

- (b) Prepare a letter to the carrier offering to settle the case within the policy limits and pointing out the risks inherent in a possible excess verdict.
7. In cases of large magnitude:
- (a) Invite the carrier in for a personal settlement conference;
 - (b) Present a mini version of the case with summaries of anticipated witness testimony at trial including that of expert witnesses;
 - (c) Provide the carrier with a legal analysis of the issues relating to liability and damages to encourage intelligent consideration of the evidence and settlement demand;
 - (d) Approach the subject of structured settlements in cases where they are warranted;
 - (e) Consider the use of a settlement video or settlement brochure.
8. Regardless of the size of the case, attempt to isolate any areas of disagreement and gain concessions from the adjuster regarding liability, damages or other areas where the parties can agree and then document those agreements in writing.
9. Allow for further dialogue and negotiation.

Note: When it appears that the parties cannot agree on settlement and that the case must be tried, the possibilities for future and continued settlement negotiations should not be forfeited. Courteously tell the adjuster that this is a case that you and the insurance company cannot agree on, and it appears as though the jury will have to decide the case. Then try for the last time to get one more offer out of the adjuster by asking her to get the company to review all the facts of the case one more time to see if it will increase its offer. By taking this approach, you can create a "win-win" position for the adjuster. The responsibility for settling or not settling the case now rests with the company. The adjuster will be more comfortable making an additional offer since she can attribute the responsibility for that decision to the company. The case can be settled without the adjuster feeling as though she lost the case.

10. Just as the door should remain open for future negotiation and settlement whenever possible on issues of liability and damages, so, too, should it remain open on controversial areas of damages where adjusters are reluctant to pay. These can include claims for loss of consortium, loss of enjoyment of life, hedonic damages, or other non-economic damages.

17. Notice of Uninsured Motorist/Underinsured Motorist Claim

In many cases your client will be injured by an uninsured or underinsured motorist. If your client has uninsured or underinsured motorist protection in his policy, his own carrier must be notified as soon as the issue of uninsured or underinsurance arises. The following is a sample letter of notice to the client's carrier that an uninsured or underinsured motorist claim can or will be made.

(Date)

(Name of Insurance Company)

(Address of Insurance Company)

Re: Policy No.

Your Insured: (Name of Client) (Address)

Dear Sir:

This office represents (name of client).

On (date of accident), (name of client) was involved in an accident with a vehicle driven by (name of defendant). The vehicle, which was owned by (name of client) and driven by him, was struck from the rear and as a result, your insured sustained personal injury.

(Name of defendant insurance company) has paid for the damage to my client's vehicle, and a claim is being processed and submitted for personal injuries on the part of my client and for loss of consortium claims on the part of his wife.

It appears from my client's continuing treatment and the severity of his injuries that (defendant) may be an "underinsured" motorist pursuant to (name of state statute).

Therefore, this letter will serve to put you on notice that our clients may be making a claim under the (uninsured/underinsured) provisions of his policy, as well as the direct claim made against (defendant) and his carrier.

If you have any questions or comments concerning this matter, or if you need any additional information, please feel free to contact me.

Sincerely,

(Name of attorney)

18. Medical Experts

Careful attention should be given to acquiring a complete file of medical information, because your ability to achieve a prompt and equitable resolution of your client's claim is directly proportional to the amount of information which you have to present to the defendant's insurance carrier for consideration.

The doctors who have treated or examined your client in the past, or who are currently rendering treatment to him, are important sources of information concerning your client's claim. Have your client complete a medical questionnaire concerning past medical problems and the physicians who treated the problems. The completion of the questionnaire by the client will enable you to identify all applicable doctors. When contacting doctors, keep in mind that in addition to being extraordinarily busy, doctors are often reluctant to get involved with any pending or potential litigation.

19. Notice of Representation

The client's treating and examining physicians, chiropractors, psychologists and psychiatrists should be written to as soon as possible and notified of your representation. These professionals will be grateful for being advised when a case is in litigation so that they may attend properly to bookkeeping, billing and evaluation. Medical professionals also want to know promptly if they will potentially be called as expert witnesses in the case and will be required to testify at deposition or trial.

The following sample letter can be adapted for use with a physician, psychologist, psychiatrist or chiropractor when the need arises:

(Date)

(Name of physician, psychologist, psychiatrist or chiropractor)

(Address)

RE: (Name of patient)

Dear Doctor:

This office is legal counsel to (name of client) with regard to injuries sustained on (date of accident) as a result of a motor vehicle accident in which he was involved.

We understand that you have examined and are presently treating our client, and your patient, for injuries sustained. Accordingly, in order to prepare our client's case properly and thereby to insure a prompt and maximum potential for recovery of damages, we

request that you provide us with copies of all reports, evaluations, statements of charges assessed to date, prognosis, diagnosis and all other documents contained in your office file concerning our client. Additionally, we understand that you will continue to treat our client for these injuries and we request that you periodically provide us with updated reports as treatment is rendered.

Concerning any charges currently outstanding, or which may accrue in the future, please keep in mind that our client has authorized us to apply the net proceeds of any recovery to the satisfaction of any such charges. Accordingly, it is also important for you to advise us periodically of the status of our client's account with you.

If you do not have access to facilities for making copies, or if you are unable to comply with this request for any other reason, please call me immediately in order to discuss a resolution to any problems you may have. We consider time to be of the essence, because we regard the prompt and equitable resolution of the client's claim to be directly related to the amount and accuracy of information presented to the defendant's insurance carrier for consideration.

We enclose an authorization signed by our client which permits you to comply with this request in full, and which, by its terms, acts as a revocation of any prior authorizations the client may have signed. Accordingly, we specifically request that you do not release any oral or written information about our client to anyone other than a proper representative of this office.

Finally, once you have reviewed the records contained in your file, we may contact you in order to discuss specific issues raised therein. Likewise, please do not hesitate to contact us with any specific questions, comments or concerns you may have.

Thank you in advance for your cooperation, courtesy and prompt attention to this matter.

Sincerely,
(Name of attorney)

20. Request for Previous Medical History

It is important to obtain as much information as possible from any treating physician, chiropractor, psychologist or psychiatrist with regard to any injuries for which the client will seek recovery. In addition to documenting the severity and duration of any physical or mental injuries, as well as any resulting disability, the history obtained by the medical professional may be crucial with regard to establishing causation issues. Accordingly, this

information should be obtained promptly so that any potential problems with respect to causation, liability or damages may be addressed at the outset.

21. Request to Doctor

(Date)

(Name of physician, chiropractor, psychologist or psychiatrist)

(Address)

RE: (Name of patient)

Dear Doctor:

This office is legal counsel to (name of client) with regard to injury sustained on (date of incident) as a result of an accident.

We understand that you treated our client from (date) to (date). In order that we may be fully advised of our client's past medical conditions, which may have a bearing on his present claims, we request that you provide us with copies of all office progress notes in your file concerning our client.

We are primarily interested in the specific history which you received in connection with your treatment of our client, any subjective complaints and objective findings, the identity of any other medical care providers seen by the client during the period of your treatment, your differential and final diagnosis, and the client's condition at discharge. If your office progress notes do not contain all of the above information, we request that you provide it to us by way of a separate document.

If you do not have access to facilities for making copies, or if you are unable to comply with this request for any other reason, please call our office immediately to discuss a resolution of the problem. We consider time to be of the essence, because prompt and equitable resolution of our client's claim is directly proportional to the amount, and accuracy, of information which we have to present to the defendant's insurance carrier for consideration.

Accordingly, please provide us with a list of all documents or reports, other than your office progress notes, in your office file concerning our client. Once we have reviewed this additional information, we may contact you in order to acquire copies of additional documents. Finally, we enclose an authorization signed by our client, which permits you

to comply with this request and which, by its terms, acts as a revocation of any prior authorizations the client may have signed. Accordingly, we specifically request that you do not release any oral or written information about the client to anyone other than a proper representative of this office.

Thank you for your cooperation and courtesy.

Sincerely,
(Name of attorney)
Enclosure

22. Request to Hospital

(Date)

Medical Records Department (Name of hospital)
(Address of hospital)

RE: (Name of patient)

Dear Record-keeper:

This office is legal counsel to (name of client) with regard to injuries sustained on (date of incident/accident) as a result of an accident.

We understand that the patient received treatment for these injuries at the hospital. Accordingly, we request copies of all hospital records pertaining to this treatment including, but not limited to, admission sheet, patient history, progress notes, incident reports, nurses' notes, reports of diagnostic studies, laboratory reports, and discharge summary. To facilitate your retrieval, we provide you the following specific information:

- (1) Name of patient: _____
- (2) Address of patient: _____
- (3) Patient's date of birth: _____

Additionally, would you please provide us with a list of all other admissions or emergency room visits of this patient and the dates of each to enable us to investigate fully the patient's prior medical history?

We enclose an authorization signed by the patient permitting you to comply with this request. Please note that the enclosed authorization, by its terms, acts as a revocation of any prior authorizations which the patient may have signed. Accordingly, we specifically request that you do not release any oral or written information about this patient to any one other than a proper representative of this office.

Finally, please advise us of any applicable charges associated with this request, so that we may ensure that they are satisfied. Thank you in advance for your prompt attention to this matter.

Sincerely,
(Name of attorney)

Enclosure

23. Request for Medical Report

When you have obtained an authorization for release of medical records that authorization, coupled with a letter of representation, should suffice for the doctor to both prepare and forward to you a medical report. There may be additional specific requests you have, however, regarding his diagnosis or prognosis. The following request for medical report serves that purpose:

(Date)
(Name of doctor)
(Address of doctor)

RE: (Name of patient)

Dear Doctor:

This office is legal counsel to (name of client) with regard to injuries sustained on (date of incident) as a result of an accident.

We have made an appointment for you to examine the patient on (date) at (time).

In order to enable us to assess the patient's claim in a complete and thorough manner, we require a comprehensive medical report with emphasis on the following matters:

1. Chief complaint;
2. Detailed history of present condition ;
3. Past medical history;
4. Physical examination;
 - (a) Subjective complaints;
 - (b) Objective clinical findings;
5. Differential or working diagnosis;
6. Diagnostic studies which may be indicated;
7. Initial prognosis;
8. Current prognosis.

Part of the patient's claim for damages as a result of the injury will be based on any applicable disability status. In order to enable you to form an opinion with regard to this issue, you are specifically requested to obtain, at the time of your examination, a complete and detailed description of the duties associated with the patient's employment. Please do not hesitate to call with any specific questions or comments which you may have. Thank you in advance for your prompt attention to this matter.

Sincerely,
(Name of attorney)

24. Impartial Medical Expert

Counsel will often have to deal with, cooperate with or confront the impartial medical expert or evaluator ("IME"). In many ways, the term "impartial" is inaccurate and a misnomer. In reality, this physician is most often associated with defense counsel and is part of the defense team. He is retained by an insurance carrier to examine the plaintiff and to render an opinion regarding the nature, extent, duration, diagnosis and prognosis for any injuries allegedly sustained. Often the IME is retained solely to question the diagnosis and prognosis of the plaintiff's treating physicians in hopes of diminishing the value of the plaintiff's injuries or calling into question the proximate causation between the accident and the injury. The IME generally examines the plaintiff either by way of stipulation or agreement between counsel, or where the defense has filed a request under the applicable rule of civil procedure for the plaintiff to submit to such an examination. There are ways, however, to use the IME to your advantage, as set forth in the checklist which follows.

25. Checklist of Ways to Use IME to Plaintiff's Advantage

1. Negotiate with defense counsel or the adjuster to determine who the IME will be. In this way, you may be able to select a physician who will more likely render an impartial opinion. This gives you greater rights than if a court orders a medical examination pursuant to Rule 35. There, the court's sole concern should be whether the physician is qualified to examine the plaintiff and render an opinion thereon.
2. Obtain from defense counsel or the adjuster a list of the qualifications and background of the IME. This usually is done in the form of a resume or curriculum vitae and it will allow you to gain immediate access to information that can be useful in the future if you should have to cross-examine this witness at trial.
3. Obtain information from the adjuster or defense counsel on how many prior occasions the IME has examined claimants for the carrier or for the defense and on how many occasions the IME has offered deposition or trial testimony on behalf of the defense. This can accomplish two goals. First, the adjuster or defense counsel will recognize your knowledge of and ability to deal with the bias and prejudice of the IME and therefore will be more likely to select an examiner who is unbiased. Second, the information you obtain can be used effectively to cross-examine the IME at trial on issues of bias or prejudice.
4. When you have learned the IME's identity, consider the following alternatives:
 - (a) forward all pertinent documentation, medical records and reports to the IME to insure that he has read and reviewed them, or
 - (b) refrain from providing him with any information (leaving it to the defense) so that at time of deposition or trial, you can question the accuracy and completeness of the IME's evaluation, conclusions and opinions based on a lack of review of pertinent medical records, factual information or other reports that should have been made available to him.

Note: The specific strategy you undertake in this regard depends upon the facts and circumstances of the case. For example, if it appears the case can settle reasonably, it may be in your client's best interest to forward sufficient information to the IME to make it more difficult for him to downplay or diminish the plaintiff's injuries. Therefore, it is more likely that his report, even if not advantageous to the plaintiff, will contain sufficient grounds for the carrier to offer a reasonable

settlement amount. However, if it appears that the case will likely be tried, it is generally advisable not to send the information and reports to the IME and rather wait until a deposition or trial to attack his opinion on the grounds that it was reached without having access to all necessary and pertinent information.

26. Evaluation and Acceptance or Rejection

As soon as you have evaluated the case and made a decision either to accept or reject it, the client should be notified. If the case is to be accepted, you should immediately evaluate it for settlement purposes, prepare the necessary contractual documents, and send them to the client for his signature and acknowledgment. If co-counsel is to be used, he should be contacted as soon as possible, and the client should be informed of and agree to his participation.

If, on the other hand, the case is going to be rejected, inform the client with a brief letter explaining the circumstances which require its rejection.

The forms and checklists in this section can be used in either circumstance.

27. Case Evaluation Checklist

1. Has the statute of limitations run? If not, when will it run? If there are several causes of action, do they have different statutes of limitations?

2. What parties can be sued?

3. Is there jurisdiction over each of those parties?

4. Do those parties have assets to satisfy any judgment?

5. Is there any insurance coverage involved? What are the policy limits?

6. What is the nature of the client's injuries?

7. What causes of action are presented?

8. Are the injuries permanent in nature?

9. Is the case viable from an economic standpoint?

10. Are there alternative methods of dispute resolution open to the client?

11. Have any settlement offers been made?

12. What kind of impression will the client make on the jury?

13. What are the potential theories of liability?

14. What are the potential problems of proof on each theory?

15. What defenses are available to the defendants?

16. Does the client have any problems with appearance, demeanor, character, or background which would have an adverse effect on the jury?

17. Should an expert witness be employed?

18. Is a referring attorney involved?

19. Should the case be referred to another attorney with more expertise in the particular area?

20. Have all appropriate documents been obtained from the client (tax returns, employment records, driving records, medical records, and criminal/arrest record)?

21. Is the investigator's report consistent with the client's story?

22. Are there any witnesses to the accident/incident?

23. Are the witnesses' accounts consistent with the client's account of the incident?

24. Is there a chance that any witness may leave the jurisdiction or be otherwise unavailable for trial?

25. Is the client prepared to make a commitment to take the case to trial?

26. Will the client be able to withstand the rigors of discovery and trial?

27. Is there a likelihood for favorable resolution of the client's claim?

Attorney's notes and comments:

28. Checklist on Drafting Effective Complaints

After the investigation and evaluation process has concluded, it will be time to draft an appropriate complaint that alleges liability and seeks damages. The following checklist, however, is designed to deal with a variety of potential complaints in personal injury actions, is generic in nature and should be reviewed prior to filing a complaint in a personal injury case.

1. Background work
 - (a) Obtain and review all relevant facts, documents and statements from the client and all available witnesses;
 - (b) Review the chronology of events that will serve as the basis for factual allegations in the complaint;
 - (c) Prepare an outline of potential elements necessary to prove each proposed cause of action (negligence, strict liability, breach of warranty, etc.);
 - (d) Review applicable case law and statutes to determine the appropriateness of the proposed legal claims;
 - (e) Review and identify appropriate defendants;
 - (f) Determine whether any preconditions to filing suit have been met (e.g., notices, demand letters, exhaustion of administrative remedies, if applicable);
 - (g) Review the Rules of Civil Procedure with respect to requirements for service of process, pleading special matters (capacity, fraud, etc.) and with respect to designation of appropriate parties. See FED. R. Civ. P. 8(a)(1)(2) and (3); 8(e)(1); 9(a), 9(b), 9(g); and 10(b), 10(c) and 11; and
 - (h) File suit in the appropriate forum that will have jurisdiction over the parties and the claims; that will be convenient for the client, for witnesses and for you as trial counsel; that will be able to afford complete relief and that will have a trial track that will bring the matter to trial, if necessary, within a reasonable period of time.

2. Know the purpose of filing the complaint
 - (a) To seek relief or damages by filing a lawsuit;
 - (b) To suspend or avoid statutes of limitation problems;
 - (c) To provide notice to the defendants of claims against them and the relief sought.

3. The format of a complaint
 - (a) The caption (provides the name of the court, the appropriate district, the names of the parties and case number);
 - (b) Preliminary jurisdictional statements, if required;
 - (c) Identification of the parties to the action;
 - (d) Factual allegations;
 - (e) Claimed breaches of duty;
 - (f) Requests for relief (e.g., monetary damages or other relief);
 - (g) Claim for jury demand; and
 - (h) Attorney's signature and client verification (where applicable).

Note: Remember that under state and federal rules of civil procedure, an attorney's signature on a complaint constitutes a certificate that he has read the complaint and that to the best of his knowledge, information and belief, formed after a reasonable inquiry, the complaint is well-grounded in fact and warranted by law and that it is not interposed for any improper purpose such as to harass or to cause unnecessary delay or needless increase in the cost of litigation.

29. Damage Evaluation Checklist

To determine the true settlement value of a case, you must evaluate all possible items of damage. Although some items may seem to overlap, they may be separate recoverable items at the time of settlement or trial. The following is a damage evaluation checklist which should be reviewed prior to settlement or trial.

1. Have all aspects of pain and suffering (past, present, and future) been analyzed and evaluated?

2. Are there any witnesses who have observed, can describe, and can testify to the client's pain and suffering?

3. Will the medical records and physician's testimony be able to further document the client's pain and suffering?

4. Are there photographs, videotapes, or films available to demonstrate the client's pain and suffering?

5. Are there any methods or means available to improve the client's pain and suffering?

6. Has the client changed his lifestyle to deal with the pain and suffering?

7. Has he changed jobs or job functions as a result of it?

8. Has he purchased any special medical support equipment to help alleviate?

9. Has he retained any special therapy to alleviate it?

10. Is the pain and suffering also of an emotional nature?

11. Can the physician's report or hospital records document the client's mental pain and suffering?

12. Do the physician's reports, psychologist's reports, and hospital records indicate that the client's symptoms are related to the trauma of the accident?

13. Does the client take any medication to ease the mental pain and suffering?

14. Is there expert medical testimony available to characterize the client's pain and suffering?

15. Has the client's injury diminished his capacity for social activities, hobbies, or other pastimes?

16. Has the client's injury changed his outlook on life?

17. Has the client's injury changed his personality?

18. Are there witnesses who could testify to such a change?

19. Has the client had difficulty maintaining relationships with persons since the injury?

20. Has the client taken up drinking or drug use since the injury?

21. Has the client's marriage deteriorated since the injury?

22. Has the injury shortened the client's life expectancy?

23. Is there expert testimony available on this point?

24. To what extent has the client's life expectancy been diminished?

25. What is the economic value of the loss of life expectancy?

26. Is there an economist available to testify on the economic impact on the shortened life expectancy?

27. What medical expenses has the client incurred?

28. What medical expenses will the client likely incur in the future?

29. Has the client had to hire a nurse or homecare staff?

30. Has he needed to purchase medications or medical equipment?

31. Is there expert testimony available on future medical expenses?

32. What will the medical expenses consist of?

33. How long in the future will care be required?

34. Is there expert testimony on the present cash value of the expenses the client will likely incur in the future?

35. Are there claims for loss of consortium?

36. Has the client's children been deprived of his services or companionship?

37. Does the particular jurisdiction recognize a claim for loss of consortium based on loss of affection?

38. What property damage has the client sustained?

39. For how long was he deprived of the property?

40. Is there expert testimony on the value of the property?

41. Has the injury caused a loss of earning capacity?

42. Has the client been denied any prospects for advancement as a result of the injury?

43. Has the client incurred any costs in re-training as a result of the injury?

44. Is there expert testimony available on the client's actual loss of earnings?

45. Is there any possibility for assessing punitive or exemplary damages against the defendant?

46. Was the defendant's conduct reckless, wanton, or malicious?

47. Was there alcohol or drug use involved in the accident?

48. Was the defendant charged with any criminal conduct as a result of the accident?

49. Can the defendant's conduct be characterized as an intentional tort?

50. What is the financial worth of the defendant?

51. What assets does he own?

52. What are his liabilities?

53. Does he have insurance coverage?

54. Will the insurance coverage cover an intentional tort?

55. If the client is the estate of a deceased person, what was the decedent's background?

56. What was the decedent's marital status?

57. What was the decedent's general health prior to the accident or injury?

58. What was the decedent's employment history?

59. How old was the decedent at the time of his death?

60. What was the decedent's income record for ten years prior to his death?

61. What was the decedent's income likely to be if he lived an additional ten years?

62. Was his yearly income increasing or decreasing?

63. Is there evidence to prove his income (e.g., tax returns, employment records, social security records)?

64. What was the decedent's net worth?

65. What expenses were incurred as a result of the injury and subsequent death?

66. Did the decedent die instantly, or did he experience pain and suffering prior to death?

67. What bills and expenses were incurred as a result of the death?

68. What services did the decedent perform for the household?

69. What is the value; of the decedent's spouse's deprivation of his companionship?

70. What is the value of the decedent's children's deprivation of his companionship?

71. Is there expert testimony available to establish what the decedent's future income would have been, minus the costs of self-maintenance?

72. What was the decedent's actuarial life expectancy?

73. What is the present value of the decedent's future income?

74. Have all problems with comparative or contributory negligence, assumption of the risk, or last clear chance been analyzed?

75. Has the statute of limitations run on any cause of action?

Attorney's note; and comments:

30. Special Damages Outline

The questionnaires appearing earlier are designed to help you develop the information necessary to assign an approximate value to the various elements of damages. The following checklist will help you to ensure that you have not overlooked any elements of your respective damage claims.

1. Lost wages:
 - (a) The amount of actual income lost as a direct and proximate result of the injuries:
 - (1) Salary or wages;
 - (2) Some jurisdictions recognize fringe benefits as wages;
 - (3) Bonuses;
 - (4) Profit sharing;
 - (5) Pension contributions;
 - (6) Employee incentive savings programs.

2. Lost earning capacity - Irrespective of the actual wages lost, what effect did the injuries have on the specific capacity of the plaintiff to earn? For example, even if the plaintiff can still engage in his occupation, are there other occupations for which the plaintiff was qualified and in which he could have engaged for higher earnings and from which he is now disabled as a direct and proximate cause of the injuries?

3. Medical expenses:

- (a) Past and future;
 - (b) Usually must be reasonably necessary to relieve, cure or rehabilitate the plaintiff from the effects of his injuries;
 - (c) Must be fair and reasonable in amount;
 - (d) Check to see if Collateral Source Rule applies;
 - (e) Do not forget drugs, prostheses (past, present and future), therapy, modification to home, vehicle, etc.
4. Consequential out-of-pocket expenses:
- (a) Reasonable repair/replacement costs of personal property;
 - (b) Reasonable substitute transportation expenses;
 - (c) Some jurisdictions allow recovery of some or all costs of suit.
5. Non-economic losses:
- (a) Pain and suffering;
 - (b) Loss of consortium, services, or family relationship;
 - (c) Some jurisdictions allow recovery for disfigurement (with or without restrictions) and/or loss of use of bodily functions or members (with or without restrictions).

Note: if you ensured that the plaintiff completed fully the questionnaires appearing earlier, most of the information necessary to assign values to the above damage items should be already available to you. While most of the out-of-pocket losses are easily identifiable, the elements of non-economic losses are certainly less clear.

31. Non-Economic Loss Calculations

One of the most difficult personal injury concepts to transform into a tangible recovery is the category of damages reflecting non-economic losses of the plaintiff. Generally, this element of damages includes compensation for pain and suffering, loss of consortium, loss of family relationships, etc. Because of the tremendous difficulty in quantifying such damages, many jurisdictions restrict the amount of recovery or the type of evidence or argument that can be used in an effort to give the jury a basis for arriving at an amount. The following outline deals with several methods of justifying an award for non-economic losses. You must examine the law of your jurisdiction to determine whether there are any restrictions on the amount of such an award or the type of evidence or argument which can be used at trial.

1. This element of damages includes pain and suffering, loss of consortium, loss of family relationships, disfigurement, loss of use.

2. Develop a complete picture of plaintiff's pre-accident life and compare it to post-accident life. Include:
 - (a) Employment;
 - (b) Hobbies;
 - (c) Leisure activities and charitable efforts;
 - (d) Family relationships;
 - (e) General interests.

3. To calculate the economic value of the non-economic loss different theories are used such as:
 - (a) Per diem argument; i.e., how many dollars a day the plaintiff should be paid because of the impact on his or her lifestyle, multiplied by the number of days since the injury and the plaintiff's life expectancy. Different per diem values may be assigned to different periods in the plaintiff's life (e.g., period immediately following incident, hospitalizations past and future, etc.);
 - (b) Pain and suffering calculated on loss of ability to earn. This assumes that idleness and/or economic worry arising from lost wages and/or earning capacity contribute to this element of damages. Some therefore argue that a multiple of the lost wages/earning capacity is an appropriate calculation, in whole or in part, for the pain and suffering which the plaintiff has and will experience;
 - (c) Pain and suffering calculated on amount of medicals. This assumes that the magnitude and complexity of the past and future medical treatment as reflected in the total cost therefore is a satisfactory indicator, in whole or in part, of the amount of pain and suffering experienced;
 - (d) Combination of lost wages/earning capacity with the cost of medical expenses. This assumes that idle time is spent not only worrying about economic loss but is taken up with prolonged or complex, painful medical treatment;
 - (e) Impact on plaintiff's life, including changes in lifestyle, changes in family relationships, embarrassment or inability to perform personal tasks.

Note: Unfortunately, a plaintiff can never be made truly whole for his injuries, and the effect that they have on his life. He can only recover money. Creativity is the key, both for plaintiff's counsel who is attempting to maximize the translation of non-economic loss into dollar value and for defense counsel who is attempting to minimize the jury's perception of the impact on plaintiff's life. A jury which has never experienced such an injury can never "know" what a plaintiff's life has become. But focusing on the changes that have occurred, and attempting to translate them into concepts that a jury can identify with, is the key to maximizing or

minimizing the award. Thus, this opportunity at creativity can be one of the most fulfilling aspects of trial work and for this reason, if no other, it warrants your devotion of considerable time, effort and energy.

32. Loss of Consortium Claims

Texas allows for the recovery for loss of consortium by either the spouse of an injured plaintiff or by the injured plaintiff's children. The following checklist can be used to outline the various elements of proof to recover damages for both loss of spousal consortium and parental consortium.

33. Checklist for Recovery of Loss of Spousal Consortium

1. Establish the existence of the spousal relationship.
2. Establish the quality of the spousal relationship (comfort, society, companionship, protection and marital relations).
3. Establish the injury to the other spouse:
 - (a) General form of injury;
 - (b) Severity of injury;
 - (c) Duration of injury;
 - (d) Prognosis.
4. Establish the disposition of the other spouse prior to the injury:
 - (a) Testimony of injured spouse;
 - (b) Testimony of spouse seeking loss of consortium damages;
 - (c) Testimony of children;
 - (d) Testimony of other family members;
 - (e) Testimony of friends.
5. Establish deterioration in the injured spouse's disposition and personality after the injury.
6. Establish the resulting deterioration in the spousal relationship after the injury.
7. Demonstrate the plaintiff's special damages: loss of the injured spouse's comfort, society, protection, companionship and marital relations.
8. Demonstrate a causal relationship (proximate cause) between the spouse's injury and the deterioration in the spousal relationship.

34. Checklist for Loss of Parental Consortium

1. Establish the existence of the parent-child relationship.
2. Establish the quality of the parent-child relationship.
3. Demonstrate the injury to the parent:

- (a) General aspects of injury;
 - (b) Severity;
 - (c) Duration;
 - (d) Prognosis.
4. Demonstrate the personality and disposition of the parent prior to the injury.
5. Demonstrate specific examples of the closeness of the parent-child relationship before the injury through:
 - (a) Testimony of parent;
 - (b) Testimony of child;
 - (c) Testimony of family members;
 - (d) Testimony of friends.
6. Demonstrate a deterioration in the parent's disposition and personality after the injury.
7. Demonstrate a deterioration of the parent-child relationship after the injury.
8. Demonstrate the susceptibility of the plaintiff to loss from the parent's care, companionship, society and protection.
9. Establish any skills taught by the parent to the child prior to the injury.
10. Demonstrate a causal relationship (proximate cause) between the parent's injury and any deterioration in the parent-child relationship.

Note: In any loss of consortium claim, remember that the plaintiff is not the party who suffered the actual physical injury. The plaintiff suffers a separate and distinct injury as a result of the physical injuries suffered by the spouse or parent.

Finally, remember that the party claiming the loss of consortium is a distinct plaintiff. You must enter into a separate retainer agreement with each of the parties claiming loss of consortium. If a child makes the claim, it may be required that a court appoint a guardian ad litem. The separate agreements are necessary because if you are successful in convincing the trier of fact that there has been a loss of parental consortium and companionship, and that loss is proximately caused by the defendant's conduct, then each party will receive a discrete amount of damages and you must have a separate agreement to collect your respective fees.

35. Soft Tissue Injury Cases

Soft tissue injury cases are often the most difficult to value, settle and prove in personal injury litigation. This is because the participants, including counsel, adjusters, physicians and the client have been conditioned to look for and review objective signs of injuries such as fractures and scarring to value cases, and have similarly been conditioned to reject as feigned, non-existent, or insubstantial any injury basically subjective in nature, such as the soft tissue injury. Medical and scientific advances such as thermography and

magnetic resonance imaging have now made it possible to verify the existence of many soft tissue injury claims. Despite these scientific and medical advancements, the soft tissue injury claim is still met with much skepticism and is viewed by defense counsel, adjusters, many physicians and the courts as often being unworthy of significant settlement dollars. As a result, plaintiff's counsel must be ready and able to quantify accurately the subjective pain, discomfort and suffering endured by the client to demonstrate to the adjuster in settlement or to the trier of fact at trial in an objective, easily understandable and convincing manner. Review the following checklist in evaluating the soft tissue injury.

36. Checklist on Soft Tissue Injury Evaluation

1. Does the client have a prior existing soft tissue injury which resulted from trauma (prior accident), muscle strain, muscle fatigue or disease?
 - (a) Learn about prior soft tissue injuries to determine whether the injury presently complained of is a new and distinct injury or an aggravation of a preexisting injury.
 - (b) Remember the defendant must take the plaintiff "as he finds him". This means that the defendant cannot try to lessen his own responsibility for damages by showing that plaintiff had some prior problem.
 - (c) The defendant cannot be held responsible for causing the underlying injury, but can be held responsible for any aggravation or worsening of the condition.

2. If the plaintiff has a prior injury, consider the following:
 - (a) What part of the body was affected?
 - (b) How was the body part affected?
 - (c) Were the plaintiff's activities limited as a result of the prior injury?
 - (d) Is the new injury a distinct and separate one or is it an aggravation or worsening of the prior existing injury?
 - (e) Has there been any aggravation or worsening of the plaintiff's condition? If so, how has it manifested itself?
 - (f) Can you demonstrate that the condition has worsened, destabilized or reoccurred as a result of the defendant's conduct, thus rendering the defendant liable in damages?

Note: Carefully document the plaintiff's past medical history. This can help demonstrate stabilization, worsening or reoccurrence of the prior injury as a result of the defendant's conduct. Additionally, testimony of family members, friends, co-workers, etc. can be used to prove either that the injury is a new one, or that if

the plaintiff had a prior injury he had fully recovered or at least had learned to live with it. In this way, you can overcome impeachment attempts at trial that claim the plaintiff is a malingerer and that the current complaints of pain, discomfort and injury were feigned or not caused by the defendant's conduct.

3. In evaluating the soft tissue injury on the merits consider:
 - (a) The likelihood of recovery;
 - (b) The likelihood of collecting any recovery: are there insurance policies; available? Do the policies afford coverage? What are the limits of recovery? What are the defendant's individual assets?
 - (c) What is the likelihood of a fair settlement being reached without trial?
 - (d) How can the injury be proven subjectively?
 - (1) Client's testimony;
 - (2) Family member testimony ;
 - (3) Friends' testimony;
 - (4) Co-workers' testimony.
 - (e) How can the injury be proven objectively?
 - (1) Thermography;
 - (2) Magnetic resonance imaging;
 - (3) Other diagnostic tests (CAT scans, bone scans, discograms, etc.).

4. How can you deal subjectively with the injury?
 - (a) Work with the client on presenting a credible presentation. How credible the client is and how he is viewed by the trier of fact will, to a large extent, determine whether his subjective injury is accepted.
 - (b) Demonstrate real ramifications of the injury such as lost wages, medicals, consortium claims, pain and suffering.
 - (c) Use the personal injury diary to enhance the client's credibility.
 - (1) Instruct the client to make use of the diary and to note in the diary when and to what extent he suffers pain and discomfort as a result of the injury;
 - (2) Require particularity and specificity as to type, nature, duration and location of pain;
 - (3) Stress to the client that the personal injury diary is the most effective way to document pain and suffering and to help prove pain and suffering to others who have not experienced it.

Note: The personal injury diary is also a way for the client to evaluate his own case. The client must agree to any settlement and the diary helps him to review the pain and discomfort he has suffered from the injury and to evaluate its worth accordingly whenever a

settlement offer is made.

- (4) Seek corroborative evidence.

Note: The client becomes more “believable” if there are others available to testify and corroborate his version of the injury and the resulting pain, discomfort and suffering he endures. Corroborative evidence can include testimony of physicians, nurses, family members, friends, co-workers and objective tests.

37. Retainer Agreement

Before you agree to take the case, have the client sign a written retainer agreement. The retainer agreement should detail what actions you will take on behalf of the client, what the fee arrangement will be, who will be responsible for out-of-pocket costs, and any other particular aspect you want to include. If the retainer agreement is clear in its terms, it will be less likely that a dispute will arise at some future time concerning fees, costs, or client expectations.

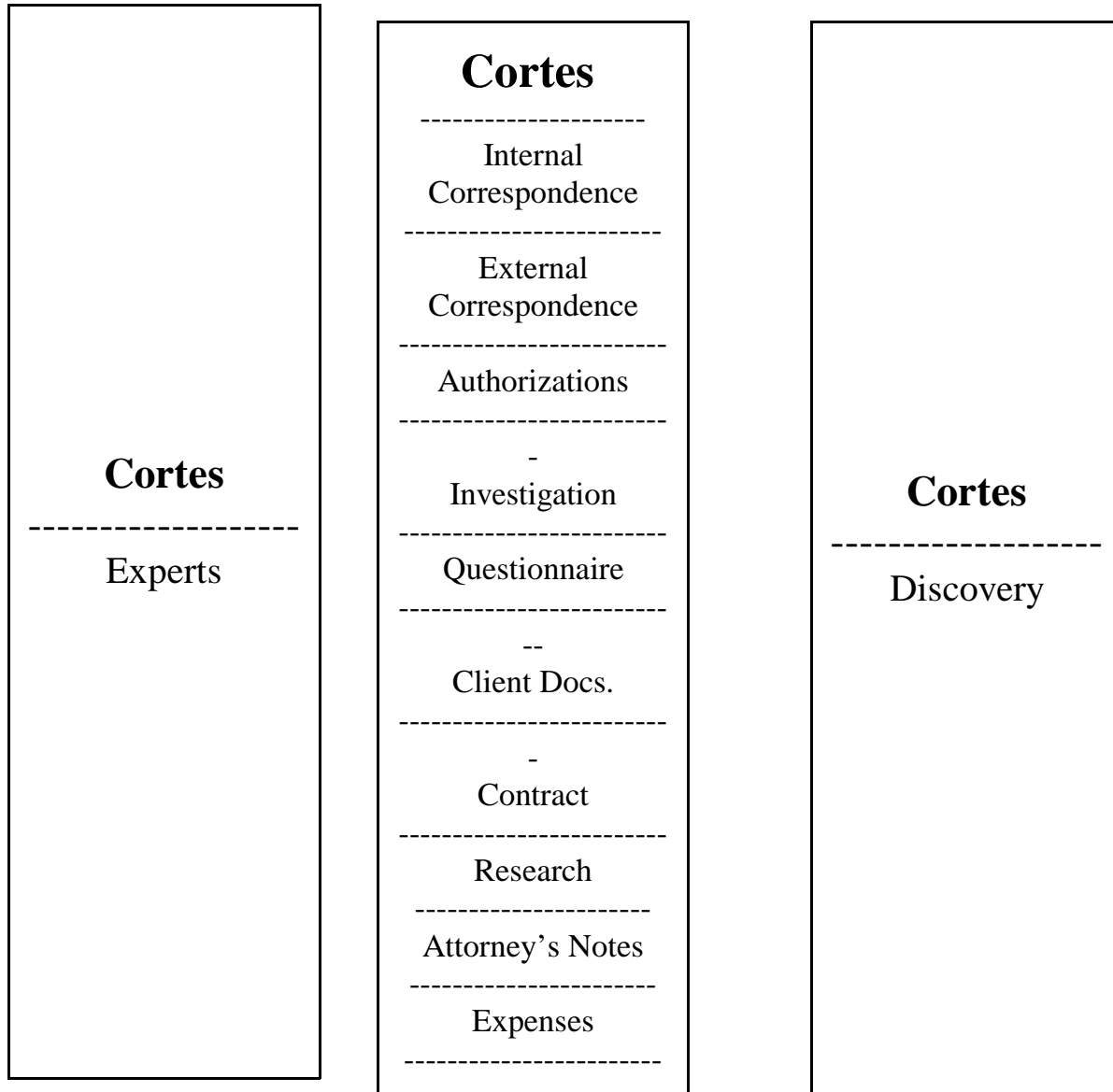
38. Agreement With Referring Attorney

In many personal injury cases, a general practitioner will refer a complicated case to a specialist. When that happens, if the referring attorney is to share in the division of fees, the canons of ethics require that he actually work on the case.

The client must be apprized of any division of fees and must approve of that division. If the referring attorney receives all copies of reports, documents, pleadings, and motions and also monitors the case, giving his input and suggestions, the canon of ethics requirements should be satisfied.

The rules of local practice, the canons of ethics, and the provisions of local bar associations governing conduct of its members should be reviewed before entering into an agreement with a referring attorney.

39. File Organization



Cortes

Pleadings

Cortes

Photographs

40. Tracking Medical Costs

The role which medical expenses play in personal injury litigation is an important one. In addition to comprising one element of the economic losses which are recoverable in personal injury litigation, both the nature and magnitude of the expenses can have a dramatic influence on a claim for pain and suffering. While the converse is not necessarily true, it can be logically argued that significant medical bills are reflective of considerable pain and suffering. Moreover, where the bills represent the provision of painful procedures (such as aggressive physical therapy, heat treatments, or even dental work) or the purchase of medical supplies to alleviate painful conditions (such as narcotic drugs, ace bandages, ointments, etc.) they provide good, solid evidence of the course of the client's pain.

Given the important role which medical expenses play in personal injury litigation, it is important for you to keep careful track of them in each case.

41. Case Rejection Letter

If you have evaluated the case and your investigation reveals that the case is without merit, uneconomical, or beyond the scope of your expertise, the client should be informed as soon as possible that the case is being rejected. Any of the results of the investigation, notes, and interviews should be turned over to him immediately upon his request, in order to avoid any problems with statutes of limitation and to afford the client the decency and respect he deserves. At the same time, you are entitled to reimbursement for any out-of-pocket expenses which you incurred as a result of your investigation. The following is a sample rejection letter.

(Date)

(Name of client)

(Address)

Dear (name of client):

We have reviewed the investigator's report, which contains a survey of the documents available at this time, the statements of witnesses, the police reports, your medical reports, your lost wage certificates, and your own statements. After this review, and our own analysis of the law in this area, we find it necessary to decline representation on this particular claim.

We feel that there are severe problems of proof with respect to the existence of a defect in the particular product which caused your injury. We also believe that we cannot process your claim in an economical, just, and favorable way.

We agree to make the results of any of our investigations available to you and to any other attorney you may employ. You should be aware, however, that the statute of limitation expires on (insert appropriate date); after that time you will be barred from bringing any claims. Thank you for the opportunity you gave us to review your claim. Please accept our best wishes in reaching a just and fair resolution of your claim.

Sincerely,
(Name of attorney)

42. Practice Tips

In investigating and evaluating the case, make sure to take complete control. Although certain functions and duties will have to be delegated to others, it is important to keep informed on the progress of the case and any problems that may develop with it. Review the file as it is progressing at least once or twice a month. Make sure all persons working to resolve your client's claim are doing so in a coordinated and productive fashion, duplicative work will only increase the time necessary for resolution.

Try to make contact with insurance adjusters as soon as possible. Although the case may not be ready for settlement, it is best to make this initial contact, to make sure that the insurance company does not attempt to contact your client.

Finally, in evaluating the case for settlement, make sure that all possible defendants have been identified, all possible causes of action analyzed, all impediments to recovery recognized, and all aspects of damage particularized. Once this has been done, the case is ready for settlement or for trial preparation.