

# Top Dozen Reasons to Involve a Settlement Planning Attorney Early in Your Case

By Julian E. Gray, CELA  
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Settlement Planning Advocacy starts long before a settlement is reached, yet has far reaching implications for years after the deal is struck. Since it costs the Plaintiff's attorney nothing to investigate the issues, why leave anything to chance?

## 1. Identify the issues related to the Plaintiff's situation other than the liability case at hand.

There are a myriad of significant peripheral issues involved in planning for the present and future needs of the injured client besides the important ones of proving causation and damages. Here are some to consider: What is the family relationship? Medical needs, housing, caregivers, transportation? How to maintain or obtain government benefits such as Medicaid, Medicare, SSI, SSDI and Veterans benefits? Current and future State and Federal Tax planning? How about future long term care needs of the client (and spouse) and preserving inheritances for spouses or children?

## 2. Give the Plaintiff the best options for future healthcare costs and coverage options.

Many injured plaintiffs will require ongoing expensive treatment or prescription drugs, and, usually both. Or, if not now, it may be foreseeable that such services and items will be necessary in the future. Now, there should be multiple options for healthcare coverage. There are specific timeframes to obtain coverage and delay can close out options forever. Prior to receiving a settlement, the plaintiff should look at health coverage through one or more of the following options: 1.) Private health insurance, 2.) Insurance through the Marketplace (Affordable Care Act), 3.) Medicare (along with the appropriate choices of a Medigap supplement or Medicare Advantage plan and Part D prescription option; and 4.) Medicaid (Medical Assistance in PA).

If you haven't examined the client's eligibility for all of these programs and the relative short and long term out-of-pocket costs, which could be significant, how do you know that the client is getting the best deal?

## 3. Identify and Plan for Future Disability-related issues.

Besides the delivery and coordination of caregiving supportive services, either in a home setting or a medical or long term care facility, the client must plan ahead for future eligibility for government benefits. Some of these benefits have a planning time horizon of five years. For a plaintiff with ongoing disabilities under the age of 65, a first party pay-back Special Needs Trust (SNT) is not always the best option. The key is to establish the overall plan considering not only current but also future needs in sight, as well as what will happen upon the death of the plaintiff. Some of these options must be exercised years in advance. In addition, SNT's may become obsolete for the client's situation at some point in the future and an exit strategy should be established long before deciding to terminate the trust.

#### **4. Special Needs Trusts take time to establish.**

SNT's must be drafted and reviewed by the plaintiff, the trustee, the Court, legal counsel for the PA Department of Human Services (DHS) and Social Security. This doesn't happen overnight and any or all parties involved may request clarifications or revisions to the document. In addition, time is needed for the plaintiff to interview and select a trustee and an investment manager. In addition, if an individual wants to serve as trustee, bonding is usually required by DHS and difficult to obtain. Finally, a trust agreement is very complex and the client (and family) need time to digest how it works and how the funds will be used and distributed over the client's lifetime. So, the generally long lead time it takes to investigate whether a SNT is even the best option coupled with the issues listed above warrant very early considerations of the client's options.

#### **5. To Structure or not to Structure?**

While structured settlements were traditionally the mainstay of settlement planning in the past, the prolonged low interest rate environment coupled with the real threat of future long term care needs for one out of every two Americans causes pause in using a structure for certain clients. For example, many clients are upset to learn that if they enter a nursing home or seek Home and Community Based Services after the settlement, all of the monthly structure payments are countable income for Medicaid eligibility purposes and will have to be spent on care costs before accessing Medicaid. This is especially troublesome for a married client who needs to support a spouse at home with the structure payments.

Therefore, clients should be made aware of the long term effects of using a structure. Even when an immediate annuity (structure) is appropriate, Pennsylvania and Medicaid have strict requirements on how such annuities can be set up. Established case law in Pennsylvania exemplifies the potential catastrophic exposure to a client (and his legal counsel) when a structure is purchased that does not comply with the new Federal rules. At the very least, a plaintiff client should have her/his own structure settlement broker representing her/his interests in settlement negotiations and the various structure options should be explored.

#### **6. Federal Estate Tax Planning.**

With the current lifetime Federal Estate Tax deduction at \$5.45 million (in 2016), many cases would not give rise to the need for this planning. However, for cases in excess of this amount, or cases in which it is anticipated the estate will grow above this amount, there is a 40% estate tax liability waiting. This is most often overlooked in cases that are structured. If the client dies, the IRS will want the present value of the future structure payments counted as a taxable asset. Since the tax is due nine months after the date of death, there is not much time to obtain these funds. If commutation of a multi-million dollar structure is the first option, then someone hasn't done their homework and the client will lose millions in the liquidation process. Sooner or later, someone is going to ask why no one investigated other options while the client was alive.

#### **7. Medicare Set Aside Options.**

"Considering" Medicare's interests for future medical payments of an injured person has always been a part of the worker's compensation arena. However, the Medicare Secondary Payor Act clearly gives the Centers for Medicare and Medicaid Services (CMS) the authority to require this consideration in liability cases and CMS regional offices have already stated that they are reviewing liability set asides. While some practitioners seem to need more proof, it will be a potential liability time bomb that could go off years in the future. With the ability to make informed decisions about healthcare in advance of the settlement (see paragraph 2 above), why not put this issue to bed as soon as possible? Who really wants to get a call from their former client

years later informing them that a six figure medical procedure was not covered by Medicare? In addition, because the rules for liability MSA's are not as well as established as in the Workers Compensation area, there are additional planning options available to the client.

#### **8. Avoiding Liability.**

Cases can take years to complete from the date of loss. The plaintiff's lawyer wants to be sure that when the case is closed – it is really closed. The Settlement Planning Attorney handles all the peripheral issues and future estate planning needs of the client so the plaintiff's lawyer can focus on maximizing the recovery for the client – period. These days, making sure the case is really closed involves a lot more than satisfying liens and considering Medicare's future interests.

#### **9. Should a Qualified Settlement Fund be implemented?**

Even those familiar with Qualified Settlement Funds (QSF) Trusts may believe they are only for class action lawsuits. Actually, QSF's established under Internal Revenue Code Section 468B can be used in single plaintiff situations when there are still unresolved issues such as outstanding lien resolutions or disagreements among the parties involved. Consider a case where a married couple has a pending divorce claim while awaiting a settlement and cannot agree on the equitable distribution of the proceeds. In this situation, a QSF Trust can be quickly established by Court order so that the defendant can be released (and take the tax deduction) and the plaintiff's lawyers can also be paid as well as reimbursed for litigation costs while the parties work out their remaining issues – for however long that may take.

#### **10. Settlement Planning Attorneys don't slow down the case.**

Settlement planning involves the investigation of many of the issues discussed herein simultaneously with the plaintiff attorney's work on the case. Since there is no obligation to pay our fees unless the case settles, it is advantageous to the plaintiff and her/his attorney to become educated on the options far in advance of settlement. Something as simple as knowing whether to accept funds into escrow and whether constructive receipt is an issue for the client can be peace of mind for the plaintiff attorney.

#### **11. Access to a care advocate.**

Comprehensive Settlement Planning requires more than just legal work. Therefore, we employ a dedicated Social Worker on staff to help the client and family cope with care management issues and a variety of non-legal services that are integral to enhancing quality of life. Having a Social Worker on staff is incredibly helpful to facilitate in-home, hospital or nursing home visits.

#### **12. It costs you and your client nothing unless the case settles.**

So, you get all of the above with no risk. Most plaintiffs do not have the ability to pay for settlement planning until after the case is funded. So, as a courtesy to the plaintiff, we handle our cases on a fixed fee basis that is put in writing in advance and only paid if the case actually settles. In that way, we share in the risk that the plaintiff attorney assumes in working on the case.

Years after the case is closed, did you really do the best job for your client? Investigate all planning options? Eliminate future liability? Enhance the client's quality of life to the fullest...

This is where we can bring great value to you and your client.

***Julian Gray, CELA is a member of the Pennsylvania Association of Justice as well as a President's Club member of the Western Pennsylvania Trial Lawyers Association. He is the Western Pennsylvania representative for the Special Needs Alliance, a national non-profit organization of lawyers selected by invitation-only to assist disabled clients and their families with disability planning issues. For more information, visit [www.saveyoursettlement.com](http://www.saveyoursettlement.com).***