

Structuring Attorney Fees (Rob Wood)

Host: Larry Cohen

Co-Host: Doug Merritt

Guest: Attorney Robert Wood

Release: August 24, 2009

Announcer: This is Ringler Radio. Where you get all the latest news and information about the structured settlement industry from the experts in the know.

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Larry Cohen: Well welcome to Ringler Radio everyone. I'm Larry Cohen, your host and head of Ringler Associates Northeast operations and we're awfully glad you could join us again today. We're coming to you from San Francisco, California where we're attending the 2009 AAJ annual convention. There are a lot of interesting and important topics and issues being discussed out here, and more than a few politicians are on hand as well. San Francisco, if you have never been here, of course, is a wonderful place to have a convention. The weather is absolutely gorgeous.

Well joining me today is my colleague Doug Merritt. Doug is a settlement annuities specialist in the San Francisco Bay area office, located right over in Walnut Creek, just about a stone's throw from where we are sitting.

Doug Merritt: Hi Larry.

Larry: Thank you Doug. Doug has been in this business for quite a while, has knowledge in a lot of the areas surrounding worker's comp, medical malpractice, product liability, all of the typical areas that handle structured settlement annuities. Doug, you've been at this for a while and I know you've been doing a good job at it.

Doug: Yes sir, since 2001.

Larry: Well our special guest today is Robert Wood. Rob is from the firm Wood and Porter, has an international reputation as a tax consultant and he's very, very well versed in the tax treatment of litigation recoveries and has extraordinarily broad experience in corporate, partnership, and individual tax matters. He's a prolific author of articles and books, too many to mention here Rob. And he's been named to America's Best Lawyers by "Forbes" magazine. That's quite an honor. Well today we're going to be drawing on his extensive expertise in the area of structured attorney's fees. So Rob, welcome to Ringler Radio.

Robert Wood: Thanks Larry, nice to be here.

Larry: In fact, I'm going to tell you welcome back to Ringler Radio, because I think we did a show a couple of years ago or so.

Robert: That's right, you're right as usual.

Larry: That's cool. Well I can't think of a more important and interesting topic for lawyers to get their heads and their hands around than the structuring of attorney fees. And by now everyone is familiar with the structuring of the plaintiff's settlement award and the advantages of that. But surprisingly, not all attorneys are even aware that they can structure their fees. Rob, are you finding that that is the case? You're running into lawyers who don't really even understand that structured fees are part of the game.

Robert: Yes, it is. And for everyone in the structured settlement industry, certainly for the plaintiff's bar, it's easy to address specific things if somebody has a specific question, "Can you do this?" or "Is it necessary for the document to read a certain way?" But I find it's hard to start from ground zero, and say, "Do you know about structured settlements, do you know how it works?" Sort of where do you begin the dialogue is tough.

Larry: Yes. Of course that's part of the job that we do as brokers when we engage at these mediations and these settlements and you turn to the plaintiff's attorney and say, "Have you considered structuring your fees?" Often times you'll get "Yeah, I really have. I'd like to do it; I think it's a great idea." Other times you get a lot of puzzled looks, and others they don't even understand the process or the concept can even be done. So our hope today is that we can have a dialogue that's going to enable a lot of lawyers around the country to learn more about the opportunities they have with structured fees.

Doug: Hi Robert, essentially it's a deferred compensation plan. Could you maybe broaden what are the benefits of that and how should it be used?

Robert: Sure, yes. It is a deferred compensation plan, no question about it. It's a special deferred compensation plan, a nonqualified plan. And by that I simply mean that it is not an ERISA employee retirement income security act pension plan. It's not special tax rules. It's a plain old pay me later arrangement. And I think to go to the basic issues, any trial lawyer, any plaintiff's lawyer who's on a contingent fee basis, that's been doing it for a while, even very successful ones, will experience spikes in their income, up and down income.

If their income is always up, and it's a question of how far it is up, they may not look at structured fees, which I think is a mistake that we'll come back to.

But certainly in the case of lawyers who have one really good year where they make lots of money, and then the next year they have trouble paying for rent and basic things, can become a real financial and tax planning nightmare. And so structuring fees is simply a matter of stretching payment out into the future.

Larry: Well you're right about evening and leveling out income streams. Obviously, lawyers get these spikes. I've had a lot of situations where lawyers are in the money in one year and the next year they're borrowing money to really make their practice work. One of the lawyers in our area, what he's done is he's actually structured his fees to, specifically cover his operating expenses in the office each year.

So that every year in the beginning of the year, typically in the first quarter, he's had enough in the structured fee scenario to enable him to really have gravy in terms of what he does the rest of the year. So that's a big plus for people who are involved in this kind of spiking.

Robert: Yes, absolutely. And I think we tend to think of this maybe in black and white terms, about structuring versus not structuring. But of course, it's very common for people to structure part of their recovery. Just as it is in the case that Ringler and any other structured settlement company would do, look at structuring a part of a plaintiff's recovery. Lawyers have that flexibility, too. So they may structure 10 percent, 20 percent, 50 percent, 80 percent of their fee, and as you say, gear it toward what their say, monthly operating expenses are on an ongoing basis. And that is real smart.

And also, another thing, and I've heard this numerous times from lawyers. They say something like, "You know, I'm tired of not knowing what year to year is going to be, and I'm tired of not knowing if my operating expenses are covered, and I want the luxury of doing the cases I want to do."

Larry: Right.

Robert: And so in some ways it can be a lifestyle decision that they're able to take cases that they like, and they don't have to look so much at the bottom line.

Larry: Interesting.

Doug: Just so they know how to expect to treat that money as it comes in, it's a fee that is deferred and grows with interest over time. That interest is taxable.

Robert: Yes, it is. If you think about it, we spend a lot of time with structured settlements looking at tax issues. Is a structure tax-free? Is the recovery, settlement or judgment, tax-free? Is it excludable for personal physical injuries? What about punitive damages, what about interest, deductibility of attorney's fees, we look at all of these mix of issues. Structured attorney's fees are actually pretty easy. Easy in concept. The lawyer knows that he or she is paying tax. If they get a million dollar fee, they're going to pay tax on it. It's obviously taxable income.

So the idea is why not spread that out over time and pay presumably lower rates when they receive it? And also, have it grow on a tax-deferred basis.

Going back to your question, Doug, about deferred comp, it is a type of deferred comp program. I don't know if this analogy helps the analysis much, but it's like an unrestricted IRA or something. There are no restrictions. You can have millions and millions and

millions of dollars.

Interestingly, and I'm sorry to get off topic, but when you talk about how great these things are, there was a proposal a couple of months ago in "Tax Notes" by a couple of academics, arguing that attorney's fee structures should be outlawed, that they're way too good a deal, that they're unrestricted.

Nobody else besides lawyers gets them, and in fact not just lawyers but contingent fee lawyers, are able to do this. And it's way too good a deal. The good news is that there's so many things going on in Washington now, I don't think that proposal will be seriously considered.

But the fact that they target these things and say, "They're way too good a deal, we should outlaw them." Sort of perversely it ought to make trial lawyers wake up and start doing that.

Larry: What a selling point. It's amazing and you know you're right about plaintiff attorneys being somewhat of a class that's specializing in this area. And it's very interesting and I'm always amazed when someone finally realizes that they can take the full amount of their fee, buy an annuity and have it deferred rather than taking their fee in cash and having almost 50% of it paid in taxes this year. To me, it's always been a no-brainer and some lawyers really need to wake up to that.

Doug: I agree, Larry, completely. And going back to what you said earlier, Rob. You had said that the claimant who would structure part of it and the attorney could structure part of it. Now in the instance that the claimant decides not to structure any of their settlement, can the attorney still structure a portion of their fees?

Robert: Yes. And the two of you who are brokers probably know this better than I do. Yes, absolutely. Certainly there is no tax law reason you can't do it. I believe that it will restrict the number of life companies that you can go to. Because if I'm not mistaken, there are some life companies that will say we will structure the lawyer's fees only if the client is also structuring. But there are also some companies that will do it no matter what.

And I said there is no tax law restriction that won't work. You can get on the question you raised all sorts of gradations of that too. That is, what if the client wants to structure \$100,000 and the lawyer wants to structure a million, is that enough?

Is there some threshold? But analytically, absolutely, the lawyer can structure even if he or she is the only one structuring.

Larry: Yeah, you know, in some life companies I always had the feeling that they're almost doing it from a marketing standpoint. "You can have the French fries but only if you order the hamburger."

Robert: That could be.

Larry: Well, let's talk about the amount of income that can be deferred in the structured fee arrangement. You know there are statutory limits to the amount you can defer in a qualified retirement plan and some of these 401(k)'s but in a structured fee arrangement, those things go away, don't they?

Robert: Yeah, they do. Again it's unrestricted which I guess to go back to the comment I made a few minutes ago. This is one of the things that the academics, tax professors, argued about is, "Look, nobody else can do this." And if you have a very successful plaintiff's lawyer, you can structure a very small fee, you can structure \$100, 000 or less but if you had a \$50,000,000 fee in some kind of a huge case, could you structure it? Absolutely. Is there a limit you can structure? The answer is no.

And I should say and I know we don't want to talk too much about tax theory here. But one thing I think helps plaintiff's lawyers understand why this is allowed and why they are sort of identified and allowed to do this and really the only people that can do it, is not because anybody at the IRS particularly like trial lawyers or anyone in Congress, necessarily for that matter.

It really is about the concept of a contingent fee and when the fee is payable and the idea. And the tax authorities, whether they're right or wrong, have consistently said this, is that a fee isn't payable until the case is really done, and that typically means settlement documents are signed.

So even though as a practical matter a lawyer who has earned a 40% contingent fee on \$10,000,000 recovery, meaning a \$4,000,000 fee, has been working on it say the last five years and it's gone to trial and settles on appeal or it's had extensive discovery, whatever the facts are, virtually all the work is done.

Notice I say virtually. Virtually everything is done. The lawyer really knows that even though orally the case settled last night at mediation for \$10,000,000, has the lawyer earned his fee? The answer is absolutely not. And that of course is why you can still structure.

Larry: Excellent. Well, now is the time that all lawyers that are listening today should start really listening, because we're going to talk about some of the specific requirements that all structured fees need to have. And when I say listen carefully, a friend of mine has a great phrase; he says, "You should listen as if you were a first time skydiver in a parachute packing class." And I think that's pretty attentive listening. So Rob, let's start.

What should a lawyer's contingency agreement with the plaintiff say regarding the ability to structure attorney's fees? What should that document say?

Robert: Well, I don't want to give any trade secrets here. I have my own special way of saying this. But essentially, and by the way, I also should say that it is not clear. You'll get differences of opinion from tax lawyers like me around the country about sort of how important this is. But certainly, optimally, I think everyone agrees that it is appropriate if the contingent fee agreement says something about the lawyer can elect to receive his or her fees on a periodic payment basis, not in cash.

How critical that phrase is as I say is a subject of debate. I will say that with lawyers that will listen and many of them have this kind of a stock revision. As you can hear, it doesn't cost you anything to say. It's not like you're obligating yourself to accept contingent fees.

The other thing that is very frequently done is sort of, again I revert to my comment about the fee isn't earned yet, very frequently right before a settlement you can amend the fee agreement to clarify something. It's not backdating the document.

It's a fee agreement that might have been executed four or five years ago with the client and you say, "We're amending it effective as of the original execution date, dating it today, clarifying that the lawyer may elect to take his fee on a periodic payment basis."

Larry: Yeah, and as long as that amendment is accomplished prior to any of the settlement documents being signed, I think that's the general consensus that that's still an official way to do it.

Robert: Absolutely.

Doug: Moving to the back end of this. The contingency fee is at the beginning of the relationship between the client and the lawyer. The back end, do you have any comments about the language that we put into the settlement docs?

Robert: Well, certainly the settlement, and this is one of those things that lawyers who are listening shouldn't try this at home. It's something that you need to get, certainly, a structured settlement broker involved. You need to get access to the life insurance markets obviously. And that's one way of doing it. And most brokers, I think certainly have been through structured legal fees before, are going to be able to supply the sort of requisite language.

So, essentially though, the settlement agreement is going to say or should say the list of periodic payments that the lawyer is going to get. So it's going to say, "The defendant is paying \$10,000,000, the client is going to get \$6,000,000 that may or may not be structured."

As you said the client hopefully will structure, may choose not to, may structure part of it. And there will be structured periodic payment language covering the client's money. And likewise there will be structured periodic payment language covering the lawyer's money.

Larry: Interesting. Well, that's very important in those settlement agreements. And there is some language that I think every settlement agreement has that helps protect against those constructive receipt issues, which we're going to talk about in a few seconds. Let's talk now about another issue that lawyers often raise and that is the corporate status of their law firm and how that works. Some corporations, some law firm corporations, are C Corps, some are S Corps. First of all, does the status of the corporation being a C or an S have any impact or any effect on the ability to receive fees on a structured basis?

Robert: No, no effect and you're asking about C Corps and S Corps. And you're right. I know you and I recently had this issue come up with something. The answer is it doesn't matter. I mean it does sort of complicate it in a few ways but it doesn't matter in terms of ability to structure. A lawyer who is a self-employed solo lawyer can structure; a lawyer who practices in a C Corp, either as a partner, a shareholder or employee can structure. A lawyer who is a partner in a partnership can structure.

In terms of the mechanics, depending on who you talk to, you can get a little more exotic or not. And indeed the entity can structure. And this is, in my experience, sort of atypical. But you could have the law firm of Smith, Jones, and Abraham, three lawyers, or it could be a thousand lawyers, in a law firm, and the firm can structure its fees and have the money come into the firm and then be paid out of the firm if it wants.

As I say, in my experience, that's atypical, because most lawyers, plaintiff's lawyers in particular, are iconoclast, and they want to go their own way, and they certainly don't want to be tied down to one law firm for the next 20 years.

Larry Cohen: You know, but I've had lawyers say when asked, do they structure their fees, they'll say, "Well, no, I'm in a partnership and I have partners." And I have to explain that, "You as an individual partner in that firm can structure your partnership share of that fee," which is true. Now, let's go back again to the contingency fee agreement, because that's the actual agreement that the client, the injured party, signs with the law firm as to how that's going to all come together. There are sometimes questions raised as to who did the claimant hire.

Should the contingency fee agreement show that the hiring took place not just with Smith and Jones Law firm, but Joe Smith and Mary Jones as well, because at the end of the day, if Mary Jones wants to structure the fee and there's no mention of her as an individual as being part of the signatory to that contractual arrangement, could that somehow get in the way of a structured fee arrangement?

Robert: Yeah, I'd think so. I think the issue you're raising, and you're right, it occasionally comes up. I actually think it should come up more than it does. And again, I know, Larry, you and I have talked about this before, I think that the let's take the classic case: Smith and Jones, and leaving aside whether Smith and Jones is a partnership or a C Corp or an S Corp or an LLP or whatever it is, but Smith and Jones is a law firm.

Smith and Jones enter into the fee agreement to represent Paul Plaintiff in a big case, a catastrophic injury case, let's say. Then we get to five years later, the case is settling for, let's say, a very large amount of money, and then Smith wants to structure, Jones doesn't, or vice versa.

As you say, if the fee agreement simply says Smith and Jones is representing Paul Plaintiff, then from an income tax perspective, which is the only way that I look at it, there is no question who is taxable on the money, assuming the fee is paid. It's the entity.

So, I guess to go back to your questions about C Corps and S Corps because it's a little easier, I think, if it's a partnership, a flow through entity, but let's say it's a C Corp, a professional corporation.

Well, many of your listeners know that with a C Corp, professional corporation, and there are still many of those around, generally what happens is the money comes in and you pay it out. You pay it out as salary, typically. So the C Corp ends up with no income.

Well, what if you're bypassing the C Corp entirely and just saying, "Well, we're going to give it to the individuals, the two shareholders." So the concern is, have you confused it? I think, arguably, yes. There aren't any cases of the IRS taking on that kind of an arrangement and saying you've ignored the entity.

I think it's really easy to fix. You already in your question suggested one way of fixing it, which is having a fee agreement that says that Paul Plaintiff is being represented not merely by Smith and Jones Inc., but also by Tom Smith and Mary Jones.

Larry: Or "the attorneys at Smith and Jones", because there may be several more than just the two of them.

Robert: Right. I would say, to me, and again, you can have the entity structure, and I've seen this done, but as I say, rarely, the entity structure and then have all the annuity payments coming into the firm and then the firm paying them out. Once again, I don't think that's terribly common. But what you suggest is a good idea. I think even better is to expressly address these issues in some kind of a, what I call when I draft these things, a payment accommodation agreement or allocation agreement, where it's the entity and lawyers agreeing that, well, really, this is the firm's income, but we're going to treat it and book it as, and I've worked with some accountants on this, as income to the firm.

But we're going to separately allocate it to the individual lawyer, and it's going to bypass the entity, and that's his share of the income for that year.

Larry: So if there are some rather exotic arrangements that a law firm wants to engage in, I think good advice would be to get your mind around that and maybe talk to someone like yourself.

Robert: Yeah, and maybe just in order or magnitude. It's not like these are terribly complicated things. The complicated part, in my experience, with firms, or the contentious part, can simply be dividing up who's going to get what, which certainly isn't a tax issue. But if it's a \$10,000,000 fee, and there are a bunch of lawyers, and they're haggling over amounts, they've got to come to a resolution on who's going to get what.

But it can be a matter of a very small number of lawyer hours. I'm talking order of maybe a couple thousand dollars at the most, to draft up some kind of an agreement that will, in my view, fix the problem.

Larry: Yeah, very good advice. Would you like to add anything?

Doug: Well, one other question that comes up periodically and a lot of companies treat it differently, but your perspective would be helpful, is the beneficiary. Can a beneficiary be changed in the attorney fee scenario? And is it better to be irrevocable or not?

Robert: Yeah, it's certainly better to have it irrevocable. And I guess your question means maybe we should cover a little bit more fundamentally what the arrangement is. One of the great things, which I guess I haven't said yet, about structured attorneys' fees is, it's the same thing that's great about any structured settlement, which is infinite flexibility. You can say, "I don't want to be paid anything for the next 20 years. I want it to start then. And then go for five years, or go for ten, or go for 15, "or I guess I've never seen this, but I guess you could say, "I want every leap year to have no payments." You can almost do anything you want, which is great.

And you can have extra big payments in years that you think you might have kids in college or something, extra expenses. So you can do all these things.

Now you just raised a question about beneficiaries, and you certainly can say, "And I'm entitled to this stream of money. What happens if I get hit by a truck or something?"

You do designate a beneficiary and, certainly from my viewpoint, and I guess I'm not sure which life companies I'm allying myself with here, but from my viewpoint, designating an irrevocable beneficiary is better than not.

I do think if push comes to shove, because life circumstances change, if you structure fees, and then five or ten years later, marital status may change, there may be other changes in life, and you may want to [ambulance siren] the ambulance going by, it may be coming for me, but circumstances may change, so you may need to change the beneficiary. My experience is usually you can.

Larry: Well, in that regard, would the designation of the "estate of the lawyer" be sufficient in terms of the so called irrevocability, that you cannot change it from that, but in the will that the individual may have, he can change it around to his new wife.

Robert: I think that works. And I've certainly seen it done, but I've also heard people argue about that one. But I believe that works, assuming the life company accepts it. Again, from a tax perspective, it's OK. One other thing that, again, I guess I fault myself for not saying up front, which is, we're talking about the great benefits of these things. Well, what are, and you asked me some questions about the fee agreement, and Doug asked me about the settlement agreement, what is a fundamental restriction?

And this is not, well, I would put this in the settlement agreement ordinarily anyway, but it's also in the life company documents, which is: You can't accelerate. You can't defer, and so on.

I guess I have to say this, as it's just a fact of life. Maybe it's a bad thing, but it's there. In order to get these great benefits of structuring fees it's not a bank account. If the lawyer thinks about it, and decides, "What I really want is no payments for ten years, and then I want it to pay level payments every month for the rest of my life, " that's fine. You lock it

in, and that's the payment you're going to get. Short of factoring or something like that, that's what you're going to get. You can't just change it every ten minutes. It just doesn't work that way.

Larry: Absolutely. And it's like everything else in life. There are some restrictions that come along the way.

Robert: I'm sorry to interrupt. It's restrictions, but it's also most people, I think, if they're thinking of a structured fee arrangement as regularizing their income and maybe serving as a, again, unrestricted retirement benefit. As you pointed out, Larry, retirement plans are all in 401k's and have very severe number limits. We're talking about unlimited money here. It's not as though they're not going to have other assets, in all likelihood. The stream of payments is one enormously important tool and, to me, the fact that you have to lock it in, is not such a big deal. That's the price you pay for the ability to do this.

Larry: You know what, to be honest, attorneys are no different than claimants in that regard in that they can dissipate money with the best of them. The fact that they can't get to it, it's better.

Robert: Maybe better.

Larry: It's a better thing; that's what I like to tell them. The other thing, of course, is those 401k's, that they have there on the side. A lot of those 401k's, as you've seen in the recent environment of the stock market, they've gone down substantially in value, whereas these annuity payments that are out there are being paid by these life companies, just as they're stated on the paper and they'll continue to get those benefits, so that's a real plus.

Let's take a quick break right now. We'll come right back and we'll talk some more about this very important topic with, I guess, nobody else better to talk about it with, Rob Wood, our tax expert from San Francisco. We'll be right back.

Welcome back to Ringler Radio, I'm your host Larry Cohen, again glad you've joined us. We're out here in San Francisco and along with my co-host Doug Meritt from Walnut Creek. We're here with tax attorney Rob Wood, who also lives and practices right here in San Francisco.

Well, Rob, this city has been inundated with lawyers this week, mostly plaintiff lawyers actually, who really need to listen to this show about structuring their fees. I've heard you say a lot about the process of structuring the fees, the whole process involved and it is important.

Every attorney must elect to defer fees before they're earned, we spoke about that earlier, to avoid running into constructive receipt issues. Let's just make sure we repeat that again. What we really mean is, it all has to be done, it all has to be agreed to, prior to the settlement documents being signed.

Robert: Right.

Larry: Let's make sure we understand that. Let's also talk about another thing and that is that these annuity companies, the life companies, they require lawyers to sign certain documents as well, don't they?

Robert: Yes.

Larry: Tell us what those documents typically are. Most of us know the 'hold harmless' agreements that have to be signed, that say to a lawyer, "look, if the IRS ever challenges this, the life company wants to be held harmless on these issues." Everybody understands that. What about some of the actual tax forms they need to sign?

Robert: Typically, there's a request for a tax payer ID number that would need to be signed, because from a tax perspective, just on a simplistic level, if the lawyer's entitled to a \$1,000,000 fee now. I guess I use the word entitled in a funny way, you just mentioned constructive receipt, again the tax concept. I think we all know, and certainly the lawyer knows that he or she has really almost earned that fee. Everything has really happened except the documents aren't signed. Again, that's the critical tax linchpin here. The fee is not earned and therefore the lawyer is not in either actual or constructive receipt of the money.

The lawyer is going to say to the life insurance company, he's going to have a consultation with a broker to determine how the lawyer wants the money; paid when; over what period of time, sometimes joint survivor with their spouse.

The payments are going to start when the payments start, off in the future at some point. They're going to be income to the lawyer at that point. The life company, when it pays the amount, let's say it's starting to pay \$100,000 a year starting in the year 20, twenty years from now. And it goes \$100,000 a year for the rest of the lawyer's life.

That \$100,000 is income then, twenty years from now. They're going to get a 1099 form for that income 20 years from now.

Larry: That's because at the time of the execution of this whole structured fee arrangement, they signed the W9 document or they signed the W4 potentially document, depending on the life company's requirements. And they set that up for the future.

Doug: We talk about all the great benefits of the deferred compensation plan and I know I run up against it quite a bit and I know Larry does as well, but we get in touch with the attorney's accountants, and they usually haven't heard of this concept and a lot of times don't even believe it because of the great tax set up that they create. What is the best way that you use to quiet the uncertainties or address their concerns about this deferred compensation set up?

Robert: Boy, I'm not sure there's an easy way. It's one that does come up and it is sort of a funny, ironic, I guess circumstance that you are trying to allay concerns and simultaneously trying to tell them something is really great and that they ought to do it. At least they ought to consider it. At the same time you know you're trying to allay the concerns of an accountant or personal tax planner or whoever it is.

But accountants raise a lot of these issues. Sometimes the accountants are the ones saying, "Wait a minute, there's no way you can do this, this is way too good to be true."

Basically, they're saying to the lawyer, "I know that you've already earned this money; I know that you have that mediation; I know everybody shook hands and agreed on the \$10,000,000 settlement; been working on this case for five years. There's no way that you can somehow push this off into the future, just by signing some documents."

Sort of perversely, you can use that argument against them saying, "Well, if I can prove to you that it works, are you willing to do it?" The best case to show them, really the only case, still is the Child's case, which was a tax court case about 10 years ago, which was affirmed by the 11th Circuit. The IRS has not had another case; they've not brought another attorney's fee case.

Last year, 2008, there was a private letter ruling which you guys are certainly aware of, dealing with nonqualified structures, which I think was important for the structured settlement industry. That ruling cited the Child's case several times.

Many people, myself included, believed that the IRS, although there was some concern the IRS didn't like legal fee structures, that the IRS has certainly accepted them now.

Provided that your documents are good, that you cross the proverbial T's and dot the proverbial I's, just one more reason to use professionals and don't try to reinvent the wheel here, I think the risk of attack is pretty darn small.

Larry: Well, you're right about that. I think Child's has become acceptable by the IRS. They're raising it, they're referencing it, and they're citing it. I think that you're right, those lawyers who follow and those brokers of course and others in the process have followed the rules of Child's, are on pretty solid ground these days.

Let's talk about the concept of using brokers in this process. Obviously, that's what we do and we feel we bring obviously some value here because of the experience that we have. You don't ever think these lawyers should be out there doing it on their own and trying to muddle through this process without really getting good advice from other folks.

A lot of lawyers have egos; they think they know how to do things.

Robert: You're certainly right about that. I think that the successful plaintiff's lawyers may even have bigger egos than many other lawyers. I think that it comes with the territory. **You know how to assess cases and how to woo juries and convince insurance companies and defendants to settle. Absolutely, number one, you've got to have access to the life markets because of getting the annuities to purchase. You need a broker.** I don't think, you guys can correct me if I'm wrong, but I don't think even if you somehow could bypass brokers and go direct to the life companies, I don't think you'd save any money.

Doug: No you can't and first of all they won't allow it.

Larry: They don't want to have to deal with people who aren't really in the process of it. Having expertise to be able to bring them things that are already done right. They'd be inundated with a lot of things that are going to be not correct.

Robert: I'll say this. Hopefully, since we're on the radio and no one can see, you can club me with something if you want. But to me the only stupid question that the plaintiff's lawyer doesn't ask the broker is, the only stupid question they ask is the one they don't ask. What they should do is say, look. I really don't know how I want this money payable. Can you run me a bunch of projections?

I'm sure both of you see a lot of this, but it shouldn't be, in my view, simply, oh, let's do it 20 years level payments or something. Be creative. Think about, and obviously part of the broker's job is to be a pest, frankly, and to push the lawyer, and say give me some more information. Give me some more information.

Well, how about this? How about this instead? How about that instead? What about your kids? What about your spouse? Think about all the angles, because that's the beauty of these things. Going back to, I suppose, the only disadvantage, you've got to lock it in. Before you lock it in, you want to think about all the choices. You can't do that without a broker.

Larry: You've said it very well. Here's a frequently misunderstood topic and question, Rob. [ambulance sirens]

Robert: I'm assuming that all the ambulances going by, that you guys personally arranged this.

Larry: We did. We actually have accidents happening all over town so we can structure these cases. [laughter]

Larry: Here's, again, a frequently misunderstood area around the issue of structured fees, and that is when you have a non-personal injury case, when you have a case that doesn't fall into 104(a). What's the story with structuring fees with non-personal injury cases?

Robert: Yes, you can absolutely do it. Once again, and I suspect both of you have your finger more on the pulse of which life companies do what than I do. But absolutely you can do it. That is, if it is, just to take an example, a big race, or gender, or discrimination case, a wrongful termination case. You see a lot of these in the employment context. The ruling that I alluded to earlier, the private letter ruling, involved a woman in a discrimination case who was structuring her recovery, which is taxable but paid over time. Lawyers do the same things.

Now, again, which life company you go to may vary, because I think some of them, and it's a question of their mechanics, how they have their assignment company set up. But absolutely you can do it. You don't need it to be a personal physical injury case.

Larry: Rob, now there's a frequently misunderstood topic. If the case is not a personal injury matter, is it still possible to structure the attorney's fees?

Let's wrap this up, Rob, with one final thought. That is, what are you seeing? What do you foresee out there as changes in tax law that could challenge the status of attorney fee deferrals? Are you seeing anything on the horizon out there?

Robert: Boy, that's tough. I think everyone is aware, with the political climate and the economy that tax rates need to go up. Well, I guess I shouldn't say everyone agrees on that. I think everyone agrees that they will go up. Whether they need to or not is a separate question. I think there are some things like a higher capital gains rate, which I've been not very accurately projecting for some years, thinking that that was going to change. I think the writing's on the wall. That will change.

In terms of is something going to happen on attorney's fee structures, I'm not aware of anything. I don't have a particularly good crystal ball, but I'm certainly not aware that there's any movement to change them.

I did allude to, and I think I've written about it, I think there's a brief article on my website on this, which is WoodPorter.com, which you can download for free, commenting on the proposal by the academics that I mentioned.

But honestly, I don't think that that's going to go anywhere. There are an infinite number of proposals being made to the tax law all the time. A very, very small percentage of them actually gets enacted, so I don't think there's much fear of that happening.

Doug: I take that as good news.

Robert: I think so, yes.

Larry: Absolutely, absolutely. So all of you out there, lawyers, if you're young lawyers, and you're starting your practice, you can start thinking about putting a little piece of each fee out into the future. I spoke to a lawyer today who had a chance back in 1989 to defer the fee for 20 years out, which would have happened right now. He would have been receiving huge amounts of money on a deferred fee and took it as cash. He was telling me he bought a boat. He took a trip and did some other things. I think maybe his second wife. The money's gone.

Doug: It's already spent.

Larry: Just like everybody else. It's amazing.

Doug: Well, it happens so often.

Robert: Actually, and this isn't my role here, but if I can, I want to step out of character as a tax lawyer for a minute. To me, and you did ask me about objections that accountants or other advisors might make, saying, gee, this is too good to be true, or this can't work, or something. But to me, the most prevalent objection here, or the most prevalent resistance lawyers have to doing these things, I don't know exactly what you

call it, but it's not dissimilar to the example you just gave. It's well, I want to spend the money, or perhaps even more prevalent is, I can do better myself.

Frankly, many accountants and financial advisors, whether they do it out of altruism because they really think they're right, or maybe out of jealousy. They don't want the role to be displaced. Whatever it is, it's the, well, look at annuity rates.

OK, great. It's a great deal. I'm not saying it's a bad deal. It's a great deal to defer the income, stretch it out over time, pay tax later, let it grow tax-free.

That's all great, but it's all going to be growing at whatever it is, five percent, six percent. That's not enough. Heck, my brother-in-law is a stockbroker. He's going to get me 30 percent.

Doug: I think Bernie Madoff was 12 percent

Robert: That's a good comment. Whatever the comment is, and I'm sure both of you have heard this and seen it happen, it puts everybody, even I've been in an awkward position sometimes. My position is to say, well, look. You ought to check that out, but if you can get it, if you really believe it, fine. It may be less efficient from a tax perspective to pay tax now and to invest on a post tax basis, which is going back to the role of the broker. Why you should ask the broker to produce a lot of paper and to think about it all. But I would just say, and Larry, the example you use of the guy who bought a boat and did this and that, and then the money's gone.

I think in a financial plan, and I'm not the world's best financial planner, even for myself. I would just say think about the alternatives. Don't get carried away with any one thing.

The idea of structuring, and the farther out you structure, like any deferred product, the better it is. If you structure for five years, it's not nearly as attractive as if you structure for 30 years, because of the benefits of compounding.

So I would just say, and it's a simple point, but to me, the biggest objection to these is not the technical. It's not the accountant being able to prove that it doesn't work, because they can't. It's the fundamental...

Larry: Psychological, too.

Doug: Yes, absolutely.

Robert: Yes, it is.

Doug: Very good words to live by.

Larry: Part of that is absolutely true. Well, with that I think we'll close. I want to thank you, Rob, for some tremendous insights into this product and into this concept. Doug, thank you again for joining us.

Doug: Thank you, Larry. Thank you, Rob.

Larry: Rob, you mentioned your website. If people want to get a hold of you, they can go to that website. Why don't you repeat that?

Robert: Sure. The website address is www.woodporter.com. My contact information, phone number, and email address are there, and you're welcome to get a hold of me. You'll also find a lot of articles on these subjects you can download for free.

Larry: You have written extensively on it.

Doug: Phenomenal research.

Larry: Phenomenal research. Doug, how would people get a hold of you?

Doug: Same thing. Online at ringlerassociates.com, I can be reached. Any questions, always.

Larry: Tremendous. All you first time listeners, remember: every Ringler Radio show can be downloaded from our website, ringlerassociates.com, or from the Legal Talk Network at legaltalknetwork.com, or from iTunes. You can actually download this onto your iPod, and as you jog around the reservoir, you can listen on those little ear buds. Again, Rob, thank you very much for all of your expertise, and to all of you out there, thanks for listening. Go out and make it a great day.