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TORT TRENDS

The newsletter of the ISBA's Section on Tort Law

Editor's note

By John L. Nisivaco of Dolan & Nisivaco, Chicago

The first article of this edition, written by Mark Karno, discusses the Seventh Circuit's Jury Trial Project. Mr. Karno provides an explanation of the project and his personal experience in a trial conducted pursuant to the project's guidelines. This is an interesting article for those who are unfamiliar with this program.

The second article is authored by William Allison and discusses the issue of presenting clients with information regarding structured settlements. The author suggests that there is an obligation, similar to informed consent in the medical field, to advise clients regarding the option of periodic payments versus a lump sum.

Thank you to all of the contributors. The articles are excellent and we hope you find the materials helpful.

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Changes on the horizon for trial lawyers: The Seventh Circuit's Jury Trial Project

By Mark L. Karno, Mark L. Karno & Associates, Chicago

I recently participated in a jury trial in front of Judge James F. Holderman in the U.S. District Court for the Northern District of Illinois, Eastern Division. This trial utilized six of the seven procedures being advocated by the 7th Circuit Jury Trial Project in the context of an advisory jury trial. The 7th Circuit Jury Trial Project is making recommendations as to improving jury trials in federal courts. Among the procedures being advocated are:

1. Utilizing a 12-member jury;
2. Utilizing jury-selection questionnaires;
3. Giving juries substantive instructions right after they are empanelled and, if necessary, during the course of the trial;
4. Setting time limits on the trial;
5. Allowing jurors to ask questions;
6. Allowing lawyers to give interim statements during the course of the trial; and
7. Enhancing jury deliberations by giving instructions in plain language and by making suggestions about such matters as how to select a foreperson and how to conduct deliberations.

I represented the plaintiff in the case of *Jose Arriaga v. USA*. Case No.: 04 C 2904. My client, Jose Arriaga, had a bodily injury claim against a United States Postal Service driver, which under the Federal Tort Claims Act, 28 USC Sec 2671 et seq, is brought against the United States of America in federal court and is normally tried as a bench trial. However, with three weeks notice, Judge Holderman invoked FRCP Rule 39(c) and ordered an advisory jury trial. At first I thought of all the extra work that I would be forced to do in order to put on the "dog and pony show" in front of a jury. However, by the end of the trial, I felt that I truly had been honored to be a participant in the project.

I found the jury selection questionnaires to be quite helpful. As a trial lawyer, we have our usual set of voir dire questions embedded into our computer hard drive that we ask in almost every case. In this trial, the trial lawyers submitted their questions in writing to the court in advance and Judge Holderman then organized and printed out a single questionnaire based upon what he felt were relevant generic questions. By having a lot of the generic questions answered in advance of the lawyers verbal questioning, it streamlined the voir dire process to a half of a day. After review-

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ing the jury questionnaire responses, the trial lawyers were given an opportunity to ask follow up questions and any new questions as well. This was all within the time parameters that we had agreed upon prior to the start of the trial.

The time limit issues were not significant in my case because Judge Holderman let the trial lawyers set our own time limits. We merely had to adhere to them. In federal court, with the extensive pre-trial memorandum that one needs to complete, one knows their case inside and out by the time it is ready for trial. Thus, a trial lawyer should know how long it will take to present their client's case.

I found the ability to give interim statements during the course of the trial to be a very powerful litigation tool. In my client's case, I was able to articulate my beliefs prior to an independent witness giving his testimony, that the witness' testimony was nothing more than an exaggeration of what truly happened and that his testimony was merely a reaction to having witnessed a horrible collision wherein someone was almost killed. Note that this witness had his deposition testimony read to the jury so I knew exactly what he was going to say. His testimony on its face was also adverse to my client's position in regards to the liability issue. I had also utilized the interim statement to give the jurors a roadmap as to the significance of other witnesses' testimony to my client's overall case. The interim statements further served to tie together the theme that I had developed in my opening statement and bridged the case seamlessly with my closing arguments.

During the course of the trial, the jurors were allowed to ask questions. The procedure was that each of the jurors was given a pad of paper. An individual juror merely had to write down a question on a piece of paper and raise it up. Thereafter, the courtroom personnel would retrieve the questions, copy the questions for the Judge and the attorneys and then if something was objectionable (i.e. questions dealing with liability insurance of a party), the Court would instruct the jury that the question cannot be answered. In my client's trial, there were a number of questions that the jury asked that were answered. Some of these dealt with opinions held by the investigating DuPage County Sheriff's Department forensic personnel who were qualified and testified as accident reconstruction experts at the trial. I actually found the questions to be helpful in clearing the air on certain areas of testimony that jurors had questions with. As a trial lawyer, we sometimes believe that we are being effective in communicating our client's case. However, it became apparent that there were areas of testimony that the jurors wanted further clarification on. These dealt with scientific calculations as to time and speed. They also had requested additional information as to my client's loss of business income claim. Again, they let me know that I did not make as thorough a presentation as I thought that I had. I was thus given an opportunity to present additional evidence to address the juror's concerns.

My impression of allowing jurors to ask questions during the course of the trial was that not only did it serve to signal the trial lawyers as to an area or areas of testimony where they needed to shore up a potential weakness in their presentation. It also kept the jury into the case in that the jurors were active participants and not just passively sitting back and watching the trial unfold before them. I did not notice a single juror falling asleep during this trial. They were attentive to the end.

I am also glad to report that the case eventually settled for the amount awarded by the advisory jury which was much greater than the offer my client received in advance of the trial.

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Informed consent for lawyers

By William A. Allison, Allison & Mosby-Scott, Bloomington

When a settlement or judgment in a personal injury action is paid in whole or in part by periodic payments, that is called a structured settlement. The Internal Revenue Code provides tax advantages for the recipient if certain conditions are met. Although periodic payments may be employed in settlements or judgments other than for personal-injury, the tax advantage is available only in personal-injury cases.

There are two major reasons for considering a structure. First, it may be a good thing for the client, including the tax advantages. Second, it may be required by the doctrine of informed consent. Illinois Rules of Professional Conduct for lawyers provide as follows:

> Rule 1.04) (b). A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Whether a client should settle his case, or whether he should accept the settlement in a lump sum or periodic payments is part of the representation by the lawyer. It is the lawyer's job to see that it is an informed decision. In the preamble to the Model Rules of Professional Conduct there is further light shed on this obligation:

> As adviser, a lawyer provides a client with an informed understanding of the client's legal rights and obligations and explains their practical implications.

The best analogy for this process is the informed consent doctrine applied in medical malpractice. Although not contained in the Illinois rules (which are based on the Model Rules of Professional Conduct), the phrase "informed consent" is used in the Model Rules. The Illinois Pattern Jury Instructions provide the last step. In a comment to the jury instructions on professional liability, it states that "the same general standard of care applies to all professionals, that is, the same degree of knowledge, skill and ability as an ordinarily careful professional would exercise under similar circumstances." (IPI on Civil 2005 edition, page 275).

Substituting "lawyer" for "physician" and substituting "client" for the word "patient" in IPI jury instruction 105.0 7.01, you get the following results:

> When I use the expression "informed consent" I mean a consent obtained from a client by a lawyer after the disclosure by the lawyer of those risks and alternatives to the proposed settlement which a reasonably well qualified lawyer would disclose in the same or similar circumstances. Failure to obtain informed consent is professional negligence.

I'm not aware of an appellate case applying this reasoning to date. However, there is a case from Texas filed on similar grounds which resulted in a settlement of over $4 million.

The structured settlement will not work for every client. However, it is one of the alternatives available to the client at the time of settlement and must be disclosed. Merely telling the client that he could take a settlement which involves monthly payments instead of a lump sum would not be sufficient information. If the lawyer is not prepared to discuss the risks and rewards, he should consult someone who is. The brokers that sell structured settlements are usually willing to present a proposed structured and discuss that with the client.

In representing clients we could approach this disclosure as just another item on a checklist that will take up our time. A more positive approach would be to look at this as a marketing opportunity and a chance to provide more value to your client. Clients want to know when they have options and what they are. With this disclosure, the client will leave your office with a more positive feeling. Making this part of your practice will not only keep you in line with ethical standards but could enhance your practice as well. That is professionalism.

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