Damages in Dollars: Presenting an Undocumented Plaintiff’s Loss of Future Earning Capacity in Dollars and Not Pesos

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I. INTRODUCTION

The engine that drives a jury to render substantial verdicts in personal injury cases is fueled by special damages, and particularly wage loss. When a jury sees big economic loss numbers presented on the "blackboard," that sets a baseline for the award and a commensurate comfort level with a large total damage award is established. One of the more frustrating scenarios a plaintiff’s attorney may face is a case where there is clear liability and a significant injury, but the plaintiff is precluded from presenting a "full value" wage loss claim because the plaintiff was an undocumented worker at the time of the incident.

Under California law, if at the time of the incident, the injured plaintiff was working without proper legal documentation (a green card or other legal temporary worker status) wage loss claims at trial may be limited to future earnings in the plaintiff’s country of origin. (Rodriguez v. Kline (1986) 186 Cal.App.3d 1145.) Thus, an undocumented plaintiff born in Mexico and injured in California may be limited to claiming future wage loss based on what could hypothetically be earned in pesos rather than dollars. The Rodriguez decision sets up the roadmap for how this issue is decided at trial. This article explores how to win a pretrial motion under Rodriguez and how to prepare for trial should you lose such a motion.

II. THE PRETRIAL MOTION: A HYPOTHETICAL PROCEEDING TO DEPORT PLAINTIFF

Under the Rodriguez decision, the trial court decides as a matter of law whether plaintiff may claim a loss of future earning capacity in dollars or the currency of plaintiff’s country of origin:

Therefore, whenever a plaintiff whose citizenship is challenged seeks to recover for loss of future earnings, his status in this country shall be decided by the trial court as a preliminary question of law. (See Evid. Code, § 310.) At the hearing conducted thereon, the defendant will have the initial burden of producing proof that the plaintiff is an alien who is subject to deportation. If this effort is successful, then the burden will shift to the plaintiff to demonstrate to the court’s satisfaction that he has taken steps which will correct his deportable condition. A contrary rule, of course, would allow someone who is not lawfully available for future work in the United States to receive compensation to which he is not

entitled. (See Alonso v. State of California (1975) 50 Cal.App.3d 242 [123 Cal.Rptr. 536].) (Rodriguez v. Kline, supra, 186 Cal.App.3d at 1149.)

If plaintiff prevails on this issue, then all evidence of alien status is excluded and loss of earning capacity may be based on past and projected future income in the United States. (Id.) Such a ruling not only increases the value of the case, it also keeps out evidence such as the use of a false social security card or driver's license to obtain employment and prevents a defendant from using the highly prejudicial argument that plaintiff has been stealing jobs from American workers.

A. The Motion in Limine

Tactically, you must decide whether to bring a Rodriguez motion or to wait and see what the defendants plan to do. There is probably little upside to bringing the motion except that perhaps presenting plaintiff's side of the story first will "inoculate" the judge. Given that it is defendant's burden initially to produce evidence plaintiff is an alien subject to deportation, it makes more sense to see what the defendant has to offer and be prepared with a smashing reply. If the decision is to wait and see, you must file a prophylactic motion to preclude the introduction of ancillary evidence of alienage such as a false social security card or driver's license under Evidence Code §§ 352, 787 and 788. This motion is discussed in detail below. Assuming the defendant is not asleep at the switch and the issue of alienage has been revealed during discovery and mediation, you should be prepared for a preliminary hearing under Rodriguez.

Under Rodriguez, the trial court is to conduct a preliminary hearing to decide: 1) whether plaintiff is subject to deportation;1 and, 2) whether plaintiff has taken steps to correct his deportable condition and therefore "might have succeeded in a proceeding for suspension of deportation." (Id. at 1149.) The trial judge sits as a hypothetical immigration hearing officer or judge. If the court concludes that plaintiff "might have" succeeded in a proceeding for suspension of deportation, then all evidence relating to alienage must be excluded. (Id.) Thus, the burden of proof for plaintiff is whether plaintiff "might have" succeeded in a proceeding to suspend deportation. For obvious reasons, it is critical to stress that the burden of proof for this motion is a significantly lower standard of "might have succeeded," which is far less burdensome than preponderance of the evidence.

B. Mustering the Evidence to Demonstrate Plaintiff Might Have Succeeded in a Proceeding for Suspension of Deportation Under 8 U.S.C. § 1229b

In Rodriguez the basis for the loss of future earning capacity was erroneously submitted to the jury in Rodriguez. The court of appeal concluded that despite the

plaintiff's illegal status, an appropriate preliminary hearing should be held to allow plaintiff to present evidence as follows:

[Plaintiff] had been in this country for nearly 20 years and had been a hardworking person of high moral character throughout that period. He allegedly had paid income taxes and owned his own business until forced to close it following the subject accident. As a consequence, he might have succeeded in a proceeding for suspension of deportation (8 U.S.C. § 1254) or he might be entitled to amnesty in the event currently pending federal immigration legislation is enacted. (Rodriguez, supra, 186 Cal.App.3d at 1149, emphasis added.)

The Rodriguez court pointed to the requirements of 8 U.S.C. § 1254 as a basis for determining whether plaintiff had taken any steps to correct his deportable condition. Section 1254 of the U.S. Code, addressing suspension of deportation, was repealed in 1996 and replaced with the very similar 8 U.S.C. § 1229b, entitled "Cancellation of Removal; Adjustment Of Status." Thus, the trial court today should consider the successor statute, 8 U.S.C. § 1229b, in weighing whether plaintiff has taken steps to correct his deportable condition and might have succeed in a proceeding for suspension of deportation.

The provisions of 8 U.S.C. § 1229b are as follows:

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien –

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or 1227(a)(3)2 of this title (except in a case described in section 1227(a)(7) of this title where the Attorney General exercises discretion to grant a waiver); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence.

Thus, the evidence needed to show steps towards correcting deportable status are physical presence, good moral character, absence of criminal convictions, and exceptional hardship.3

1. The physical presence requirement

Of the three primary criteria, the physical presence requirement is the most mechanical. Under 8 U.S.C. § 1229(d)(2), a plaintiff in the United States for 10 years shall:

... be considered to have failed to maintain continuous physical presence in the United States under subsections (b)(1) and (b)(2) of this section if the alien has departed from the United States for any period in excess of 90 days or for any periods in the aggregate exceeding 180 days.

To satisfy these criteria, plaintiff must testify to living in the United States for at least 10 years with no single period outside the country greater than 90 days and no aggregate departure greater than 6 months. Plaintiff obviously can testify to travel outside the country but if such travel is in excess of the above time frames, plaintiff loses. It is advisable to file a declaration from plaintiff with the motion stating facts that meet the physical presence criteria.

2. The good moral character requirement

This requirement provides an opportunity to present evidence that basically shows plaintiff is the kind of person anyone would want as their neighbor. The case law discussing 8 U.S.C. § 1229b, as well as the now-repealed 8 U.S.C. § 1254, provide examples of the factors an immigration judge (IJ) would consider in determining whether a plaintiff had met the good moral character requirement. These factors include, but are not limited to: whether plaintiff was hard-working, an active member or regular volunteer in a church or the community, a reliable tenant, involved in friends' and relatives' lives in a positive way; whether plaintiff had a clean criminal record; and whether plaintiff had abstained from abusing substances.

It is worth noting that in Ramirez-Alejandre v. Ashcroft (9th Cir. 2003) 320 F.3d 858, 870-871, an immigration judge found the plaintiff had established good moral character "despite using false documents to secure employment, failing to file income tax forms, and failing to disclose information to the INS at his arrest." That finding was affirmed by the Board of Immigration Appeals (BIA) on appeal and was later upheld by the 9th Circuit.

Evidence that plaintiff worked ever since entering the United States and was considered an excellent employee – reliable, hard working, diligent, never "written up" for violating policies, being late or failing to do assignments is useful. Obtaining a declaration from the plaintiff's former employer is advisable. If the employer filed any immigration documents, such as an I-140 Immigrant Petition for Alien Worker, to assist plaintiff in curing their alien status, such evidence may also be valuable.4

Evidence of homeownership and plaintiff's responsibility for the payments on the home, never defaulting and/or paying all taxes on the property is very persuasive. Further evidence of payment of all taxes, income and otherwise, is also useful.

Evidence of family life, length of marriage and children is persuasive under the good character requirement as well as the extreme or unusual hardship requirement as the effect of a deportation on any child born in the United States is given special consideration. That plaintiff does not drink alcohol or smoke and has never been charged with, let alone convicted of, a crime or felony or been subject to any deportation proceeding should be presented if available. Evidence of good standing in the community is very persuasive, i.e., plaintiff is a devout member of a church and is considered a person of good standing and is respected in the community. Here a declaration from clergy or other community group, Little League, Boy Scouts, etc. should be submitted.5 Again, confirm that the plaintiff is the kind of person you want living next door.

3. The hardship requirement

Section 1229b(1)(D)6 requires the plaintiff to show that removal from the United States would result in "exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence." This is a purely discretionary standard. (See Kalaw v. INS (9th Cir. 1997) 133 F.3d 1147.) The factors that should be considered in determining whether a plaintiff meets the hardship requirement under § 1229b include:

(1) Applicant's age, both at entry and at the time of their application for relief; family ties in the United States and abroad; length of residence in the United States over the minimum requirement; (2) Political and economic conditions in their native country; (3) Financial impact of departure from the United States, including ability to find work in plaintiff's country of citizenship; (4) Involvement and position in their local community; (5) Immigration history; (6) Whether a deportation will disrupt the lives of children, especially those who have remained in the country during their early formative years. (Id.)

With respect to the applicant’s children who have grown up in the U.S., their language skills, educational attainment, medical conditions, ties to the community, ability to adapt to a foreign country, and impact on life opportunities are factors that the BIA is compelled to consider. (See In re Recinas, 23 I. & N. Dec. 467 (BIA 2002); In re Kao, 23 I. & N. Dec. 45 (BIA 2001).) This list is not exclusive or exhaustive. Courts have consistently held that because the determination of extreme hardship is made on a fact-specific basis, the BIA must consider all factors bearing on that determination (Ramirez-Alejandre, supra, 320 F.3d at 876), and the BIA has noted that the hardship analysis "requires the assessment of hardship factors in their totality, often termed a ‘cumulative’ analysis" (In re Recinas (BIA 2002) 23 I. & N. Dec. 467). Here, you need to be careful about arguing fact similarities to other Bureau of Immigration cases as there are many cases where applicants are deported under what appear to be very harsh circumstances. It is critical to remind the court that the standard on the issue of hardship is discretionary and again, plaintiff’s burden of proof is that the plaintiff "might have succeeded" in a proceeding to suspend deportation.

4. Conclusion: Plaintiff has taken steps to correct the deportable status and might have succeeded in a proceeding for suspension of deportation

For purposes of this motion, under Rodriguez, the ideal plaintiff will show:

• Plaintiff exceeds the physical presence requirement.

• Plaintiff is a person of exceptionally high moral character, respected in the community.

• Plaintiff is a hardworking, taxpaying homeowner.

• Plaintiff is committed and supportive to the family.

• Plaintiff is spiritually dedicated, does not smoke or drink.

• Plaintiff has never been charged or convicted of any crime.

• Plaintiff’s family would experience extreme hardship in the event of deportation.

• Plaintiff’s employer considered plaintiff a model employee and filed an immigrant worker application on plaintiff’s behalf.

Thus, under Rodriguez v. Kline, evidence of plaintiff’s alienage should be excluded at trial for any purpose and plaintiff’s projected earning capacity should be based on past and projected future income in the United States.

5. The Pending Federal Legislation Clause Under Rodriguez

The Rodriguez decision allows for a catch-all argument that plaintiff "might be entitled to amnesty in the event currently pending federal immigration legislation is enacted." (Rodriguez, at 1149.) When the Rodriguez case was decided the Reagan administration was considering a broad-based amnesty program. Today, the current federal government is considering immigration reforms that could apply and assist a plaintiff. Unfortunately, the reforms offered up by the Bush administration appear to require that the undocumented worker demonstrate there is no legal worker available or willing to do the job. This is a difficult proposition in today's economic environment. Another federal legislative proposal that has been introduced in the House and Senate is the Safe, Orderly, Legal Visas, and Enforcement (SOLVE) Act of 2004. The Solve Act includes the following provisions:

• Earned legalization for undocumented workers in the U.S.;

• Green cards for the spouses and children of legalized workers;

• Transitional legalization program available to more workers; and

• A comprehensive family reunification and backlog reduction system

In any event, the argument must be made that there is a decided interest at the federal level of passing immigration reform and that plaintiff, in the words of Rodriguez, "might be entitled to amnesty in the event currently pending federal immigration legislation is enacted." It would be an injustice for plaintiff to be saddled by the trial court ruling damages are limited to future earnings in the country of origin only to have legislation passed post-trial that "overturns" the trial court's decision.

III. HEDGING YOUR BET: WHAT DO YOU DO IF YOU LOSE THE MOTION?

A. Fight for the Best, Be Prepared for the Worst

The best way to protect your undocumented client is to essentially prepare two cases for trial, one assuming loss of future earning capacity in U.S. dollars and the other assuming loss of future earning capacity in the country of origin. One tactic is to have plaintiff's vocational and economic experts prepared to testify regarding wage loss in both countries.

In the case of a ten-year construction worker born in Mexico, the vocational expert must be prepared to testify as to what the plaintiff would earn in Mexico – on its face, a losing proposition. However, consider that the plaintiff has 10 years of experience working for U.S. construction companies. It would be reasonable for the expert to assume the plaintiff, if healthy, would more likely than not work for a U.S. construction company in Mexico. Further, given the plaintiff's lengthy work for U.S. companies, the expert could assume that plaintiff would be able to work as a foreman. There are U.S. construction firms in Mexico paying $450-$500 a week to foreman. While the wage loss claim may not be the same as a $70,000.00 a year union wage-and-benefit package, a plaintiff can still blackboard substantial future wage loss. Consider the best "re-employment" opportunity, assuming plaintiff's unlimited pre-injury capacity in the country of origin, and be prepared to present it to the jury. This approach also allows your economist to present the damage calculation in dollars.

Secondly, considering that the injured plaintiff is now "damaged goods," what re-employment opportunity is there in the country of origin that can be considered for mitigating damages? The answer is that the mitigation earnings in the country of origin may be little to nothing, thereby further increasing your loss of future earning capacity in the country of origin.

B. Keep Out Evidence of Alienage

Regardless of how the court rules on the Rodriguez motion, it is imperative that you keep out evidence of alienage to the greatest extent possible due to likely juror bias and prejudice. Request that the defendants be precluded from introducing evidence regarding plaintiff's immigration or alien status. For example, preclude defendants from mentioning plaintiff's illegal entry into the United States, fake social security card, driver's license or California identity card, including how they were procured or plaintiff's use of these cards or numbers for any purpose.

Evidence Code § 787 provides that:

Subject to Section 788, evidence of specific instances of his conduct relevant only as tending to prove a trait of his character is inadmissible to attack or support the credibility of a witness.

The only exception to this provision is Evidence Code § 788, which allows introduction of a witness's felony convictions for impeachment purposes. Assuming there is no felony conviction attached to the illegal entry and use of false documents, the only relevance to the trial would be for character evidence, and the only purpose for which the defendants may seek to introduce this evidence

is to attack the plaintiff’s credibility. Pursuant to Evidence Code §§ 787 and 788, such evidence is inadmissible.

IV. CONCLUSION

Under the Rodriguez decision, the undocumented plaintiff in a personal injury case can be severely hamstrung in presenting future loss of earning capacity. It is a simple question of exchange rates, dollars vs. pesos. However, Rodriguez shows how the undocumented plaintiff can overcome the presumption that wage loss will be pegged to the currency of the country of origin. With the relaxed burden of proof, a long-term undocumented plaintiff with a good work record, solid standing in the community and family ties here is well positioned to argue that they "might succeed" in the pre-trial hypothetical proceeding to suspend deportation. Nonetheless, know the status of current immigration reform legislation so the trial court will be put in the awkward position of denying "legal" status for the purposes of trial only to have federal law grant such status in the future. Lastly, prepare for two trials: have experts who can maximize pre-injury earnings in the country of origin versus the lower post-injury earnings in the origin country.

1 For purposes of this article, it is assumed plaintiff is subject to deportation. You should consider stipulating to deportability if there is no basis to dispute the issue.

2 These sections list those offenses for which a person is per se not eligible for suspension of deportation. All of these provisions deal with convictions for various felonies ranging from crimes of moral turpitude, drug possession, prostitution, treason, and other heinous crimes.

3 It is important to put on the record that all evidence being presented and admitted in this pre-trial motion is for the motion only and is not to be considered in the case before the jury unless it is later offered and admitted into evidence.

4 Be careful here of proving too much because such an application may result in an unfavorable decision, thereby seriously undercutting plaintiff’s claim.

5 Each declarant needs to be prepared to testify in court.

6 The successor statute to 8 U.S.C section 1254.

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Joint Representation in a Personal Injury or Wrongful Death Action

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Joint representation in personal injury actions can be a plaintiff attorney's most satisfying and rewarding experience. The attorney, beyond navigating the legal landscape, naturally bonds with the clients as they cope with their loss, be it a personal injury or wrongful death. However, when preparing to represent more than one individual in the same action, an attorney is well advised to keep in mind and prepare for the pitfalls and conflicts of joint representation.

The typical scenarios that present conflict problems to practitioners are basically categorized into three situations (1) married couple where one spouse is injured and other spouse has a loss of consortium claim; (2) separation or divorce of married couples; (3) wrongful death claim brought by parents and/or children of deceased. Each of these situations presents unique potential or actual conflict situations, and they are addressed as follows.

A. Rules of Professional Conduct

All issues of conflict flow from the basic Rules of Professional Responsibility. In particular, the conflict rules that guide this area are found in Rule 3-310, "Avoiding the Representation of Adverse Interests." California Rules of Professional Responsibility Rule 3-310(C) addresses the question of how an attorney must handle situations when representing clients whose interests potentially and actually conflict. This section reads in pertinent part as follows:

A member shall not, without the informed written consent of each client:

(1) Accept representation of more than one client in a matter in which the interests of the clients potentially conflict; or

(2) Accept or continue representation of more than one client in a matter in which the interests of the clients actually conflict; or

(3) Represent a client in a matter and at the same time in a separate matter accept as a client a person or entity whose interest in the first matter is adverse to the client in the first matter.

Thus, the attorney must receive "informed written consent" – from both clients – in potential or actual conflict situations. Additionally, under 3-310(D):

A member who represents two or more clients shall not enter into an aggregate settlement of the claims of or against the clients without the informed written consent of each client.

Thus, upon the settlement of a case, additional written consent is required when more than one client is represented. In the Discussion Section of 3-310, the Rules explain this section as follows:

[F]or the sake of convenience or economy, ... parties may well prefer to employ a single counsel, but a member must disclose the potential adverse aspects of such multiple representation (e.g., Evid. Code, §962) and must obtain the informed written consent of the clients thereto pursuant to subparagraph (C)(1). Moreover, if the potential adversity should become actual, the member must obtain the further informed written consent of the clients pursuant to subparagraph (C)(2).

In other words, an attorney is obliged to vigilantly keep clients informed and updated as to actual and potential conflicts as they arise throughout the representation. With these rules in place, they can be applied to the three typical scenarios below.

B. Married Couple Where One Spouse Is Injured and the Other Has Loss of Consortium Claim

This situation presents the easiest of the three to deal with. Pursuant to California law, the spouse of the injured party has a claim for loss of consortium. Each party is entitled to a separate award by the jury if the case is tried. With this separate award, there clearly could be a potential or actual conflict in terms of settling this case. However, this conflict is substantially eliminated by statute because any award to a married couple is community property. Therefore, regardless of the amount either party receives, both are entitled to a half interest in the other's recovery.

Under Family Code §780:

Except as provided in Section 781 and subject to the rules of allocation set forth in Section 2603, money and other property received or to be received by a married person in satisfaction of a judgment for damages for personal injuries, or pursuant to an agreement for the settlement or compromise of a claim for such damages, is community property if the cause of action for the damages arose during the marriage. [Added 1992 ch. 162 (operative Jan. 1, 1994).] (emphasis supplied).

Generally, therefore, under Family Code § 780, an award of damages or a judgment in favor of a married couple will be treated as community property.

Since one-half of either award is considered to belong to the other spouse, there is no actual conflict in this joint representation.

Nonetheless, an attorney has a duty to address the good, the bad and the ugly of litigation and conflicts of interest fit at least two of those categories. While there is no conflict so long as the couple stays married, if there is any indication that the marriage may not last, there could be an issue of a potential conflict that may require some disclosures. Such disclosures could be incorporated into the original letter of representation. Namely, the letter could set forth the applicable Family Code provisions addressing how an award for damages is treated under the law. Such a letter could include the caveat that in the event of a future dissolution, the disposition of any damage award is presumed to be the separate property of the injured individual but that a judge, weighing certain factors, is empowered to redistribute the award. The law affecting such a disposition is discussed below.

C. Separation or Divorce of Married Couples

1. Divorce or Legal Separation Before the Accrual of the Cause of Action

As a starting point, the first issue is whether the divorce or separation occurred before or after the accrual of the cause of action. If either legal separation or divorce occurred before the accrual of the cause of action, there is no claim for loss of consortium, and only the injured party has a right to a claim. (Eldon v. Sheldon (1988) 46 Cal.3d 267, 277 [holding only married couples can bring an action for loss of consortium].) Therefore, only one claimant exists and there is no conflict. Under Family Code § 781, the funds received in settlement or by verdict of the claim are the separate property of the injured individual. Thus, any award for damages given to the divorced or legally separated injured party is separate property.

2. Divorce or Legal Separation After the Accrual of the Cause of Action

Unfortunately, as all plaintiffs' attorneys know, the stresses and strains of a serious injury and resulting lawsuit can break up even the most solid marriage. The emotional difficulty of coping with the permanent disability of a spouse, as well as the economic and social strains inevitably experienced during the litigation are often too much for a married couple to handle. What is an attorney's duty if a married couple that is jointly represented separates during the litigation?

If the couple separates or is otherwise estranged after the accrual of the action but prior to settlement or judgment, money damages or other award are still treated as community property. (See Family Code §§ 780 and 781.) However, if the couple divorces after the settlement or judgment, the question is how is the money treated

in the dissolution proceeding and what duties does the attorney owe to the clients under Rule 3-310? Again, California Family Law addresses the issue. Under Family Code § 2603:

(b) Community estate personal injury damages shall be assigned to the party who suffered the injuries unless the court, after taking into account the economic condition and needs of each party, the time that has elapsed since the recovery of the damages or the accrual of the cause of action, and all other facts of the case, determines that the interests of justice require another disposition. In such a case, the community estate personal injury damages shall be assigned to the respective parties in such proportions as the court determines to be just, except that at least one-half of the damages shall be assigned to the party who suffered the injuries.

Thus, if the couple separates after the accrual of the action, the award or settlement is still taken as community property. However, if a divorce is initiated, the judge will treat the funds as the separate property of the injured party unless justice requires otherwise. Therefore, what obligations does a careful practitioner have if his clients separate during the pendancy of the claim? Obviously, when clients separate there is an actual conflict in representing the two parties and informed written consent to continue representation must be obtained.

In any such situation, the clients should be informed of the relevant provisions of the Family Code. They should be told that any award or settlement would be considered community property prior to divorce. However, upon divorce, it may be treated as separate property, unless a judge weighing the above factors decides otherwise. If the personal injury action is resolved by a trial, the jury will apportion the percentage recovery for each injured party.

If a matter is resolved by settlement, the conflict issue is also complicated. In anticipation of the conflict over apportionment of a settlement, an attorney may consider setting forth a dispute resolution mechanism within the conflict letter (i.e., binding arbitration of the distribution of settlement, or suggesting an agreement authorizing the attorney to negotiate and settle the claims independently during the settlement proceedings).

D. Wrongful Death of Spouse, Child or Parent

This presents one of the most difficult situations to resolve. Under California law, in a wrongful death action, there is a "single award" given for the wrongful death of any person. This award may be subject to the claims of multiple individuals such as a spouse and the children of the deceased. It can also involve children born out of wedlock, and children from prior marriages. All have potential claims, and all have a conflict in relationship to one another. If the case is tried to verdict, it is

up to the judge to divide the proceeds, unless the parties have agreed to a division ahead of time. (C.C.P. § 377.61.)

To prepare for the first meeting with the spouse and children bringing the wrongful death action, should the attorney have a conflict letter at the ready? For obvious reasons, in the first meeting with clients coping with every person's worst nightmare, bringing up the "potential adverse aspects" of potential and actual conflicts is not easy. The subtext of any such discussion, by implication, is the suggestion that two injured and emotionally fragile plaintiffs may be at loggerheads over money damages awarded by virtue of their respective injuries. In such a case, the potential conflict is the foreseeable dispute in resolving the case through a settlement that is more favorable for one plaintiff or another.

The conflict is best resolved if the parties are able to easily determine among themselves ahead of time the proper division of funds. Obviously, the attorney cannot and should not get involved with the discussions as to what a fair division should be absent written consent to provide such advice in an actual conflict situation. This route is often only possible with a close family relationship without complicating factors such as children of prior marriages or those born out of wedlock, competing with children of the current marriage. If this is done with written agreement and informed consent by all parties at the start of the representation, the conflict rules may be satisfied.

However, sometimes the conflict may be such that joint representation should be avoided altogether, as discussed below.

E. Conflict Too Substantial to Continue

Although the rules allow for continued representation in actual conflict situations, there are clearly times where the representation of adverse interests is not appropriate and the attorney should consider having each client obtain separate counsel. Such a situation is most apparent during the trial of a case where there are actual conflicts between the clients. How can an attorney adequately represent adverse interests in front of a jury, which requires placing one person's interest above the other? The risk is that following the determination of the jury, the party who received the lower amount will be unhappy with the result and could easily claim that "inadequate" informed consent was received.

Therefore, while every case presents its own unique factual situation, the careful practitioner must keep in mind that not all conflicts can be overcome by disclosure and written consent. Some cases clearly require separate counsel to adequately, and fairly, represent all sides of the litigation.

F. Conclusion

In cases where an attorney jointly represents family members or others, the dictates of Rule 3-310 are the only guide. As such, an attorney must, at the outset of the case, be prepared to fully advise the clients of the potential and actual conflict that exist and receive written informed consent from the clients to proceed. Oftentimes that can be accomplished with a "sign-on" letter that fully explains the conflict scenario and provides for a signature line for acknowledgment.

In any event, the attorney must be vigilant in spotting the potential and actual conflicts and deal with them as they arise. Further, if a potential conflict becomes an actual conflict, the attorney must revisit the issue with the clients and receive additional "written informed consent" to proceed with the representation or if the conflict is too significant, joint representation should end.