Ethical Considerations in Personal Injury Settlements and Lien Resolution

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This article discusses what every personal injury trial lawyer in New York State must be aware of as he or she prepares for pre-trial mediation or the first settlement conference. Additionally, important ethical issues must be considered in connection with resolving existing liens and claims. For the most part, the ethical considerations discussed apply equally to both plaintiff and defense attorneys.

Many of the items one often thinks of as “trial” preparation apply with equal importance to preparing for mediation or preparing for the very first settlement conference. Among other things, it is incumbent upon both plaintiff and defense counsel to understand the judgment value of every case prior to engaging in settlement negotiations. Being prepared, so as to best represent your client, requires proper preparation prior to making the first demand or counteroffer. When it comes to representing your client, having one’s head in the sand simply will not do at any stage of the game.

PREPARATION FOR MEDIATION OR SETTLEMENT DISCUSSIONS

As every personal injury lawyer knows, the New York legislature enacted a periodic payment of judgments statute in 1985 for medical malpractice cases.1 In 1986 an essentially identical statute became law for all other types of personal injury suits.2 These statutes drastically altered the method of calculating and paying damages and converted every verdict of $250,000.00 or more in future damages into a Periodic Judgment where the plaintiff will be paid most of the future damage award in periodic payments over a period of years (as determined by the trier of fact) pursuant to CPLR Article 50-A or 50-B.3

For purposes of this article, we will focus on CPLR Art. 50-B calculations only, recognizing that a different set of calculations is now required under new CPLR Art. 50-A which was passed in June, 2003 and effective on and after July 26, 2003.4

Significantly, this paper is not about periodic judgment calculations, but rather about ethical considerations in such cases.

UNDERSTANDING PERIODIC JUDGMENT VALUE

Fundamental to every attorney’s representation of his/her client is the attorney’s competence to handle the legal matter presented. Indeed, Rule 1.1 of the New York Rules of Professional Conduct5 provides as follows:

Rule 1.1: Competence
(a) A lawyer should provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.
(b) A lawyer shall not handle a legal matter that the lawyer knows or should know that the lawyer is not competent to handle, without associating with a lawyer who is competent to handle it.
(c) A lawyer shall not intentionally:
   (1) fail to seek the objectives of the client through reasonably available means permitted by law and these Rules; or
   (2) prejudice or damage the client during the course of the representation except as permitted or required by these Rules.

Taken in the context of an attorney’s preparation for mediation and/or settlement discussions, every defense attorney must know, at the very least, what the defendant’s (or carrier’s) exposure is, and every plaintiff attorney must know what the real judgment value of plaintiff’s case is. In other words, both sides must know the true value of the case prior to engaging in settlement discussions in order to comply with the “preparation” requirement of Rule 1.1(a); the “objectives” requirement of subsection (c) (1); and the “prejudice or damage” requirement of (c)(2).

Under New York’s Periodic Judgment statutes, as the Court of Appeals stated in Desiderio v. Ochs, 100 N.Y.2d 159 (2003), the plaintiff’s award pursuant to a periodic judgment under Art. 50-A (old law) or Art. 50-B may greatly exceed even the jury’s verdict. “. . . [B]ecause of the catastrophic nature of plaintiff’s injuries, coupled with a [long] projected life expectancy . . . there is a potential dramatic discrepancy between the jury award and an ultimate recovery, assuming plaintiff’s survival for . . . [the projected life expectancy].”6

1. N.Y. Statute 250,000.00
2. N.Y. Statute 250,000.00
3. N.Y. Statute 250,000.00
4. N.Y. Statute 250,000.00
5. N.Y. Statute 250,000.00
6. N.Y. Statute 250,000.00
The Desiderio decision focused on nursing care, one of the major elements of the jury’s future damage award, to illustrate this point.

The expert evidence at trial was that plaintiff’s nursing care could cost as much as $262,800 in the first year, with an annual ‘growth rate’ of 3.3% being the national average. Thus, $262,800 compounding at a rate of 3.33% for plaintiff’s life expectancy of 55 years equals the jury’s figure of $40 million. By contrast, the calculation urged by the plaintiff (for inclusion in the periodic judgment) and applied by the courts below yields a first year payment of $635,594 and compounds that payment by four percent per year, far in excess of the amount required by the evidence, but in compliance with the statutory formula and our precedents.7 [Emphasis added.]

An attorney who does not know the judgment value of his/her case prior to settlement negotiations may be considered “unprepared” for those negotiations, especially when CPLR Art. 50-B calculations are readily available without cost.8

Using the nursing home damage projection testified to at trial in Desiderio, as our hypothetical, i.e. $262,800 per year for 55 years growing at an annual rate of 3.335% and discounted by 4.21% [the current (June 21, 2011) yield of the 30 year U.S. Treasury Bond], produces a present value amount of $11,614,471.

Doing the same present value calculation for the periodic judgment award of $635,593 per year for 55 years, payable in monthly installments in advance as required by the CPLR, increasing by 4% compounded annually commencing with the second year, results in a present value of $32,503,752.

Focusing now on just this one significant element of damages, assume you are the plaintiff’s attorney handling a case where your experts are prepared to testify that the future cost of plaintiff’s nursing care is $262,800 per year for 55 years (plaintiff’s life expectancy); that the inflation rate for such damages is 3.335%; and that the present value of such damages is $11,614,471. Assume further that trial is three months away and the judge has asked the parties to attempt to settle via mediation.

Still focusing on just this one item of future damages only, what does plaintiff demand?

- $11,614,471
- $32,503,752

On the defense side of our hypothetical case, what does defense counsel advise defendant its exposure is?

- $11,614,471
- $32,503,752

Will either plaintiff’s or defendant’s counsel be fully prepared and in compliance with Rule 1.1 by attending mediation without first learning the periodic judgment value of the case?

Will plaintiff’s counsel be in compliance with the “preparation” requirement of Rule 1.1 (a) if he/she makes a demand without first learning the periodic judgment value?

If defense counsel has not obtained an expert’s analysis and advice and is, therefore, uninformed about the periodic judgment value of plaintiff’s damages, will it be possible to properly advise defendant of its exposure, a necessary ingredient to defendant’s ability to make a good faith and reasonable counteroffer?

Framed this way, the answers seem obvious.

Let’s assume defendant’s experts (life care planner and economist) are prepared to testify that 100% of plaintiff’s future nursing expense can be provided for $131,400 per year for the same duration and that the same inflation rate of 3.335% would apply. The present value (using the same discount rate of 4.21%) of plaintiff’s future nursing care damages would be $5,807,235.50 according to defendant’s experts.

But must defense counsel learn, by reasonable inquiry and by hiring a CPLR 50-B expert, that the periodic judgment value of defendant’s experts’ anticipated trial testimony is $16,251,876?

The answer is equally obvious.

Let’s now look at the second sentence of Rule 1.1(a): “Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” One must ask at least three questions:

1. Is it “reasonably necessary” for the attorneys on both sides to educate themselves, prior to mediation, about the periodic judgment value of every case?
2. Will an attorney on either side who attends mediation or a settlement conference without learning the periodic judgment value of
his/her case satisfy the “legal knowledge” requirement Rule 1.1(a)?

3. Will the “thoroughness” requirement be satisfied without such inquiry?

EXPANDED HYPOTHETICAL ILLUSTRATION

Expanding on our hypothetical will illustrate this point. The future nursing home damages described above will again be used as the only element of damages for the purposes of our hypothetical discussion.

Assume Plaintiff (P), represented by attorney Darn Good (DG), won a summary judgment motion on liability in September 2010 establishing 100% liability against defendant (D), represented by attorney Just Fight (JF) who was retained by D’s New York State domiciled insurer (NYSDI). Trial on damages was scheduled for mid-December 2010 and the Supreme Court justice presiding, Honorable Extremely Good (EG), requested the parties attend mediation to try to resolve the case. Previously, both sides’ experts’ reports were exchanged, depositions conducted, and each side knew the anticipated damage trial testimony of the other, i.e. P’s experts would testify to the $282,400 annual cost of nursing care for 55 years growing at 3.335% and D’s experts would testify to one-half that annual amount for an equal duration and the same inflation rate.

Plaintiff’s counsel, DG, engaged the services of a company well known and respected on both sides of the proverbial aisle for its skill and expertise in doing the calculations required by CPLR Art. 50-B and approached mediation by demanding the periodic judgment value of the case, $32,503,752.

Plaintiff’s counsel, DG, also asked his periodic judgment experts to calculate the periodic judgment value of defendant’s experts’ anticipated testimony. As shown above, the periodic judgment value (exposure) of defendant’s experts’ anticipated trial testimony (assuming the jury accepts 100% of the defense experts’ testimony and rejects 100% of plaintiff’s experts’ testimony) came to $16,251,876.

At mediation P’s counsel, DG, joined by his CPLR 50-B expert, explained the basis for P’s $32,503,752 demand.

D’s counsel, JF, offered $8,000,000 to settle.

P’s counsel, DG, then explained to the mediator and to JF that the periodic judgment value (exposure) of D’s own experts’ testimony was $16,251,876 and that an offer of half that amount, in a case where 100% liability had previously been established, was clearly insufficient.

Notwithstanding the foregoing, JF refused to increase NYSDI’s offer of $8,000,000 even though DG reduced P’s demand to $21,500,000. Needless to say, the case did not settle.

Several weeks later, and on the eve of the damage trial, Justice EG once again attempted to achieve settlement. The scenario described above at mediation repeated itself, with one major difference. DG, on behalf of P, made his “bottom line” demand, $16,000,000. JF rejected this demand, and refused to increase NYSDI’s $8,000,000 offer.

Approximately two weeks later the jury awarded 100% of what plaintiff’s experts testified to having a periodic judgment value of $32,503,752.

ANALYSIS UNDER RULE 1.1

In our expanded hypothetical, plaintiff’s counsel clearly demonstrated the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation of plaintiff at mediation and the subsequent pre-trial settlement conference. By obtaining a comprehensive CPLR Art. 50-B Periodic Judgment analysis prior to mediation, plaintiff’s counsel was able to convincingly demonstrate to the mediator and the court the bona fides of plaintiff’s demand. Significantly, by having a 50-B analysis prepared which analyzed defendants’ experts’ testimony, plaintiff’s counsel was able to demonstrate the reasonableness of his “bottom line.”

What about defense counsel’s approach in our hypothetical?

On the one hand, if our hypothetical defense attorney did not independently educate himself about the periodic judgment value of the case, and was only aware of the present value of both sets of experts’ expected trial testimony, but not the periodic judgment value of same, then defense counsel would seem to have failed the “preparation” requirement of Rule 1.1(a).

On the other hand, assume our hypothetical defense attorney was fully informed, by his own expert, of the periodic judgment value of both sets of experts’ testimony, but nevertheless steadfastly refused to increase defendant’s offer, even after plaintiff reduced his demand to what defendant’s experts would try to prove during the damage trial. One must conclude,
under such assumed circumstances, that one of two things happened:

1. Defendant recognized that under its best case scenario it would lose $16M, but nevertheless refused to grant more than $8M in authority to its counsel; or
2. Defense counsel did not fully inform defendant of the certain range of loss at trial, to wit, $16M to $32M.

If conclusion number 1 is accurate, defense counsel would have ethically done his job, but the hypothetical defendant’s decision maker would appear to have acted irrationally. Indeed, Rule 1.2(a) of the New York Rules of Professional Conduct provides in pertinent part that, “... a lawyer shall abide by a client’s decisions concerning the objectives of representation and, as required by Rule 1.4, shall consult with the client as to the means by which they are to be pursued. A lawyer shall abide by a client’s decision whether to settle a matter.”

Whether defendant’s decision was rational or irrational, defense counsel under conclusion 1 above would have acted within the Rules of Professional Conduct.

If, however, conclusion 2 is applicable, it appears that by failing to educate his client, defense counsel may have failed to meet the “objectives” requirement of Rule 1.1(c)(1) and perhaps the “prejudice or damage” requirement of Rule 1.1(c)(2).

In addition, Rule 1.4 is applicable to our hypothetical facts under conclusion 2 above.

Rule 1.4: Communication

a. A lawyer shall:

(1) promptly inform the client of:

(i) any decision or circumstance with respect to which the client’s informed consent, as defined in Rule 1.0(j), is required by these Rules;
(ii) any information required by court rule or other law to be communicated to a client; and
(iii) material developments in the matter including settlement or plea offers.

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(2) reasonably consult with the client about the means by which the client’s objectives are to be accomplished;

(3) keep the client reasonably informed about the status of the matter;

(4) promptly comply with a client’s reasonable requests for information; and

(5) consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by these Rules or other law.

b. A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Without belaboring the point, most readers will likely conclude, as we do, that defense counsel who knew the periodic judgment value of both sets of experts’ testimony and failed to so inform defendant (or defendant’s large case committee where in-house claims’ counsel often makes decisions on behalf of a carrier) will likely have violated Rule 1.4(a)(1)(i).9

The New York Rules of Professional Conduct are accompanied by “Comments” after each Rule.10 Comment 5 for Rule 1.4(b) states, in pertinent part as follows:

Explaining Matters:
[5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense . . .

Is there any question that an attorney who is himself
or herself informed of the range (minimum and maximum) of the virtually certain damage award, as in our hypothetical, but fails nevertheless to educate his client so as to allow the client to make an informed decision regarding a settlement opportunity, has failed in his/her professional responsibility under Rule 1.4(b)?

ATTORNEYS’ RESPONSIBILITY IN MEDICARE LIEN RESOLUTION

As every personal injury trial lawyer is by now undoubtedly aware, over the past several years Medicare has become increasingly aggressive in the pursuit and enforcement of its statutory right to reimbursement for past conditional payments expended to cover treatment of a beneficiary’s tort-related injuries. Changes in protocol and regulations continually develop. These developments often occur without notice to the legal profession, thereby requiring lawyers to exercise constant vigilance in monitoring this evolutionary process. As a consequence, Medicare lien resolution is no longer an intuitive, straightforward aspect of case file management. The ever-increasing complexities of the specific procedures are in fact occasionally misinterpreted by the government-appointed contractors tasked with their implementation.

Not surprisingly, all of these recent advancements resulted in the creation of a cottage industry of specialty firms that concentrate solely on Medicare compliance and lien resolution. A corresponding amplification of the ethical considerations surrounding the outsourcing of this work has likewise materialized. At the outset, several basic Rules of Professional Conduct demand attention when determining whether to hire an outside entity specializing in Medicare lien resolution. And if a decision is made to hire an outside “specialist,” every lawyer must be cognizant of the applicable ethical considerations.

• Does one hire a non-lawyer to do this work?
• Must the trial lawyer supervise the non-lawyer handling lien resolution issues for the lawyer’s client?
• What if the non-lawyer is an independent contractor who is neither supervised by a lawyer, nor employed by a law firm?
• Do some of the lien resolution tasks constitute legal work?
• Do any so-called “specialists” in the lien resolution field engage in the practice of law without a license?
• Is it ethical for a lawyer to engage the services of such a firm?

The comments to Rule 1.1 make it clear to focus, at least in part, on what is at stake.

Comment[5]: Thoroughness and Preparation.
Competent handling of a particular matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; . . .[Emphasis added].

So the question begged then becomes: What is at stake when it comes to proper and timely resolution of the potential or actual Medicare lien?

The answer is that a very real possibility exists that everything the lawyer strived to achieve in successful litigation resulting in a favorable judgment and/or settlement can be placed in jeopardy by the mishandling of the conditional payment component of a file.

Unfortunately, it is not altogether uncommon for a highly competent and seasoned trial lawyer to obtain a favorable judgment or settle a case only to find out thereafter that Medicare asserts a valid statutory right to consume the entirety of the proceeds. The only available remedial measure left at that point may be to file a Request for a Waiver or, in the alternative, a Request for a Compromise. However, CMS has established defined criteria for the granting of either request. Even in cases where the prerequisites for waiver or compromise are fulfilled, Medicare remains predictably and persistently reluctant to acquiesce.

Unambiguously charged with the responsibility of taking into consideration Medicare’s possible reimbursement interests in each lawsuit, every personal injury attorney remains statutorily accountable. Consequently, the lawyer must weigh the proposed Medicare conditional payment factor against the decision to go forward with litigation. An inquiry must be conducted as to whether pursuit of legal recourse best serves the interests of the client or that of Medicare. To be certain, an attorney must exercise caution and be cognizant of a potential violation of New York’s ethics rules before proceeding with a case without a clearly defined picture of the client’s Medicare eligibility and traceable lien status, obtaining a settlement or judgment, and assessing a fee for services rendered that ultimately protects
only the interests of Medicare.

A LAWYER’S WORKLOAD MUST BE CONTROLLED SO THAT EACH MATTER CAN BE HANDLED DILIGENTLY AND PROMPTLY

Rule 1.3: Diligence

(a) A lawyer shall act with reasonable diligence and promptness in representing a client.

(b) A lawyer shall not neglect a legal matter entrusted to the lawyer.

(c) A lawyer shall not intentionally fail to carry out a contract of employment entered into with a client for professional services, but the lawyer may withdraw as permitted under these Rules.

Comment [2]: A lawyer’s work load must be controlled so that each matter can be handled diligently and promptly. Lawyers are encouraged to adopt and follow effective office procedures and systems; neglect may occur when such arrangements are not in place or are ineffective. [Emphasis added.]

Comment [3]: Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness. . . [Emphasis added.]

Successful interaction with the Medicare contractors requires a great deal of determination and patience. More importantly, as Abraham Lincoln succinctly stated, “A lawyer’s time is his stock in trade.” Nowhere is this more applicable than in dealing with the Medicare Secondary Payer Recovery Contractor (MSPRC). Communication with the MSPRC typically consumes a disproportionate amount of time when compared to what is actually accomplished during the discourse. Daily average time on hold with the MSPRC per call usually varies from thirty-five to seventy-five minutes before connecting with a representative. Couple this phenomenon with the amount of time it takes to, among other things, analyze a lengthy conditional payment summary, file a dispute, make follow up calls to check status, file additional requests, prepare and send settlement documents and request a final demand. All of these time consuming factors, as well as myriad others too numerous to list, play key roles in the determination of whether to outsource lien resolution work or to keep the matter in-house.

Under most circumstances, the “do-it-yourself” approach to file management works well for the attorney and serves the client’s best interest. If the attorney and staff possess the resources to effectively accomplish an advantageous lien resolution result for every case file, then no ethical efficient-use-of-time issues present themselves.

It becomes a different matter altogether, however, when an inordinate amount of the lawyer’s time and/or that of the staff is spent trying to resolve a lien issue, perhaps unsuccessfully. Ethically, it is permissible for an attorney to retain a specialty law firm to resolve a Medicare lien issue, and the fee may be charged as a disbursement against the total settlement proceeds provided that certain conditions are met. (See NYCLA Professional Ethics Committee Ethics Opinion 739, July 10, 2008.)

This ethics opinion is not to be taken lightly, or too broadly. It deals primarily with the ethical questions involved in a personal injury trial lawyer referring lien resolution services to other lawyers who specialize in Medicare, Medicaid or private healthcare lien resolution.11

We get into a virtual minefield of ethical issues when this type of work is referred to a non-lawyer who is neither an employee of the “referring” lawyer, nor directly and closely supervised and directed in his everyday work by the “referring” lawyer (as a paralegal employee would be).

Certainly, any competent attorney possesses the ability to learn the nuances of Medicare lien resolution and eventually become adept at handling these matters. The issue, however, involves not aptitude, but fortitude. Suffice it to say that no trial lawyer looks forward to the prospect of immersing himself or herself in the process of Medicare lien negotiation.

If an attorney decides to outsource lien resolution work, it must be borne in mind that the referring lawyer remains responsible for the overall work product. This is the case even when the lien resolution tasks are referred to another lawyer. But
what about non-lawyers?

There does not seem to be any issue having an in-house non-lawyer, such as a paralegal, handle lien resolution work under the trial lawyer’s direct supervision.

A LAWYER WITH DIRECT SUPERVISORY AUTHORITY OVER THE WORK OF NON-LAWYERS MUST ADEQUATELY SUPERVISE THOSE NONLAWYERS

Rule 5.3: Lawyer's Responsibility for Conduct of Nonlawyers

(a) A law firm shall ensure that the work of nonlawyers who work for the firm is adequately supervised, as appropriate. A lawyer with direct supervisory authority over a nonlawyer shall adequately supervise the work of the nonlawyer, as appropriate. In either case, the degree of supervision required is that which is reasonable under the circumstances, taking into account factors such as the experience of the person whose work is being supervised, the amount of work involved in a particular matter and the likelihood that ethical problems might arise in the course of working on the matter.

(b) A lawyer shall be responsible for conduct of a nonlawyer employed or retained by or associated with the lawyer that would be a violation of these Rules if engaged in by a lawyer, if:

(1) the lawyer orders or directs the specific conduct or, with knowledge of the specific conduct, ratifies it; or

(2) the lawyer is a partner in a law firm or is a lawyer who individually or together with other lawyers possesses comparable managerial responsibility in a law firm in which the nonlawyer is employed or is a lawyer who has supervisory authority over the nonlawyer; and

(i) knows of such conduct at a time when it could be prevented or its consequences avoided or mitigated but fails to take reasonable remedial action; or

(ii) in the exercise of reasonable management or supervisory authority should have known of the conduct so that reasonable remedial action could have been taken at a time when the consequences of the conduct could have been avoided or mitigated.

Comment [1] This Rule requires a law firm to ensure that work of nonlawyers is appropriately supervised. In addition, a lawyer with direct supervisory authority over the work of nonlawyers must adequately supervise those nonlawyers. [Emphasis added.]

It would be absurd to conclude, under these Rules of Professional Conduct, that a lawyer could refer lien resolution work to a non-lawyer whom he or she does not employ and thereby escape the direct supervisory responsibility the lawyer would have if the non-lawyer was so employed. The only reasonable and ethically logical conclusion is that engaging a non-lawyer who is neither employed nor supervised by the referring attorney to perform lien resolution services violates the New York Rules of Professional Conduct.

The main advantage of referring lien resolution work to a specialized firm is that such a referral permits the attorney to devote time and direct attention to the actual litigation of the lawsuit rather than being bogged down with issues of Medicare compliance. As pointed out above, if the lawyer chooses to outsource, then careful consideration must be given to whether the work will be assigned to another lawyer or to a nonlawyer. If the work is assigned to a nonlawyer, under Rule 5.3, it becomes incumbent upon the referring attorney to supervise the nonlawyer. As such, some of the time-saving advantages of outsourcing may be lost when the referring attorney assigns the work to a nonlawyer, but then must maintain a supervisory role over that individual or group.

Particularly when it comes to the filing of Disputes, Appeals, Requests for Compromise and Requests for Waiver, the referring lawyer must maintain direction over every one of these communications inasmuch as they constitute direct representation of the client in his or her interaction with the Medicare contractor to ensure that what is being submitted on the client’s behalf coincides with the directions of the lawyer and serves the best interest of the client.

Moreover, if a Medicare lien appeal should proceed beyond the first level of appeal (Redetermination) and eventually necessitate a hearing before an Administrative Law Judge, while the plaintiff’s
attorney may permit a non-lawyer (under the attorney’s supervision) to prepare the record for the hearing, the lawyer should be present at the hearing, state the nature of the case and the inherent issues, and make the appropriate argument before the judge. Having a non-lawyer do that, regardless of whether Medicare will allow it, puts the lawyer in serious jeopardy under New York’s Rules of Professional Conduct.

Medicare compliance continues to be an area of perpetual change. Many revisions to the current system will likely be forthcoming over the next several years. To maintain the requisite knowledge and skill, a lawyer should keep abreast of these changes and engage in continuing study and education.

If outsourcing is desired, it should be to a law firm or other specialty firm which has lawyers on staff to perform these services, and thereby ensure compliance with Rule 5.3.

PAYING (OR GETTING PAID) FOR LIEN RESOLUTION (LEGAL) SERVICES

As noted above (and in endnote 11), a 2008 Ethics Opinion of the New York County Lawyers’ Association Professional Ethics Committee dealt with and discussed ethical issues pertaining to the treatment of legal fees when a personal injury lawyer retains a specialty law firm “to negotiate a plaintiff’s complex Medicare, Medicaid or private health insurance lien . . .” Specifically, this Ethics Opinion held that a personal injury lawyer may ethically consider and treat such legal fees as a disbursement to be charged against a client’s total settlement proceeds (and, therefore shared by the lawyer and the client proportionally in accordance with the retainer agreement) provided the following five criteria were strictly adhered to:

1. “At the outset of the representation, the retainer agreement with the client provides that the attorney may engage an outside law firm for lien resolution and that the fee for said service will be charged as a disbursement.” [Emphasis added.]
2. “The actual charges are passed on to the client at cost and said charges must be reasonable.”
3. “The transaction results in a net benefit to the client on each lien negotiated.”
4. “The transaction complies with all principles of substantive law, including the fee limitations on contingent fees in the New York Judiciary Law and Appellate Divisions rules.”
5. “The referring attorney remains responsible for the overall work product.”

Although the five criteria are all somewhat self-explanatory, the NYCLA Ethics Committee went to considerable length to underscore the meaning and significance of each of the five criteria. As regards the first criterion, the opinion stated that “… courts, ethics boards, and committees have taken a dim view of costs or fees that are sprung upon the client after the parties have signed a fee agreement (citations omitted) . . . [and that] . . . it is necessary that the original fee agreement provide that the attorney may, at her discretion, obtain outside expertise on the matter of lien resolution and that the cost may be charged as a disbursement.” [Emphasis added.]

The “net benefit to the client” requirement found in the third criterion, as well as the compliance with substantive law and fees limitations requirements of the fourth criterion are quite significant and require discussion here.

Suppose a lien resolution law firm charged $10,000.00 to negotiate a lien of $5,000.00. The ethics opinion (and common sense) dictates that it would not be reasonable to post a disbursement in the amount of such a fee. What if the lien claimed was $500,000.00 but the fee charged exceeded the lien reduction? In other words, what if the outside lawyer engaged by plaintiff’s counsel to negotiate a lien reduction was unsuccessful in getting the lien reduced by an amount greater than his or her fee? The NYCLA Ethics Committee held that “[i]f the result of the lien resolution is less than the entire fee, the attorney may not charge this fee as a disbursement” and that “. . . the attorney who outsources negotiation of a lien for a pre-determined fee should be solely responsible for said fee. If the service fails to reduce the lien by an amount that exceeds its fee the attorney bears the risk. (This restriction serves to prevent the automatic reflexive referral of liens issues to outside counsel, where the case does not merit it.)

Now suppose that the sum of legal fees for specialized, clearly warranted, lien resolution services which are charged as disbursements, when added to the personal injury attorney’s contingent legal fee, equals a total amount in excess of the amount (for legal fees) permitted by the Appellate Division rules or the Judiciary Law sliding scale for medical malpractice cases. Would this be ethical? Legal?
The NYCLA Ethics Committee stated:

[w]hether Medicare, Medicaid and Healthcare lien resolution is included in the scope of the usual personal injury contingency fee retainer agreement is a mixed question of law and of ethics . . . [and] this Committee does not have jurisdiction to interpret the Judiciary Law, Appellate Division rules, or federal law and rules, but does note that a lawyer who charges a fee in excess of the fees permitted, will have acted both unethically and illegally.16 [Emphasis added.]

In reviewing this important ethics opinion and in deciding whether to engage lien resolution counsel or handle lien resolution issues in-house by plaintiff’s personal injury law firm, one must consider that the NYCLA Ethics Committee was keenly aware that, “[h]istorically, the resolution of liens on recoveries was considered a routine part of case management.”17 Consequently, we recommend that the five criteria quoted above be strictly adhered to in every case. If they cannot all be followed, plaintiff’s counsel should absorb the outside lawyer’s fee out of his or her contingent fee, thereby remaining in compliance with the NYCLA ethics opinion.

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BEWARE OF WAVERS OF LIEN RESOLUTION FEES – THEY MAY BE ILLEGAL

Suppose a lien resolution company is either affiliated with a structured settlement company or is run by people who perform the dual function of providing lien resolution services as well as structured settlement brokerage and consulting services. Assume further that in marketing their services, such companies offer to handle lien resolution for a fee, but to waive (or reduce) those fees if they are also used for the structured settlement.18 Such an offer may be very attractive to a plaintiff’s personal injury attorney, especially if a structured settlement is contemplated or anticipated to be part of the settlement.

As with many things that seem too good to ignore, this one is simply illegal. Insurance Law § 4224, which is titled, “Life, accident and health insurance; discrimination and rebating; prohibited inducements and interdependent sales” provides in pertinent part as follows:

“(c) . . . no such life insurance company and no . . . officer, agent, solicitor or representative thereof . . . and no licensed insurance broker and no employee or other representative of any such insurer, agent or broker, shall pay, allow or give, or offer to pay, allow or give, directly or indirectly, as an inducement to any person to
In plain English, it is illegal to offer, pay or receive anything of value, including the waiver of fees otherwise chargeable for lien resolution services, in consideration for using a particular structured settlement broker to place or co-broker a structured settlement.\textsuperscript{19} The best way to avoid this clear violation of the insurance law is to steer clear of companies engaging in these practices and to insist on receiving a CORA affidavit in every case involving a structured settlement, as described below.

Prior to 1983 when Congress amended the Internal Revenue Code (hereinafter “IRC” or “Code”) and created the Qualified Assignment (\textit{novation}) section,\textsuperscript{20} defendants (or their carriers), in every structured settlement, had to retain the post settlement obligation to make future periodic payments and they also had to purchase and retain ownership of the annuity used to fund the structure.\textsuperscript{21} This was necessary in order to comply with the Rev. Rul. 79-220 which provides that as long as plaintiff has no ownership interest in the annuity, nor dominion and control over it, all of plaintiff’s future periodic payments will be excluded from income tax.\textsuperscript{22} In essence, prior to 1983 defendant was the guarantor of the annuity issuer (life company); was not relieved of the periodic payment obligation owed to plaintiff; and had the right, therefore, to insist on the life company chosen to fund the structure and also the broker used to place the annuity with that life company.

In 1982, however, Congress enacted The Periodic Payment Settlement Act of 1982\textsuperscript{23} which President Ronald Reagan signed into law effective January 14, 1983. That bill codified Rev. Rul. 79-220 by amending IRC Section 104(a)(2) and created IRC

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Section 130, the “Qualified Assignment” section of the Code. In particular, IRC 130(c) allows a defendant to assign its future periodic payment obligation to a third party assignee and, pursuant to a self-executing novation found in the Settlement Agreement and Release, become relieved of the future periodic payment obligation initially agreed to.

The following flow chart, which should be familiar to most trial lawyers, illustrates the transfer of defendant’s future periodic payment obligation to the third-party Assignee.

Since 1983, and certainly in the last twenty years, virtually all structured settlements are completed this way. At the end of the day, when the Settlement Agreement and Release has been executed, along with the Qualified Assignment, Stipulation of Discontinuance with Prejudice, and other ancillary “closing” documents, the defendant is completely and irrevocably released from (a) the claims sued upon, and (b) the future periodic payments which defendant agreed to pay in the first place. Without a qualified assignment, defendant or defendant’s carrier would have to own the annuity; and plaintiff would be limited to being a general creditor of defendant or its carrier.

By contrast, when a qualified assignment is done, plaintiff, via negotiation, has an equal voice in choosing the two entities (life company and assignment company) which will bear the long-term responsibility for paying the future periodic payments to the plaintiff.

The point of this discussion is to show the importance of plaintiff retaining his or her own structured settlement broker. Working exclusively on a case for the plaintiff, this broker will advise plaintiff and plaintiff’s counsel about the relative merits and demerits of the available life and assignment companies, as well as other important issues that require independent unbiased advice. However trustworthy the defendant’s broker may be, he or she is serving the defense in that case. Being a “nice guy” is not, and should never be, the test of when a plaintiff should use the defendant’s expert in any case.

Since the plaintiff has the greatest stake in the choice of life and assignment companies, it is imperative that the plaintiff have his or her own broker in every case functioning in that case exclusively as plaintiff’s expert. This does not prevent the defense broker from continuing to represent the defendant.

The New York Rules of Professional Conduct require every attorney to exercise independent professional judgment. Isolating the relevant language of Rule 2.1 in the context of a potential structured settlement we have the following:

In representing a client, a lawyer shall exercise independent professional judgment . . . [in] rendering advice [regarding] other considerations such as . . . economic . . . factors that may be relevant to the client’s situation.

Does a plaintiff attorney who accepts defendant’s structured settlement expert’s proposed structured settlement plan without retaining his/her own structured settlement consultant expert potentially violate Rule 2.1?

Has defendant’s expert “shopped” the life insurance company marketplace for the most competitive quotes within the range of life companies acceptable to plaintiff?

Has defendant’s expert spread the risk among New York licensed life insurers to ensure the greatest degree of protection afforded by New York Law?

Have rated ages been obtained to provide enhanced annuity benefits to plaintiff (at no additional cost to defendant)?

These, and a myriad of additional questions, demonstrate the importance of plaintiff attorneys obtaining independent expert advice in every structured settlement case, without which the plaintiff’s lawyer will not be able to “exercise independent professional judgment,” potentially in violation of Rule 2.1.
THE LEGISLATURE WEIGHS IN
In 2002, the New York Legislature passed the Model Structured Settlement Protection Act, a law intended to protect structured settlement recipients who wish to sell all or part of their future payments rights in a factoring transaction. Unlike the model act which only protects plaintiffs when they sell their payment rights, the New York Legislature passed a version of the bill that also added protection for plaintiffs when their structured settlements are first negotiated, created and placed.

General Obligations Law §5-1702: Initial disclosure of structured settlement terms

In negotiating a structured settlement of claims brought by or on behalf of a claimant who is domiciled in this state, the defendant or defendant’s legal representative shall disclose in writing to the claimant or the claimant’s legal representative all of the following information that is not otherwise specified in the structured settlement agreement:

(a) the amounts and due dates of the periodic payments to be made under the structured settlement agreement. In the case of payments that will be subject to periodic percentage increases, the amounts of future payments may be disclosed by identifying the base payment amount, the amount and timing of scheduled increases, and the manner in which increases will be compounded;

(b) the amount of the premium payable to the annuity issuer;

(c) the nature and amount of any cost that may be deducted from any of the periodic payments;

(d) where applicable, that any transfer of the periodic payments is prohibited by the terms of the structured settlement and may otherwise be prohibited or restricted under applicable law; and

(e) a statement that the claimant is advised to obtain independent professional advice relating to the legal, tax and financial implications of the settlement, including any adverse consequences and that the defendant or defendant’s legal representative may not refer any advisor, attorney or firm for such purpose.

Noteworthy among the items of “initial disclosure” required to be made by defendant or its legal representative at the time a structured settlement is being negotiated, is the requirement found in GOL §5-1702(e).

Simply stated, neither the defendant nor its lawyer may recommend anyone to plaintiff for financial advice, let alone insist that defendant’s structured settlement expert provide such advice.

This leads us to ask, what constitutes financial advice in the context of a structured settlement?

APPROACH TO STRUCTURED SETTLEMENTS: THE 1980S AND NOW

Many, if not most, structured settlements in the 1980s were “pure” in the sense that plaintiff made a dollar demand to start settlement discussions and defendant responded with a structured settlement proposal consisting of up-front cash plus a promise of specific future periodic payments. If plaintiff accepted defendant’s structured settlement counteroffer the case was settled, subject only to the paperwork. No financial advice was given to plaintiff by defendant’s representatives. A structured settlement offer was made and accepted.

For much of the last two decades, most cases settled quite differently. Starting similarly, plaintiff’s counsel will make a demand, with or without the proviso that plaintiff “needs or desires” a structured settlement. Defendant responds with a counteroffer, usually a cash amount. Ultimately, as the parties get closer to achieving a settlement, a plaintiff who is interested in a structured settlement will either make a demand for a sum of money “subject to defendant agreeing to a structure,” or the plaintiff will accept defendant’s offer “provided defendant is agreeable to doing a structure” and subject to the negotiation and completion of the (critically important and tax code compliant) settlement documents.

Assuming tentative agreement on the quantum, although not yet agreeing on the terms of the structure, the plaintiff now needs to sit down with a qualified structured settlement financial planning expert to review possible periodic payments plans; choice of life company providers/issuers of annuities, including their ratings, size, financial condition, rates; assignment companies; etc., 100% of which constitutes providing financial advice to plaintiff. And the providing of such advice is precisely what the defendant is prohibited from doing for the plaintiff. As the GOL §5-1702 makes clear, the defendant may
not even refer anyone to plaintiff for such advice.\textsuperscript{31}

Clearly, working up a financial plan for the plaintiff, after agreement has been reached on the quantum to be spent on the settlement and on the structure, is precisely what the General Obligations Law prohibits the defendant from doing either directly, through defendant’s own broker, or through a third party recommended by defendant.

It is also noteworthy that no such prohibition exists which would prohibit a plaintiff or plaintiff attorney from insisting, as a condition of settlement, that plaintiff’s structured settlement broker handle the entire placement of the annuity. Defendants do not need protection from having financial advice in the form of a structured settlement forced upon them. Since defendants are completely removed from the picture after a Qualified Assignment is executed, with the same end of day effect as if a cash settlement had been entered into and a general release provided, the only concern defendants should have is whether they have been completely released with no recourse. Notwithstanding the foregoing, since structured settlement consultants are experts: (a) on issues of the completeness of the novation; (b) whether any constructive receipt issue or violation of the economic benefit doctrine might arise if the wrong tax language is used in any of the settlement documents; and (c) on many other defense-oriented issues in these cases, defendants are clearly entitled to retain their own structured settlement broker if they so choose. They may not, however, force their broker on the plaintiff.\textsuperscript{32} Plaintiff’s choice of broker is not something the defendant has any say in, by negotiation, as a condition of settlement, or otherwise. So said the legislature.

Consequently, the “Modern Approach” is for each side to engage its own structured settlement broker, for each to fully represent its own client in any particular case, and for the life company to pay a commission to each broker separately.

**STRUCTURED SETTLEMENT (CORA) AFFIDAVIT**

The Structured Settlement Affidavit, also known as a “CORA” affidavit,\textsuperscript{33} is a series of affirmative representations and warranties, signed by the structured settlement broker which warrants the integrity of the structured settlement. Certain courts will not approve a structured settlement in an infant’s or incapacitated person’s case without the filing of this affidavit.\textsuperscript{34}

The ethical standards and clear need for this affidavit are obvious. The CORA affidavit warrants as follows:

1. That no rebates, service fees, administrative fees nor any other consideration of any kind or in any amount will be paid to any insurer, party, attorney for a party, guardian ad litem.
2. The actual cost of the structured settlement portion of the settlement is set forth;
3. The structured settlement broker’s commission is fully disclosed;
4. Plaintiff’s rated age, if any, is disclosed;
5. That no post settlement medical underwriting has or will take place to secretly reduce defendant’s cost;
6. That no present value calculations were provided, or in cases involving CPLR Art. 50-A or 50-B, that present value figures were provided in connection with the periodic judgment analyses performed;
7. That no solicitation of plaintiff on behalf of any factoring company will ever be made by the broker or his/her company, nor will assistance to any factoring company be given, nor consideration accepted from a factoring company for assistance in purchasing plaintiff’s payment rights;
8. That the broker is neither an in-house broker of any party or carrier involved in the settlement, nor an exclusive broker of any party or carrier.

This affidavit should be given in every structured settlement case. If your broker can’t or won’t provide it, you need to get a new broker.\textsuperscript{35}

**WHAT TO PUT ON THE RECORD**

An important part of concluding a proper tax free structured settlement, and satisfying the preparation requirement of Rule 1.1 of The New York Rules of Professional Conduct, includes knowing what to put on the record when a case “settles” in court, but the parties do not have any details of the structured settlement worked out yet. The following is suggested to avoid both constructive receipt and a potential violation of the Economic Benefit Doctrine:

The parties have agreed to settle this case for a structured settlement consisting of future periodic payments plus an up-front cash payment. The total cost of the settlement to the defendant is $\ldots\ldots\ldots$. The precise terms of settlement will be set forth in detail in a properly drawn structured settlement.
agreement and release. __________ is the structured settlement broker of record that will be placing the annuity.

This article is not intended to be an exhaustive treatise of all ethical considerations in personal injury settlements and related lien resolution issues. It is, however, intended to address current hot ethical topics in the personal injury arena.

1 CPLR Art. 50-A became law in 1985 and was repealed and re-enacted in modified form in 2003.
2 See CPLR Art. 50-B.
3 The amended version of Art. 50-A has a different threshold and currently provides for different calculations than Art. 50-B.
4 New CPLR Art. 50-A applies to medical malpractice cases filed on or after July 26, 2003. Old Art. 50-A continues to apply to medical malpractice cases filed prior to July 26, 2003. Consequently, two different sets of calculations are applicable under CPLR Art. 50-A depending on the date suit was filed.
5 Effective April 9, 2009 as amended through April 15, 2011.
6 100 N.Y.2d 159 at 168.
7 Id. at 168.

8 Some structured settlement companies provide analyses, including calculations under CPLR Art. 50-A and 50-B without charge. Other structured settlement firms and most economists will provide these calculations at charges often ranging from $1,500 to $3,000 or more.
9 Rule 1.0(j) states that, ‘‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated information adequate for the person to make an informed decision, and after the lawyer has adequately explained to the person the material risks of the proposed course of conduct and reasonably available alternatives.’’
10 The Preamble to the New York Rules of Professional Conduct defines the purpose and scope of the rules: ‘‘[13] The Comment accompanying each Rule explains and illustrates the meaning and purpose of the Rule. The Preamble and this note on Scope provide general orientation. The Comments are intended as guides to interpretation, but the text of each Rule is authoritative.’’
11 The subject of the inquiry in the NYCLA Ethics Committee decision reads as follows: ‘‘Topic: Fees for specialized counsel retained to negotiate a plaintiff’s complex Medicare, Medicaid or private health insurance lien may be charged to the settlement as a disbursement under certain conditions.’’
12 Id.
13 NYCLA Professional Ethics Committee Ethics Opinion 739, pages 4 – 6, July 10, 2008.
14 Id., page 4.
15 Id., page 5. The parenthetical comment is from the NYCLA Ethics Opinion.
16 Id., page 6.
17 See id., page 2, section entitled, “Traditional Handling of Liens in Personal Injury Cases.”
18 This discussion assumes that the lien resolution firm which plaintiff’s personal injury lawyer engages employs attorneys to handle the legal work involved in lien resolution and otherwise meets the criteria for such work.
19 The same analysis applies to companies that offer Medicare Set Aside services and offer to waive or reduce their fees for such services if their affiliated structured settlement company is retained by plaintiff’s counsel. This is also true with respect to companies that offer lower interest rates on loans to personal injury attorneys if they utilize the services of certain specific or affiliated structured settlement companies. In all such cases, the waived or reduced lien resolution fee, MSA fee, or lower interest rate on the law firm loan, amount to consideration not specified in the annuity policy, and is therefore an illegal rebate in violation of Insurance Law section 4224.
20 IRC Sect. 130(c).
21 Rev. Rul. 79-220.
22 Id.
23 See H.R. 5470 (“The Periodic Payment Settlement Act of 1982”) as passed by the House and the Senate.
24 Defendant’s execution of a qualified assignment transferring liability for the future periodic payments to a third party is important to protect the plaintiff as well as the defendant. From plaintiff’s viewpoint, plaintiff may have a security interest in the annuity only if a qualified assignment is entered. See IRC 130 (c), last paragraph, which was passed in 1988 as part of the Technical and Miscellaneous Revenue Act of that year and provides, “The determination for purposes of this chapter of when the recipient is treated as having received any payment with respect to which there has been a qualified assignment shall be made without regard to any provision of such assignment which grants the recipient rights as a creditor greater than those of a general creditor.”
25 Except in the rarest of cases, most “defense” brokers are also “plaintiff” brokers in other cases. Even one well-known plaintiff broker, who claimed for years to be “exclusively” working on the plaintiff side, had filed affidavits with the federal government claiming to be primarily on the defense side. The affidavits were apparently filed in an effort to get on the federal government’s list of brokers approved for federal tort claims settlements.
26 In our adversarial system, each side has always recognized the importance of retaining its own experts in the field of medicine, accident reconstruction, economics, engineering, etc. Structured settlement experts should be treated the same.
27 The life companies all recognize the legitimate role of each structured settlement broker and will pay each broker separately and independently pursuant to the brokers’ commission sharing agreement.
29 See GOL §5-1701, et. seq.
30 See Jacobson, “Avoiding a Legal Malpractice Trap Created by a Legislative Oversight,” Bill of Particulars (Fall 2007).
31 One New York based structured settlement broker argues that GOL §5-1701(e) does not give plaintiffs the right to retain their own structured settlement broker because of the definition in this section which states, “(e) ‘independent professional advice’ means advice of an attorney, certified public accountant, actuary or other licensed professional adviser: (i) who is engaged by a claimant or payee to
render advice concerning the legal, tax and financial implications of a structured settlement or a transfer of structured settlement payment rights; (ii) who is not in any manner affiliated with or compensated by the defendant in such settlement or the transferee of such transfer; and (iii) whose compensation for rendering such advice is not affected by whether a settlement or transfer occurs or does not occur.” This broker argues that unless plaintiff is paying his/her advisor directly out of his/her own pocket, the plaintiff does not have the right, pursuant to this statute, to have his/her own structured settlement broker. This argument begs the question. GOL §5-1702(e) prohibits the defendant from imposing anyone on the plaintiff for such advice; and from recommending anyone, even a neutral, to the plaintiff for such advice. But it does not prohibit the plaintiff or plaintiff’s counsel from engaging the services of an independent structured settlement broker who is compensated by commission by the life company issuing the annuity. In other words, the statute does not require the plaintiff to engage a financial professional who is paid by the plaintiff, and it leaves the plaintiff free to choose a structured settlement financial professional of plaintiff’s choice to provide such advice.

32 The same New York based broker who makes the fallacious argument described in the prior endnote often influences his casualty company clients to insert into mediation agreements that, “the first [$$xxx,xxxx] of any structured settlement must be funded with the [ABC Ins. Company’s] money.” Additionally, this broker also gets some of his casualty company clients to add a line stating that he will be the exclusive broker to place the structured settlement annuity. This seems to be an obvious effort to thwart the GOL provision described, since “placing” the annuity results in the same broker receiving the entire commission. We believe that plaintiff’s counsel must refuse to permit the insertion of any such language in a mediation agreement or on the record since failing to do so, and accepting this language, may result in an inadvertent violation of Rule 2.1 of the New York Rules of Professional Conduct explained above.

33 CORA is an acronym for Certificate of Reliability and Assurances, originally created by one of the authors of this article, Martin Jacobson, approximately 20 years ago.

34 See, e.g., court rules of the 12th Judicial District.

35 To their credit, some self-insured defendants like The City of New York and the NYC Health and Hospitals’ Corporation will not do business with any broker who does not offer and provide a CORA affidavit on every case.

Robert Schweers has dedicated his practice on Medicare Compliance, lien negotiation, and resolution. Over these years he has become an expert in the field and has saved plaintiff’s millions of dollars in Medicare reimbursements. He is the Senior Claims Analyst for Precision Lien Resolution, LLC. In that role he is actively engaged with CMS and the MSPRC on a daily basis. He continues his diligent work on correcting technical errors in submissions to help expedite the issuance of the conditional payment and final demand letters as well as challenging and eliminating, through a variety of methods, any improper assessments to the plaintiff’s Medicare file.

Martin Jacobson is Vice President and General Counsel of Creative Capital Inc. He is also a licensed attorney in New York and New Jersey with extensive trial experience in both the state and federal courts. Prior to going into the private practice of law in 1976, he did defense work with the New York City Corporation Counsel’s Office. Subsequently, he was a partner in a WallStreet area law firm in New York City. Mr. Jacobson is a renowned lecturer on structured settlements and periodic judgments and regularly presents seminars to the bench, bar association groups, law firms, casualty companies and self-insured’s. He negotiates structured settlements for Creative Capital’s clients and is an expert on the subject of periodic judgments.