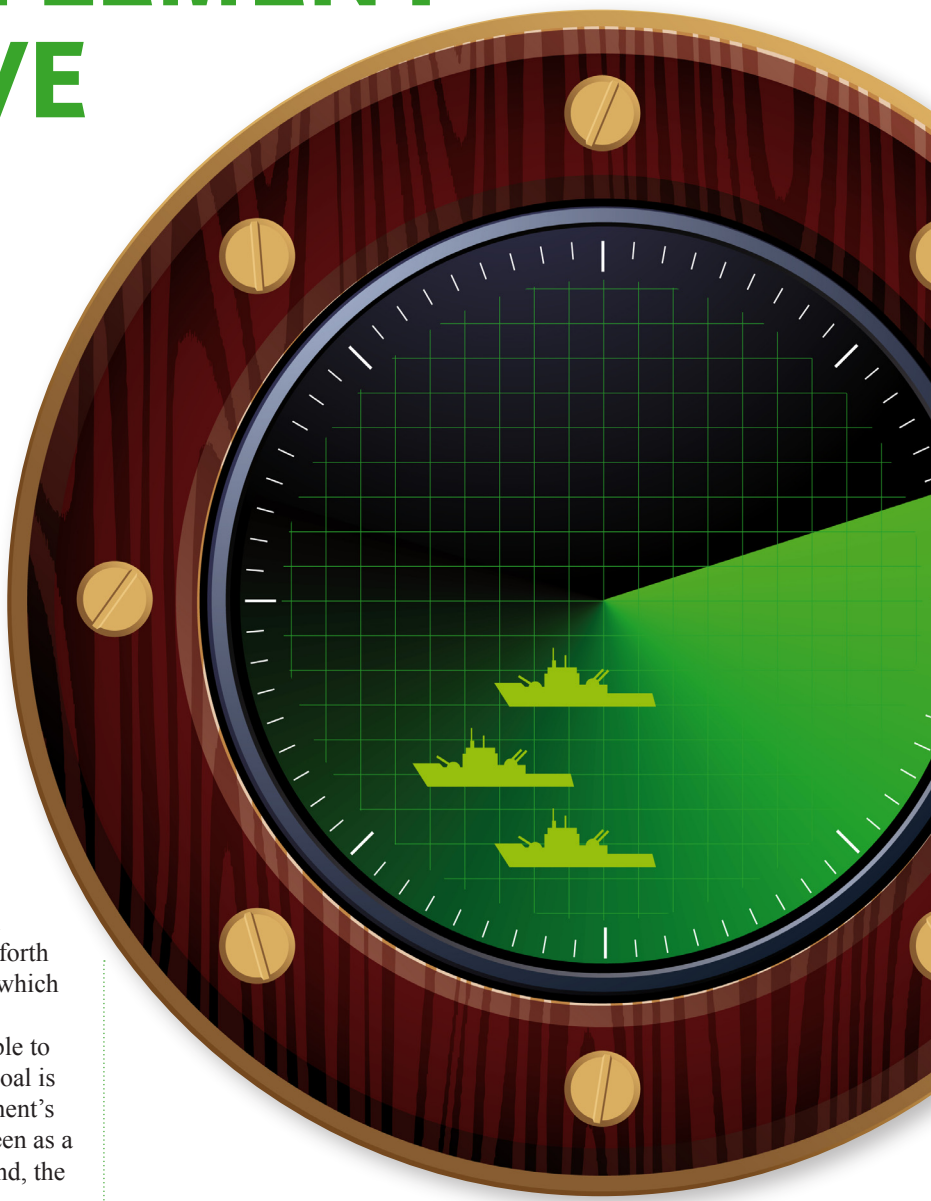
WHAT SETTLEMENT TOOLS HAVE YOU LEFT UNUSED?

NEVADA'S COMPUTATION OF DAMAGES RULE

BY MICHAEL C. MILLS, ESQ.



"You sunk my battleship!"

Many of you played the game of battleships as a child. Each player marks the location of various naval vessels on some graph paper, keeping the paper hidden from the opponent's view. The opponents go back and forth guessing the location of the appropriate grid square in which those pretend vessels are hidden.

Contrast that with chess. The board of play is visible to both players who take turns moving their pieces. The goal is to strategically move one's pieces to take out the opponent's king. While both games can be entertaining, chess is seen as a game of intellectual analysis and skill. On the other hand, the game of battleships is little more than one of chance.

So, what can attorneys and courts do to make litigation more like chess and less like battleships? One answer is surprisingly simple. It is NRCP Rule 16.1(a)(1)(C), which involves the computation of damages. This simple but often-unnoticed rule obligates a party to provide the other side with the following information:

> A computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary matter, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered;

This Nevada rule is patterned after FRCP 26(f). Federal case law and commentators have identified three important purposes behind the rule. In the case of *Design Strategy, Inc. v. Davis,* 469 F.3d 284 (2d Cir. 2006), the court said that the rule was intended to:

1. accelerate the exchange of basic information needed to prepare for trial;
2. focus and prioritize discovery; and
3. aid the parties in making informed decisions about settlement.

Each of these purposes is important. However, the third purpose of aiding the parties in making informed decisions about settlement is critical in Nevada. Here's why. Even while total civil filings in the district courts were declining, for every 100 civil cases closed another 140 were opened.[1] The justice court civil case clearance rate was a bit better but it still shows an increasing trend with 109 civil cases added for every 100 closed.[2] ADR options and new district court judges added in 2011 may have some impact on

these numbers. But with the advent of "courtroom sharing" in the Eighth Judicial District, it is not clear what, if any, ameliorative effect these new judges will have on the civil case clearance rate.

When the parties don't comply and the courts do not compel compliance the computation of damages rule, the opportunities for each to make informed decisions as to whether settlement is in their best interest will be lost. Each of the parties to a civil action should be able to use this tool to their own advantage by encouraging early and meaningful settlement discussions.

BENEFITS REALIZED BY PLAINTIFFS WHEN SERVING A COMPLETE COMPUTATION OF DAMAGES EARLY IN DISCOVERY

This rule is self-initiating. Just like the other provisions of Rule 16.1, plaintiffs are obliged to comply simply because the rule demands it. The rule anticipates that a computation be conducted for any category of damages. This should be read to mean that the Rule 16.1 exchange of documents should also include a computation of damages. In order to accomplish this task, a plaintiff's attorney will have to know his or her case and determine what types of damages are appropriate to the facts.

Sometimes when a full list of damages is impossible to complete, plaintiff's attorneys will ignore the requirement altogether, claiming that it is too early in the litigation for them to guess what their damages may be. That argument did not carry much weight in the case of *Allstate Ins. Co. v. Nassiri*, No. 2:08-cv-00369-JCM-GWF, slip op. at 6 (D. Nev. Dec. 16, 2010). (Opinion available on Fastcase.) In that case the court explained that while a plaintiff may not be able to provide a detailed computation of damages early in the case, a plaintiff cannot simply produce documents without some sort of explanation regarding computation of damages. The court said plaintiff should "provide its computation of damages in light of the information currently available to it, in sufficient detail so as to enable the defendants to understand the contours of their potential exposure and make informed decisions regarding settlement and discovery" (*Id.* at 5-6. *See also City and County of San Francisco v. Tutor-Saliba Corp.,* 218 F.R.D. 219, 221-222 (N.D. Cal. 2003).)

In addition, by early disclosure, plaintiff's attorney will not suffer the consequences imposed by the court in *Wintice Group, Inc. v. Destiny Longleg*, No. 2:08-cv-01827-PMP-PAL, slip op. (D. Nev. Feb. 3, 2011). In that case the court excluded plaintiff's expert in part because plaintiff failed to identify lost earnings as a category of damages (*Id.* at 10-11). Furthermore, plaintiffs will realize one important benefit by putting claims for damages out on the table early; namely, it will keep settlement discussions going.

BENEFITS REALIZED BY DEFENDANTS WHEN INSISTING ON A COMPLETE COMPUTATION OF DAMAGES EARLY IN DISCOVERY

There is nothing more frustrating to a defense attorney than having a plaintiff who won't negotiate. And a defense attorney has no better tool to get the client or the insurance company to reevaluate the case than to give them new and additional information. At the early stage of litigation, defendants would be missing out on an opportunity to push settlement forward by failing to communicate information included in that first computation of damages.

By obtaining detailed information in a computation of damages, the defense can obtain and communicate to its clients and principal the anticipated risks in the litigation. If the computation of damages discloses the need for future medical care, even if that number is not yet fully known, the defense should be telling its principal to either obtain or anticipate naming an expert or experts to address future care and the economic issues surrounding them. If the computation of damages identifies future lost wages or future lost earning capacity, even if that number is not fully developed, the principal will need to know that more extensive discovery (and thus more expense) will be anticipated.

Will this type of disclosure in a computation of damage compel a reevaluation of the case by the defense? It has been known to happen. And in the meantime, the parties will be better able to focus their discovery on what is important rather than wasting time and energy, and often the court's time, getting the plaintiff to finally concede that he or she will not be pursuing a certain line of damages.

BENEFITS REALIZED BY THE JUDICIARY IN ENFORCING THE COMPUTATION OF DAMAGES RULE

The only way that all sides are going to realize the benefits of this rule, namely early and continuous discussions about settlement, is for the judiciary to be involved. The question then is how does the court best enforce compliance without imposing draconian results? There are several things that it can do.

When it comes to enforcement, the judiciary's first choice may be to grant a defense motion to compel production of a computation of damages (See NRCP 37(a)(2)). A question that often arises at these hearings is whether plaintiffs should be obligated to assign an amount to the various categories of general damage. While some judges are willing to compel the plaintiff to compute damages in all categories, others believe that plaintiffs should not have to provide a computation in the area of general damages, i.e. pain and suffering.

If the purpose of the rule is to facilitate settlement, this latter position doesn't make sense. Can you think of a case where a plaintiff who claims general damages fails at the time of trial to evaluate and communicate its position of value to the jury? Why would the attorney be any less capable of making such a computation on the value of general damages at the outset of the case rather than at the end? Again, if the pain gets

continued on page 18

WHAT SETTLEMENT TOOLS HAVE YOU LEFT UNUSED?

continued from page 17

worse or the condition deteriorates, a supplemental disclosure can be made. But to leave that category of damages blank or to fall back on the empty catch phrase, "in an amount in excess of $10,000" undermines the settlement purpose behind the rule.

Any order to compel should also impose an obligation on the claimant to disclose all categories of damage that they anticipate and to compute those damages as soon as possible. For example, a plaintiff may anticipate future care, but at the time of the early case conference does not have an estimate of those future costs. In order to realize the purpose behind the rule, plaintiffs should at least identify that particular category of damage and supplement the disclosure with a computation as soon as is practicable.

The judiciary's second option to enforce is to deny the plaintiff, by way of a motion in limine, the opportunity to introduce evidence of damages that have not been included in the computation.[3] This enforcement option is more controversial, but is within the judge's discretionary powers. In *Design Strategy, Inc., supra*, the court was faced with a situation where a plaintiff, who had failed to disclose a certain category of damages (lost profits), wanted to add that item of damage just before trial. The court found that in order to avoid the sanction of striking that item of damages, the plaintiff would have the burden of demonstrating that its late-produced computation would not prejudice the defendant (*Id.* at 298). There have been a number of other cases where the courts have discussed the sanction of excluding certain damage claims that were not properly disclosed under the federal equivalent of Nevada's computation of damages rule (*See Gilvin v. Fire,* 2002 U.S. Dist. Lexis 15249 (D.D.C. 2002) and *Am. Realty Trust, Inc. v. Matisse Partners, L.L.C.,* 2002 WL 1489543 (N.D. Tex. 2002) as examples). However, as pointed out in *Allstate*, *supra,* the court reserves the sanction of evidence preclusion to the most egregious cases (*Allstate* at 7).

If the court properly warns the plaintiff by entering a thorough order to compel production of a computation, the court will face less criticism if it is later forced to deny proof on a certain line item of damages. It also goes without saying that the court has leeway to deny such a sanction where plaintiff demonstrates substantial justification for the delay or that no harm will be realized by the opponent.

In the end, the benefits of this computation of damages rule can never be realized if the rule is never used. However, as the plaintiffs' attorneys, the defense attorneys and the courts work together, the parties and the court can clearly realize the important purpose behind the rule, which is to inform the parties regarding their settlement options. This will hopefully result in cases coming to resolution more quickly and fairly, allowing parties to put their strategy and skill to work in litigation rather than in guessing where the other side has hidden its damages. ■

For more than 20 years, attorney **MIKE MILLS** has been solving problems for insurance carriers that do business in Nevada through consultations, opinions and trials. Additionally, Mills & Associates publishes a coverage and bad faith law blog at www.NevadaCoverageLaw.com. Mills can be reached by phone at (702) 240-6060 x114 or by e-mail at mike@mcmillslaw.com.

1 2010 Annual Report of the Nevada Judiciary, p.31.
2 *Id.* pp. 37-38.
3 NRCP 37(c)(1) provides:
A party that without substantial justification fails to disclose information required by Rule 16.1, 16.2, or 26(e)(1), or to amend a prior response to discovery as required by Rule 26(e)(2), is not, unless such failure is harmless, permitted to use as evidence at a trial, at a hearing, or on a motion any witness or information not so disclosed. In addition to or in lieu of this sanction, the court, on motion and after affording an opportunity to be heard, may impose other appropriate sanctions. In addition to requiring payment of reasonable expenses, including attorney's fees, caused by the failure, these sanctions may include any of the actions authorized under Rule 37(b)(2)(A), (B), and (C) and may include informing the jury of the failure to make the disclosure.