless acted in concert, or if hazardous wastes or waste disposal sites were involved. AZ St § 12.2506A.
AR	J&S liability.

CA	J&S liability for economic damages. None for non-economic damages.
CO	No J&S liability unless conspiracy involved.
CT	No J&S liability.
DE	J&S liability.
FL	No J&S liability except for economic damages with certain exceptions. FL St § 768.81.
GA	J&S liability if plaintiff without blame. If plaintiff is partially to blame, no J&S liability. GA St § 51-12-33.
HI	J&S liability.
ID	No J&S liability with limited exceptions. ID St § 6-803.
IL	Partial J&S liability. A defendant less than 25% to blame is not J&S liable. IL St Ch 735 § 5/2-1117.
IN	No J&S liability.
IA	No J&S liability, defendant less than 50% to blame. If more than 50% to blame J&S liable only of economic damages. IA St § 668.4.
KS	J&S liability does not exist when there is comparative negligence. KS § 60-258a.
KY	No J&S liability.
LA	No J&S liability without evidence of conspiracy. LA C.C. Art. § 2324.
ME	J&S liability.
MD	J&S liability.
MA	J&S liability.
MI	No J&S liability except in certain cases. MI § 600.6304.
MN	J&S liability, with certain limits for defendants less than 15% at fault. MN St § 604.02.
MS	For non-economic damages, a defendant's liability is several. A defendant whose fault is less than thirty percent (30%), shall be severally liable for economic losses, and a defendant determined to

	be greater than thirty percent (30%) liable shall be jointly and severally liable up to fifty percent (50%) to the plaintiff's damages.
MO	J&S liability.
MT	J&S liability if a party's negligence is determined to be greater than 50% of the combined negligence of all parties. May be jointly liable with another party if act in concert. J&S liability for defendants greater than 50% to blame. MT St 27-1-703.
NE	Liability of each defendant for economic damages is joint and several, except for non-economic damages. NE St § 25-21, 185.10.
NV	No J&S liability. NV St § 41.141.
NH	J&S liability if greater than 50% at fault. NH St § 507:7-e.
NJ	J&S liability if greater than 60% at fault. NJ St § 2A: 15-5.3.
NM	Abolished, with some exceptions. NM St § 41-3A-1.
NY	J&S liability. NY CPLR § 1401 et seq.
NC	J&S liability. NC St § 1B-1.
ND	No J&S liability. ND St 32-03.2-02.
OH	J&S liability. OH St § 2307.31.
OK	J&S liability. OK St tit 23 §§ 13-14.
OR	Limited J&S liability. OR § 18.485.
PA	Limited J&S liability. PA St tit 42 § 7102.
RI	J&S liability. RI St § 10-6-2 et seq.
SC	J&S liability. SC St §§ 15-38-20, 15-38-40.
SD	Limited J&S liability with caps. SD St § 15-8-15.1.
TN	J&S liability. TN St § 29-11-103.
TX	Limited J&S liability. TX St §§ 33.012,33.013.
UT	No J&S liability. UT §§ 78-27-28(3), 78-27-40(1).
VT	No J&S liability. VT title 12 § 1036.
VA	J&S liability. VA St § 8.01-50 et seq.

WA	Limited J&S liability. WA St 4.22.070.
WV	J&S liability. WV St § 55-7-13.
WI	J&S liability for those 51% at fault. WI St 895.045.
WY	No J&S liability. WY § 1-1-109(c).

**See J. Laffey, (2003).

The abolishment or modification of joint and several liability can greatly effect the exposure in a high value case, as in those states that have abolished or limited joint and several liability, a defendant is only responsible for his proportionate share of the blame for non-economic damages, and in some cases, even economic damages. Because in most high exposure cases non-economic damages will make up the lion's share of the award, it can significantly decrease one's exposure if other parties are also defendants, and there is no joint and several liability. One should be aware of the laws of joint and several liability in one's state and consider the status of the local jurisdiction in assessing the value of a high exposure case. Generally, the value of a high exposure case will be less when joint and several liability has been abolished or limited.

In line with discussing those statutory factors that assist in reducing exposure in a high value case, a word should be mentioned regarding seatbelt use. Very often, in a high exposure case, liability will be clear. However, damages can sometimes be mitigated, if it can be established that the decedent or plaintiff was not wearing a seatbelt. Currently, only ten states allow a significant reduction in damages due to the plaintiff's failure to wear a seatbelt.[xvi] The remainder of the states allow extremely limited reductions, or no reductions at all. Thus, the seatbelt defense might be useful if one is litigating in one of the minority of states that allows a virtually unlimited percentage of the plaintiff's damages, to be allocated to the plaintiff, based on the plaintiff's failure to wear his seatbelt. In the remainder of the country, however, in a catastrophic case, a seatbelt defense may be

of limited use to a defendant. While one should be mindful of the seatbelt defense, in a catastrophic case in most of the United States, it may not be a significant enough issue to greatly impact the assessment of the client's exposure, due to the caps in place on the reduction of the plaintiff's verdict, or the disallowance of this defense strategy.

I. Dealing with the Media

In a catastrophic high exposure case, one may find oneself dealing with pre-trial media publicity. Indeed, in my experience, it is not unusual for a plaintiff with a severely injured client to actively seek out media attention, doubtless in the hopes of influencing the pool of perspective jurors, and raising a case's value.

Dealings with the media are largely governed by each state's rules of ethics. As a general rule, an attorney cannot make extra judicial statements that a reasonable person would expect to be disseminated by means of public communication, if the lawyer knows or reasonably should know that it would have a substantial likelihood of materially prejudicing an adjudicative proceeding.[xvii] A lawyer may, however, generally make a statement to protect his client from the substantial undue prejudicial effect of recent publicity not initiated by the lawyer or the lawyer's client.[xviii] The statement generally must be limited only to that information necessary to mitigate the recent adverse publicity.

In the event one finds oneself in a high profile case, one should be very careful regarding what statements one issues to the media. Aside from running afoul of local bar rules, one also runs the risk of making ill-considered comments. Also, one should be careful, both pre-trial and post-trial, not to make any statements that might give the impression that one's client is unsympathetic or unconcerned with the claims raised by the plaintiff.[xix] However, one should not, out of fear of

responding, let prejudicial or unfair statements against one's client go without response. It is a delicate balancing act, however, when handled with tact and diplomacy, a defense attorney dealing with the media can not only create a good impression of his client in the minds of the local community, but also deflect any prejudicial remarks made by opposing counsel.

Generally, I prefer not to speak to the media. I believe the risk is not worth the reward in a civil case. If required to, however, I would suggest one's statements to the media be short and concise. I do not recommend speech making. Short statements will reduce the risk of running afoul of the code of ethics, or saying something prejudicial to your client.

Conclusion

In sum, assessing and defending a high exposure case involves many elements. Pre-suit, one must determine as much information as one can regarding the circumstances surrounding the collision, the plaintiff and the plaintiff's claims for damages, as well as one's own client. One should also consider other ancillary issues, such as the plaintiff's attorney's stake in a particular matter, and what amounts that will be deducted from the settlement proceeds, in assessing the likely range within which a plaintiff will accept a settlement offer, should one be appropriate. Moreover, one should not succumb to any pressure by excess carriers to over-value a case simply to assist in settling it within the range of a given insurance policy or SIR unless it is reasonable to do so. One should also, however, be equally careful not to under-value a case.

Furthermore, any lawsuits involving catastrophic injuries filed against one's client should be removed to federal court if possible. All of the above measures, coupled with retaining the proper experts as early as possible to look at the vehicle and scene, interviewing as many people as possible who may have knowledge regarding the accident, as early as possible, and assessing what damages

are recoverable for a given claim within your jurisdiction, will have the overall effect of reducing the exposure to your client, and providing one's client the ability to accurately assess the risk.

Lastly, one should be aware of new tort reforms and all available defenses in one's jurisdiction, in assessing the true value of a case.

End Notes

i. Removal based on a claim or right arising under the U.S. Constitution, or treatise or laws of the United States, is not addressed, as it is unlikely such a basis for removal will be encountered in the defense of a trucking company in a personal injury or wrongful death suit. While such a basis might apply in a case involving an airliner, pursuant to the Warsaw Convention, this section focuses on diversity jurisdiction. For cases expounding upon diversity jurisdiction, See *Wisconsin Dept. Of Correction v. Schact*, 524 U.S. 381, 118 S.Ct. 2047, 141 L.Ed.2d 364 (1998); *Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 117 S.Ct. 467, 136 L.Ed.2d 437 (1996).

ii. *Chicago, Rock Island R.R. v. Martin*, 128 U.S. 245, 20 S.Ct. 854 (1900); *J.D. Bradley v. Maryland Cas. Co.*, 382 F.2d 415 (8th Cir. 1967); *Lapoint v. Mid-Atlantic Settlement Svc., Inc.*, 256 F.Supp. 2d 1 (D.D.C. 2003).

iii. See e.g., *Town of Freedom Okl. v. Muskogee Bridge Co., Inc.*, 466 F.Supp. 75 (N.D. Okla. 1978); *Crooke v. R. J. Reynolds Tobacco Co.*, 978 F.Supp. 1482 (N.D. Ga. 1997). Also, one should consider whether the party, which defeats diversity jurisdiction is only a nominal party.

iv. Be advised that one must undertake early settlement discussions very delicately, because if the plaintiff's attorney even suspects there is "chum in the water," then he or she will likely press the attack with renewed vigor. One must be careful, in early settlement negotiations, not to give the impression of vulnerability. Also, bear in mind, a plaintiff's attorney who recommends settlement with little meaningful discovery, is arguably committing malpractice. See e.g., *Collins v. Perrine*, 108 N.M. 714, 778 P.2d 912 (1989). Thus, against diligent plaintiff's counsel, early settlements with limited discovery may be rare.

v. The attorney, however, should always advise the client if a suit involves damages in excess of any policy limits, and should advise the client to seek independent counsel with regard to the possibility of an excess judgment. See e.g., *Hartford Accident and Indemnity Co. v. Foster*, 528 So.2d 255 (Miss. 1988). The lawyer should also be aware that he may be sued for legal malpractice by the insurance company that has retained him. See also, *American Casualty Co. v. O'Flaherty*, 57 Cal. App. 4th 1070, 67 Cal. Rptr.2d 539 (1997); But See, *American*

Employers Ins. v. Medical Protective Company, 165 Mich. App. 657, 419 N.W. 2d 447 (1988) (excess insurer could not sue trial attorney for malpractice as attorney owed no duty to excess insurer).

vi. See *Continental Casualty Co. v. Reserve Insurance Company*, 307 Minn. 5, 238 N.W. 2d 862 (1976); *Northwest Mutual Ins. Co. v. Farmers Ins. Group*, 76 Cal. App. 1031, 143 Cal. Rptr. 415 (1978); *General Accident Fire & Life Assurance v. American Casualty Company*, 390 So.2d 761 (Fla. 3rd DCA 1980); *Hartford v. Aetna Casualty Accident and Indemnity Co.*, 164 Ariz. 286, 792 P.2d 749 (1990); *Schal Bovis, Inc. v. Casualty Insurance Company*, 314 Ill. App. 3rd 562, 732 N.E. 2d 1082 (2000).

vii. See note 5, supra.

viii. See *P. Dazon* "The Effects of Tort Reforms on the Frequency and Severity of Medical Malpractice Claims: A Summary of Research Results." (1986); See also *R. Birnholtz*: "The Validity and Propriety of Contingency Fee Controls." (1990) UCLA Law Review. Citing, *Dazon*, Birnholtz notes that the imposition of limits on contingency fees charged by plaintiff's lawyers lowered average settlements by 9%, and reduced the percentage of cases reaching trial to verdict from 6.1% to 4.6%, in medical malpractice cases.

ix. Biological children, be they legitimate or illegitimate, as well as adopted children, may bring a claim for wrongful death. See, *Chatelain v. Department of Transportation*, 586 So.2d 1373 (La. 1991). Illegitimate children, however, may face additional hurdles by having to prove, in a timely fashion, that they are the biological offspring of the decedent. Additionally, fathers who have abandoned their offspring may be barred from asserting a wrongful death claim, or sharing in any proceeds. See In Re *Estate of Brennan*, 565 N.Y. S.2d 277, 169 A.D.2d 1000, (Ny 1991); *Williford v. Williford*, 288 N.C. 506, 219 S.E.2d 220, (1975); *Adkison v. Adkison*, 286 Ala. 306, 239 So.2d 562 (Ala. 1970). Fla. Stat. § 768.18; *Postema v. Postema*, 118 Wash.App. 185, 72 P.3d 1122 (2003); *Perry v. Williams*, 133 N.M. 844, 70 P.3d 1283 (2003); *Kimbler v. Arms*, 102 S.W. 3rd 517 (Ky. 2003).

Also, bear in mind that persons acting in loco parents may bring a claim for the death of minor in some cases. See, *Miller v. Boden,* 103 Ohio. App. 73, 658 N.E. 809 (1995).

x. See *Transparency International, Inc.* Global Corruption Report 2003, (Profile Books, 2003)(Outlines perceived official corruption in various countries).

xi. See Dr. Rushing, L. Lane and E. Bosman Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings, Vol. 70, Defense Counsel Journal, No. 3 (July 2003).

xii. For a detailed discussion of which courts do not permit such arguments, See *Id.*, pp. 381-887.

xiii. See Ibid.

xiv. Appeals to the conscience of the community are generally not permitted. See also, *Kiwanis Club of Little Havana v. Kalafe*, 723 So.2d 838 (Fla. 3rd DCA 1999)

xv. See also, *Gray Drugfair, Inc. v. Heller*, 478 So.2d 1159 (Fla. 3rd DCA 1985); *Caribe Tugboat Co. v. Duffy*, 427 So.2d 227 (Fla. 1st DCA 1983).

xvi. See *Hutchins v. Schwartz*, 724 P.2d 1194 (Alaska 1986)(failure to use a seatbelt may reduce damages); *Law v. Superior Court of Ariz*., 755 P.2d 1135 (Ariz. 1988)(non-use of seatbelt is comparative fault); *Housley v. Godinea*, 6 Cal. Rptr 2d 111 (Cal. 1992)(non seatbelt use may be contributory negligence); Colorado Statutes Sec. 42-4-237 (1985)(provides for unlimited reduction of pain and suffering due to failure to use seatbelt); Florida Statutes Sec. 316.614 (provides for reduction of damages pursuant to jury's finding of percentage of comparative fault of the plaintiff); *Laughlin v. Lamkin*, 979 S.W. 121 (Ky. 1998)(same scheme as Florida's); *Waterson v. General Motors Corp*., 544 A.2d 357 (N.J. 1988)(reduction of damages by percentage of comparative fault); New York Veh x T. AAF Sec. 1229.C (non-use of seatbelt can be considered in mitigation of damages); *Smith v. Goodyear Tires and Rubber Co.*, 600 F.Supp. 1561 (Vt. 1985)(non-use of seatbelt could be considered as comparative negligence).

xvii. See R. Rotunda, "Dealing with the Media: Ethical, Constitutional, and Practical Parameters" 84 ILBJ 614 (Dec. 1996)(citing the ABA model rule.) ABA Model Rule 3.6.

xviii. See, *Id.*

xix. For a complete discussion of concerns when dealing with the media, See J. Gladstone, "Trial By Media: Managing News Coverage of Your Case, Your Client, and Yourself" 43 Orange County Lawyer 22 (Sep. 2001)

APPENDIX

IN THE CIRCUIT COURT OF THE
16TH JUDICIAL CIRCUIT IN AND
FOR MONROE COUNTY, FLORIDA

CASE NO.: CAM 01 202

DERKE SNODGRASS and
TIFFANY WILLIAMS, his wife,

Plaintiffs,

vs.

SYNAGRO OF FLORIDA- A&J, INC.

and KELLY WAYNE NANCE,

Defendants.
_____/

DEFENDANTS' MOTION IN LIMINE TO PREVENT PLAINTIFFS' COUNSEL FROM COMMENTING OR SUGGESTING TO THE JURY A PER DIEM OR LUMP SUM FIGURE RELATED TO THE PLAINTIFFS' NON-ECONOMIC DAMAGES

COME NOW the Defendants, SYNAGRO OF FLORIDA- A&J, INC. ("SYNAGRO") and KELLY WAYNE NANCE, by and through undersigned counsel, pursuant to Florida Rules of Civil Procedure, hereby move this Court in limine for an order preventing Plaintiffs' Counsel From Commenting or Suggesting to the Jury a Per Diem or Lump Sum Figure Related to the Plaintiffs' Non-Economic Damages, and as grounds in support therefore, state as follows:

1. The Defendants believe that during trial or closing arguments Plaintiffs' counsel will suggest to the jury either a per diem or lump sum figure, or both related to the Plaintiffs' non-economic damages. The Defendants would be severely prejudiced by Plaintiffs' counsel suggesting a number related to the Plaintiffs' non-economic damages, especially since liability has already been determined against NANCE and SYNAGRO and no one else.

2. No objective tests can assess the severity of Mr. Snodgrass' non-economic losses, and no satisfactory measure can translate this type of harm into dollars. However, Plaintiffs' counsel, without a factual basis for doing so, will suggest either a lump sum or per diem amount of non-economic damages to a jury. Once the jury has heard this suggestion, the Defendants are prejudiced and defense counsel has no effective way to "un-ring the bell."

3. An argument seeking a specific monetary amount for non-economic damages by its very nature is based solely on the opinion of Plaintiffs' counsel and risks unfairly swaying the jury

by "anchoring the jurors' expectations of a fair award at a place set by counsel, rather than by the evidence."

4. It is a longstanding rule that awards for non-monetary damages such as loss of society, care, protection, and pain and suffering are left to the sound discretion of the jury. Suggesting a lump sum amount does not assist the jury; it manipulates the jury.

5. Furthermore, with regard to per diem arguments:

a. The Defendants will be prejudiced by being placed in a position of attempting

rebut arguments having no basis in evidence.

b. Per diem arguments may produce an astronomical product if a per diem approach to pain and suffering is allowed.

c. Per diem arguments falsely assume that pain is continual and uniform when, in fact, it can be intermittent.

d. Because the per diem is being estimated into the future, there is no allowance for a discount for the present value of the total award.

6. In Florida, the propriety of making per diem arguments rests within the sound discretion of the trial court. *Ratner v. Arrington*, 111 So.2d 82 (Fla. 3rd DCA 1959); *see also Perdue v. Watson*, 144 So.2d 840 (Fla. 2nd DCA 1962). The Florida courts have held that a per diem amount approach in calculating damages for pain and suffering of the injured Plaintiff before a jury in closing argument must be supported by some evidence of established or calculable monetary value. *Ratner.* If the trial court decides to permit a per diem argument on damages, it may caution the jury that the figures used therein are not to be considered as evidence. *Daniel v. Prysi*, 432 So.2d 174

(Fla. 2nd DCA 1983). While an attorney is given broad latitude to it in closing arguments, his remarks must be confined to the evidence, and the issues and inferences that can be drawn from that evidence. *Lingle v. Dion*, 776 So.2d 1073 (Fla. 4th DCA 2001). Permitting the Plaintiffs to utilize the per diem argument and demonstrative charts for the first time in closing argument and refusing to grant the Defendants' request to respond to such an argument constitutes reversible error. *Heddendorf v. Joyce*, 178 So.2d 126 (Fla. 2nd DCA 1965).

7. Defendants further submit any instruction by the court to the jury to disregard per diem or lump sum arguments is insufficient to dispel its influence on the jurors.

8. Furthermore, Plaintiffs do not have an expert economist in this cause, nor have they produced or shown the Defendants any evidence or exhibits that they intend to use at trial that may be introduced to the jury on this issue. To allow the Plaintiffs to surprise the Defendants at trial with calculations as to the Plaintiffs' non-economic damages without having first established that those numbers are based on admissible evidence would be improper and would impose a prejudice on the Defendants.

WHEREFORE, the Defendants, SYNAGRO OF FLORIDA- A&J, INC. and KELLY WAYNE NANCE, respectfully request this Honorable Court to enter order preventing the Plaintiffs' counsel from commenting or suggesting to the jury a per diem or lump sum figure related to the Plaintiffs' non-economic damages, and for further and other relief that this court deems just and proper.

CERTIFICATE OF SERVICE

WE HEREBY certify that a true and correct copy was telefaxed and mailed to: Robert B. Boyers, Leesfield Leighton Rubio Mahfood & Boyers, P.A., 2350 South Dixie Highway, Miami, Florida 33133, on this ____ day of July, 2003.

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