

NOTES

THE ETHICS OF STRUCTURING SETTLEMENTS

I. INTRODUCTION

Over the past ten years, the use of structured settlements¹ as a means for settling catastrophic losses has increased dramatically.² A number of factors have influenced the increased use of structured settlements, the most important of which has been the favorable tax treatment afforded them.³

Plaintiffs often favor the use of structured settlements because they guarantee a steady stream of income,⁴ provide substantial tax benefits⁵ and serve as a hedge against inflation.⁶ Plaintiffs' attorneys are somewhat hesi-

1. A structured settlement, for the purposes of this Note, is a settlement in which there is a lump-sum payment and a series of periodic payments to the plaintiff funded by an annuity purchased by the defendant. This Note is limited to personal injury cases which do not present workers' compensation claims.

An excellent example of how a structured settlement can be utilized to compensate an injured tort victim can be found in *A v. D*, 196 N.J. Super. 340, 482 A.2d 531 (1984). In that case, a boy was born deformed due to drugs administered to his mother during pregnancy. *Id.* at __, 482 A.2d at 532. Of the settlement approved by the court, \$275,000 was allotted to a structured settlement for the boy. *Id.* at __, 482 A.2d at 533. Of this amount \$225,000 was used to purchase an annuity providing both monthly and lump-sum payments. *Id.* at __, 482 A.2d at 533. The annuity was originally written for \$400 per month immediately, increasing to \$750 per month in 1989, and increasing again in 1996 to \$2,500 per month plus four percent annual increases. *Id.* at __, 482 A.2d at 535-36, exhibit III. The lump-sum provisions of the annuity provide for payments of \$10,000 per year for 12 years starting in 1990, then two lump-sum payments: one of \$200,000 in 2000 and another of \$154,166.67 in 2011. *Id.* at __, 482 A.2d at 535-56, exhibit III.

The court in reviewing the provision of this settlement looked at the award of attorney's fees and stated: "If a [tort victim] lives his normal life expectancy of 57.02 years the total annuity payout will be \$3,012,233.64; and if he does not, the guaranteed payments for 30 years will total \$1,330,528.91." This is a sizable payout for an original annuity investment of only \$225,000.

2. Danninger, Johnson & Lesti, *Negotiating a Structured Settlement*, 70 A.B.A.J. 67, 67 (May 1984).

3. See *infra* notes 27-50 and accompanying text.

4. Comment, *Structured Settlements: Customized Compensation for Personal Injury Plaintiffs*, 13 STETSON L. REV. 309, 313 (1984). See also *infra* notes 50-59 and accompanying text.

5. See *infra* notes 27-50 and accompanying text.

6. Miller, *ART OF ADVOCACY: SETTLEMENT* § 10.41 (1984). See also *infra* notes 23-26 and accompanying text.

tant to use structured settlements, however, because most are either unfamiliar with how structured settlements work,⁷ or are not convinced that their use is economically beneficial.⁸ Defendants contemplate the use of such settlements because structuring settlements brings litigation to a close⁹ and often results in a net financial savings to the defendant.¹⁰ Defense counsel encourage the use of structured settlements because it benefits their clients,¹¹ satisfies claimants,¹² and avoids congestion of the courts.¹³

The increased use of structured settlements has spawned a number of interesting questions for lawyers using them as settlement devices. The purpose of this Note is to address two of the ethical questions facing the attorney who uses or recommends the use of structured settlements.¹⁴ The first such question concerns the responsibility of an attorney when counseling his client on the use and mechanics of a structured settlement. The second question focuses upon the limitations placed on the plaintiff's attorney with regard to the acceptance of a structured or contingent fee once a structured settlement has been chosen as the means of settlement. Discussion of these questions will provide the attorney with several practical considerations that must be evaluated when negotiating a structured settlement.

II. COUNSELING A CLIENT ABOUT STRUCTURED SETTLEMENTS PURSUANT TO EC 7-8¹⁵

A. *Ethical Considerations of Counseling a Client*

The Model Code of Professional Responsibility sets standards for attorneys in their professional roles.¹⁶ Canon Seven of the Model Code covers the relationship between attorney and client, in particular, the attorney's duty to keep the client informed of options arising during the decision-making

7. Miller, *supra* note 6, at § 10.00; Lampo & Waldeck, *Structured Settlements: A Primer*, 39 J. Mo. B. 181, 182 (1983); Comment, *supra* note 4, at 329.

8. This is grounded in the attorney's concern about the effect of inflation on his client's recovery and about the nature and amount of his fee payment.

9. Comment, *supra* note 4, at 317-18.

10. Hillard, *Alternative Recovery Methods: Structured Settlements and Periodic Payment of Judgments*, 34 FED'N OF INS. COUNS. Q. 237, 253-54 (1983-84); Comment, *supra* note 4, at 316.

11. See *supra* notes 9-10 and accompanying text.

12. See *supra* notes 4-6 and accompanying text.

13. See *infra* note 58.

14. This Note will not address the ethical problems raised by a conflict of interest between the attorney and client and will only touch upon the attorney's duty, as a part of discussing all available options, to relay settlement offers made by the defendant.

15. It should be noted at the outset that little case law exists on structured settlements. Structured settlements, being settled, do not reach the court unless a problem arises with the payments under the terms of the agreement. The majority of cases which have reached the courts deal with attorney's fees. These cases will serve as the basis for section III of this Note.

16. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Preliminary Statement (1980).

process.¹⁷ The ethical considerations following Canon Seven of the Model Code directly address the lawyer's role as informant/counselor in the decision-making process.¹⁸ The major points of EC 7-8 are: (1) an advisory conversation should take place; (2) in this consultation, the attorney must inform the client of all "relevant considerations;" and (3) the attorney may counsel the client not only on legal matters, but may also offer advice on practical considerations.¹⁹

The relevant considerations which an attorney must discuss with his client depend upon the client's role in the lawsuit and possible settlement negotiations.²⁰ The different roles not only reveal the advantages and disadvantages to the client of using a structured settlement, but also reveal the areas in which an attorney who utilizes structured settlements should be well-versed.

B. The Plaintiff/Tort Victim as Client

Structured settlements are a unique option for settlement of a plaintiff's claim in that they provide the plaintiff with some degree of security.²¹ The security a structured settlement offers arises from the tax-free nature of the periodic payments under such a settlement agreement.²² Three considerations come to mind when discussing the relevant points a plaintiff's attorney should raise with his client who is considering the acceptance of a structured settlement.

17. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1981).

18. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981). Ethical Consideration 7-8 states in part:

A lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations. A lawyer ought to initiate this decision-making process if the client does not do so. Advice of a lawyer to his client need not be confined to purely legal considerations. A lawyer should advise his client of the possible effect of each legal alternative. A lawyer should bring to bear upon this decision-making process the fullness of his experience as well as his objective viewpoint. . . . In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself. . . .

Id.

19. *Id.*

20. For a discussion of considerations relevant to a plaintiff client, see *infra* notes 21-60 and accompanying text. For a discussion of considerations relevant to a defendant client, see *infra* notes 61-71 and accompanying text.

21. Hillard, *supra* note 10, at 249-50.

22. *Id.* A lump sum settlement consists of one payment in full satisfaction of the settlement agreement. When the payment is made, the entire amount is in the control of the tort victim/plaintiff. If he invests the sum in an annuity, any income from the annuity is taxable as gross income.

Conversely, a structured settlement generally consists of a lump-sum payment supplemented by periodic payments generated by an annuity. The money is managed for the claimant and made available on a gradual basis. Interest on the annuity is not taxable. *Id.*

First, the attorney should recognize that a structured settlement *may* be used as a hedge against inflation.²³ The plaintiff and his counsel will probably note at the outset of a discussion involving structured settlements that periodic payments are not likely to keep pace with inflation.²⁴ In response, the defendant may be willing to build in an inflation rate factor which would increase payments by a given percentage annually.²⁵ Even if inflation is built into a settlement offer, however, plaintiff's counsel is likely to argue that the actual rate of inflation will increase, thereby reducing the value of the structured settlement.²⁶ Plaintiff's counsel should be aware of the limitations of structured settlements, especially regarding inflationary concerns, in order to facilitate full discussion of the matter with his client.

The next consideration involves the tax consequences to the client of receiving payments from a structured settlement. The Internal Revenue Code directly addresses the taxation of payments received as compensation for personal injuries.²⁷ Section 104(a)(2) imposes four requirements which a plaintiff must meet before he may exclude the payments from gross income.

23. Moore, *Structured Settlements: Considerations for Defense Counsel*, 17 FORUM 1335, 1338 (1982). Miller has suggested four ways in which a structured settlement can keep pace with inflation. Miller, *supra* note 6, at § 10.42. The four ways are set out fully *infra*, note 26.

24. *Id.*

25. *Id.*; Danninger, Johnson & Lesti, *supra* note 2, at 68. The defendant or his insurer may choose to build in inflation in a number of other ways. Three other inflation factoring devices are described *infra*, note 26.

26. The majority of authors recognize that the rate of inflation is not predictable and that structured settlements developed without some sort of increase for inflation will deplete the value of the dollars received by the plaintiff. Ciecka, *A Comparison of Lump-Sum and Structured Settlements*, 1983 TRIAL LAW GUIDE 450, 452 (1983); Miller, *supra* note 6, at § 10.41. Miller suggests four ways in which inflation may be factored into the annuity payments to minimize or alleviate the effects of inflation. The first method is to increase the payment by a specified percentage each year. Miller, *supra* note 6, at § 10.42(1). Alternatively, payments can be increased by a specified amount at the end of a given term. *Id.* at § 10.42(2). A third way of factoring inflation into the structured settlement is to set up the level payment annuity with a lump-sum annuity. *Id.* at § 10.42(3). The lump-sum annuity would pay a certain amount after the passage of a term or terms certain. *Id.* Finally, the level payment annuity can be set up as initially paying larger than level amounts. *Id.* at § 10.42(4). Inflation would eventually catch up with the payments and offset the overpayments in the early years. *Id.* The defense attorney may have to concede there is no complete hedge against inflation, but the tax-free nature of the annuity payments and the availability of outside sources of income provide some shelter from inflation. Moore, *supra* note 23, at 1338.

27. I.R.C. § 104(a)(2) provides:

Except in the case of amounts attributable to (and not in excess of) deductions allowed under section 213 (relating to medical, etc., expenses) for any prior taxable year, gross income does not include—

...

(2) the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness;

...

I.R.C. § 104(a)(2) (1984).

First, the exclusion from gross income attaches only to money received.²⁸ Second, the damages must be the result of a suit or agreement.²⁹ Third, the damages may be either a lump-sum or a periodic payment.³⁰ Finally, the damages must be in the nature of compensation for personal injuries or sickness.³¹

In addition to explaining the exclusionary section to a client, the attorney will want to have knowledge of four revenue rulings released by the Commissioner of the Internal Revenue Service, which interpret and apply section 104(a)(2) to structured settlements and periodic payment of tort damages. Revenue Ruling 65-29³² was issued in response to a plaintiff's investment of a lump sum award from a personal injury action.³³ In Revenue Ruling 65-29, the Commissioner stated that when a plaintiff receives control of a damage award, only the lump sum payment, not the income from its investment, is subject to exclusion under section 104(a)(2).³⁴ The creation of a trust to compensate an individual for personal injuries served as the basis for Revenue Ruling 77-230.³⁵ Finding that the recipient did not have control of the trust when the government retained a reversionary interest in the *res* of the trust, the recipient was able to exclude the periodic payments received thereunder.³⁶

Two revenue rulings specifically dealing with payments under a structured settlement were issued in 1979.³⁷ Revenue Ruling 79-220 stated that the full amount of payments received under a structured settlement, not just the present value of all payments, was excludable from the gross income of the recipient.³⁸ This exclusion was allowed because the recipient "had a right to receive only the monthly payments and did not have the actual or constructive receipt or the economic benefit of the lump-sum amount that was invested to yield that monthly payment."³⁹ Pursuant to Revenue Ruling 79-313, where monthly annuity payments were subject to an inflationary increase, the taxpayer was able to exclude from gross income all amounts ac-

28. *Id.*

29. *Id.* The regulations promulgated to explain I.R.C. § 104(a)(2) state that the language regarding damages received by a suit or agreement means "an amount received (other than workmen's compensation) through prosecution of a legal suit or action based upon tort or tort type rights, or through a settlement agreement entered into in lieu of such prosecution." Treas. Reg. § 1.104-1(c) (1956).

30. I.R.C. § 104 (a)(2) (1984).

31. *Id.*

32. Rev. Rul. 65-29, 1965-1 C.B. 59.

33. *Id.*

34. *Id.* at 59-60.

35. Rev. Rul. 77-230, 1977-2 C.B. 214. The government created a trust for the individual's future medical expenses. *Id.*

36. *Id.* at 215.

37. Rev. Rul. 79-220, 1979-2 C.B. 74; Rev. Rul. 79-313, 1979-2 C.B. 75.

38. Rev. Rul. 79-220, 1979-2 C.B. at 75.

39. *Id.*

tually received.⁴⁰

The provisions of the Internal Revenue Code and the revenue rulings issued thereunder provide several guidelines for the course of consultation when an attorney and his client consider accepting a structured settlement offer. The attorney and client should discuss several practical matters before reaching a decision. First, it is important to make certain that the client does not receive any rights to the funding instrument, and is entitled only to the periodic payment of proceeds which that device generates.⁴¹ The client is not even to have the option of changing the beneficiary.⁴² Next, the purchaser of the annuity should be designated its owner to avoid ownership by the plaintiff, which would imply constructive receipt.⁴³ Third, the attorney should set forth the terms of the funding instrument in the written settlement agreement, specifying the terms so they are fixed and determinable.⁴⁴ Moreover, the client should have no more rights against the tortfeasor than a general creditor.⁴⁵ Finally, contrary to the views of a considerable number of writers,⁴⁶ it is not necessary for the annuity premium to be concealed from the client/plaintiff.⁴⁷ Premiums may be disclosed to set the actual cost basis of the settlement for the determination of attorney's fees.⁴⁸

The tax aspects of structured settlements provide a unique area in which the attorney may counsel his client. The advice of counsel on tax matters often brings to the foreground both legal and practical considerations. In light of the complexity and enormity of tax materials, the attorney has a duty, pursuant to EC 7-8,⁴⁹ to advise his client of all relevant code sections and revenue rulings.⁵⁰

40. Rev. Rul. 79-313, 1979-2 C.B. at 76.

41. Rev. Rul. 79-220, *supra* note 37; Rev. Rul. 77-230, *supra* note 35; S. REP. NO. 646, 97th Cong., 2d Sess. 4, reprinted in 1982 U.S. CODE CONG. & AD. NEWS 4580, 4583 ("the periodic payments of personal injury damages are still excludable from income only if the recipient taxpayer is not in constructive receipt of or does not have the current economic benefit of the sum required to produce the periodic payments"); Miller, *supra* note 6, at § 10.25; Moore, *The Use of Annuities in the Settlement of Personal Injury Cases*, 49 INS. COUNS. J. 50, 53 (1982).

42. Miller, *supra* note 6, at § 10.25.

43. *Id.*; Harlan, *A Look at the Benefits of Structured Settlements*, DAILY BUS. REC., April 28, 1983, at 16, col. 1.

44. *Id.*

45. *Id.*; Moore, *supra* note 41, at 53.

46. Danninger, Johnson & Lesti, *supra* note 2, at 70; Harlan, *supra* note 43, at 16, col. 1.

47. Hillard, *supra* note 10, at 255; Staller & Fineman, *Attorney's Dilemma—Obtaining Proper Fee From Structured Settlement*, 1983 TRIAL LAW. GUIDE 489, 494 n. (1983) [hereinafter cited as DILEMMA]. See also Bosco, *Editorial Comments to Staller & Fineman, Attorney's Dilemma—Obtaining Proper Fee From Structured Settlement*, 1983 TRIAL LAW. GUIDE at 501, 523 [hereinafter cited as Bosco]. *Contra* Harlan, *supra* note 43, at 16, col. 1. "Disclosing the actual cost is by no means tantamount to constructive receipt by the plaintiff." Bosco, at 523. This is the excuse many insurers give for not disclosing cost information.

48. Miller, *supra* note 6, at § 10.84(1).

49. See *supra* note 18.

50. Cf. 9 FED. TAXES (P-H) ¶ 37225(5), at 37,196 (client may be penalized for late filing if

The final matter an attorney must consider and discuss with his tort victim/client is the client's ability to handle large amounts of money.⁵¹ Especially in tort cases, where large jury awards have become common, lawyers have all too frequently noted the propensity of a client to "squander away" a large lump sum award in a short period of time.⁵² The most significant cause of the dissipation of the award is the client's ignorance in investing funds.⁵³ If a structured settlement is utilized, the money is not in the client's hands for investment, rather he is entitled only to payments as they are actually received.⁵⁴ This method of awarding damages plays several useful roles. First, it guarantees income to an individual for a lifetime or term certain.⁵⁵ Second, it takes the investment risk out of the hands of the individual and places it with a company which is more competent in investment practices.⁵⁶ Finally, it benefits society by guaranteeing that the tort victim will not become a ward of the state,⁵⁷ by clearing court dockets,⁵⁸ and by avoiding higher insurance premiums.⁵⁹

In determining whether a structured settlement may be beneficial in a given case, an attorney may want to consider the following factors: (1) whether the client is a prudent investor; (2) whether the client is a spendthrift; (3) whether the client will be able to avoid ill advice on investments; and (4) whether the client will be able to say "no" to needy friends and relatives.⁶⁰ Discussion of these financial matters as well as the tax implications and inflationary considerations of structural settlements will fulfill the

he consults attorney with little tax background); but see *id.*, at 37,197 (penalty may be revoked if client can show advice was given after a thorough analysis of the I.R.C.).

51. Lampo & Waldeck, *supra* note 7, at 183-84.

52. Laing, *What Every Lawyer Needs to Know About Structured Settlements*, 52 KAN. B.A.J. 280, 284 (1983). See also Lampo & Waldeck, *supra* note 7, at 184; Harlan, *Structured Settlements: Are They For You?*, DAILY BUS. REC., April 21, 1983, at 16, col. 1.

53. See Manaker & Giancola, *Negotiating a Structured Settlement*, 14 TRIAL LAW. Q. No. 3/4, at 36, 38 (1982); Harlan, *supra* note 52, at 16, col. 2. Several other factors cause the plaintiff to squander away large tort awards. See Miller, *supra* note 6, at § 10.140 (Figure 10-46) (is the client a spendthrift? can he avoid bad investment advice?; and can he reject pleas from friends and relatives for money?); Harlan, *supra* note 52, at 16, col. 2 (reiterating the problems caused by a plaintiff's inability to avoid bad advice and to turn down pleas of his family and friends).

54. Comment, *supra* note 4, at 313.

55. S. HUEBNER & K. BLACK, *LIFE INSURANCE* 110 (10th ed. 1982); Lampo & Waldeck, *supra* note 7, at 183.

56. Harlan, *supra* note 43, at 16, col. 2.

57. Laing, *supra* note 52, at 285; Harlan, *supra* note 43, at 16, col. 4; Comment, *supra* note 4, at 313.

58. Laing, *supra* note 52, at 285; Harlan, *supra* note 43, at 16, col. 3.

59. Laing, *supra* note 52, at 285; Harlan, *supra* note 43, at 16, col. 4. Premiums are kept down because the insurance company saves money in litigation costs as well as the savings that purchase of an annuity will give in the long-term payment of a loss. See *infra* notes 61-71 and accompanying text.

60. See *supra* note 53 and accompanying text.

attorney's obligation under EC 7-8 to inform his tort victim/client of all relevant considerations during the decision-making process.

C. *The Defendant/Tortfeasor or Insurer as Client*

The burden is nearly always on the defendant to offer a settlement.⁶¹ Structured settlements provide a basis upon which to satisfy the expectations of the tort victim/plaintiff while simultaneously benefiting the defendant or his insurance carrier.⁶² From a defense perspective, two points need to be discussed with the tortfeasor and his insurer: First, structuring a settlement will usually result in a reduced cost to the client if liability is fairly certain,⁶³ and second, the threat of long and expensive litigation is extinguished by the settlement of the claim.⁶⁴

An attorney for a tortfeasor or his insurer should cautiously examine and counsel on the use of structured settlements. A careful examination is extremely important in determining the settlement cost, since insurance companies often view the reduced cost of settling cases as the single most important advantage of structured settlements.⁶⁵ The attorney, prior to giving advice on the proposed settlement, should have a specialist review the package to determine if it is less costly than a lump-sum award.⁶⁶ Additional cost savings which may benefit the client arise out of administrative cost savings in closing the files and passing on the obligation to make periodic payments to the provider of the annuity or funding device.⁶⁷

The attorney should also discuss with his tortfeasor/insurer client the relative advantages and disadvantages of using a structured settlement to avoid costly and consuming litigation. Where the claim is relatively large and liability is questionable, the attorney may want to litigate the matter to show the claimant that his demands are unreasonable.⁶⁸ Under EC 7-8, the attorney must remember that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the

61. Moore, *supra* note 23, at 1335-36.

62. *Id.*

63. Hillard, *supra* note 10, at 253-54; Comment, *supra* note 4, at 317-18.

64. Comment, *supra* note 4, at 317-18.

65. *Structured Settlements: Use & Characteristics of Structured Settlements in the Property-Casualty Insurance Industry*, All-Industry Research Advisory Council, at 25 (Oct. 1983) [hereinafter cited as AIRAC] (survey of 54 property-casualty insurers which represent 58% of the 1981 premium volume of property-casualty companies).

66. This review is beneficial to the client since his purpose is to reduce the cost to himself or his insurer. Cf. Comment, *supra* note 4, at 316 (Insurance companies generally settle to save time and money.). By showing the structured settlement costs less than the lump-sum requested, the attorney is providing the most important justification for structuring settlements: reduced cost. See AIRAC, *supra* note 64, at 24 (Table 21) & 25.

67. AIRAC, *supra* note 64, at 25.

68. Cf. Moore, *supra* note 23, at 1336 (Defense counsel may challenge the plaintiff's claim for damages by countering with an argument about plaintiff's liability.).

client and not for himself."⁶⁹ This fact alone may obligate the attorney to tell his client that by settling he may avoid lengthy, costly litigation.⁷⁰ The alternative of settlement may be attractive to a client who seeks to end the litigation.⁷¹

Defense counsel's duty to inform his client of relevant considerations under EC 7-8 covers his duty to evaluate the terms of a proposed settlement in addition to allowing the client to choose a course of action which may be against counsel's evaluation of the case. The role of the defense counselor as an advisor is to provide options for the defendant and his insurer to evaluate after a complete explanation of the relevant factors involved in the decision.⁷²

Both plaintiff and defense counsel have an affirmative duty under EC 7-8 to inform their clients of all the relevant considerations bearing upon the client's decision. The ethical concerns raised by EC 7-8 are not the only concerns evolving from structured settlements. Additionally, ethical concerns are raised in determination of the plaintiff's attorney's fee.

III. LIMITATIONS ON THE ACCEPTANCE OF A STRUCTURED OR A CONTINGENT FEE IN A CASE INVOLVING A STRUCTURED SETTLEMENT

A. *Limitations Imposed by the Model Code of Professional Responsibility*

Canon Two of the Model Code of Professional Responsibility sets forth the duty of an attorney to make legal services available.⁷³ The ethical considerations and disciplinary rules evolving from this canon deal with fees, advertising, and other aspects of the retention of counsel. Several specific ethical considerations and a disciplinary rule guide the attorney who is structuring a settlement in setting his fee.⁷⁴ The main concern of the bar is that the attorney's fee be reasonable.⁷⁵

The Model Code of Professional Responsibility specifies several rele-

69. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

70. See Moore, *supra* note 23, at 1336.

71. Even where the client is fairly sure he could win the case, he may want to forego costly legal action because under the American rule he would not be entitled to recover the cost of legal counsel in the event of a favorable decision. *Brown Township Mut. Ins. Ass'n v. Kress*, 330 N.W.2d 291, 300 (Iowa 1983) (citing *McNabb v. Osmundson*, 315 N.W.2d 9 (Iowa 1982)). It may be cheaper in the long run to settle for a marginal amount, satisfying both the plaintiff and defendant.

72. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1981).

73. Canon Two of the Model Code provides that "a lawyer should assist the legal profession in fulfilling its duty to make legal counsel available." MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 2 (1981).

74. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17, 2-18, 2-19 & 2-20 (1981); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106 (1981).

75. This fact is codified in EC 2-17, which states "[a] lawyer should not charge more than a reasonable fee." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-17 (1981).

vant factors to consider in determining the reasonableness of a fee.⁷⁶ A number of courts have noted these factors when determining whether an attorney's fee is reasonable in a structured settlement.⁷⁷ The Minnesota Supreme Court reviewed the reasonableness of an attorney's fee in a case where lump sum and periodic disability payments were to be made to the claimant over a number of years.⁷⁸ In *Continental Casualty Co. v. Knowlton*,⁷⁹ the court determined the reasonableness of the fee employing factors similar to those embodied in Disciplinary Rule 2-106(B).⁸⁰ Awarding a fee which it deemed large, the court justified the excess based upon the importance of the case to the client, and the services rendered by the attorney.⁸¹

The factors were affirmed as determinative of the reasonableness of an attorney's contingent fee in a 1981 Fifth Circuit opinion.⁸² The court in *Hoffert v. General Motors Corp.*⁸³ stated that "[a] district court abuses its discretion when it allows a fee without carefully considering the factors set forth in DR2-106(B) of the ABA Code of Professional Responsibility."⁸⁴ The district court's reduction of contingent attorney's fees for the representation

76. EC 2-18 states that "the determination of the reasonableness of a fee requires consideration of all relevant circumstances, including those stated in the Disciplinary Rules." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-18 (1981). The Ethical Consideration then goes on to list a number of factors raised by DR 2-106(B), which are as follows:

- (1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.
- (2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.
- (3) The fee customarily charged in the locality for similar legal services.
- (4) The amount involved and the results obtained.
- (5) The time limitations imposed by the client or by the circumstances.
- (6) The nature and length of the professional relationship with the client.
- (7) The experience, reputation, and ability of the lawyer or lawyers performing the services.
- (8) Whether the fee is fixed or contingent.

MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(B) (1981). See also MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-18 (1981) (listing a number of the above factors).

77. See *infra* notes 77-78 and accompanying text. *E.g.*, *Abel v. Tisdale*, 673 P.2d 836, 838 (Okla. 1983) (where no challenge to the attorney's contingent fee is made on the basis of the DR 2-106(B) factors, no reduction in the fee by the court is warranted).

78. *Continental Casualty Co. v. Knowlton*, 305 Minn. 201, 232 N.W.2d 789 (1975).

79. *Id.* at 201, 232 N.W.2d at 789.

80. *Id.* at —, 232 N.W.2d at 797. For factors set out in DR 2-106(B), see *supra* note 75. The court added two additional factors for determination of the reasonableness of a fee. 305 Minn. at —, 232 N.W.2d at 797. The court is to consider the likelihood the client will pay and the opportunity to perform future services for the client. *Id.* (quoting *Kittler & Hedelson v. Sheehan Properties, Inc.*, 295 Minn. 232, 236, 203 N.W.2d 835, 839 (1973)).

81. *Continental Casualty Co. v. Knowlton*, 305 Minn. at —, 232 N.W.2d at 797.

82. *Hoffert v. General Motors Corp.*, 656 F.2d 161 (5th Cir. 1981).

83. *Id.*

84. *Id.* at 166.

of an injured minor in settlement negotiations was affirmed.⁸⁵ The Fifth Circuit affirmed the reduction because the lower court had considered the relevant factors of DR 2-106(B) in ruling on the reasonableness of the fee.⁸⁶

With a structured settlement as the basis for the calculation of the attorney's fee, the Federal District Court for New Jersey evaluated the DR 2-106(B) factors in judging the reasonableness of an attorney's contingent fee.⁸⁷ The court not only found the fee of thirty percent of the total recovery reasonable, it also stressed that the award was a way of encouraging utilization of structured settlements.⁸⁸ In so ruling the court followed a long line of New Jersey state court decisions allowing increased recovery of fees by attorneys who utilized structured settlements.⁸⁹

The reasonableness of an attorney's contingent fee often becomes an issue because the client has never previously been a party to a contingent fee arrangement, and lacks the knowledge to negotiate the fee arrangement.⁹⁰ Ethical Consideration 2-19 warns of this ignorance of fee arrangements and charges the attorney with the ethical obligation of explaining the basis of his fee.⁹¹ To facilitate the calculation of a fair and reasonable fee, the attorney is encouraged to reach a fee agreement as early in the employment relationship as possible.⁹² Ethical Consideration 2-19 also recommends that the terms of the agreement be written, especially in the case of a contingent fee arrangement.⁹³ The courts have been protective of the client

85. *Id.*

86. *Id.* In addition to reviewing these factors the district court entered findings which expedited the appellate review. *Id.*

87. *Donaghy v. Napoleon*, 543 F. Supp. 112, 115 (D.N.J. 1982). Under New Jersey law, an attorney must file for an increase in fee if his contingent fee award exceeds a certain percentage of the recovered amount. *Id.* at 114-15.

88. *Id.* at 115. The court, after reviewing the DR 2-106(B) factors, stated:

An excellent result was obtained for plaintiffs in this case through the use of the structured form which because of its very nature presents a difficult basis on which to predicate counsel fees. To penalize counsel for use of this structured form and the excellent result obtained therefrom would discourage attorneys from pursuing this method of settlement.

Id.

89. *Iskander v. Columbia Cement Co.*, 192 N.J. Super. 114, 469 A.2d 103 (1983); *Pettiford v. Eskwitt*, 189 N.J. Super. 485, 460 A.2d 716 (1983); *Landgraf v. Glasser*, 186 N.J. Super. 381, 452 A.2d 713 (1982); *Tobias v. Autore*, 182 N.J. Super. 328, 440 A.2d 1171 (1982); *Merendino v. FMC Corp.*, 181 N.J. Super. 503, 438 A.2d 365 (1981). For a discussion of these decisions and the judicial and legislative limitations on contingent fees, see *infra* notes 95-101 and accompanying text.

90. *Iskander v. Columbia Cement Co.*, 192 N.J. Super. at —, 469 A.2d at 106 (lay persons are unable to weigh the value of the case against the reasonableness of the fee).

91. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-19 (1981).

92. *Id.* This arrangement is to inhibit misunderstanding and to promote "good relations between the lawyer and the client." *Id.*

93. *Id.* Rule 1.5 of the new Rules of Professional Conduct incorporates the factors of DR 2-106(B) and the concern that a contingent fee arrangement be in writing. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983). The new rule also lays out the terms which must be

when the contingent fee agreement is not in writing or does not specifically provide for the fee following a structured settlement.⁹⁴ In *Perez v. Pappas*,⁹⁵ the Washington Supreme Court considered the fiduciary relationship between the attorney and his client.⁹⁶ The court stated that where fee negotiations have not included a discussion of structured settlements, the attorney and his client may have to renegotiate the fee in light of the possibility of a structured settlement.⁹⁷

The Minnesota Supreme Court, in *Cardenas v. Ramsey County*,⁹⁸ held that absent an express written agreement to the contrary, attorney's fees are to be received periodically as the client receives settlement amounts.⁹⁹ This decision upheld the client's right to a majority of the initial lump-sum and periodic payments under the structured settlement.¹⁰⁰ It should be noted that in this case, the attorney and his client had not reached an agreement on the fee arrangement to be used if a structured settlement was accepted.¹⁰¹

The final provision of the Code of Professional Responsibility which is applicable to contingent fees under a structured settlement is Ethical Consideration 2-20.¹⁰² Ethical Consideration 2-20 allows an attorney to enter a contingent fee arrangement only after the client has been "fully informed of all relevant factors"¹⁰³ and still desires a contingent fee.¹⁰⁴ While this ethical consideration and those discussed above¹⁰⁵ set the parameters for the attorney's fee under a structured settlement, two collateral matters arise which must be viewed in light of the limitations imposed by the Code of Professional Responsibility. The matters which warrant such consideration are the basis of the attorney's fee and the timetable for its payment.

B. *Determining the Basis of the Attorney's Contingent Fee*

"Oftentimes, structured settlements do not readily lend themselves to

specified in the agreement, including the percentage to be awarded in a settlement and whether expenses are to be deducted prior to or following the calculation of the contingent fee. *Id.*

94. See *infra* notes 94-100 and accompanying text.

95. 98 Wash. 2d 835, 659 P.2d 475 (1983).

96. *Id.* at ___, 659 P.2d at 479.

97. *Id.* at ___, 659 P.2d at 478. Also, where the renegotiated fee is higher than the fee under the original agreement, the new fee will be subjected to careful scrutiny. *Id.* at ___, 659 P.2d at 479.

98. *Cardenas v. Ramsey County*, 322 N.W.2d 191 (Minn. 1982).

99. *Id.* at 193. For a further discussion of the time frame for receipt of attorney's fees, see *infra* notes 113-26 and accompanying text.

100. *Cardenas v. Ramsey County*, 322 N.W.2d at 194.

101. *Id.* at 193.

102. MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 2-20 (1981).

103. *Id.*

104. *Id.*

105. See *supra* notes 72-100 and accompanying text.

the usual course of calculating fees pursuant to contingent fee agreements."¹⁰⁶ The main reason for difficulty in calculating the attorney's fee is the problem of determining the proper basis for the fee. Two common bases for attorney's fees in structured settlements are "total actual cost" and "total expected present value."¹⁰⁷ Total actual cost is the amount the defendant or his insurer will have to pay today to meet the terms of the structured settlement.¹⁰⁸ Total expected present value is the estimated worth of all the payments to be received in the future from the structured settlement.¹⁰⁹ The future payments are multiplied by a discount factor to arrive at the total expected present value.¹¹⁰

Two of the major differences between actual cost and expected present value are the inclusion of company administrative expenses and attorney's fees in the calculation of actual cost. Expenses are not included in an expected present value calculation.¹¹¹ Actual cost, on the other hand, includes an allowance for company administrative expenses of managing the annuity and for attorney's fees in procuring the structured settlement.¹¹² Actual cost, therefore, is not simply the cost of the annuity, but is the total cost of the settlement.¹¹³ The variance between the two amounts can lead to a great disparity in the amount of the attorney's fee.

C. Determining the Time at which the Attorney's Fee Is to be Paid

A more difficult question for the attorney is whether he should be allowed to collect his entire fee up front at the time of the settlement, or whether he should be required to wait and receive his fee proportionately as the client receives his periodic payments. The initial problem with allowing the attorney to collect all his fee up front is that the lump sum payment by the tortfeasor to the client may not cover the fee. Even if it does, is the attorney entitled to the first proceeds of the action? The lump sum payment

106. *Perez v. Pappas*, 98 Wash. 2d at —, 659 P.2d at 478.

107. *DILEMMA*, *supra* note 47, at 495. See also Choulos, *Structured Settlements: Cure or Curse?*, 16 TRIAL 73, 75 (Nov. 1980).

108. *DILEMMA*, *supra* note 47, at 495. The New Jersey Superior Court has adopted the total actual cost as the basis for determining the attorney's fee under a contingent fee contract entered into in that state. See *Donaghy v. Napoleon*, 543 F. Supp. at 114 (relying on the New Jersey court's rationale in *Tobias and Merendino*); *Tobias v. Autore*, 182 N.J. Super. at —, 440 A.2d at 1173; *Merendino v. FMC Corp.*, 181 N.J. Super. at —, 438 A.2d at 368.

109. *S. HUEBNER & K. BLACK*, *supra* note 55, at 333-36.

110. *DILEMMA*, *supra* note 47, at 495; Choulos, *supra* note 77, at 75. While no courts have specifically endorsed this approach, a number of authors have proposed it as an alternative to the total actual cost basis approach. The Washington Supreme Court indicated that the "accepted practice" in determining an attorney's contingent fee in a structured settlement is to determine the expected present value. *Perez v. Pappas*, 98 Wash. 2d at —, 659 P.2d at 478 n.1.

111. *S. HUEBNER & K. BLACK*, *supra* note 55, at 333-36.

112. *Miller*, *supra* note 6, at § 10.84(1).

113. *Id.*

in a structured settlement is often designed to pay the medical expenses already incurred by the client. If the attorney is allowed first right to this amount, the client may be subjected to the abuse of creditors anxious to collect charges made by the client. It has been suggested that such an exercise of first rights by an attorney to collect his fee may prompt a suit by the client against the attorney.¹¹⁴

The Minnesota Supreme Court, in *Cardenas v. Ramsey County*,¹¹⁵ rejected the trial court's ruling that an attorney could receive his entire fee out of the lump sum award.¹¹⁶ The trial court had reasoned that due to the attorney's aptness and skill in structuring a settlement of the client's case, the attorney was entitled to full payment of his fees from the lump sum portion of the settlement.¹¹⁷ The appellate court disagreed.¹¹⁸ The court found that the attorney and client had not reached an agreement on the terms of the fee if a structured settlement would be accepted.¹¹⁹

If up-front payment of the attorney's fee from the lump sum award presents problems, it is not surprising that significant problems also arise if the attorney's fee is to be structured or paid periodically out of the proceeds of the settlement agreement.¹²⁰ One court has rejected the periodic payment of attorney's fees following a structured settlement as "both unwieldly and impractical."¹²¹ The practical reasons for discouraging this practice include the simplification of firm management systems¹²² and the possibility that an attorney may not live long enough to recover his full fee.¹²³ One reason for allowing periodic fee payment is that the attorney who receives periodic payments from his client or an independent funding device may receive tax benefits by deferring the receipt of income.¹²⁴

In a number of cases involving the settlement of disability claims with

114. *Bosco*, *supra* note 47, at 510.

115. 322 N.W.2d 191 (Minn. 1982).

116. *Id.* at 193.

117. *Id.*

118. *Id.*

119. *See supra* notes 97-100 and accompanying text.

120. By a structured attorney's fee, the author means the fee is separately negotiated in the settlement and a separate annuity is purchased by the defendant or his insurer to fund periodic payments of the attorney's fee. This differs from what will be referred to as "periodic payment" of the attorney's fee. The latter would be paid as a straight percentage of the client's award following the client's receipt of the proceeds of the funding annuity.

121. *Johnson v. Sears, Roebuck & Co.*, 291 Pa. Super. 625, —, 436 A.2d 675, 678 (1981).

122. *DILEMMA*, *supra* note 47, at 494. The specific problems in firm management raised by the periodic payment of fees are how to deal with mergers, dissolutions, cash flow, and attorneys leaving the firm who generated the fees. *Id.*

123. *Miller*, *supra* note 6, at § 10.84(3)(b). *Miller* states "[t]he major drawback of the percentage of payments approach is that the attorney's time horizon may be significantly shorter than that of the plaintiff being represented." *Id.* Where the attorney is middle-aged, he may not outlive a minor client receiving periodic payments under a structured settlement, thus being deprived of a portion of his fee.

124. *Hillard*, *supra* note 10, at 252.

monthly amounts to be paid to the plaintiff over an extended period of time, the lawyer was required to take his fee proportionately out of the monthly amounts received by his client.¹²⁵ In two instances where a dispute arose regarding the contingent fee contract and a structured settlement, the courts allowed the attorney to receive only a part of his fee from the lump sum portion of the settlement.¹²⁶ The balance of the fee was to be paid as the plaintiff received the annuity payment.¹²⁷

Since the attorney's fee may be subject to the court's scrutiny following a structured settlement, it is advisable that the attorney carefully lay out and execute a written fee agreement.¹²⁸ The agreement should set forth the basis upon which the attorney's fee is to be calculated, and the time at which the attorney is entitled to payment.¹²⁹ The attorney should fully explain to his client the necessity of such an agreement in order to satisfy the ethical requirements set out following Canon Two.¹³⁰

D. *Additional Limitations on Fees Imposed by the Courts and Legislatures*

Legislatures and courts are free to impose limitations on the reasonableness of fees in addition to the limitations proposed by the code of ethics and case law.¹³¹ One court which has set limits on contingent fees in tort litiga-

125. *Stoebe v. Kitley*, 249 N.W.2d 667 (Iowa 1977); *Continental Casualty Co. v. Knowlton*, 305 Minn. 201, 232 N.W.2d 789; *Blazek v. North Am. Life & Casualty Co.*, 265 Minn. 236, 121 N.W.2d 339 (1963). Structured settlements are often utilized in workmen's compensation claims to achieve results similar to those in the cases above. Both methods provide for the periodic payment of sums to compensate for personal injuries.

126. *Cardenas v. Ramsey County*, 322 N.W.2d at 193; *Sayble v. Feinman*, 76 Cal. App. 3d 509, —, 142 Cal. Rptr. 895, 899 (1978). In both of these cases, the representation agreement executed by the lawyer and client did not make allowances for amounts received from a structured settlement.

127. *Cardenas v. Ramsey County*, 322 N.W.2d at 193; *Sayble v. Feinman*, 76 Cal. App. 3d at —, 142 Cal. Rptr. at 899.

128. A sample representation agreement can be found at Appendix A. The author developed this agreement following an examination of a number of documents. Miller, *supra* note 6, ch. 10 app. A; L'Estrange & Tucker, *Fee Agreements (With Forms)*, PRACTICAL LAWYER'S MANUAL ON LAWYER-CLIENT RELATIONS 163 (1983); DILEMMA, *supra* note 47, app. A, at 10-143.

129. The attorney should always be concerned about conflict of interest problems. He should keep in mind that a contingent fee contract should only be entered when it is in the client's best interest, independent of its effect on the attorney's financial welfare. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 5-7 (1981).

130. For a discussion of these ethical considerations, see *supra* notes 72-104 and accompanying text.

131. *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, 66 N.J. 258, —, 330 A.2d 350, 353-54 (1974) (recognizing the judicial power to make rules governing fees). The Supreme Court of New Jersey in ruling on the constitutionality of N.J. Court Rule 1:21-7 recognized the power of the court to regulate the practice of law, to make rules governing fees in litigation, and specifically, to single out and set limits on contingent fees. *Id.* at —, 330 A.2d at 355. Since N.J. Court Rule 1:21-7 was adopted, it has been successfully amended by the state

tion, and has been called upon to rule on the fee under a structured settlement, is New Jersey.¹³² The New Jersey rule imposes percentage limitations on the recovery of contingent fees.¹³³ When the settlement results in a fee greater than that allowed by the rule, the attorney often files for a review of the fee to determine if the higher fee will be allowed by the court.¹³⁴

The New Jersey Superior Court first reviewed a fee from a structured settlement in light of Rule 1:21-7 in *Merendino v. FMC Corp.*¹³⁵ In *Merendino*, the court allowed the attorney a fee in excess of the judicial limit, stating such an award was "in the best interests of both attorney and client."¹³⁶ The court subsequently followed this decision, allowing fees in excess of the limitation imposed by the court rule, in six of six later cases it reviewed.¹³⁷ In nearly every case, the court went through an analysis of the DR 2-106(B)¹³⁸ factors in analyzing the reasonableness of the attorney's fee in light of the court rule and the circumstances of the case.¹³⁹

While the Iowa courts or legislature have not adopted rules or statutes limiting contingent fee awards under structured settlements, a careful analy-

legislature. One such amendment spelled out the method of calculating a fee when utilizing a structured settlement. N.J. COURT RULE 1:21-7(h) (1984) (adopted and effective Jan. 16, 1984).

The New Jersey rule governing contingent fees in structured settlements sets forth the following definitions:

Calculation of Fee in Structured Settlements. As used herein the term "structured settlement" refers to the payment of any settlement between the parties or judgment entered pursuant to a proceeding approved by the [c]ourt, the terms of which provide for the payment of the funds to be received by the plaintiff on an installment basis. For purposes of paragraph (c), the basis for calculation of a contingent fee shall be the value of the structured settlement as herein defined. Value shall consist of any cash payment made upon consummation of the settlement plus the actual cost to the party making the settlement of the deferred payment aspects thereof. In the event that the party paying the settlement does not purchase the deferred payment component, the actual cost assigned by that party to that component. For further purposes of this rule the party making the settlement shall disclose to the party receiving the settlement its actual cost and, if it does not purchase the deferred payment aspect of the settlement, the factors and assumptions used by it in assigning actual cost.

N.J. COURT RULE 1:21-7(h).

132. For a list of cases decided under the New Jersey contingent fee rule, see *supra* note 88.

133. N.J. COURT RULE 1:21-7(c) (1984).

134. N.J. COURT RULE 1:21-7(f) (1984). The attorney may petition the assignment judge to determine the reasonableness of the fee in light of all the circumstances.

135. 181 N.J. Super. 503, 438 A.2d 365 (1981).

136. *Id.* at —, 438 A.2d at 371.

137. *Bambi v. Dr. O*, 196 N.J. Super. 536, 482 A.2d 536 (1984); *A v. D*, 196 N.J. Super. 340, 482 A.2d 531 (1984); *Iskander v. Columbia Cement Co.*, 192 N.J. Super. 114, 469 A.2d 103; *Pettiford v. Eskwitt*, 189 N.J. Super. 485, 460 A.2d 716; *Landgraf v. Glasser*, 186 N.J. Super. 381, 452 A.2d 713; *Tobias v. Autore*, 182 N.J. Super. 328, 440 A.2d 1171. See also *Donaghy v. Napoleon*, 543 F. Supp. 112 (federal court applying New Jersey state law).

138. See *supra* note 50.

139. See *supra* notes 86-88 and accompanying text.

sis of the Iowa law governing reasonable fees sheds light on what the court would do if determining an attorney's fee in a structured settlement. The Iowa Supreme Court, in analyzing an attorney's fee in *In re Marriage of Jennerjohn*,¹⁴⁰ set forth and reviewed factors similar to those stated in DR 2-106(B).¹⁴¹ In two subsequent cases the court¹⁴² upheld the DR 2-106(B) factors as essential to the determination of a reasonable fee.¹⁴³

In addition to its recognition of the factors for determining a reasonable fee, the Iowa Supreme Court has allowed an attorney to accept a contingent fee in a judgment on a disability policy providing for periodic payments.¹⁴⁴ The attorney was allowed to receive a contingent portion of the lump sum initial payment¹⁴⁵ and a percentage of any policy payments thereafter.¹⁴⁶

Under the reasonableness factors and the rule of *Stoebe v. Kitley*, it is likely that the Iowa Supreme Court would allow contingent fee recovery of attorney's fees when a structured settlement is utilized. What remains unclear from an examination of Iowa case law is whether the fee would be premised upon the actual cost or upon the present value of the structured settlement. In following the majority rule,¹⁴⁷ the court would allow recovery on the actual cost of the settlement, a larger value than its expected present value.

IV. CONCLUSION

Because the use of structured settlements in catastrophic losses is on the rise, attorneys must be well-versed in their use and operation. In addition, lawyers should be aware of the ethical concerns raised by their use. This Note has discussed two ethical questions which the attorney must address before utilizing a structured settlement. First, the client, pursuant to

140. 203 N.W.2d 237 (Iowa 1972).

141. *Id.* at 245.

142. *Heninger & Heninger v. Davenport Bank & Trust*, 341 N.W.2d 43 (Iowa 1983); *Wunschel Law Firm v. Clabaugh*, 291 N.W.2d 331 (Iowa 1980).

143. *Heninger & Heninger v. Davenport Bank & Trust*, 341 N.W.2d at 48; *Wunschel Law Firm v. Clabaugh*, 291 N.W.2d at 334. The court in *Wunschel Law Firm* went on to say: "We agree that the overriding principle from the ethical standards is that the fee must be reasonable. We concur with the Committee that a contingent fee contract is unreasonable when it provides for determination of the fee by factors having no logical relationship to the value of the services." *Id.* at 337.

The court in *Wunschel Law Firm* also cited *American Trial Lawyers Ass'n v. New Jersey Supreme Court*, *supra* note 130, for the proposition that courts can set limits on contingent fees under this power to regulate the bar. *Wunschel Law Firm v. Clabaugh*, 291 N.W.2d at 334.

144. *Stoebe v. Kitley*, 249 N.W.2d 667, 668 (Iowa 1977).

145. *Id.*

146. *Id.* The court favorably cited and adopted the Minnesota Supreme Court's decision in *Continental Casualty Co. v. Knowlton*, *supra* note 78. In that decision, the attorney was allowed a fee on the future disability payments received by his client. *Continental Casualty Co. v. Knowlton*, 232 N.W.2d at 794-95.

147. See *supra* notes 113-29 and accompanying text.

Ethical Consideration 7-8, must be informed of all relevant considerations before he can decide whether to offer or accept a structured settlement.¹⁴⁸ The matters on which an attorney must counsel a client depend upon the client's role in the litigation. Attorneys should inform plaintiff clients of the tax consequences of structured settlements,¹⁴⁹ their value in light of inflation,¹⁵⁰ and their potential to provide long-term benefits to the client by virtue of periodic settlement payments.¹⁵¹ Attorneys should inform defendant clients of the reduced cost of structuring a settlement¹⁵² and the opportunity to forego costly litigation by using a structured settlement.¹⁵³

The attorney must determine what limitations are imposed on his recovery of a contingent fee following a structured settlement. In figuring out the limitations on his fee, the attorney should examine Canon Two of the Code of Professional Responsibility¹⁵⁴ and the judicial rules governing contingent fees in his state.¹⁵⁵ The attorney's fee should also be governed by the doctrine of reasonableness. The attorney should be conscious of these ethical concerns in counseling his clients on the offering or acceptance of a structured settlement.

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148. See *supra* notes 15-71 and accompanying text.

149. See *supra* notes 27-50 and accompanying text.

150. See *supra* notes 23-26 and accompanying text.

151. See *supra* notes 51-59 and accompanying text.

152. See *supra* notes 64-66 and accompanying text.

153. See *supra* notes 67-70 and accompanying text.

154. See *supra* notes 72-104 and accompanying text.

155. See *supra* notes 130-46 and accompanying text.

Appendix A**SAMPLE REPRESENTATION AGREEMENT**

_____ (Name of Client) retains and employs _____ (Name of Attorney or Firm) to represent him/her in the handling, presentation and settlement of any or all claims of Client against _____ (Name of Prospective Defendant), arising out of events occurring _____, 19___. Attorney may take any actions in the handling and supervision of the claim and Client agrees to pay a legal fee in the amount of thirty-three and one-third percent (33- $\frac{1}{3}$ %) of any and all sums recovered after the filing of the legal claim, whether the claim is settled, litigated, or appealed.

"Recovery" shall mean anything received by Client in compensation for his/her claim. It will include deferred payments, attorney's fees and interest awarded by the court, provided for by statute, or settled upon by the parties.

Client authorizes Attorney to pursue a structured settlement of the claim, providing for a lump sum and several periodic payments. The attorney's fee is to be based on the total actual cost of the structured settlement. Payments to Attorney will be paid periodically as Client receives settlement amounts. At the option of Client, Attorney may collect his entire fee out of the lump sum and initial payments under the structured settlement. [At this point, the attorney should include standard provisions regarding the employment of associates to assist in the work, as well as a provision relating to compensation if the attorney is discharged or withdraws from the action. The attorney should also include any other standard provisions which explain the scope of his employment or the determination of his fee.]

This agreement becomes effective when signed by Client and returned to Attorney.

Date

Attorney

Date

Client

