

# Beside Still Waters

WEST VIRGINIA FATAL  
INJURY GUIDE

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## **Psalm 23**

The Lord is my shepherd;  
I shall not want.  
He makes me to lie down  
In green pastures;  
He leads me beside the still waters.  
He restores my soul;  
He leads me in the paths of righteousness  
For his name's sake.  
Yea, though I walk through the valley  
Of the shadow of death,  
I will fear no evil;  
For You are with me;  
Your rod and Your staff,  
They comfort me.  
You prepare a table before me  
In the presence of my enemies;  
You anoint my head with oil;  
My cup runs over.  
Surely goodness and mercy shall  
Follow me all the days of my life;  
And I will dwell in the house of  
the Lord forever.

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## About the Author



Jeff Robinette is a personal injury lawyer with decades of experience in handling fatal injury claims, also known as “wrongful death” claims. Prior to representing injured individuals exclusively, Mr. Robinette was a partner in a major West Virginia law firm where he focused his law practice on defending serious and fatal injury claims.

He now devotes his entire law practice to representing injury victims -- with a focus on fatal injury claims.

Mr. Robinette has handled hundreds of serious, catastrophic, and fatal injury claims caused by motor vehicle collisions and unsafe working conditions -- the two leading causes of fatal injuries in the United States. He also has handled a significant variety of fatal injury claims caused by other means such as: airplane crashes, vehicular collisions with motorcyclists and pedestrians, underground coal mine explosions and equipment malfunctions, surface mine operations, carbon monoxide exposure, heavy equipment and timbering operations, structural steel construction, commercial and residential construction, electrical power plant operations, electrocution from electrical transmission line construction, fatalities from electrical burns and fire burns, defective equipment and defective consumer products, swimming pool drowning, recreational boating collision, and violent criminal acts.

Mr. Robinette is a former editor and contributing author of the West Virginia Law Review, and is a leading author on West Virginia injury victims' rights. In addition to this title, *Beside Still Waters: West Virginia Fatal Injury Guide*, he has written these additional books for West Virginia injury victims:

*Collision Care: West Virginia Auto Injury Guide*

*Righting the Wrong: West Virginia Serious Injury Guide*

Mr. Robinette is a life-time member of the Multi-Million Dollar Advocates Forum and Elite Lawyers of America, whose memberships are limited to personal injury lawyers who have attained multiple, multi-million dollar recoveries for personal injury victims. He is a former Adjunct Instructor on Appellate Advocacy at West Virginia University College of Law. He is also an U.S. Army veteran, serving as an artillery, intelligence, and psychological operations officer, and was an accomplished paratrooper (Jump Master Qualified) in the acclaimed 82nd Airborne Division.

Mr. Robinette is the founding member of Robinette Legal Group, PLLC, a personal injury law firm devoted to advocating the rights of injured people throughout West Virginia. You can learn more about Robinette Legal Group, PLLC at <http://www.RobinetteLaw.com>

## Introduction

*"He leads me beside the still waters."  
-Psalm 23*

Some individuals, due to the nature of their occupation, face daily risks of a serious or fatal injury. Many West Virginians proudly serve the public as police officers, firemen, and military personnel -- all of which occupations have a known risk of a serious or fatal injury. Still, other individuals work in dangerous environments such as coal mines, gas and oil drilling sites, industrial plants, and construction sites, which also pose a significant risk to workers of a serious or fatal injury. All these individuals and their families realize that tragic events can, and sometimes do, occur. When a fatal injury occurs, it causes immeasurable sorrow and hardships on those families involved.

Other citizens of this state, however, don't have these same kinds of daily worries -- that something tragic could happen to them or their family -- because of the apparent absence of work hazards. For instance, take a stay-at-home mom who works very hard to care for her family and home. Her greatest risk of injury may be operating the family van to purchase groceries or transport children to school, sports, and events. Or take a retired individual, who also operates a vehicle to visit friends and go grocery shopping. Just because these individuals don't work in a dangerous environment doesn't mean that they will be spared from every kind of tragic harm. Because wrongdoers give no advance warning to anyone of their careless and lethal behavior, fatal injuries can occur in any setting to any family, irrespective

of the best efforts to avoid harm. The families of those who are fatally injured are left to pick up the pieces of their damaged lives and start over again.

That's why this book was written: to provide the surviving family members with essential information to enable them to maximize their efforts to rebuild their lives.

### WHAT IS A "WRONGFUL" DEATH?

Death, no matter the cause, is a sensitive topic for most people. Perhaps this is because the termination of life evokes so much sorrow; and it also arouses a fear of the unknown. So people just don't like to talk about death. Even hospitals -- where a significant number of deaths occur -- have learned that talking directly to terminally ill patients and their families about "death" issues causes unnecessary sorrow and stress. So, hospitals have all but stopped using the phrase "end-of-life-care" to refer to the last few things medical science can do for dying patients. Hospitals now use the phrase "palliative care," meaning the hospital staff will focus on the patient's comfort needs at the end of their life.

### THE SORROW OF PREMATURE DEATH

No matter how we look at it, though, death is an unfortunate and inescapable part of life -- our cemeteries are evidence of this fact. Premature death is especially hard on the family. Many years ago, my relative's one year-old baby was critically ill -- he was born with a bad heart valve -- and had to undergo multiple surgeries. I visited with the family often and I saw the tremendous sorrow on their faces and the tears that were shed. Their baby did not recover; there just wasn't anything that could be done medically to save their child. But was the death of their child wrongful?

Whether any particular death is "wrongful" in the eyes of the law will primarily depend on the reason the death occurred. All "wrongful" deaths have this fact in common: they are all premature deaths. But, not all premature deaths are wrongful. Let me explain further. If a disease process such as cancer or a birth defect causes the premature death of an individual, and assuming all medical assistance was properly administered in a timely manner, then such individual's premature death will not be considered a "wrongful" death in the eyes of the law. Similarly, if the natural aging process is the reason an individual's health declines and they die, then their death is not considered premature or "wrongful" in the eyes of the law either. But if an individual is fatally injured at any stage of their life by the negligent acts of another person, that individual's death is both premature and wrongful. So, the death of an individual is "wrongful" when their death was a result of the negligent conduct of another person or company.

### HOW DO "WRONGFUL DEATHS" OCCUR?

Many West Virginians tragically die each year from traumatic injuries and exposures caused by the negligence of other parties. Common "wrongful death" claims that occur in West Virginia include: fatalities from motor vehicle collisions, coal mine explosions, and unsafe working conditions. Other less-frequent causes of "wrongful" death include: fatalities from airplane crashes, motorcycle and bicycle collisions, natural gas explosions and exposures, carbon monoxide exposures, chemical poisoning, timbering operations, elevator malfunctions, electrical contact at power plants and transmission lines, chemical, electrical, and fire burns, use of defective equipment and products, swimming pool hazards, recreational boating, and violent criminal acts.



If your family member died a natural or truly “accidental” death, then no one is legally responsible for their death and your losses. However, if your family member’s death was caused by the negligent conduct of others, you and your family have legal rights of recovery for your losses. The best way to know for sure what your legal rights are is to consult with an experienced personal injury lawyer. This legal consultation, by the way, will not cost you anything – the first consultation is free.

### ARE “WRONGFUL DEATHS” COMMON?

Compared to the number of people who sustain serious injuries, fatal injuries are considerably less frequent. Fatal injuries, however, do occur frequently, if not daily, in West Virginia. Most fatal injuries occur as a result of highway collisions and workplace exposures to unsafe conditions. What makes one collision or work exposure the stage for a fatal injury, and a similar collision or work exposure the stage for a not-so-serious injury is a mystery. There is seemingly an invisible line that differentiates between a fatal injury in the one case, and a not-so-serious injury in the other case. I have investigated dozens of traumatic events that caused serious -- but not life-threatening -- injuries, when the same traumatic forces historically and statistically have caused a fatal injury. A general rule of thumb is that any traumatic event that could cause a serious or catastrophic injury could also cause a fatal injury.

The silver cord of life can be severed by trauma from such daily occurrences as a highway collision or a fall from a step ladder. Less common, but just as lethal causes, include: underground and surface coal mine operations involving methane explosions, malfunction of mining equipment and blasting operations; power plant construction and operations involving falls from structural steel, electrocutions and high-temperature heat burns; timbering

operations involving industrial loggers and dozers, and felling of timber; natural gas explosions, heavy equipment turnovers, carbon monoxide poisoning, and hundreds of automobile, motorcycle and tractor-trailer collisions on highways.

I have personally handled all of these types of fatal injury claims, and can attest to the sorrow it causes to the families of those fatally injured. To rebuild your life, you will need to learn new ways to adjust to the losses you have sustained from the premature death of your family member. In fact, your entire family will have to make significant adjustments in order to move forward with your individual lives.

### LOSS OF COMPANIONSHIP & FINANCIAL SUPPORT

Two of the most significant areas of your life that will be affected by the loss of your family member are:

- 1) The loss of companionship with your deceased family member
- 2) The loss of financial support for your family

### LOSS OF COMPANIONSHIP

There is no replacement for the loss of companionship you have sustained. There can only be the one unique spouse or parent, or child. True, other relationships can be formed in the future, but no one can replace the life of your deceased family member. The law specifically recognizes your loss of companionship, and provides for a different kind of compensation for your losses through a monetary recovery. The law understands two important things:

Nothing can bring your loved one back;

Other than a monetary payment to you for your losses, no other compensation exists.

So the law recognizes that a monetary payment for your losses -- while grossly inadequate -- can at least help you financially to rebuild your life.

### LOSS OF FINANCIAL SUPPORT

Perhaps your deceased family member also worked hard to provide for your family's financial needs. Now, your financial support is gone, too. But bills don't stop just because you have lost your family member who was working to provide for your family. If your family is a typical American family, you probably don't have much in the way of savings to meet your day-to-day living expenses, now that your primary -- if not sole source of financial support -- has been taken away. You will have to make immediate arrangements to meet your future living expenses such as the payment of the house mortgage, or your children's college tuition, or car loans, and the like. These are just some of the damages you and your family will sustain as a result of this tragedy in your life. And you now face -- perhaps for the first time -- real uncertainty about your family's future.

### PRACTICAL LEGAL ADVICE AVAILABLE

Right now, you need practical legal advice on how to address your most pressing concern: how to rebuild your life and take care of the financial strains this tragedy has caused you and your family. Applying the information you will learn from this guide is your first step in rebuilding your life and realizing a financial future for yourself and your family.

*Beside Still Waters* is written in easy-to-understand language -- without the "legalese" -- to provide you with timely advice on how

to rebuild your financial future by obtaining fair compensation for your tragic losses. As you read this helpful guide, you will discover that there are laws that protect you and your family from some of the consequences of the negligent and wrongful behavior of those who caused your losses. Your damages, which include all your financial losses like medical bills, burial costs, and future lost wages should be paid by the parties responsible for causing the death of your family member -- but they won't pay, that is, not without a legal battle. This guide will teach you how to enforce your legal rights against the wrongdoers that caused your family's losses in a fair and professional way to obtain the compensation your family deserves.

### NO SUBSTITUTE FOR LEGAL ADVICE

*Beside Still Waters* will also show you how to navigate through the complexities of the insurance claim process and civil court system so that you will not be taken advantage of by insurance adjusters and their defense lawyers who are determined to minimize and deny your losses which have resulted from the death of your loved one.

A word of caution though: while this guide will provide helpful insight into the insurance claim process and civil court system, it is no substitute for sound legal advice from a qualified personal injury lawyer about the unique details of your fatal injury claim. Thus, I strongly recommend that you speak with a qualified personal injury lawyer about your claim. Accordingly, no client-lawyer relationship is created by this guide. To obtain such a client-lawyer relationship, you must consult with and retain your own qualified personal injury lawyer. Throughout this guide I will explain how you can easily accomplish this important process.

*Jeff Robinette*

## CHAPTER ONE

# Your Legal Rights

One of my most solemn responsibilities as a personal injury lawyer is to meet with the grieving families of fatal injury victims. It takes many months for families to begin to realize just how all their lives will be adversely affected, especially considering the emotional pain and financial hardships they will all face in the future. Spouses are often the hardest hit because they shared not only a close, intimate relationship with their deceased spouse, but they may also share joint responsibility for family debt -- such as a home mortgage or car payment. The children are enormously affected, too. Great care must be taken to look out for their interests, and as we proceed forward, I will explain how the law protects children's rights when one of their parents is fatally injured.

### WHOSE LEGAL RIGHTS ARE INVOLVED?

When an individual is fatally injured, that person's rights are not cut off at the time of death. Their rights and obligations are carried forward as part of their estate. The law refers to the rights of a deceased person as the decedent's estate. When an individual suddenly dies, it naturally follows that many people will be adversely affected -- including family, friends, employers, and business associates. The family, of course, is chiefly affected by the death of a close family member. There are countless ways in which the family structure provides support for spouses, children, parents, grandparents, extended

family and friends. Family is the fabric of a healthy society. When a premature and wrongful death occurs in the family structure, the entire family structure is shaken to the core. The family cannot easily adjust to the loss of a loved one compared to how a large corporation or the military adjusts to the loss of one of its members. So, special provisions are made for the family to ensure that they are given protection and primary consideration for compensation. The law has a vested interest in stabilizing the remaining family structure.

But as I mentioned previously, other people -- like employers, close friends, business associates -- are affected, too. These individuals surely will also suffer some losses, perhaps even significant financial losses, due to the premature death of an individual they were otherwise not related to. But are they entitled to the same rights as the family? When a “wrongful” death occurs, two common questions arise: “Who has the right to bring a wrongful death lawsuit?” and “Who is entitled to recover for their losses?”

### PERSONAL REPRESENTATIVE

Almost every individual in America possesses something of value. It could be a very meager value, or a vast fortune. The old English law, from which we have derived much of our laws, referred to the ownership of property as an estate. So, when a person died, what he or she owned was part of their estate. The use of the term estate has broadened significantly over the last few hundred years, and now that term is used to describe everything an individual has, both assets and debts. It also includes legal rights to recover against other individuals.

Every deceased individual possess certain legal rights, too. These legal rights are part of their estate. In order for a deceased

individual to exercise their legal rights -- to benefit others after their death -- they must do so through a personal representative. Only a personal representative such as a close family member or friend can act on behalf of the estate of the deceased individual. Usually there is only one personal representative appointed over the estate of the deceased family member. The personal representative must be appointed and post bond in order to officially and legally act on behalf of the estate of the deceased individual. One of the first orders of business of the personal representative is to address probate matters, such as the execution of the terms of the decedent’s will and last testament and the payment of any estate debts. Additionally, for our purposes, there is a significant role that the personal representative plays in the oversight of the estate: the pursuit of a wrongful death claim on behalf of the decedent’s estate.

### BENEFICIARIES OF THE ESTATE

West Virginia law provides that a personal representative may file a lawsuit for the wrongful death of a deceased individual to pursue compensation for the beneficiaries of the decedent’s estate -- those who are family-related or financially dependent on the deceased individual. Beneficiaries include: the surviving spouse and children, including adopted children and step-children, brothers and sisters, parents and any persons who were financially dependent on the deceased individual. It is common for the personal representative to also be a beneficiary of the estate.

### IMPORTANT FIRST STEPS

It is understandably difficult for you just now -- when your life has been so dramatically changed -- to consider what first steps you need to take to ensure that your loved one’s estate can pursue a wrongful death claim against the responsible parties. As

you will learn, taking action now will secure your future rights to just compensation -- as a beneficiary of the estate -- for your injuries and losses. So, the first thing you must do is to ensure that you or someone you trust is appointed as the personal representative of the estate of your deceased family member. You may call my office for further information on how to obtain this appointment.

## RIGHT TO JUSTICE

Most people don't think that much about their rights as citizens -- that is, what freedoms and responsibilities we have as citizens -- that often. We're too busy taking care of all the things that occupy our time. But "time" seems to stand still for families who are dealing with the sudden death of a close family member. That's when it starts to dawn on them that there ought to be some protection afforded by the law, protection that will require the responsible parties to pay for their injuries and losses. Fortunately, there is protection and we enjoy that protection because others paid an extremely high cost for it.

Over the last two hundred plus years, countless men and women have given up their possessions and their lives for the freedoms and rights we enjoy today. Right now, all over the world, there are civil wars and conflicts over the same civil rights we already possess here in West Virginia. One of the greatest rights we have, and should cherish, is the right to petition a court of justice when we have a grievance. This is called civil justice. When we have been harmed by the wrongful conduct of others, we have the right to pursue civil justice against the responsible parties. Without the right to civil justice, no injury victim would be guaranteed a fair hearing on their injury claim. Experience has borne out that we can't rely on the "good will" of wrongdoers to compensate injury victims. It rarely happens.

The right to civil justice -- that is, the right to trial by jury -- was contemplated by the founding fathers of our great country and considered by them to be one of the most important rights we have as citizens. John Adams, one of our founding fathers, wrote in 1774 that "Trial by jury [is] the heart and lungs of liberty. Without [it] we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds." This right was set forth in the 7th Amendment of our Constitution. The right to civil justice and the lawyers who exercise that right for injured people have created the best court system in the world. It is your privilege as a citizen to exercise this right when your loved one has been fatally injured by the careless conduct of others.

## WRONGDOERS DON'T CARE ABOUT YOUR RIGHTS

I hardly need to remind you that habitual wrongdoers, such as intoxicated and careless drivers, place little value on other people's safety. They don't have any respect for the law or the civil justice system -- their conduct proves it! Neither do profit-centered corporations care much about other people's safety; otherwise, they wouldn't knowingly continue to produce defective products that injure and kill consumers. Because of wrongdoers' unacceptable attitudes about safety, our civil courts open their doors daily to injury victims who choose to pursue fair compensation from those who caused their injuries.

And that's where my job as a trial lawyer comes in: to make sure your legal rights are protected where it counts, and that's in a court of law.

## WHEN YOUR RIGHTS ARE NOT EXERCISED

If your legal rights to civil justice are not asserted, however, then the wrongdoers who caused your injuries will learn that there

are no serious consequences for their wrongful conduct. That is an unfortunate result. It enables wrongdoers to prosper and the number of fatally injured people to multiply. It explains why we have so many drunks on the road killing and maiming others. Bars and sellers of alcohol have learned how to avoid financial accountability for serving patrons too much alcohol. It explains why bad companies exploit consumers by making defective products that harm consumers. It explains why unsafe companies put their employees and others at risk of injury and death so they can make more money. They have all learned how they can get away with hurting and killing other people. Thus, the financial burden of injury and death is shifted from the wrongdoers to the injury victims and their families, and even society.

You can make a difference though, by showing the people who don't care about the safety of others that you will stand up for what is right and not allow such individuals and companies to get away with such behavior. Your decision to assert the legal rights of your family member's estate against the wrongdoers will ensure that not only you will benefit, but others as well -- including your children and grandchildren.

### RIGHT TO COUNSEL

Your success as a participant in the civil justice system depends, in large part, on the quality and experience of the lawyer you choose to represent you. This means that you need to choose a lawyer who is well suited to handle your fatal injury claim. Although demands for your attention are constant -- dealing with burial arrangements and insurance adjuster inquiries -- you should nonetheless make time to talk with a personal injury lawyer. Feeling overwhelmed by all the demands on your time, you may contemplate waiting a while to find a good lawyer. But,

as you will learn, your delay in consulting with a lawyer could be a big mistake.

### LOSS OF EVIDENCE

If you think that waiting a few months to speak with a lawyer won't impact your wrongful death claim, think again. Waiting even a few weeks to get legal advice about your case may be just enough time for evidence to be lost or destroyed or an important witness to disappear. Loss of vital evidence and witness testimony will cause permanent shortcomings in your wrongful death case. I recently heard about a break-in of a police department's "evidence" locker where key evidence that was used to convict criminals was stored. Know what happened? That's right. All the criminals that were convicted on that evidence had to be set free. All because the evidence that convicted them disappeared. Let nobody kid you; without evidence you have no way of proving liability against the responsible parties who caused the death of your family member.

The problem is you don't know when your evidence will disappear or be destroyed. An important witness to your case will not likely call you up, out of the blue, and give you their testimony and forwarding address before they skip town. When they skip town, there goes your evidence, too. And that documentary evidence -- the tangible information like records and parts -- you need to prove your case can disappear. Nobody is going to alert you to that either.

Legal harm is akin to radiation, you can't see it or feel it, but it will cause serious harm. It doesn't matter if your evidence is accidentally lost or intentionally destroyed; both have the same adverse impact on your fatal injury claim. All these things happen without you knowing it -- these are legal ramifications

of waiting too long to get legal counsel. You don't have to end up being further harmed -- you can exercise your right to consult with your own lawyer about your injury claim today.

### ADVANTAGE OF REPRESENTATION

Perhaps by now you see that having your own lawyer -- early in the process -- is not such a bad idea after all. It actually works to your advantage. What does it take to gain this advantage? Only an hour of your time. That's right, an hour of your time is all it will take to secure the advantage you need to win your case. Now, you can spend countless hours, or even days, worrying about your situation, to no avail. Or, you can dial my law firm's number right now -- 1-304-594-1800 -- and discuss your case with me over the phone. The call is free, and it will set your mind at ease. The choice is yours. But remember, delaying a free consultation with a lawyer will yield the same result as not hiring a lawyer -- in both circumstances you end up not having your interests protected.

### WHEN YOU DON'T NEED A LAWYER

I receive hundreds of calls a year from individuals with various types of legal problems. There are almost countless types of minor civil disputes that occur every day. Although people do consult lawyers for relatively less significant disputes, many of these minor disputes can be resolved without legal counsel. Sometimes just good common sense is all that is needed to end a dispute.

Another factor to consider is the cost of hiring a lawyer, which I will discuss further in this guide. If the dispute is over \$500 in damages, and the lawyer services will cost more than the disputed amount of damages, it makes a lot of sense for people to handle these small disputes themselves. But when it comes to

a serious personal injury claim -- like a wrongful death claim -- it is wise to seek experienced legal counsel. The amount of compensation can be in the millions of dollars, and that potential alone warrants the hiring of professional legal care. Otherwise, you may end up with a very bad result.

### BAD RESULTS FOLLOW BAD DECISIONS

A few people, though, may still think about "handling" their own wrongful death case. They reason that if they get into trouble doing so, no big deal, they'll just call a lawyer to bail them out later if they need it. They figure the risk of messing things up is worth the chance to avoid paying legal fees. When they find out, however, all the work required of trial lawyers in handling a wrongful death case, they generally have second thoughts. Among the many other things that trial lawyers have to do in a wrongful death case, they have to:

- Conduct a proper scene investigation without missing or destroying evidence.
- Identify all the fact witnesses with any knowledge of the cause of the fatal injuries.
- Locate all the fact witnesses and obtain their sworn statements and affidavits.
- Identify all the parties responsible for causing the fatal injuries to your family member.
- Locate all the parties responsible for causing the fatal injuries to your family member.
- Locate all the insurance coverage potentially covering their injuries and damages.

- Litigate insurance coverage disputes with the insurance companies.
- File a proper wrongful death lawsuit.
- Respond to the defendants' defenses, motions and written discovery requests.
- Prepare written discovery to the defendants.
- Prepare all the plaintiff's witnesses for deposition and trial testimony.
- Prepare for and conduct cross-examinations of all the defense witnesses.
- Conduct legal research and write legal briefs on key issues in the case.
- Prepare a Pre-trial Memorandum addressing all legal issues to be tried by the court.
- Represent their client in court proceedings on all pre-trial issues.
- Prepare for trial, including the preparation of arguments, evidence, and witness testimony.
- Conduct a jury trial of their case.
- File post-trial motions.
- File an appeal, as required. For those few individuals who may still want to "handle" their own wrongful death case, I would like to also point out that they will need to

hire an appellate lawyer to file an appeal to reverse the bad result that is almost certain to occur because they handled their own case.

As a former defense lawyer, I have witnessed some people who have attempted to handle their own personal injury case. Without exception, their cases were either thrown out of court or ended in an unfavorable way. Lawyers, however, are not the only professionals who see this type of misfortune occur. Medical doctors can tell of their experiences in trying to help patients who delayed treatment because they thought they could self-treat their own serious medical condition. Unfortunately for some, an otherwise treatable condition turned out to be even more serious or fatal when early treatment was not obtained. So handling your own wrongful death case has its risks: you may squander your decedent's estate's only chance to obtain fair compensation for its losses.

### AVOID HELPING THE INSURANCE COMPANY

Those who are responsible for causing the death of your loved one are interested in the decisions you make -- as the personal representative of the estate -- especially whether you will retain legal counsel or "handle" your own wrongful death case. They actually prefer that you "handle" the wrongful death case yourself because they know you won't do all the things that a skilled trial lawyer will do to prepare the case. You see, while you are trying to figure out what the next step is, their own defense lawyers are getting to the evidence to manipulate the facts of the case to their favor. Whoever gets to the evidence first has a head start on the case.

Don't think this is not important. I previously explained what happened when evidence is lost or taken in a criminal setting --



convicted criminals are released from jail and criminal charges for other wrongdoers are dropped. So whoever gets to the evidence first has a significant advantage over the other side. A good trial lawyer knows how to use evidence that favors your position, and how to dispel “made-up” evidence by the other side. A trial lawyer manages the case like a good coach manages an athletic team. If you viewed a sporting event where one team had been professionally coached, but the other team hadn’t been coached at all, which team would have an advantage? What would be the likely outcome? Your legal case is a competition, a legal debate. Each party marshals evidence and legal theories to convince the court their position is correct. If you are the only person on your legal team, how will you compete against the legal team of the other side? You will have to face off, alone, against the insurance company, its seasoned defense lawyers, their expert witnesses, and unlimited financial resources. If you think you have a problem, the time to act is now -- call my law firm for a free consultation to discuss your case.

### YOU NEED SPECIALIZED LEGAL CARE

When it comes to your sudden and serious financial needs, the insurance company wants to discourage you from having your own legal counsel -- personal injury lawyers make it hard on wrongdoers and insurance companies to duck responsibility. Sadly, insurance companies have persuaded some injury victims that they don’t need a lawyer, at a time when it is most needed. I once heard about a man who had fallen in a store and couldn’t get up. The store manager, selfishly not wanting to have an ambulance pull up to the front door, in full view of other shoppers, insisted the man be moved to the back room. But a concerned family member demanded that an ambulance be called to provide urgent medical treatment. It turned out that the man had fractured his hip in the fall. Don’t let the insurance

company tell you what to do when you know that their advice is wrong. Call for legal help now. It is the right thing to do.

With your own counsel, you can turn the tables and get the upper hand. Your lawyer can get the head start on your case by inspecting the scene where the fatal injury occurred, consulting with experts that are objective in their opinions, collecting evidence that supports your position, and making sure that no evidence is destroyed. But rest assured, the insurance companies will have their own defense lawyers get to the scene quickly, consult with their bought-and-paid-for experts, and even change or destroy evidence that is favorable to you. The question is, who will get to the evidence first? Your lawyer or theirs?

So think this important decision through. Waiting to call a lawyer will harm your case. Why should you carry the extra burden of complex legal issues on top of your other concerns? You can relieve yourself of your legal burdens by making a simple telephone call. Since the phone call is free, there is no reason to delay. So call a lawyer right now and ensure the preservation of your loved one’s future legal rights against the parties responsible for causing your losses.

### RIGHT TO PROGRESS

Our laws have not always protected the rights of injured people like they do today -- it has taken over two centuries of legal progress for this to happen. Consider the untold number of injury victims from recent prior decades who received no compensation for their injuries because laws favored business and industry and practically ignored workers’ safety. If your injuries had occurred even fifty years ago, you would not have the opportunity to obtain full compensation for your injuries. Sadly, so many injury victims of prior decades received no compensation for their

injuries. The injury victims of by-gone years basically had to just accept their “bad lot” in life; and even when wrongdoing was acknowledged, they still weren’t compensated because it was conveniently stated that money wouldn’t alleviate suffering. Sounds like a corporate executive thought of that idea.

### HAWKS NEST TUNNEL DISASTER

In 1927, Union Carbide made plans to blast a three mile tunnel through Gauley Mountain, West Virginia. It hired the contracting firm of Rinehart & Dennis to blast through the three-mile tunnel. During blasting operations, workers discovered silica -- a mineral used in producing steel -- and were directed to mine the mineral in addition to conducting the tunneling operations. The unexpected money gained by the sale of the silica was not used to purchase any type of safety equipment for the exposed miners. In fact, the miners were not given any protection from breathing the silica dust during blasting operations. Ironically, the management executives were provided such protection and wore them right in front of the unprotected miners.

Consequentially, these unfortunate workers developed silicosis, a severe, even deadly lung disease brought on by their exposure to silica dust. Young, healthy miners collapsed like old men with emphysema and silicosis. The company covered up the tragedy by having these miners evaluated by their “company” doctors, who “diagnosed” other causes of illness, like pneumonia, instead of the correct diagnosis of silicosis. The company eventually admitted to 109 deaths, but a Congressional hearing placed the death toll at 476. Other investigations found over 1,000 deaths resulting from this silica exposure. Because many of the workers left the area after they were exposed, it is impossible to determine the exact number of silicosis deaths involved. This is one of America’s worst, yet least known, industrial disasters.

### EFFECTS OF COAL MINING

I understand that when the coal barons first sent their land agents into this state, they enticed landowners, especially farmers, by offering to buy something beneath the surface of their land. The idea of selling “invisible” assets was foreign to those early mountaineers; they couldn’t imagine that someone would want to buy something you couldn’t see below the surface -- mineral rights like coal, oil and gas -- and that the extraction of these minerals would not adversely effect how they would use the surface of their property. The farmer was told that he could go on farming, just as before. No one but the coal and steel barons knew the true worth of those mineral rights. The early natives of West Virginia certainly didn’t know the true value of those mineral rights. That’s why they thought that any amount of money they got was a good thing, especially for something they couldn’t see or measure way beneath the surface of their property. So, they accepted this extra money which was enough to pay their property taxes and buy a few extras for their homes. Little did they know how their decision would not only ruin their own property, but it would also change the face of West Virginia permanently.

Mineral rights were purchased, well, for dirt cheap, for practically nothing. Many native West Virginian’s feel the coal companies have treated them and their ancestors as they do the coal they have mined -- as a resource that can be exploited. When you visit the mansions of the absentee coal barons that profited gloriously from coal mining, and then view the squalor of the coal camps and the absolute harshness of the coal mines, you really begin to feel the plight of these earlier coal miners. You can understand why many West Virginians feel the way they do about the coal companies.

If I were an outsider, I would be hesitant to talk about West Virginians' feelings concerning the effects of coal mining in this state. But I am not an outsider, nor am I ignorant of coal mining operations. I was born and raised in the southern coal fields of West Virginia. I attended and graduated from two colleges in West Virginia. Outside of my military service in the Army, I have always lived in West Virginia. My maternal grandfather was a union organizer in the southern coal fields in the earlier part of the last century. My mother was born and raised in a coal camp in southern West Virginia. My paternal grandfather worked on the railroads that hauled the coal from the mines. I grew up in the coal fields and have seen some of the needless damage that coal companies have caused to our people and land. I have also, as a defense lawyer, represented many coal companies and have inspected their underground and surface mining operations.

What I am getting at is there have been countless billions of dollars of assets funneled out of this state, but very little money, comparatively speaking, has been put back into the state or its people by the coal companies who profited from coal mining. Just look at the damage coal mining has caused to our ground and surface water and natural beauty of our state. You can try to cover it up and make the best of a bad situation. Some people have that option. A local developer decided to use Copper Creek as the name of his housing development that had an acid-run-off stream running through it. I see his point, as Copper Creek does sound better than Acid Creek or Orange Creek. But not everybody can ignore or cover up the fact that our ground water has been polluted with acid run-off -- many towns in the southern coalfields have no safe water to drink at all.

## COAL MINING DISASTERS

The truth is coal companies historically have been careless about the safety of the miner and their well-being. The old "company store" still transports the mind to a time when miners never got out of debt, lived in filth, and died an early death. Because accurate records do not exist for the earlier stages of coal mining in this state, there is no way of knowing precisely how many thousands of coal miners that have been seriously injured or killed because of unsafe working conditions in the mines.

Take the 1968 Farmington Mine Disaster as an example. Inadequate ventilation, inadequate control of explosive methane gas and coal dust, and inadequate testing for methane -- all these were contributing factors to the ferocious blast and fire that killed seventy-eight miners. Then consider the 1972 Buffalo Creek Disaster caused by the rupture of sediment ponds built by the coal companies over a period of several decades. One hundred and twenty-five men, women and children perished when the massive torrent of muck swept down the valley of Buffalo Creek.

In time, state and federal laws were enacted to require better protection for coal miners, but enforcement was inadequate and sophisticated coal companies learned how to skirt around compliance. Consequently, more coal mine disasters resulted. Just in the last decade alone, three more fatal mine disasters occurred claiming the lives of dozens more miners: the 2006 Sago Mine Disaster; the 2006 Aracoma Alma Mine Disaster; and the 2010 Upper Big Branch Mine Disaster. But even with more exacting laws requiring miner safety, mining deaths still continue because coal companies are still more motivated to make bigger profits than to provide better safety for coal miners.

Remember John Adams' warning? We still need to be on guard against being "ridden like horses" and "worked like cattle" because the modern-day companies have the same tendencies as their predecessors -- to take advantage of their work force. Like their predecessors, our modern-day companies don't want to fairly compensate the people they injure or the families of the people they kill. Just like in earlier times of corporate abuse, little to no compensation will be offered to injury victims who must nurse their own injuries with inadequate financial support.

### HOW LAWMAKERS RESPONDED

Lawmakers normally respond to public sentiment; this is how our representative system of government works. When enough interested citizens and injury victims voice support for better laws, it is up to the lawmakers to respond. In recent decades there has been steady public support for better laws for injury victims. But, corporations and insurance companies don't want more restrictive safety requirements -- for them, that equates to more liability exposure.

In response, lawmakers have had to choose between helping the corporations make more money and helping injury victims get recoveries from wrongdoers. Lawmakers thus far have not completely caved in to the desires of the corporations and insurance companies, because many people have voiced their outrage over corporate greed and their role in causing an increase in incidents involving serious injuries and deaths. But it takes a constant flow of information to lawmakers about injury victims' plights, and that's where trial lawyers associations are effective in protecting your rights. My law firm is a member of the American Association for Justice and the West Virginia Association for Justice, organizations that work on a state and national level to protect the rights of injury victims.

Our present laws reflect how society feels about victims receiving compensation for their injuries: that the parties responsible for those injuries -- and the insurance companies insuring those risks -- should be liable to pay fair compensation for all injuries and losses. So, you should not feel that you are overstepping the protection the law affords you by pursuing fair compensation for your injuries. Nor should you be concerned about what a few other people may think -- both the law and social opinions agree that you deserve to be fairly compensated for your injuries.

### FAMILY STORY

I would like to share this family story to emphasize the value of having a good lawyer, without which, you cannot get the protection our current laws afford you. Some 75 years ago, when my father was a young boy, he fell and broke his right elbow. The hospital doctor was not a specialist in setting broken bones, but the hospital didn't tell my grandparents that information. The doctor told them that he needed to re-break the arm at the elbow to set it properly. So, under extreme pain my dad's right arm was re-broken and set at a 45 degree angle. Because the doctor didn't know what he was doing, my dad's arm locked in that position! So, to add more damage to the mess he already created, the doctor re-broke the arm again! Can you imagine the trauma and pain? But the doctor still could not get it right because of his botched first effort. He considered re-breaking my dad's arm yet again. Fortunately even he finally recognized that he was making things worse, and that one more re-break would unquestionably cause irreparable nerve damage to the already impaired condition of the arm. So, the doctor just decided not to see my dad any longer, leaving my dad with a permanently disabled arm.

My grandparents had the wits to know that things should not have turned out the way they did. They searched for a personal injury lawyer, but there were not that many around -- they all seemed to work for the big companies. They finally found a lawyer who would meet with them, and they were told that they had “no case” against the hospital or the doctor. So, without other options, they just accepted the bad result. They later found out, however, that their lawyer was a good friend of this doctor!

By this time the full effects of the Great Depression were being felt. My grandpa had already lost his job on the railroad, their farm was foreclosed on by the bank, and they were living in an old chicken coup, barely scratching out enough food to survive on. As a share cropper’s son, my dad had to work in the corn fields and was expected to do the same amount of work a normal boy his age could do. My dad learned to improvise and got jobs that didn’t require the full use of two strong arms. But that “bum arm” bothered him all his life, and in his final years, he actually begged the doctors to amputate it because of the intense pain it caused him. My dad got nothing for his injuries, other than decades of physical suffering.

My grandparents and dad had to accept their bad result, but you don’t have to. You can do something about your circumstances, no matter how bad they may seem at this time. There are better laws and, may I say, better lawyers that can help you obtain just compensation for your injuries. A free consultation with a skilled personal injury lawyer is a privilege we have today those prior generations did not have. Take the time, right now, to speak with a good lawyer.

## WHEN IT IS TOO LATE TO HELP

I am saddened when I receive calls from injury victims who gave up their rights to recovery because they listened to an insurance adjuster’s dogma that their injury claim had no merit -- now they have to pay all their medical bills and they have no means to earn a living. This is a secondary harm caused by insurance companies: your initial injuries didn’t heal after all -- contrary to what you were told by the insurance adjuster and their doctors -- and because you waited too long to pursue your injury claim, you have forfeited your right to future compensation for your injuries and lost wages.

## RIGHT TO LEGAL PROCESS

The personal representative of an estate’s most potent weapon against wrongdoers is the right to legal process -- that is, the right to file a lawsuit for wrongful death damages. As you will learn, it is the threat of the outcome of a lawsuit that forces wrongdoers and insurance companies to compensate the estates of fatal injury victims. Many wrongful death claims are “settled out of court,” meaning that no jury trial was required to satisfactorily resolve the claim. In fact, the vast majority of lawsuits, about 90%, are settled before the parties have to go to court and try the case before a jury. What this means to you is that odds are in your favor that your fatal injury claim will most likely be settled before trial. It is the threat of the outcome of the lawsuit, however, that forces insurance companies to pay fair compensation to the estates of fatal injury victims.

Of course, a personal representative of an estate can settle an injury claim for less than the damages the estate has actually sustained. All the personal representative has to do is accept the “low-ball” offer of settlement from the insurance adjuster.

Fortunately, the law knows how insurance companies work on vulnerable people, like grieving family members who are desperate for money, so that's one main reason that courts require that the "settlement" be approved by the court. If the amount is insufficient, the court may not approve it. But this doesn't happen with skilled trial lawyers; they don't settle cases "cheap" just to avoid litigation or trial. Skilled trial lawyers use the litigation process to their client's advantage. Remember, it is the threat of the outcome of litigation and trial that actually causes the fair value of a fatal injury claim to be realized.

So you should view a lawsuit not with fear, but as an ally or aide to your cause. A lawsuit, however, should never be used for a wrong purpose, such as to harass another party, or to "get even" on a long-standing personal feud. The law only affords you the right and opportunity to seek fair compensation for all your legitimate injuries and losses. The ultimate goal of any lawsuit, then, is to pursue fair compensation. But fair compensation is usually contested vigorously by the insurance company. That's why lawsuits end up being filed -- because the insurance company refuses to offer fair compensation for your fatal injury claim. You should not turn back from pursuing just compensation for the estate just because a lawsuit may have to be filed.

### RIGHT TO LEGAL PROCEEDINGS

As stated previously, most lawsuits for fatal injury claims are filed primarily because the insurance adjuster will not offer fair compensation for the damages sustained by the estate of the fatally injured person. It is this same prevailing attitude of the insurance adjuster that forces litigation in some cases. Litigation is the term that lawyers and judges use to describe the legal proceedings after a lawsuit is filed wherein the parties find out what evidence exists for both sides on all issues. Trial lawyers

spend most of their practice in the litigation process: it is the spring board to understanding the strengths and weaknesses of each side's case before trial.

### FOCUS OF FATAL INJURY LITIGATION

Fatal injury litigation focuses on two primary subjects: the cause of the fatal injury; and the nature and severity of the societal and financial injuries sustained by the family of the fatal injury victim. In many fatal injury cases liability is adamantly denied, which means that there will be a lot of discovery of the cause of the fatal injury. When the facts surrounding the fatal injury claim prove liability against a wrongdoer, the insurance company will often continue to contest liability -- it shows that they are tough. Often though, the real focus of discovery in clear liability cases will be on the amount of societal and financial losses that were sustained by the family.

Both the estate and the wrongdoers will hire "experts" to give opinions on liability and damages, and these experts are often chosen for their skill and experience. Both sides also try to find experts that are known to generally give favorable testimony to their side of the case. It is no big secret -- it has been going on for as long as experts have been used in courts. It's just part of the litigation process. So neither side can say with certainty that they are absolutely right. Often, both sides present equally compelling explanations of the case. That's why you need the most skilled personal injury lawyer to prepare your case and chose your experts -- success in your case depends on it.

It is important to note that what is fair compensation to one person would not be to another person. Fair compensation for injuries is hard to define because it is so individual. For example, if a paraplegic is severely injured from a car collision, causing

a severe laceration of the leg, the defense will make it sound less significant because a paraplegic can't feel the pain associated with the laceration or surgical procedure for repair. However, an individual with normal use of their legs would certainly feel excruciating pain if they sustain the same injury and the result would be quite different. If this is true in a common personal injury claim, how much more true it is in a fatal injury claim. Some of the losses and damages can be calculated, for example, lost wages -- but other losses like the loss of time spent with a spouse or parent are intangible and are difficult to place a dollar value on. So, identifying what is fair compensation in a fatal injury claim can involve both tangible and intangible factors.

That's why experienced trial lawyers rely on what juries say about compensation for fatal injury claims. While juries can, and sometimes do, judge a case wrong, it is mostly because of unrevealed prejudices one or more jurors may have that taint the verdict. Even with these risks in mind, it is still the best system of justice in modern society. Parties will always disagree about the value of a case, but only a jury can say definitively what fair compensation is going to be in any given case. When a jury deliberates, they consider what would be fair compensation to the estate of a fatally injured person, and they must all agree on the amount of recovery. A unanimous consensus, called a verdict (a Latin term meaning to speak the truth) will state the amount of compensation the estate of the fatally injured person will receive. If six people who don't know any of the parties or each other can agree on the amount of compensation, then that's a pretty fair indicator of the value of a given claim. Remember though, while your wrongful death claim will not likely get to the verdict stage of litigation, it is the legal process of litigation that motivates the parties toward resolution of the case.

## DISTRUST OF JURIES

Insurance companies are financially motivated to distrust juries because the claims adjuster doesn't have control over juries like they do over the claims handling process. That's a primary reason why they distrust juries -- they can't manipulate them around to their way of thinking. Occasionally, when a jury verdict goes against an insurance company, the insurance adjusters respond by saying that the jury was "tainted with sympathy" for the injury victim. Of course this can happen, but it doesn't happen often, at least not in my experience because judges instruct jurors not to sympathize with any injury victim, I believe that jurors do, most of the time, put sympathy aside -- I have witnessed this dozens of times in personal injury trials. In fact, I have participated in many trials where a so-called, "defense verdict" was rendered against a sympathetic injury victim. If anything, jurors are too hard on injury victims, not the other way around.

Insurance companies also want to believe that juries award injury victims too much money. Again, experience proves that jury verdicts are fair to both sides. If a case is not meritorious, and cannot meet the requisite burden of proof to substantiate the injury claim, the jury will issue an adverse verdict to the plaintiff. However, if the insurance company is not being fair to the injury victim, because paying the claim for what it is actually worth will greatly exceed their low-ball assessments, and a jury subsequently awards the injury victim fair compensation, the insurance company says the jury was tainted with sympathy.

What the insurance companies are really afraid of is how juries upset their methods of obtaining minimal settlements of injury claims. Every time a jury awards a fair recovery to an injury victim, the jury verdict is an indictment against the insurance company for offering inadequate settlement offers to injury

victims. The charge against the insurance company is that they won't consider all the damages that are legally available to injury victims. The trial judge ensures that each juror knows the full range of damages an injured person may receive for compensation for their injuries. Because juries follow the trial judge's instruction, their verdicts often include fair compensation for the future pain and suffering of the injury victim -- a category of damages deliberately overlooked by insurance companies. Good lawyers use jury verdicts as a valid reference point to obtain better settlements for injury victims.

### WHY ADJUSTERS WANT TO SETTLE NOW

Insurance companies know that if your fatal injury claim is in the hands of a capable personal injury lawyer who is skilled in insurance issues and trial tactics, they don't have much of a chance getting a "low-ball" settlement on the fatal injury claim. They know this for a fact. They also know that going to trial is not always such a good idea either. They could pay fair compensation on the front end of the claim and save everybody a lot of trouble. But, they can't make the swelling profits they need to make if they are paying fair compensation to every injury victim. The one thing they can do, though, is to try to get to you now, before you hire a lawyer, and try to talk you into a settlement. By swiftly convincing unrepresented injury victims that the money they are offering now, will be more than they will get to keep if they hire a lawyer, many injury victims will accept less than they deserve -- a lot less.

You should know that "low-ball" settlement attempts by insurance adjusters are frowned upon by West Virginia law, and in some cases, can be rescinded. If you are a victim of a "low-ball" settlement with an insurance company, you must immediately contact a personal injury lawyer to assess the fairness and viability

of the settlement. It may not be too late, and even after paying a lawyer, you can still end up with a better recovery. As will be pointed out in a later section, even the insurance companies' own studies show that injury victims get better settlements with legal representation, even after the lawyer has been paid.

So, you now have the information needed to decide whether or not you need a lawyer. Will you forfeit your legal rights and allow the responsible parties and the insurance companies to keep the compensation you deserve? Or, will you pick up the phone and call a qualified personal injury lawyer to discuss your legal needs?

### FORFEITING YOUR CLAIM

As I stated previously, my grandparents had to accept their bad result, even though they attempted to obtain compensation for my father's injuries. In contrast, a personal representative of an estate has the power to choose to accept the estate's losses and forfeit the legal right to pursue compensation for the wrongful death of your family member -- or not. Before you give more thought to that possibility, however, I would like to explain to you how your decision to essentially "drop the claim" will affect others involved: none of the beneficiaries will receive anything for their losses, and other people will more likely be injured by the same harms because the wrongdoers were not held accountable for their conduct. You should always give ultimate concern over the estate's beneficiaries before you decide not to pursue legal representation. Keep this in mind -- that someone other than you may wish to pursue a wrongful death claim, and if you are not willing, you should step aside and allow another family member to carry this responsibility forward.



## WHAT IT WILL MEAN TO “ACCEPT” NOTHING

The forfeiture of the estate’s legal rights to a recovery will mean that the estate will be responsible for paying all of the past debts, including your decedent’s medical bills, out of the estate’s assets, if there are any. And, may I add, that the beneficiaries will not receive any compensation for their deceased family member’s lost wages, or their own pain and suffering they have already endured and will continue to endure into the future. Because this decision is so important, I want to stress how easy it is for the estate to relinquish its rights to future compensation.

The personal representative may intentionally forego just compensation -- that is, they consciously decide they don’t want to pursue compensation from the responsible parties or their insurance company. Or, the personal representative can inadvertently forgo just compensation simply by delaying too long to pursue the fatal injury claim. Few people intend to “just drop their case.” Many people just wait too long to do anything about it. In either event, the responsible parties and their insurance companies will be relieved from their obligation to compensate the estate for its fatal injuries and damages. But your fatal injury claim doesn’t have to turn out this way -- you can make a phone call to a skilled lawyer to discuss your legal rights to pursue fair compensation for your losses today.

## CHAPTER TWO

# Legal Liability

News reports are full of tragedies and fatalities that occur everywhere and every day -- earthquakes, hurricanes, war casualties, terrorist bombings, school shootings, highway collisions, and countless other tragic events that adversely alter people’s lives. Obviously, not every fatal injury is caused by the legal negligence of someone else. Earthquakes and hurricanes are not legally accountable for the devastation they cause. Careless people unfortunately injure and kill themselves. If a careless person ignores warning signs and drives their car off a cliff, there is all likelihood that their consequential injuries or death will be considered their own fault, for which the civil justice system will not hold others accountable.

## LIABILITY BASED ON FAULT

The cause of many fatal injuries, however, is clearly the result of someone else’s fault. Legal fault is called negligence. Proving “negligence” is no simple matter; there are dozens of real defenses that may apply to any given fatal injury claim. As will be discussed further, it is your responsibility as the personal representative of your deceased family member’s estate to prove that they were fatally injured because of another person’s negligent conduct.

## TIME LIMITATIONS

West Virginia law provides that wrongful death lawsuits must be filed in court within two years from the date of death of

the deceased family member. This means that the personal representative must diligently choose a qualified personal injury lawyer to represent the estate and pursue legal action against the wrongdoers, and their insurance companies, who are responsible for the estate's damages and losses. If you do not file a lawsuit within the two-year statute of limitations period the estate's wrongful death claim will be forever time-barred. This means that the estate and its beneficiaries will collect nothing for their losses.

If legal counsel is consulted soon after the tragic loss occurs -- within days or weeks of the tragic loss -- many wrongful death cases can be settled without having to file a formal lawsuit against the wrongdoers. So, you should not delay your consultation with a personal injury lawyer. Remember, you cannot consult legal counsel too early. The earlier you consult legal counsel, the better chance your lawyer will have in getting the best recovery for your case. Where an early settlement is obtained, there still will be a need to have the court oversee and approve the distribution of the settlement proceeds to those beneficiaries mentioned previously. In fact, the court will even appoint a separate lawyer to protect the rights of minor children, where they are involved.

### EXCEPTION TO STATUTE OF LIMITATIONS

There are a few exceptions to the applicable two-year statute of limitations period for wrongful death claims. One important exception is when a responsible party commits fraud by hiding their identity or evidence of their culpability. But finding the evidence to prove fraud is very difficult, and even skilled trial lawyers have a hard time proving that a fraud has been committed. So, don't delay in consulting with

a lawyer early on in the process of your duties as a personal representative of an estate.

### TWO YEARS IS NOT THAT FAR AWAY

Two years may sound like a long time from now. But it is not, when considering all the things that must be done to secure your legal rights against the responsible parties. In fact, some states even allow three years to file a lawsuit, but as stated previously, not in West Virginia -- two years is the limit. Every day that you wait to seek legal counsel equates to a loss of opportunity to obtain full compensation for your injuries. In reality, it is the first 30 days following the fatal injuries to your deceased family member that are most critical to your case. It is within this relatively short time period that initial inspections should be completed and necessary evidence and testimony secured. It is always best if a lawyer is consulted within the first few days following the tragic event, because certain evidence won't last even 30 days. If you wait too long to develop your wrongful death claim, it will make the job of even a good lawyer more difficult to obtain a full recovery for the estate.

Be advised, if the personal representative waits to consult a lawyer for the estate until a few months before the expiration of the two-year statute of limitations period, it is almost guaranteed that the estate's wrongful death claim will be already compromised in some manner. It is somewhat like getting cancer diagnosed early -- the chances of a "good result" are greater the earlier the cancer diagnosis is made. So, don't wait to get the estate's wrongful death claim reviewed by a qualified lawyer -- the estate's right to compensation depends on it.

## BURDEN OF PROOF

In order for the estate to be compensated for all the damages that were caused by the negligent conduct of others, the estate has a legal obligation to prove the entirety of the wrongful death claim: the cause of the fatal injuries and the amount of damages. The law refers to this requirement as the burden of proof. Thus, the estate must first prove that someone other than the decedent (your deceased family member) caused their death. Unless the estate can first prove that someone other than the decedent caused their death, the estate will have no right of recovery for damages.

### YOUR FATAL INJURY CLAIM IS UNIQUE

Because each person is unique, and has one-of-a-kind relationships with many people, it is a logical conclusion then that every fatal injury claim is unique also. Moreover, the circumstances of every fatal injury claim are always different, too. There are no “cookie-cutter” fatal injury cases -- all are different and require a complete search of all the facts surrounding the fatal injury and the subsequent damages. So, it is absolutely necessary to gather all the evidence relative to your fatal injury case -- every piece of evidence may be necessary to meet your burden of proof of the cause of the fatal injuries and the extent of the damages resulting therefrom. Unless the estate gathers all the evidence to meet its burden of proof, the parties who caused the fatal injuries to your decedent will be relieved of any responsibility they would otherwise have to compensate the estate for its losses.

Be aware that the wrongdoers have no obligation to prove or disprove anything in court. It is the estate’s burden to prove its claim. If the estate cannot meet any part of the burden of proof,

it loses the case. Even when the estate does meet its initial burden of proof, the wrongdoers have the right to rebut the evidence. Wrongdoers are highly motivated to deter you from properly preparing your claim in the first instance. That way, they don’t have anything to rebut. If they succeed, they win. This is why waiting to marshal and preserve your evidence is so critical -- without evidence, you can’t meet your burden of proving your fatal injury claim.

## BURDEN OF PROOF CASE STUDY

Since many fatal injuries occur from automobile collisions, let’s explore what key evidence is essential to prove the causation of a typical automobile collision. Realizing your fatal injury claim may have been caused by a different means -- like an equipment malfunction or an unsafe working condition -- keep in mind that the same burden of proof analysis used in this case study can be used in your fatal injury case as well.

## THE LIABILITY INVESTIGATION

The first responders to automobile collisions are usually other motorists who happen upon the scene. In fatal injury cases, it is seldom that any of the severely injured persons involved in the collision will be able to call for help. Usually someone else calls “911” and reports the collision. Because very serious injuries are obvious, both the police and ambulance services will likely respond simultaneously to the scene of the collision.

Police officers assigned to traffic duty are normally younger, less experienced officers and are not well-trained in accident reconstruction or witness examination. Moreover, police officers, like other government inspectors, have no legal training to determine what actually is a proximate cause, or “legal cause” of an auto collision or other traumatic event. Thus, their findings

of contributing circumstances of the collision may not turn out to be a proximate cause of the traumatic event. Only those contributing circumstances that trigger legal liability of the responsible party for causing the collision will matter in a court of law. The trial judge has ultimate authority on what evidence is relevant to proving your case, not the police officer.

For example, when the at-fault driver was not supposed to be driving a vehicle at all because their driver's license had been suspended for unpaid parking fines, one could easily reason that the collision would not have occurred if the other driver had not been driving at all. But the law does not always follow that reasoning -- only the conduct of the other driver related to the actual operation of the vehicle they were driving is considered to determine legal liability of the collision. Nonetheless, police reports and other findings are an important part of the injury and liability evaluations. But standing alone, police reports are not always reliable to establish legal liability for the cause of the fatal automobile collision.

### THE FATAL INJURY INVESTIGATION

In high-impact automobile collisions, occupants of the vehicles often sustain life-threatening to fatal injuries. Emergency medical personnel don't have to ask such injury victims if they "think" they are injured. The serious to fatal injuries are self-evident. Extraction equipment like the "jaws of life" are often used to remove fatally injured victims from demolished vehicles. Unlike a serious injury case, where there is a life to save, in a fatal injury case the investigation focuses on the cause of the collision.

### THE LIABILITY INVESTIGATION

You may feel that your liability case against the other driver is solid because the police officer reported that the other driver was

at-fault for causing the collision. Just because the police officer initially reports something that favors your position, this does not necessarily mean that you will meet your burden of proof. Even these favorable facets of your claim are often contested by the defense lawyers. Moreover, police officers can neutralize even favorable initial opinions because they forget important facts or misstate information they had earlier relied upon. I have witnessed this happen many times. Even when you think that all the evidence is on your side, it may turn out that it isn't. So, you always need to bolster your favorable evidence through the use of expert testimony and other eye witness accounts of the collision. Remember, the insurance adjuster can, and often does, reject your favorable evidence and they will "create" their own version of the collision.

As an example, in a recent automobile collision, the police officer found that the collision was caused by a particular driver. Eye witness accounts of the collision supported the police officer's findings. However, the insurance company did their own investigation, manufacturing their own conclusions contrary to the police officer's findings, causing needless litigation. It takes skilled lawyering to defeat the abusive tactics of the insurance companies to prove, in a court of law, the legal liability of the parties responsible for causing the fatal collision.

### WHEN POLICE OFFICERS ARE WRONG

Perhaps your case involves just the opposite finding of the police: that your deceased family member was the at-fault party causing the collision. Because police officers (or other safety inspectors) do not spend the time, or have the training, to thoroughly investigate incidents of serious injuries, important evidence and key witnesses can be overlooked, causing innocent parties to be blamed for causing their own catastrophic or fatal injuries.

For instance, several years ago police officers investigated a tragic highway collision involving a minivan and a bicyclist. Because the police officers had only interviewed a few witnesses -- who only saw the moment of impact between the bicyclist and a minivan -- the police erroneously concluded that my client caused the collision. The police officers did not take the time to interview all the many eye witnesses (there were dozens) who saw what happened before the collision occurred as well as the collision itself. I obtained all the other eye witness testimony and these witnesses testified in court to my client's innocence. A complete investigation of the cause of the collision proved that my client was innocent, and the police officers changed their opinions in court of my client's innocence.

Thankfully, things worked out for my client but the police officers' mistake caused four years of litigation and a week of courtroom drama for the truth to finally come out. Our own life experiences have taught us that it is rare that people admit they are wrong, especially in a public setting like a jury trial. Perhaps you can appreciate how much effort it took to get two police officers to admit they were wrong in front of a jury!

Even though jurors know that the police can be wrong -- such as when they, the jurors, get pulled over for speeding -- they still give the investigating police officer's opinions a lot of weight when it comes to your fatal injury claim. The jury knows that the police are supposed to be neutral, and they have no financial interest in your injury claim. Also remember that people naturally tend to look for faults in other people, so jurors won't need anyone to remind them to look for fault in your deceased family member's conduct.

If the investigating police officer is critical of your deceased family member's conduct, even if that opinion is not supported by all

the facts, then jurors may also find that you have not met your burden of proof. Thus, the estate may receive no compensation. This is a very good reason why legal representation should be obtained soon after the catastrophic event, so that all the evidence can be preserved.

### WHEN THE POLICE ARE RIGHT

Of course, police officers and safety inspectors are not wrong all the time. Most of the time they are right. So, when they are right, and they are "on your side," remember that you nonetheless have an adversary that will endeavor to change the minds of the police officers and safety inspectors, especially in a case where the cause of the traumatic incident is arguably debatable. Sometimes your adversaries -- the insurance adjuster, their lawyers and experts -- succeed in persuading police officers and other officials to change their opinions. Unless you have your own lawyer looking out for your interests, you will not be able to prevent the insurance company from taking such adverse action against your claim.

### COMPARATIVE FAULT

In order for you to pursue a wrongful death claim against someone else for your family member's death, the cause of death must have been predominately caused by the other person's conduct. For instance, if you were severely injured in an auto collision, and your driving merely contributed in some small way (e.g., you were traveling 60mph in a 55mph speed zone), you will not likely be foreclosed from pursuing your injury claim against the other at-fault driver. However, the percentage of your own fault (called "comparative fault") will reduce your compensation by the same percentage of fault you contributed to causing the auto collision. So, if you are found by a jury to have been 20% at fault in causing the auto collision, your compensation will be reduced

by 20% of the total verdict. The same analogy is true for your wrongful death claim.

Insurance adjusters exaggerate the significance of your deceased family member's conduct -- like going 5mph over the speed limit -- as a basis to substantially reduce the value of your wrongful death claim. The same problem can occur in other kinds of fatal injury cases -- like construction or coal mine disasters -- where adjuster exaggerates the impact of the employee's conduct to show that the fatal injuries would not have occurred if the employee hadn't failed to follow safe work practices.

### WHEN YOU GET NOTHING

While the law permits your own decedent's comparative fault to be as high as 49%, the closer their fault gets to this maximum percentage, the less the estate will be compensated. You also run a greater risk -- the higher the percentage of comparative fault is -- that the estate will be completely foreclosed from recovering anything at all. If your family member's fault equates to 50%, then the estate will be foreclosed from any recovery or compensation for wrongful death damages. For instance, if a construction worker decides to remove his safety equipment in violation of safety rules, and is fatally injured, it is likely that the worker's conduct will be viewed as a significant contributing factor to his own death. The law and jurors take a dim view of parties whose own conduct significantly contributes to their own fatal injuries. Be aware that insurance adjusters try to craft reasons why your decedent's alleged negligent conduct equaled or exceeded that of their own insured, which has the end result of the estate receiving little to nothing in settlement of your fatal injury claim.

## CHAPTER THREE

# Proving Your Claim

If you polled a large group of citizens on what legal standard applies to proving a wrongful death claim for civil damages, many people would incorrectly tell you that fatal injury victims have to prove their claim beyond a reasonable doubt. But this is wrong, this standard applies only in criminal cases, not in civil cases. Claims adjusters try to confuse the representatives of the estate by making it sound like they have to remove all doubt about the cause of the fatal injury claim in order to prevail. Again, this is not true. You don't have to remove all doubt to prove your case.

Unfortunately, and for a host of reasons I will not elaborate on, even jurors are confused about what the correct standard of proof is for civil cases, like wrongful death claims. They have watched too many crime shows and televised criminal trials of celebrities -- they have heard "beyond a reasonable doubt" repeated over and over. So, when they report for jury duty, they are surprised that there is a different, lower standard that applies to civil cases that are being tried. As the judge explains to the jurors before the trial begins, the reason injury victims don't have to meet the criminal standard of proof is because fatal injury claims for damages are civil cases, not criminal cases -- no jail sentence will be required of the wrongdoer if a verdict is rendered against him. They just have to pay monetary damages to the injured party. In order to prove your fatal injury claim in a civil court, there are two different standards that

apply: the preponderance of the evidence standard and the reasonable degree of certainty standard.

### PREPONDERANCE OF THE EVIDENCE STANDARD

Preponderance of the evidence simply means that if your evidence was placed on one side of a scale, and the other party's evidence was placed on the other side of the scale, in order for you to prevail in court, your evidence must "outweigh" the other party's evidence. If your evidence is even slightly more convincing, you have proven your case by a preponderance of the evidence.

This does not mean that you need more witnesses or more documents to prove your case. Your evidence, however much you have, must be more convincing than the other party's evidence. For instance, if an uninvolved, unbiased witness testifies that the at-fault driver ran through a red light and crashed into a vehicle, it won't matter if the at-fault party rounds up a couple of other family members to testify the light was yellow. Although the at-fault party may have more witnesses than the injured party, these other witnesses are all family members of the wrongdoer, so they are not unbiased. The police and jurors tend to believe neutral witnesses more than the parties themselves. As long as your evidence is even slightly more compelling than the other side, you have met your burden of proof. Be aware, however, that there are several key parts of your injury claim that fall under this standard -- such as proving liability and past medical and economic damages -- so a thorough evaluation of all the relevant facts and supporting evidence is needed in order to prioritize what evidence is most critical to each part of your fatal injury claim.

### REASONABLE DEGREE OF CERTAINTY STANDARD

Because no one knows the future with 100% certainty, courts require that certain future damages like future medical costs and loss of future wages be attested to by "experts" in these areas of losses. The standard that courts require to prove future damages is reasonable degree of certainty. This civil standard is not the same standard as the criminal standard -- beyond a reasonable doubt -- although the word "reasonable" is included in both standards. The reasonable degree of certainty civil standard requires that an injury or condition be permanent and that an "expert" testify that future damages are more likely than not to be sustained. Again, if an expert weighs the evidence, and sees that future losses are more likely than not to occur, the expert can say these future losses will be sustained based on a reasonable degree of certainty.

For instance, when a coal miner is fatally injured by an explosion, in order for the coal miner's estate to receive future lost wages due to his death, the estate must prove several things. In a serious injury case, the injured miner must prove by a preponderance of the evidence that his injuries are permanent. In a fatal injury case, permanency cannot be disputed. Thus, the estate must prove the amount of the miner's future lost wages, which is typically accomplished through expert testimony -- such as an economist -- based on a reasonable degree of certainty that the estate indeed will suffer such economic damages.

### PROVING YOUR CASE IN COURT

Do not be misled by an insurance adjuster, or anyone else for that matter, who trivializes the need to have a trial lawyer in order to prove your fatal injury claim. I have seen many people attempt to "handle" their own case, and have failed. Proving

your case in court is no easy matter, even for skilled trial lawyers. It takes many years of the study of law and a lot more years of trial practice to become competent and successful at trial.

The insurance company has unlimited financial resources to hire seasoned trial lawyers to defeat your legitimate fatal injury claim in court. I should know; I spent decades successfully defending many hundreds of injury claims in court. It is my seasoned observation that without experienced trial counsel on your side, the insurance adjuster and their defense lawyers will use your inexperience to their advantage to minimize and even defeat your legitimate fatal injury claim. Please take a word of advice: leave the lawyering to the professionals.

### WHAT DAMAGES ARE COMPENSABLE?

In a typical fatal injury case, the estate is entitled to pursue compensation for their medical expenses, burial expenses, past and future pain and suffering, past and future lost wages, and, importantly, loss of consortium (support and companionship) damages. Keep in mind that West Virginia is not a common-law marriage state, meaning that you must have a marriage license to be lawfully married in West Virginia. West Virginia will, however, recognize other states' laws on certain points of law, so it is best to consult with a lawyer about the specifics of your relationship if it is anything other than a licensed marriage. Finally, in some types of cases, such as where the other party is guilty of gross or wanton conduct -- like driving under the influence of alcohol -- punitive damages may also be rendered against the wrongdoer by a jury in a court of law.

### ALL DAMAGES MUST BE PROVEN

With each category of damages, however, there are complex substantive laws, evidentiary rules, and trial court procedures

that must be strictly followed in order to prove your wrongful death claim in a court of law. If you are unrepresented, there will be no one to advise you on the law, the evidence, or trial court procedures to ensure that you meet your burden of proof in court. Any failure on your part to follow these strict standards will have an adverse impact on your ability to obtain a fair recovery for the estate of your deceased family member. Remember, only those damages that can be proven in a court of law will be considered for compensation. Thankfully, there's no need for you to try to prove your own case because there is help available from my law firm which offers a free consultation to discuss your fatal injury claim.

### COMPENSATION SOURCES

In order for the estate to actually receive fair compensation, there must be an actual source of payment. A verdict awarding the estate a million dollars that is uncollectable is worthless. Irrespective of whether your recovery is being sought from an individual or a corporation, there is a substantial risk that the estate will not receive all the compensation it deserves. This result often occurs because many wrongdoers don't have any financial assets and are too irresponsible to purchase liability insurance. The ones that do have assets have hidden them from detection.

### BANKRUPTCY OPTIONS

Verdicts for fatal injury damages, unfortunately, may be discharged in bankruptcy. When a wrongdoer -- especially a small company -- does not have the financial ability to pay the debt they owe, our bankruptcy laws allow them to file a petition for bankruptcy protection. A bankruptcy trustee will be appointed over the assets of the debtor, and after all the priority debts are considered and paid, your verdict will be considered. That is, if there is anything left over. Most of the time there isn't anything left.



## INSURANCE IS BEST SOURCE OF PAYMENT

Insurance companies have made a contract with their policy holders: they will assume the risks of paying all losses for a set premium amount. It is an educated gamble. It's all about playing the odds. But insurance companies are notorious for shirking on their obligations. When there are fewer injury claims, the insurance company does not send back portions of premiums to their insured drivers who have not caused a collision during the policy period. No, the insurance company keeps the profits. When, however, there are a lot of injury claims, and they have to pay more in a given year, the insurance company cannot demand more money from their policy holders. They have to pay -- and that's the rub. That's why they shirk on their obligations -- or at least try.

Insurance companies know that they are the target of payment of fatal injury claims because they are contractually obligated to pay fatal injury damages. They cannot easily file for bankruptcy or receivership protection to avoid payment. And the few times that this has occurred, there is a guarantee association of insurance companies that act as an excess policy of insurance so that insured policy holders are not left in a lurch without any insurance coverage. Ideally, one or more of the wrongdoers that caused the fatal injuries will have some amount of insurance coverage to compensate the estate for its losses. Most often, even when liability coverage is present, it is insufficient to meet the amount of the damages and losses. Because insurance companies don't make it easy to ascertain insurance coverages, you need an experienced insurance lawyer to find these coverages. Insurance companies pride themselves in making insurance policies as complex as possible, hiding insurance coverages under hundreds of exclusions. I should know, I interpreted insurance policy terms and wrote exclusions for insurance companies in addition

to litigating hundreds of insurance coverage disputes. Now, I use all my insurance knowledge and experience to obtain insurance coverages for settlements for fatal injury clients. It pays to have an experienced lawyer to handle your fatal injury case; it will likely involve an insurance coverage dispute.

## TYPES OF RECOVERIES FROM INSURANCE COMPANIES

In a significant number of fatal injury claims, there are various types of insurance coverages that may cover part or all of the claim. The estate's recovery may be linked to being able to convince one or more insurance companies that the fatal injuries are covered by their insurance policies.

There are many types of insurance coverages that routinely apply to fatal injury cases: workers compensation coverage, third-party liability coverage, third-party medical payments coverage; third-party excess liability coverage; first-party underinsured and uninsured automobile insurance coverage, first-party medical payments coverage, and personal excess insurance coverage. These insurance coverages not only sound complex and confusing, they are. So, it takes a highly-trained legal eye to find the applicable insurance coverages you will need to obtain fair compensation for the estate's injuries and losses.

## SUBROGATION & MEDICARE LIENS

The resolution of fatal injury claims has many complex facets. One such facet is subrogation. Subrogation is a fancy legal term that literally means that one party gets to step into the shoes of another party. Where subrogation comes up most often in fatal injury cases is the payment of medical expenses and reimbursement of workers compensation benefits paid to workers.

Quite often, very expensive life-saving medical treatment and care was attempted to revive a critically injured person. If your decedent's medical bills have been paid by their own health coverage or medical payments coverage from their auto policy, those medical insurers have a statutory and contractual right to be paid back. Additionally, if your decedent was Medicare/Medicaid qualified, your fatal injury claim and recovery must be reported to those federal entities because they may have a right to be reimbursed for any bills they have paid. Similarly, if your family member's death occurred while they were at work, workers compensation benefits that have been paid may need to be reimbursed as well.

Finally, there are some fatal injury victims that owe for back taxes, child support and alimony. The law in this area is complex and often changes. If a personal representative accepts a "low-ball" settlement offer from the insurance company and does not consider all the debts that may be at issue, there may be little to nothing left to pay all the beneficiaries for their losses.

So, just because you have a solid case against the other party who caused the death of your loved one, that alone does not necessarily mean that you will ultimately collect a fair recovery from them. They may not have sufficient financial assets, and they may file for bankruptcy. Unless you have a lawyer who is well-versed in insurance coverage law and subrogation laws, the estate may not collect a plug nickel for its injuries and losses.

## CHAPTER FOUR

# The Insurance Company

In the previous chapters I explained how important it is to have legal counsel to preserve the estate's legal rights against those responsible for its damages. I briefly mentioned how skilled personal injury lawyers can protect the personal representative from unfair dealings of the insurance adjuster assigned to your fatal injury claim. This chapter, in greater detail, explains how the insurance company intends to "handle" your fatal injury claim.

### FINANCIAL MOTIVATION OF THE INSURANCE COMPANY

For centuries modern societies have encouraged the use of insurance coverage to guard against the risk of financial ruin. We pay monthly premiums for health insurance because we don't want to incur the significant cost of cancer treatment, and the like -- that risk is spread out to thousands of other policy holders. The same type of principal applies to the purchase of liability insurance coverage (called "casualty" insurance) to guard against the risk of injuring someone in the pursuit of our day-to-day activities. The risk of certain liabilities is also spread out to hundreds or thousands of other policy holders covering the same kinds of risk.

Insurance companies know exactly how much money to charge policy holders for insurance coverage. They assess the frequency and severity of certain risks (like damages caused by fires or injuries caused by auto collisions), and the information gathered

dictates how much the insurance premium will be which is charged to individuals who purchase insurance for the same risk of loss. Again, the cost of the premium is based on the type, severity, and frequency of the risk, and the number of premiums sold. Theoretically, the more premiums that are sold, the lower the premium will be. In automobile insurance, for instance, the more frequently collisions occur and cause injuries, the more money the insurance companies charge for the insurance premiums. In turn, the more auto insurance policies that are sold, i.e., spreading out the risk of loss, the less the premiums should be to those purchasing the same coverage.

### FINANCIAL STATEMENTS SHOW BIG PROFITS

Insurance executives are paid huge salaries to successfully manage insurance companies to make larger profits. If they don't succeed, just like in any other corporation or business, they lose their job. Part of their strategy for success is to find creative ways to increase profits: the common favorite is to decry that their company will go broke unless there is a reduction of claims and lawsuits. In other words, they don't want to keep their end of the bargain. As stated before, they are under contract to pay all claims that come due, but instead of paying the claims, they want to withhold the money for their own pursuits.

A review of their financial reports show, however, that they are not going broke. Large insurance companies are primarily funded by insurance premium dollars and investors who buy other insurance products, including company shares on the stock market. Insurance companies covet the highest ratings from A.M. Best and Moody's -- two important rating institutions in the insurance industry -- which are used to bolster their bragging rights as affluent, strong insurance companies. Their marketing strategy to get these ratings is simple: convince people to pay

more in insurance premiums and pay out as little as possible to injury victims.

When demands are made to lower premiums, they argue they cannot because there won't be enough money to pay all the claims that are filed every year. The insurance companies won't lower their premiums even when they make money hand-over-fist -- the goal is to make more money, not less, if they are going to satisfy the expectations of insurance executives and stockholders. So this debate is not about the number of claims or lawsuits, but about the lack of integrity in the insurance industry -- they are making billions of dollars a year, but telling the public that they are going broke. They are laughing all the way to the bank when people respond to their cries.

### HOW THE MONEY IS SPENT

Understandably, successful insurance executives command million dollar salaries and lots of other benefits. And, the salaries of the claims supervisors and adjusters aren't too shabby either -- most claims supervisors and claims adjusters make as much, if not more, as many lawyers. Because the payment of legitimate injury claims reduces the insurance companies' profits, there is constant tension between company management and claims adjusters and supervisors. The adjusters can't settle the injury claims cheaply enough for their bosses, and any "over payment" on a claim results in a bad mark on the adjuster's performance evaluation.

So you have on the one side of the equation the contractual obligation to pay injury claims, and on the other side of the equation the absolute resistance to pay those claims because it makes the company look less profitable. That's a bad mark on the insurance executives, and investors are not too keen on

investing in a poorly performing company. Since the insurance companies don't like to reduce their salaries or the number of their adjusters, they try hard to make the company profitable by denying insurance claims.

### REGULATORY RESTRICTIONS

State regulatory authorities are on to the schemes of the insurance companies. They know the companies are out to make billions, and the job of the regulatory authorities is to keep them honest, as best as they can. So, the business of selling insurance and adjusting injury claims is regulated by the West Virginia Insurance Commissioner's Office. Insurance companies must get approval to sell insurance in this state, and the insurance policies must be approved for use. There are also some restrictions on how much insurance companies can charge for certain types of insurance coverages. Insurance companies view the Insurance Commissioner's office with respect, but they prefer to have as little to do with them as possible. So insurance companies typically don't want to involve the insurance commissioner in the way they conduct business, especially when it comes to making profits.

### HOW INSURANCE PROFITS ARE INCREASED

Insurance companies have two preferred ways to increase their revenues: sell more insurance policies and pay less on injury claims. Selling more insurance is competitive and requires a lot of money to be invested. Yet, every major insurer spends this money without reservation. Because they spend millions of dollars on advertising, we remember their slogans and musical ditties. While healthy competition for insurance coverage may help lower insurance rates for some people, you have to keep in mind that lower premiums mean that the margin of profit on these policies will be smaller for the insurance company. In turn,

the insurance company must reduce salaries of the executives and staff, or reduce the amount that can be paid on legitimate injury claims. In the decades that I worked for the insurance industry, I was told countless times that the payment on claims must be reduced by some percentage, like 10% or 15%. I never heard, however, of an adjuster getting a pay cut because of shortfalls in income – it's always the injury victim that pays.

### ROLE OF CLAIMS ADJUSTERS

Although I have devoted the entire next chapter on role of claims adjusters, it is important to understand, at this juncture, that in order for the insurance company to carry out their business model of high profits, they must have a "hatchet man" who can say "no" to injury victims. That "hatchet man" is none other than the claims adjuster. Their job is to delay payment, deny payment, and minimize payment to injury victims. The lower the claims adjuster can "adjust" your claim, the more money the insurance company has to pay the huge salaries of insurance executives and the like. The claims adjuster also gets rewarded with promotions and pay raises for doing such a "good job" for the insurance company.

### ASSIGNMENT OF CLAIM

When a traumatic event occurs, causing injury to another person, the at-fault party -- who is insured under a policy of insurance -- is required to notify their insurance company of the incident. A claims adjuster will be assigned to investigate and "adjust" the claim. Insurance adjusters have stressful jobs -- they spend eight to twelve hours a day behind their computer desk handling hundreds of injury claims at the same time. They have the same goals in mind for all their claims: deny the claim, delay payment on the claim, and minimize payment on the claim. They get audited every year for performance, and they are always stressed

out, trying to find creative ways to legitimize their denials or downward adjustments of injury claims.

### EXPECT MANY ADJUSTERS

Because insurance coverage is required for many kinds of activities -- driving motor vehicles and trucks and conducting certain kinds of businesses -- it is likely that your injury claim will involve more than one type of insurance coverage. The typical injury claim may involve many of the following insurance coverages: automobile insurance coverage (including liability, uninsured and underinsured motorist coverage, and medical payments coverage), worker's compensation coverage, personal health insurance coverage, commercial lines of liability coverage for corporations, and various umbrella and excess coverages. Because your injury claim will involve more than one insurance coverage, you will have to deal with more than one adjuster. Each adjuster has the same motivation -- to deny or minimize your claim.

### ADJUSTERS ARE INSULATED FROM REALITY

Insurance executives are smart enough to know that their claims adjusters can be persuaded to deviate from company policies to minimize payments on claims. They think their adjusters are too vulnerable to the "smooth talking" tactics of familiar personal injury lawyers -- lawyers they have day-to-day contact with on injury claims. Several years ago they put an end to this practice. Here's how they did it: instead of allowing their claims adjusters to handle claims where they live and work, they rotate claims to other adjusters in different cities. That way every personal injury lawyer is a stranger. People distrust strangers and don't let their guard down easily. The insurance company figured out how to use this to their advantage. Things went so well for them, they decided to use it on their own defense lawyers, too! Now

they haggle over the legal bills of their own defense lawyers without concern of ruining a good relationship -- there is no relationship to ruin.

So what's the net effect on your claim? The insurance adjuster only hears one voice, the voice of their master. The mantra of their master is, "Don't overpay claims." No other voice matters. The personal injury lawyer's voice is a stranger to them, so they disregard it completely. Even their own defense lawyer's voice is ignored. The defense lawyers know to keep their mouth shut and do what the adjuster wants; that's the trade-off for getting the work.

This method of adjusting claims is being followed by all the major insurance companies. It keeps their claims adjusters "objective" in assessing values to injury claims. The insurance companies know that it is easier for their claims adjusters to disregard "persuasive" arguments from unfamiliar lawyers, and stick to company policies of paying next-to-nothing on injury claims.

### ROLE OF CLAIMS SUPERVISORS

The insurance company has numerous claims supervisors in each regional claims office to provide oversight to the dozens of claims adjusters that work in that office. A primary goal of the claims supervisor is to keep their adjusters from deviating from company policies. Claims supervisors are the lowest level of company management, and they report directly to claims managers, who, in turn, report directly to upper management on the progress of accomplishing company goals in minimizing payment on injury claims. "Policy Number One" for every claims supervisor is to reduce payment on all personal injury claims.

I cannot count the hundreds of times, as a defense lawyer for the insurance companies, that I advised a claims adjuster that a particular injury claim was legitimate and needed to be settled fairly. Even when I succeeded in persuading the claims adjuster to make a fair offer of settlement, the claims supervisor often refused my advice to make a fair settlement offer to the injured party. Why would they ignore the advice of their own lawyer? Because they think they know more than their own lawyers. And any advice that recommends the fair payment of an injury claim automatically conflicts with “Policy Number One” -- reduce payments on all injury claims.

### INSURANCE COMPANY RESOURCES

Insurance companies are very powerful players in the corporate market. Aside from the banking community, insurance companies are perhaps the most powerful corporate entities in the United States. In order to be powerful in the corporate world, you need capital, that is money, and a lot of it. And they’ve got it -- hundreds of billions of dollars. Insurance companies obtain that money by selling insurance and investment products. The way they keep most of their money is by denying or minimizing payments on injury claims. They then take the money they have been able to keep back from injury victims, and invest it themselves to make even more money. They have accumulated substantial financial resources to fund all the staff and resources they will need to maintain this pattern of reducing payments on injury claims.

### MODERN COMPUTER TECHNOLOGY

Perhaps the most important innovation that has changed how insurance companies do business is the computer. There is no more paper file to clutter office spaces, and many adjusters work from home, using their computers. But computer systems cost

a lot of money, especially the kind of computer systems that are used by insurance companies. Just twenty years ago, adjusters read paper files in order to adjust claims. Now, through the use of powerful computer systems, claims adjusters can review your entire claim file, including photographs, audio/video recordings, court documents and medical records, anywhere and anytime.

The insurance adjuster has the ability to research your personal background instantly, and discover a lot of information about you, your family and even your friends. They use this personal information to scrutinize every facet of your injury claim and find ways to minimize, if not deny, fair compensation for the fatal injury of your loved-one.

### INJURY ASSESSMENT SOFTWARE

All major insurance companies now use computer software programs to assist adjusters in placing a “value” on fatal injury claims. These specially-designed programs purportedly allow adjusters to “standardize” claim information so that claims evaluations are efficient and consistent. The problem is, the programs were written for the insurance companies, using their input as to what was fair compensation. So, the whole program is flawed in favor of the insurance company.

Some insurance companies have developed their own adjustment software programs, while others have opted for the commercially marketed software programs. The leading adjustment software programs that are commercially available are Colossus, Claims Outcome Advisor and Claims IQ. These programs systematically assess claim information and assign a reduced value to each injury claim. Some programs also assess the skill and experience of the personal injury attorney, and whether he or she is capable of getting a substantial verdict against the company.

Claims adjusters are instructed not to deviate from the computer assessment of the fatal injury claim -- what they personally may think about the value of the claim is completely taken out of the picture, it's not important or relevant. This is why the adjuster's "low-ball" offer of settlement doesn't bother them; their personal opinion doesn't matter.

### ARSENAL OF DEFENSE LAWYERS

Because insurance companies' model of profitability is dependent upon obtaining low-ball settlements in all injury claims, they must have a powerful weapon to threaten those fatal injury victims who don't want to accept a minimal settlement offer. The most effective way insurance companies achieve minimal settlements is through the threat of force: that is, threatening not to pay the claim and forcing injury victims to file a lawsuit and litigate their fatal injury claim all the way to trial. Injury victims know that insurance companies have the money to pay their defense lawyers to contest their case in court. This is intimidation. So the real weapon insurance companies have at their command is their defense lawyer.

What the insurance adjuster doesn't tell the injury victim is that they don't like to get their expensive defense lawyers involved unless they have to -- they disdain legal bills as much as they do paying injury claims. They also don't like litigating either, it's risky business for them. The truth is that defense lawyers are a constant financial drain on insurance companies, too. But the injury victim doesn't know this, and they can give in to the baseless threats of the insurance adjuster. Many injury victims are amazed when they hear that the thing they feared the most -- like hiring a lawyer to file a lawsuit -- was, in fact, the very thing that produced a fair result of their claim.

You should also know that insurance companies demand their defense lawyers to be "yes" men and women to the company. Their lawyers must do exactly as they are instructed, or they will get fired. Insurance companies don't like defense lawyers who disagree with their adjuster's assessments of claims, either. In a major brain trauma case I recently handled, the insurance company went through three sets of defense lawyers from three different firms. Why? Because the prior defense lawyers indicated that the company would need to pay a significant settlement to resolve the claim -- so, they were canned.

### SOCIAL INFLUENCE

Insurance companies use their financial resources to effectively promote their policies to minimize payments on injury claims. While severe and fatal injuries occur every day in West Virginia, not all of these injuries and deaths are caused by the careless acts of others -- many of them are due to the unfortunate individual's own fault. On the whole, there are not that many fatal injuries that actually trigger a liability claim against an insurance company. The voice of these few injury victims are no match against the powerful voices of the multi-billion dollar insurance companies. But that's not the message you hear in the mainstream social media. The insurance companies make it sound like the "sky is falling" every time an injury victim is given fair compensation for their injuries. And people tend to start believing what they keep hearing. Hopefully what people mostly hear is true, and that is a good thing. But if what they hear is wrong, like propaganda from the insurance companies, then that is a loss to society.

### INSURANCE COMPANY PROPAGANDA

The insurance industry spends countless millions of dollars each year alerting the public that they can have cheaper car insurance,

if they didn't have to pay baseless injury claims. They say all these injury claims drive the price of insurance up. But don't believe it. They are making billions of dollars of profits. The reason they keep saying the same thing over and over is because each new generation of adults haven't figured out the truth. It's like the advertising and cover-up of the tobacco industry: although the industry was finally held accountable for some of their wrongs, a later generation of adults and kids -- who haven't suffered yet -- are allured into smoking by the same kinds of advertising. Insurance companies focus their propagandist campaigns on young people's desire for cheap insurance -- and they use that desire to their advantage to convince people that injury victims are undeserving of compensation, and that they are the cause of escalating insurance premiums.

I recently reviewed the public financial disclosure of a large insurance company in West Virginia. The propagandist they used to make more money is the same kind of propagandist I described previously. They boasted that they collected \$1.5 billion dollars in insurance premiums in 2011. Their liabilities were less than a billion dollars, meaning they made a profit of about five hundred million dollars in 2011. That's a lot of money, and I certainly have seen no reduction in my insurance premiums.

### INFLUENCE ON LAWMAKERS

I must say, the insurance industry has persuaded a lot of lawmakers to their way of thinking. Lawmakers, of course, are politicians. And politicians need two things: financial support and votes. Insurance companies lobby hard and have financial support for those politicians who will support their agendas. Using the fear that jury verdicts were putting insurance companies out of business, and even threatening to leave the state, lawmakers gave

in to the pressure and changed the laws to shield the insurance companies for wrongful conduct toward injury victims.

Unfortunately, a lot of injury victims now suffer because well-meaning people listened to the insurance companies' propagandist. Even sadder is that some people didn't stop to listen to the injury victim's side of the debate, and they unfairly have a negative view of real injury victims and their lawyers. The truth is the insurance industry (and big business) took unfair advantage of a lot of people. Now, even legitimate injury claims are being labeled as "frivolous", and even real injury victims are being portrayed as "greedy" people who ask for more money than they deserve.



## CHAPTER FIVE

# Insurance Bad Faith

West Virginia law recognizes that insurance companies are financially motivated act in their own self-interest, and therefore, they must be regulated and penalized when they commit acts of self-interest against injury victims. The bad faith adjustment of claims is the most common way insurance companies act in their own self-interest -- they put their interest over and above the interest of the injury victim; they attempt to pay less money to injury victims than they deserve.

Because insurance regulations proved to be ineffective in deterring insurance companies from acting in bad faith, laws were passed to prevent the insurance company from certain acts -- misrepresentation, false advertising, defamation, coercion, intimidation, false statements -- and provided meaningful penalties when they violated these laws.

## HISTORY OF BAD FAITH

The West Virginia Legislature has recognized that insurance companies are motivated to mistreat injury victims in order to amass more money for themselves. The reason the Legislature prohibited conduct like misrepresentation, defamation, intimidation and coercion was because the insurance companies were guilty of practicing such behavior!

The West Virginia Unfair Trade Practices Act was enacted to keep insurance companies -- and their defense lawyers --

responsible to act in good faith in adjusting and defending every kind of injury claim. But, in 1995, the insurance industry finally persuaded a thin majority in the West Virginia legislature to repeal part of this law, as it applies to third-party claims. Now, the insurance company can treat injury victims, a.k.a., claimants, just about however they wish -- they can even lie to them. And they do.

One of my clients recently was told by the insurance adjuster from a national insurance company that “federal law prohibited paying anything more than \$5,000 for a soft tissue injury claim.” What a bald-faced lie! Before 1995, this kind of lying would have been grounds to sue the insurance adjuster and the company for bad faith. That was then; this is now. Now adjusters can act with unbridled dishonesty, misrepresentation, coercion, etc., in adjusting third-party injury claims.

As long as the insurance industry is making vast profits from this scheme, rewarding its own executives with million dollar salaries, and promoting adjusters who use such bad faith tactics in adjusting injury claims, there is no reason for them to pay you fair compensation for your injuries. It takes an experienced personal injury lawyer to force the insurance company to pay you the compensation you deserve.

## THIRD-PARTY CLAIM HANDLING STANDARDS

Laws used to require insurance companies to act in good faith in adjusting every kind of personal injury claim, whether it was a claim made against a person’s own insurance company (called “first-party” claims), or a claim made against another person’s insurance company (called “third-party” claims). Because the insurance companies were constantly getting caught acting in bad faith, which cost them some stiff penalties, they lobbied to

get the “third-party” portion of the bad faith law repealed. Some insurance companies even created a “crisis” by threatening to leave the state if laws were not changed. By a thin margin, they ultimately got their way. Now, the law only prohibits first-party bad faith, which is claims against your own insurance company. So, insurance adjusters have regressed to their same old pattern of conduct in misrepresentation, coercion, and the like with most injury victims.

The Legislature bought into the approach recommended by the insurance companies -- shift the oversight of adjuster’s conduct to the insurance commissioner’s office and limit recovery to \$10,000 for violations. Let’s see how this “fixed” the problem.

### REGULATIONS ARE IGNORED

Although insurance regulations still require fairness in the insurance companies’ conduct in handling your third-party claim, the insurance regulations mean practically nothing to the insurance companies. Why? Because there is no meaningful monetary penalty for bad faith behavior. Only a measly \$10,000. The experts and costs needed to prosecute such a claim exceed this amount, alone. Even if an injury victim had the time to waste pursuing a regulatory bad faith claim against an insurance company, there would be nothing gained.

Until better laws are passed, personal injury lawyers must skillfully use the present laws and regulations to obtain fair compensation for injury victims. It can be done, but there is always stiff resistance from the insurance industry. A skilled personal injury lawyer knows how to handle the insurance company’s tactics and can still obtain fair compensation for injury victims.

### FIRST-PARTY CLAIMS HANDLING STANDARDS

As stated earlier, the insurance company is still vulnerable to “first-party” bad faith claims, and they hate it. So, whenever you have to deal with your own insurance company for say, medical payments coverage, that is a first-party claim, and the insurance adjuster and the company can be sued for committing acts of bad faith against you. The same would be true if you were pursuing underinsured or uninsured motorist coverage. That is your insurance, and the insurance adjuster can’t mistreat you in the same way in a third-party claim adjustment process.

### CALL FOR MORE TORT REFORM

The insurance industry responds to the threat of first-party bad faith lawsuits by advocating more revisions to our laws. They call it “tort reform.” Because an injury is a “tort” -- short for “tort-u-ous” conduct -- the insurance industry wants laws to actually protect those who are guilty of tortuous conduct! I suppose if I were born into a family of insurance executives, and pocketed millions of dollars a year, it may be easier to convince myself and others that this is good for society. But to the rest of us Americans, their propaganda sounds more like injury victims will have little to no meaningful rights of recovery when they are tortuously injured by others.

Hence, insurance companies disdain trial lawyers and trial lawyer associations because of their stance against “tort reform.” Trial lawyers are a real threat to insurance companies’ bottom line on profits. Insurance companies allege that trial lawyers manipulate the civil justice system to obtain run-a-way verdicts for injury victims. We know from previous chapters that it is the jury, not the trial lawyers, who decide what is

fair compensation for injury victims. The insurance industry simply rejects any concept of fairness.

### ATTACK ON JUDICIARY

The insurance industry supports tort reform organizations that label West Virginia courts as so-called, “judicial hell-holes.” This unwarranted labeling of our civil justice system is promoted by the insurance industry and the politicians that receive their support. Because our trial judges (and jurors) routinely disagree with the insurance adjusters’ positions on coverages and claims, they are attacked by the insurance industry.

### ATTACK ON JURIES

The insurance companies mostly hate that our jurors -- in bad faith claims against the company -- can punish them harshly for egregious behavior. Some of these jury verdicts against the insurance companies have been in the multi-million dollar range. But to a multi-billion dollar company, this is but pocket change. So, their conduct is hardly affected by even these verdicts. Their profitability model mandates that they minimize the value of claims.

Ironically, when the insurance company gets a “defense verdict” -- that is a verdict that “agrees” with their assessment of the case -- they pat themselves on the back for “calling it right.” Juries that go their way are perceived as seeing the obvious, but when they disagree, they are blind. No matter what the result, though, they think that they are always right. They are always smarter than the judge and jury, and smirk when adverse rulings are made in their cases. The truth is, sometimes juries do agree with the insurance company assessment of the claim. But not always. It takes experience and wisdom to know when to settle and when to try a case before a jury.

### JURIES DECIDE VALUE OF CLAIM

Contrary to the “tort reform” agenda of the insurance industry, it is not the personal injury lawyers or judges who determine what is a fair recovery for injury victims -- it is the citizens of this state, our jurors, who decide what, if any, compensation is fair for injury victims. It just so happens that these verdicts upset the insurance companies’ profitability forecasts and rebuke their “bad faith” practices of offering woefully inadequate settlements to injury victims. If the insurance companies would only make fair settlement offers to injury victims, there would be no need for a jury trial, or, for that matter, personal injury lawyers! But we know that is not possible. So, it is the jury system that is the real safeguard of justice for injury victims. Good trial lawyers know how to use the civil justice system to obtain fair and just recoveries for injury victims.

### JUDGES AND JURORS ARE FAIR

Insurance companies have spent an enormous amount of money to persuade the public that there are too many lawsuits and frivolous claims. The insurance industry supports the labeling of West Virginia as a “judicial hell-hole.” They want to discredit our state judiciary by asserting that some of our judges allow trial lawyers to stir up jurors to get big verdicts. Numerous insurance and defense associations rant and rave about how bad West Virginia’s court systems are compared to other states. The truth is all of their arguments are based on their own self-interest and financial greed. Instead of paying fair recoveries to needy injured people who deserve the compensation, the insurance companies put their own financial interest first, ahead of the interests of victims of catastrophic and fatal injuries.

Our state and federal court judges have a very good understanding of the positions of both sides of this debate. They are sworn to uphold the law and not favor one position over the other. They try their level best to be fair to both sides. Unfortunately, many jurors have already been influenced by the insurance companies' dogma that bad things will happen if damages are not capped, or more tort reforms are not passed. As a consequence, many jurors hold a dim view of trial lawyers and injury victims. That is, until they are injured -- then they realize their prior views were wrong.

### FRONT-LINE DEFENSE

Your representation by an experienced personal injury lawyer is a front-line defense against the unfair tactics of the insurance industry. In fact, the Insurance Research Counsel, which is funded by the insurance industry, did a study several years ago to see if represented parties got better recoveries. They were hoping to prove that people were no better off with lawyers, but their own studies recognized that represented individuals indeed got better recoveries! This particular result was not what they had hoped for, so they created a "new study" and found that unrepresented injury victims had lower medical costs than represented injury victims. What the study really showed was that unrepresented injury victims got less medical treatment because they got less money for medical treatments. Thus, even insurance industries' studies show that represented parties get more money for necessary medical treatment, and they received more money for their injuries, too. But the insurance adjuster does not want you to know this, and will not encourage you to seek legal counsel because it would mean the insurance company would be forced to compensate you more fairly.

## CHAPTER SIX

# Claims Adjustment Process

In previous chapters I explained why the insurance industry is financially motivated to minimize or deny your fatal injury claim. During the claims adjustment process, the insurance companies will expend substantial financial resources and hire savvy defense lawyers to exploit your privacy and derail your attempts to obtain fair compensation for the estate's damages. In this chapter, I will reveal some of the ways in which insurance adjusters use their financial and legal advantages against the personal representative in the claims adjustment process.

### THE "ACCIDENTAL" DEATH

Claims adjusters begin the claims process with an overall strategy of making you feel insecure in pursuing your fatal injury claim for the estate. Part of the claim process is to cause you, as the personal representative, to change your thinking about your wrongful death claim, and to change your feelings about the individual or company that caused the fatal injuries to your family member. If the fatality stems from an automobile collision, the claims adjuster will attempt to "sanitize" the conduct of their insured driver -- no matter how egregious their conduct -- to create the inference that the cause of the fatal collision was nothing more than an "accident."

## “ACCIDENTAL” DEATHS MEANS NOBODY IS AT FAULT

By legal definition, accidents are “an unforeseen and injurious occurrence not attributable to mistake, neglect, or misconduct.” *Black’s Law Dictionary*, 7th Ed. 1999. If the cause of your decedent’s fatal injury is deemed “accidental,” then neither the other person involved, nor their insurance company, are obligated to pay the estate anything. Because the term “accidental” is used so broadly in society and even legal settings, there is much confusion about what constitutes an “accident” and what is a preventable traumatic event causing a fatal injury.

### REAL ACCIDENTS ARE RARE

In reality, by legal definition, real accidents that cause serious personal injuries rarely occur. This may be difficult for some people to accept because the term “accident” (or some form of the word) is misused every day. Phrases like, “That’s an accident waiting to happen,” or, “Sorry, that was an accident,” reinforce the idea that “things happen” and there is nothing that can be done to prevent it. But that is not true; there are things we can do to prevent serious injuries. We have to change our viewpoints though. For instance, when you lean back in the rocker and crush the cat’s tail, you don’t think too much about it later on -- perhaps that could be considered an accident. But if the baby sitter leaned back in the same rocker and crushed your infant’s fingers, I doubt you would consider that an accident -- it sounds more like neglect. Again, reason we have a hard time distinguishing between “accidental” and “neglectful” injuries is because the common usage of the word “accidental” is different from the legal definition of “accidental.” Be advised, in order for you to obtain compensation for your injuries, you must be able to

overcome the common understanding of the word “accidental,” and prove that your injuries resulted from neglectful conduct.

### TRAUMATIC INJURIES ARE PREVENTABLE

Now that we know that personal injuries are not, legally speaking, accidental, we can rightly conclude that personal injuries caused by a traumatic event were preventable. Thus, all workplace injuries and auto collisions are preventable, and not accidental. To illustrate this point, consider automobile collision investigations which show that speed, driver alertness, mechanical upkeep are all factors that contribute to the negligent operation of a motor vehicle, which are within the operator’s use and control of the vehicle. People operate their vehicles negligently by making conscious decisions to exceed the safe speed, or fail to maintain the breaks or tires. The vehicle didn’t just evolve into this state of use or disrepair on its own, any more than the vehicle drove itself down the road and collided with another vehicle -- it was the owner and operator who is responsible for operation and condition of the vehicle. Thus, the owner and operator made intermittent decisions that violated some safety law or ordinance -- as such, they are rule-breakers.

Likewise, workplace injury investigations often show that employees are injured and killed because the employer failed to provide a safe work environment for employees. The unsafe work environments must be managed by the company, and when they decide to not follow safety rules, they become rule-breakers, too.

### RULE BREAKERS CAUSE INJURIES

For this reason, I have not referred to the conduct of the at-fault parties, who caused the death of your family member, as hapless, unlucky people who just happened to be at the wrong place at

the wrong time. When they decided to drive too fast, or ignored safety rules, they invited injury not only to themselves, but fatal injuries to others. So your decedent's fatal injuries were not the result of a mere "accident." If they were accidental, then the law may not hold anyone responsible. This is not an outcome the estate deserves.

### MISAPPLICATION OF LEGAL FAULT RULES

The claims adjustment process is often a precursor to formal litigation. Many fatal injury claims can be settled without the formal filing of a civil lawsuit. When a fatal injury claim is set up, and a claims adjuster begins the process of evaluating your claim, there are still legal standards that will apply to your claim. The foremost rule that is applied is the legal fault rule: unless the alleged wrongdoer is guilty of breaking a law or rule, there is no basis for considering your claim. Thus, unless you can show in a court of law that the person who fatally injured your family member is a rule-breaker, you will not get the opportunity to present your fatal injury claim -- the law requires that you prove legal liability against the wrongdoer. The wrongdoer must be found "at-fault" or negligent for causing the death of your family member. Since most fatal injuries occur in automobile collisions, I will use an auto collision as an example of how an insurance adjuster will evaluate legal liability of their insured driver who is accused of causing the fatal collision. Keep in mind that the insurance adjuster has a financial incentive to persuade you to their way of thinking; that the facts of your fatal injury claim cannot possibly prove legal liability against their insured driver.

### EXAMPLE OF AN AUTO INJURY CLAIM

As we have learned from the previous section, all personal injuries and fatal injuries are avoidable in some way or other. Thus, auto collisions are preventable. When a significant auto

collision occurs, causing a fatal injury, it should be self-evident that somebody violated safety laws and caused the collision. In fact, we now know that this is the case. However, the insurance adjuster may still try to argue that the auto collision was unavoidable, or accidental. There are several reasons the insurance adjusters take this stance: they know it will discourage and frustrate you; they get to keep their money longer; and they know they will succeed in a fair number of fatal injury claims.

For support of their position, they have historically relied on the official report forms used by police departments. For numerous decades law enforcement officers used the "Uniform Accident Report" form to annotate information about the auto collision. Notice the word "Accident" in the title of the form? Insurance companies and defense lawyers used the "accident" report form effectively to devalue cases. During trials, the defense lawyer, the police officer, and even the judge referred to the traumatic collision as an "accident." So, how did juries respond to this? I think they had to be almost over-persuaded that the auto collision was not just accidental, but that someone had caused it. I can tell you by experience, the lawyer representing the injury victim had to work twice as hard at convincing the jurors that the collision was not an accident.

Recently, however, the use of a revised auto collision report form was mandated in West Virginia. Now, every auto collision in West Virginia is reported on the revised form: "State of West Virginia Uniform Traffic Crash Report." The word "Accident" has been replaced with the word "Crash" in the title of the report. The insurance adjuster and defense lawyer no longer can use the same tactics they used to use, and even police officers must recognize that they are investigating car "crashes," not mere "accidents." But, old ways are hard to break, and it will take

constant reminders to adjusters and even judges to refrain from referring to the auto collision as an “accident.”

### ADJUSTERS ACT AS LAWYER & JUDGE

Insurance adjusters spend a vast amount of their time reviewing claims for personal injuries submitted by personal injury lawyers. Many of these claims are in litigation, meaning that a lawsuit has already been filed. So, they review even more legal documents, legal opinions on coverage, and liability and damage assessments from their own defense lawyers. Claims adjusters spend a lot of time talking to plaintiff lawyers and defense lawyers. Naturally, they learn some basic legal principles and are expected to be able to express these principles in basic form to others. After working with hundreds of adjusters through the years, I believe many adjusters enjoy the recognition they receive from their superiors and other lawyers concerning their knowledge of the law. Some, however, think of themselves as being the equivalent of lawyers, and try to practice law without a license.

### ADJUSTERS CONTROL THE CASE

It should be no surprise that claims adjusters use their knowledge of the law to their advantage. I wish I had a dollar for every time I heard an adjuster say, “I’m not a lawyer, but ...,” and then they proceed to tell me their interpretation of the applicable law. They expect their defense lawyers to follow their advice, too. Some claims adjusters even dictate trial court procedures to their own lawyers. In my former days as an insurance defense lawyer, I have had some of these adjusters dictate to me how to prepare strategies for the legal defense of cases. As laws have changed to give the adjusters more protection for bad faith conduct, they even took over many of the traditional areas of legal practice from the defense lawyers. Now, it’s the adjuster who dictates what kind of defense will

be made on any given case. They dictate who will be deposed, when discovery will be conducted, whether an expert will be retained, and the like. As far as evaluating the claim, the defense lawyer has no say in the value of the common personal injury case -- the adjuster evaluates the settlement value of the claim and even chooses the mediators. One adjuster even represented to me that lawyers were no longer the “experts” at settlement negotiations, he was! Another adjuster represented that he was the “star” of mediation! Yet, another adjuster informed me that he was a trial lawyer, and that he was going to take the case “all the way” to trial! I kindly reminded him that a law degree would be helpful. Turns out, he didn’t even have a college education. Such is the case of way too many claims adjusters, they wield too much power over unrepresented injury victims. They have become the judge of your case.

So when discussions about your injury claim occur between just you and the adjuster, who do you think will misuse the law to bolster their position? If the adjuster is barking orders to their own defense lawyers, what will he or she say to you about your injury claim? Unless you have an experienced trial lawyer on your side (or just happen to have studied law yourself), you are not going to make any headway with the adjuster -- they are not easily persuaded.

### AVOID RECORDED STATEMENTS

Insurance adjusters are not permitted to contact represented injury victims directly and question them about their injuries. However, they may contact unrepresented injury victims whenever and as often as they choose to do so. When the insurance adjuster contacts you, and asks you if the conversation can be recorded, you should decline the request -- at least until after you have consulted with a personal injury lawyer. Be careful

even speaking on the phone with the insurance adjuster -- because the insurance adjuster will take notes of this conversation in the claim file notes in the most unfavorable terms concerning your fatal injury claim. In the many hundreds of claim files I have reviewed, the adjuster almost never reports the injuries in the most favorable light of the injury victim. Often, the injury victim's purported comments are not even consistent with their claim for damages.

### PREPARATION NEEDED

Many injury victims are charmed by the adjuster's friendly ways over the phone and see no reason to refuse a recorded statement. The adjuster is armed with the tape recorder, her notes about your fatal injury claim, and an outline of questions that are designed to minimize your damages. When an injury victim provides the adjuster with a recorded statement, they invariably make mistakes. The injury victim doesn't have their injury file, so they can't review it beforehand. More importantly, the injury victim has not been prepared by legal counsel, and doesn't have legal counsel present to refer questions about how to answer certain questions asked by the adjuster. They will make mistakes because they were basically "shooting from the hip" in answering important questions that affect their injury claim. They often have no idea that their claim has been seriously compromised until after they have met with legal counsel.

### MISTAKES PROVIDE CROSS-EXAMINATION AMMUNITION

The insurance adjuster will not explain just how the insurance company and their hired defense lawyers plan to use this recorded statement against them in a court of law. Again, I should know -- I used hundreds of them to discredit injury claims. One particular injury victim had stated something wrong about the

timing of the events of the auto collision, and two years later, that account -- which was the account closest to the date of the injury -- persuaded her lawyer to drop the claim because it showed that she was the person who caused the collision. She was confused by the questioning, she had no lawyer to help her, and her claim was destroyed. So, you should be aware that every word you say will be scrutinized for accuracy and truthfulness. If you make a mistake that is favorable to the insurance company, they will use this against you, too. It is a chief purpose of the "recorded statement" to make you look like a malingerer, or worse, a liar at trial.

### REFUSE MEDICAL RELEASE AUTHORIZATIONS

Another way insurance adjusters take advantage of unrepresented injury victims is to use private information contained in their medical records to minimize or defeat their injury claim. The insurance adjusters obtain the injury victim's private medical information through a medical release authorization, which has to be signed by the injury victim. This medical authorization allows the insurance company to obtain all the injury victim's medical records -- not just those relating to the injuries sustained from the traumatic event. So when the claims adjuster requests you to sign a medical release authorization, tell the adjuster you will provide copies of your records from your treatments for your injuries.

### SOCIAL MEDIA TRAPS

It is a common practice for insurance adjusters to use the Internet to covertly find out everything they can about your family: your address, what kind of home and vehicles you own, your job and where you work, your family and children, and even your friends. If you have already disclosed anything about your fatal injury claim on Facebook, Twitter, or other social media, you should



be aware that the insurance adjuster has been trained to locate this information and use it against you. If any other damaging information is found in the public domain of the Internet, it will also be used against you when you pursue your legal rights against parties who are responsible for your damages. Even if you only communicate privately to your friends and family about your fatal injury claim using the Internet, you are not safe. Some courts require disclosure of even private communications. The best practice is to discuss your injuries with your lawyer -- only those communications are protected. Remember, abstain from using the Internet to discuss your fatal injury claim with your family and friends.

### SPOLIATION OF EVIDENCE

Many people don't know that they have an obligation to preserve evidence that relates to their fatal injury claim. If you discard evidence (called "spoliation"), you may be prohibited from asserting part or even all of your fatal injury claim. You have a duty to preserve the evidence that is under your control or ownership. So, you may need to keep your wrecked vehicle (or other items such as equipment or products) in the same condition if they contributed in any way to the cause of death of your family member. You should immediately have photographs taken of anything involved in the cause of the fatal injury, because any evidence that supports your injury claim may quickly "disappear" and never be found again. Remember, if you can't locate a key part of your evidence, your fatal injury claim may be denied.

### HOW TO PRESERVE EVIDENCE

Meeting your duty to preserve evidence that you own or control can be confusing sometimes, even for lawyers. For instance, immediately following an automobile collision on a state road,

you decide to move your car off the road to avoid another possible collision. The police were not on the scene yet, so no one in authority told you to do this; you took it on yourself because you wanted to be safe. Although your actions were reasonable, the insurance adjuster may still wrongfully accuse you of moving your vehicle to hide your role in causing the collision. But if you decided to leave your car on the road, and were hit again, you would be blamed by the same adjuster for causing another wreck or aggravating your own injuries! So, injury victims often face the criticism of the insurance adjuster and their defense lawyers no matter what they do.

### INSURANCE ADJUSTERS ALLOW SPOILIATION

Insurance adjusters know that bad pictures of vehicles make for bad evidence against them at trial. They will eagerly convince injury victims to discard or salvage their vehicle before adequate pictures or inspections can be taken of the damage. This is especially the case when undercarriage damage is at issue. To the naked eye, that "little scuff" on the back bumper could hardly support a serious injury claim; however, under the bumper cover was a dent in the metal bumper system. If you allow the vehicle to be salvaged and crushed, then you are stuck with these limitations in presenting your injury claim.

What then, can an injured person do to make sure that they don't destroy key evidence for their injury claim? Engage experienced legal counsel early in the claim process to safely navigate all the pitfalls the insurance companies have created for your injury claim.

## CHAPTER SEVEN

# The Litigation Process

There are many reasons a lawsuit is a necessary step towards obtaining fair compensation for the estates of fatal injury victims. Some fatal injury claims are going to be disputed no matter what information is provided to the insurance adjuster. Some injury claims take a year or more to even develop the facts and ascertain the damages, which means that little time is left to negotiate before the two-year statute of limitations period expires -- so, a lawsuit is filed to preserve the claim. Still, some injury victims wait until much of the two-year statute of limitations has expired before seeking legal counsel. Experienced trial counsel will file the lawsuit and withhold service of process on the defendant(s) until a claim can be discussed with the insurance company.

## FILING OF THE LAWSUIT

A lawsuit is a legal document that sets forth the necessary information to make a legal claim against another party. The legal document is called a Complaint. The complaint has several parts. The first part, called the style of the case, lists the proper names of the injury victims, called Plaintiffs. The style also lists the parties being sued, called the Defendants. The second part, dealing with the particulars of each party, is needed to ensure the proper jurisdiction of the lawsuit. Thereafter, there are many claims, called counts, which list and recite the facts as the injury victim views them. These facts are considered allegations, because they have to be proven.

Lawsuits are routinely filed in state court, at the county courthouse -- in the circuit court's office. To determine which county is the proper place of filing the lawsuit, consideration must be given to where the injury occurred and where at least one of the defendants resides. Lawsuits can also be filed in federal district court under certain conditions. Most lawsuits for personal injury claims are under the jurisdiction of state circuit court judges that are located in each county of the state. When the circuit court clerk officially files the complaint, a civil action number will be assigned to the lawsuit.

## SERVICE OF PROCESS

In order to complete the process of filing a lawsuit, the responsible parties who caused your injuries must actually be legally notified of the lawsuit. The title of the notice is called a Summons. The process by which the defendants are provided a copy of the Summons and Complaint is referred to as the service of process. Service of process cannot be ignored. Even if you file your lawsuit on time, but you fail to actually obtain proper service of process on any party, your lawsuit will be dismissed. You will not recover anything.

Obtaining service of process on a party sounds simple enough -- all you have to do is locate the right party and get the summons and complaint into their possession. The truth is it is one of the most difficult parts of any case. You have limited time to get all the parties served, and you have to be exactly correct in the names and addresses of the parties being served. The problem is that wrongdoers hide their true identities and their addresses to avoid being identified. It's not just individuals that can't be located, but corporations, too. The name on the truck that caused your injuries probably is not the correct name of the company that is legally obligated to pay for your injuries. This is

because corporations are allowed to use trade names to conduct business -- but these trade names are not the legal entity you must serve. Because the United States has become engrossed in the global market, more and more companies that are in West Virginia are owned by foreigners in other countries. It is very difficult tracking down these foreign companies because they have lawyers who are experts at concealing their identity from the public. Remember, you only have a short time period to effect service of process on each defendant after your lawsuit is filed, so don't try this on your own.

### RESPONSIVE PLEADINGS

When a defendant is served with a copy of the summons and complaint, the summons will state that they have a certain number of days (up to 30 days) to respond to the complaint. The defendant's response can be a motion to dismiss and/or an answer to the complaint. If the defendant files a motion to dismiss, the court will make a ruling on the motion to dismiss before the claim will proceed through the court system. If the motion to dismiss is granted, then the case will be dismissed and you will have to pursue a different complaint, if there is time left to do so. If the motion to dismiss is denied, then the defendant must file an answer to the complaint. The defendant normally denies almost every allegation in the complaint that goes to the merits of your injury claim. Defendants also recite dozens of defenses to your claim -- so you should expect to have to prove everything from the cause of your injuries to each of your medical conditions.

### COURT APPEARANCES

After all the parties to the lawsuit have made an appearance -- by answering the complaint or filing a notice of appearance of counsel for a party -- the presiding judge of the circuit

court will notify all the attorneys for the parties (and any unrepresented parties) of a scheduling conference. All the lawyers and unrepresented parties will attend this conference where the judge discusses the lawsuit. Thereafter, the court will issue a scheduling order which outlines all the important deadlines for discovery to be completed and the date of trial. Failure to follow the court's scheduling order can result in sanctions against those parties that violate the order.

### FORMAL DISCOVERY PROCESS

Pursuant to the deadlines in the scheduling order, the parties have about six to eight months to conduct all discovery needed for trial. Discovery includes depositions of parties and witnesses, written interrogatories (questions) to the parties, production of documents requests, inspections, medical examinations, and the like. The goal of discovery is to find out what evidence the other side has and compare it to the evidence you have to support your case. Many cases that appear to be straight-forward before discovery begins end up being complicated in the end. This happens because at the outset of any case, it is easier to see evidence that supports your position than evidence that contradicts it.

### MEDIATION PROCESS

One particular item that is included in almost every scheduling conference order is a mandate to conduct mediation. Mediation is an informal process where the parties meet together (usually in a law office or court house) and discuss settlement possibilities of the case. The mediation process is not the same as going to trial -- no evidentiary objections will be made, nor rulings on the validity of any part of the injury claim. A mediator is agreed to in advance by both sides, and the mediator is provided some basic information about the injury claim. On the date of the

mediation, the parties will meet with the mediator and discuss the injury claim. Again, the objective of mediation is to settle the case. This will require both sides to compromise aspects of their views of the case. If the parties cannot come to a compromise and settlement of the case, then the case will proceed to court.

The parties well know that proceeding to trial is a real threat to a weak case. Thus, both sides will “bluff” their way through a mediation by asserting that they will go to trial! The truth is, unless you can foresee the future, you don’t know what a jury verdict will render your client -- some jury verdicts favor the insurance company, while others favor injury victims. So all sides, the plaintiff’s and defendant’s, and the insurance companies’ insuring the losses, have a vested interest in trying hard to settle injury claims before going to a jury trial. Trained mediators are used to help the parties see each other’s positions, and assist in the “negotiation process” of mediation.

### PRETRIAL PROCESS

The mediator will notify the circuit court that the mediation was either successful or unsuccessful. If the mediation does not produce a settlement, the court will have a final hearing before trial, called a pretrial conference. The pretrial conference is a very important part of the litigation process. It is at this hearing that the court will hear arguments over evidence that will be offered by one side or the other, and make procedural and substantive law decisions on how the case will be tried before a jury. Often, because of adverse rulings or favorable rulings of the court, one side or the other reconsider their prior positions, and the parties come to a settlement of the case. A few cases, however, just can’t be settled. So, a few select cases will be decided by a jury. Because jury trials take a lot of preparation of evidence and witnesses,

expect to commit about a week of your life to prepare for and appear at a jury trial.

### TRIAL PROCESS

On the first morning of trial, you will arrive at the court house and meet with your lawyer. The first thing that will be done is that the judge will normally hear any final motions or arguments from the lawyers and make rulings. Thereafter, the jury panel will be called, consisting of citizens of the county where the lawsuit is filed. Many people will be called, but in the end, only six jurors and two alternates will sit on your jury. The judge will have numerous questions for the jury panel, and most judges allow the lawyers to question the jury panel as well. When the lawyers question the jury panel, it is called voir dire. From time to time, a juror will not meet the qualifications to sit on a jury panel -- due to knowledge of the parties or witnesses -- so other people are called to replace such a juror. When all the parties are satisfied that the panel can sit on their case, the judge sends the parties out of the court room or the jurors out of the court room so the lawyers can strike those jurors they don’t want on their jury. Each side can strike two main jurors, and one alternate. Again, in the end, there will be six main jurors and two alternate jurors. At the end of the trial, the alternate jurors will be released, and will not decide the case -- unless they replace a regular juror who had to be replaced.

Since the Plaintiff has the burden of proof to substantiate their claim, they proceed first with the evidence at trial. The Plaintiff’s lawyer will make an opening statement about the case. Then the Defendant’s lawyer will make an opening statement, explaining their view of the case. Subsequently, the Plaintiff will present all their witnesses and testimony. The Defendant will cross-examine these witnesses to refute their testimony.

After the Plaintiff has completed their case, the Defendant may call their witnesses and present any other evidence. Thereafter, the Plaintiff may have some rebuttal testimony to present. Then both sides rest their case.

The court will then instruct the jury on the law that will apply to the case. The lawyers will have fought for weeks and sometimes months over the language that is going into the jury instructions. When finished reading the jury instructions to the jury, the court will then allow the Plaintiff and Defendant to make closing statements. Because the Plaintiff has the burden of proof, they have the last word and can speak again for a few more minutes to the jury. What goes into these closing statements is complex and requires much skill and experience to do well. Thereafter, the jury receives the case and goes to the jury room to deliberate on the case. When they have reached a unanimous verdict, they report to the court and the verdict is read in open court with all parties present. This is a nerve-racking time for all the parties because there is no going back and accepting previous offers, either way, once the verdict is read. It is final. The only thing left is an appeal for the side that is displeased with the result of the verdict.

### THE JURY PROCESS WORKS

Contrary to what the insurance industry has told people, the jury system is fair to all sides of the injury dispute. The reason insurance companies don't like the jury system is because jury verdicts often exceed the claims adjuster's value of the claim. This happens quite often because jurors must consider all lawful damages that can be awarded to injury victims. Thus, jurors analyze each injury victim's entire range of alleged damages and make their own assessment of the value of the case. Since insurance companies don't evaluate the claim based on the entire

range of damages available to the injury victim, jury verdicts are a threat to their way of doing business. The adjuster is trained to not place a very high value on an injury victim's quality of life or their future health needs. But the jury is not so limited. That's why insurance companies are against impartial jurors.

### MUTUAL RISKS OF TRIAL

There is no room for bragging about jury verdicts because no one knows what a handful of complete strangers will think about their case. That's what makes our jury system so unique and effective -- nobody gets an unfair advantage with complete strangers. That's also why it takes a lot of skill to present evidence, you are addressing complete strangers about a very big issue. So, there are risks in going to trial, for both sides.

Most cases, however, are settled. The reason is because jurors can and often do disagree with one side or the other on important parts of the case. This is a big incentive for parties to settle rather than to go to trial. Only 10% of all claims proceed to trial, which means that the few that go to trial can go either way, depending on how the jury feels about the claim. A skilled trial lawyer can often sense how a case is going, long before the jury is given the opportunity to decide the case. Sometimes, a settlement is reached at trial because the jury panel or the way the evidence may be presented didn't turn out to be so favorable to one side or the other after all.

### OUTCOME OF JURY TRIALS

Jury trials over hotly disputed injury claims worry insurance adjusters particularly because jurors are capable of disagreeing with the claim assessment on different types of injury claims. This can disrupt established values of certain kinds of cases. Suppose an adjuster evaluates a neck injury at \$50,000. The plaintiff's

counsel evaluates the value at \$100,000. Because neither side will budge, the case proceeds to trial. The jury awards \$250,000 to the injury victim. Now, there is a new precedent for demanding a higher value on such cases. For those lawyers capable of obtaining the best results for their clients, higher verdicts mean that the insurance company will pay those lawyers more to settle their injury cases.

### GOOSE-GANDER RULE

We have all heard of the goose-gander rule, that is, what is good for the goose is good for the gander. As indicated previously, no one controls what a jury will do in any given case, and sometimes they agree with the assessment made by the insurance adjuster. It takes a lot of skill and handling of hundreds of cases to know when to fold your cards and settle a case. Not every case is perfect, and each case has weaknesses. So there should be no surprise that jurors can and do agree with insurance company assessments. That is the risk injury victims take when they go to trial. But whenever a jury renders a verdict that is “too high” for the insurance company, the insurance company decries “foul.”

As a defense lawyer, I routinely received calls from claims supervisors reporting their “victories” in court -- when the plaintiff got little to nothing. But as time went on, I realized that the insurance companies only reported their victories, but not their losses. They didn’t want their defense lawyers to know how bad their evaluations were in the many cases that went bad. So I started asking about their losses, and to find out how their attitudes to the adverse jury verdicts changed their views of jurors. Of course, the adverse verdicts against them were tainted; their evaluation of a claim is never wrong.

### CALL FOR MORE “TORT REFORM”

The insurance industry wants to do away with the strength of the jury system in this state. Although all jury verdicts now have an automatic right to appeal, and will be heard, that is not enough. The insurance industry wants two appellate courts so that they have two chances to reverse adverse verdicts. They have the money to pay for their lawyers to appeal, but this drains the injury victims as they have to wait many, many months, and perhaps even years to get their hard-earned recoveries.

This country was founded on the right to trial by jury and it is the cornerstone of liberty for all, even today. “Representative government and trial by jury are the heart and lungs of liberty. Without them we have no other fortification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and clothed like swine and hounds.” John Adams, 1774. But the insurance industry wants to change all that for their financial benefit.

### POST-TRIAL PROCESS

Despite all that I have said about the outcome of the jury trial, that is not the end of the case. There are procedural safe-guards for all parties to ensure that what the jury and judge have decided about the case is, in fact, fair. That process is referred to as the post-trial process. For simplicity, I will include in my discussions the appellate process as well, since both occur after the jury renders its verdict.

When the jury reaches a verdict in a case, the verdict is read aloud in open court. Often enough, one party or the other will not agree with the verdict or other court rulings made during trial. They must file post-trial motions to alter the verdict based

on concrete reasons the verdict was wrong. The trial judge may agree with the post-trial motion and alter the verdict in some manner, large or small. Or, the trial judge may let the verdict stand. In either case, the parties to the lawsuit have a short period of time to file an appeal to the West Virginia Supreme Court of Appeals, located in Charleston, West Virginia. Legal briefs will be presented and oral presentation of the arguments made. Thereafter, the Justices of the Court will issue a ruling that may uphold the verdict, strike down the verdict, or require a re-trial on some or all issues.

While the jury verdict is not a final statement about a case, it is very persuasive and many parties who could not agree on a settlement value of a case prior to trial are often able to reach an agreement after the verdict is rendered. Each case is unique, and that is why you need a personal injury lawyer who has litigation, trial and appeal experience to handle your serious or catastrophic injury case.

## CHAPTER EIGHT

# How to Hire a Lawyer

By now, you probably recognize that having your own lawyer would be a good idea. You have a few questions though, about how to hire a lawyer and what kind of arrangements can be made for the payment of the legal services. This chapter will answer these questions, and many others, regarding the retention of the best lawyer to handle your fatal injury claim.

### LAWYER ADVERTISING

The advertising industry makes billions of dollars a year directing people to various products and services. Magazines and newspapers are full of ads, as well as are the yellow pages of phone books and television commercials. It is challenging to locate a specialized lawyer using these kinds of advertisements. It seems that it should not be this hard to locate a good lawyer: if someone had a skin condition that needed medical attention, they could easily find a licensed dermatologist to take care of the problem because dermatologists specialize in treatment of skin conditions. There is a problem: experienced personal injury lawyers cannot advertise that they specialize in handling catastrophic injury cases. The West Virginia State Bar, which oversees the licensing of lawyers, does not issue a board certification to such class of experienced lawyers, and thus, such lawyers cannot advertise that they are “specialized” in handling such cases.

So, any lawyer may advertise for personal injury cases, even if they only dabble in the “personal injury” practice of law. Unfortunately, the person needing a personal injury lawyer with trial experience cannot easily find such a lawyer because these qualified lawyers are not permitted to say they specialize in personal injury and trial law. Hence, not every lawyer who advertises for “Personal Injury Cases” has the necessary experience to successfully handle catastrophic injury cases. It takes many years of intense and focused litigation and trial experience, requiring the successful handling of hundreds and hundreds of serious injury and wrongful death cases, to become a highly qualified personal injury lawyer.

Because there are no rules prohibiting inexperienced lawyers from trying to attract injured victims as clients, they often inflate their credentials. Recently, I noticed a law firm in Washington, D.C. boasted in the phone book yellow pages that they had “100 years of combined experience.” I must confess that reaching the “100 years” mark looked impressive. That is, until I read on that they had 70 lawyers! On average, each lawyer had less than one and a half years of experience! I had a good laugh. But there might be something to it, because some local law firms are advertising the same way. You, however, deserve an experienced lawyer who personally has decades of real legal experience to handle your claim, not some rookie who is trying to learn the ropes of litigation at your expense.

### FOCUS ON FATAL INJURY CASES

Even if a lawyer has practiced law for many years, that alone doesn’t mean you have located the right lawyer. Many lawyers have dabbled for decades in too many kinds of law to be exceptional in any of them. It is not uncommon to see lawyers with a few decades of experience advertise for personal injury

cases in addition to their many other areas of practice which may include: criminal law, bankruptcy law, divorce and family law, employment law, taxation law, black lung law, workers compensation law, social security benefits, elder law, real estates, administrative law, health law, titles and deeds, and estate planning – a full-service law firm. So, the fact that a lawyer has been practicing for decades doesn’t mean anything unless the focus of that practice has been on personal injury law, insurance law, trials and appeals.

I am not suggesting, however, that only the most experienced personal injury lawyers are the only lawyers who can handle personal injury cases. Many good, hard-working lawyers can handle many types of simple personal injury cases. But wrongful death cases are a lot more involved than simple personal injury cases. You will only get one chance at a recovery, so you should choose a lawyer that focuses exclusively on the area of your needs. That is why my law firm practices exclusively in personal injury law, with a focus on representing fatal injury victims.

### FOCUS ON INSURANCE PRACTICE

I have stressed this point throughout this guide that one of the most important parts of your injury case is understanding what kind of insurance coverage will be available to pay for your injuries. This area of law is very complex, and should not be left to an inexperienced lawyer. I have litigated hundreds of insurance issues and have the experience at trial and appeals to handle the most challenging insurance coverage disputes. Don’t settle for less than a skilled insurance lawyer to handle your catastrophic injury case -- your recovery depends on it.



## FOCUS ON TRIAL PRACTICE

As stated previously, trial experience is extremely important as well because the insurance companies pay attention to their opponent's qualifications and track record. The insurance companies know that good trial lawyers do more and get more for their clients than inexperienced lawyers, and thus the insurance companies pay more for claims that are handled by those skilled lawyers. Insurance companies have respect for highly-skilled, former defense lawyers who now practice personal injury law -- they know these lawyers can handle the catastrophic injury and wrongful death cases successfully at trial and appeal.

## FOCUS ON APPELLATE PRACTICE

You should be aware that many lawyers who advertise they are a "trial lawyer" may have never tried a personal injury case before a jury, much less argued an appeal before the West Virginia Supreme Court of Appeals. Even the Chief Justice of the West Virginia Supreme Court has commented, "Most lawyers who classify themselves as 'trial lawyers' or 'litigators' have no trial experience." The West Virginia Lawyer, Jan-Mar 2012 Ed. Only choose an experienced personal injury lawyer with real trial and appellate experience in catastrophic injury cases to handle your injury claim.

## VALUE OF A GOOD LAWYER

In the mid-1970's, General Chuck Yeager visited my high school in southern West Virginia, and he spoke about his experience as a test pilot for the Air Force and NASA. A West Virginia native, General Yeager broke the sound barrier -- a dangerous and courageous feat in those early days space flight testing. Some years later, he appeared on TV commercials for AC Delco batteries and spark plugs. The "You can pay me now, or pay me

later" slogan he made popular is still repeated today, at least by those of us in our 50's (or above). Of course, the cost of buying a new spark plug or battery is a lot cheaper than the damage a bad one can cause, so the saying goes. The same is true about hiring a lawyer. A qualified, competent personal injury lawyer will do more for you than you can do for yourself. Such a lawyer will not only earn their fees, but will give you the best chance of ending up with more in your pocket.

We live in a "handy-man" society, and there are lots of people who wire or plumb their own houses. At the time, the do-it-yourself approach seemed to be a great cost savings, but when it is time to sell the house, that's when the problems surface and regrets are borne! Perhaps you should give further consideration to obtaining a lawyer to look over your case before you take the "handy-man" approach to solving your own legal problems. Remember, the insurance adjusters have their own lawyers. Shouldn't you?

## YOU CAN AFFORD A GOOD LAWYER

A good lawyer will offer you a contingency fee contract, which means that you will not have to advance any money to the lawyer for fees or costs. The fees and costs are paid when the lawyer obtains a fair recovery for you. Good lawyers are worth the fees they charge, which are customarily about one-third of the recovery in a typical personal injury case. Fees may be slightly more for some cases where the legal issues are complex and/or where liability issues are in serious dispute. Contingency fee contracts must be in writing under ethic rules, which provides both you and the lawyer with a record of what was agreed to for the representation. Be cautious, however, of lawyers who advertise for low fees; you may get what you pay for.

## MALPRACTICE INSURANCE

Unfortunately, some lawyers are too eager to attract personal injury clients and are not adept at running their own law office at the same time. They forget to file important legal papers, and ultimately, some injury claims are dismissed because of lawyer malpractice. Inquire of lawyers you are considering about legal malpractice insurance. Many lawyers do not have any legal malpractice insurance coverage. This means that if that lawyer makes a legal mistake on your case, and it causes your claim to be dismissed or significantly diminished in value, there will be no insurance settlement of your claim -- you will be forced to sue the lawyer, who may not have any financial resources to pay your claim.

The State Bar mandates that all professional limited liability companies must have at least one million dollars in liability protection for legal malpractice. My law firm is a Professional Limited Liability Company (PLLC), and carries mandatory liability coverage for the protection of clients. Even excellent lawyers can make a mistake, but if we do, we want our clients to be cared for properly. By the way, I can proudly report that neither myself, nor any associate of my law firm, has ever had an ethics complaint or malpractice claim filed against us. We always endeavor to do things right the first time for our clients.

## FAMILY MATTERS

When it comes to looking out for your legal rights, you should also realize that your decision will affect not only you, but your family as well. No one, not even your family, though, can force you to look out for them. It is your decision to look out for your family and seek legal counsel. When serious medical conditions are ignored, they usually get worse, if not fatal. Similarly, legal

“conditions” that are ignored often get worse. This is why injured people should seek legal advice early on in the claim process to prevent their legal rights from being lost or compromised. Those who get legal help early don’t have to agonize over whether they are making good decisions about their injury claim; they rely on their lawyer for such advice. Be assured that the insurance company will provide no help for you or your family after you have waited too long to act on your claim.

## CHAPTER NINE

# The 9 “Don’ts” Of Your Claim:

## # 1: DON’T BE DISHONEST ABOUT YOUR CLAIM

The number one way to ruin your otherwise legitimate fatal injury claim is to lie about anything. The veracity, the truthfulness, of what caused your loved one’s fatal injury has to ultimately be believed by a jury. If you are not honest in all accounts, even a seemingly insignificant thing, you may not be believed about the rest of your fatal injury claim. As a true illustration, a client lied to the police about who was driving the vehicle to shield blame from the actual driver who wasn’t supposed to be driving. Irrespective of whether my client or her friend was the driver, it should not have mattered since the collision was caused by the driver of the other vehicle that ran a stop sign. The insurance company and defense lawyer used the lie to refute my client’s injury claims, even though her injuries were legitimate, permanent, and painful. Ultimately, the jury did not fully believe the magnitude of the client’s injuries because she had lied to the police. Always be honest about your claim.

## #2: DON’T GUESS ABOUT YOUR CLAIM

From early childhood schooling, we have learned that not knowing a particular subject is looked down upon by teachers and peers. There is a lot of pressure in adult society to be “in the know” as well. When we are asked a question in an area

that perhaps we should know the answer to, we will try our level best to have some answer -- right or wrong. When it comes to giving information that will be scrutinized by the insurance adjuster and defense lawyer, guessing about information is not a good idea. You will be characterized as someone who just “makes up” information to fit their financial motives, or worse, you will be considered a liar. You also stand a good chance of minimizing good testimony based on all the facts, when they are fully developed, because you guessed about things you were not sure about. This creates competing story lines and jurors become suspicious when you change your story. Don’t guess about your claim.

## #3: DON’T CONCEAL INFORMATION ABOUT YOUR CLAIM

The previous two lessons -- about lying and guessing -- are closely associated with the third lesson: don’t conceal information. While lying is an act of commission, that is what you do say knowing it is untrue; concealing information is an act of omission, which is what you didn’t say knowing it to be true. Both are wrong and both will ruin your catastrophic or fatal injury claim. Let’s consider an example of concealing information. Suppose the insurance adjuster asks someone if they ever have had a neck injury before. They think a moment or two and then remember getting chiropractic treatment on their back and neck about ten years ago. The treatment was not specifically for an injury, and after several treatments the symptoms went away, and they have not had to go back since. So, they answer “no” to the insurance adjuster’s question. It later turns out that the insurance adjuster not only finds out about the chiropractic treatment, but asserts that they concealed this treatment. While there is a technical distinction between

treatment for a neck injury and treatment for a neck condition, most jurors will think they tried to conceal information.

So, before you decide to discuss your case with the insurance adjuster you ought to give careful consideration to the difficulties you will face without legal counsel. It is easy to get confused and say the wrong thing when the insurance adjuster is firing questions at you and you feel the sense of urgency to answer each one, hoping your responses will satisfy the insurance adjuster. Take my word for it, the insurance adjuster is laying traps for you to fall into and will allow you to hang yourself if you are not very careful. Don't conceal information about the claim.

#### #4: DON'T EXAGGERATE YOUR DAMAGES

Suppose you are standing in line at the customer service counter at a large department store. The product you bought just didn't work well, and you wanted to get a refund. The person in front of you is arguing with the management on another return and you start to get anxious, that is more anxious than you already are. Even though the product you bought could have worked for someone else, it didn't work for you. But you have already taken the product out of the box, and after all efforts to put it back in the same way you bought it, it doesn't look like a new package anymore. So, you start thinking of every reason the product didn't work for you -- just in case the management doesn't like your first reason for wanting to return the product.

Well, if you are the type of person that doesn't like this type of confrontation, you are going to feel a lot more nervous when the insurance adjuster calls to have a "chat" about the cause of the fatality and damages suffered by the beneficiaries. Sure, you want to tell the truth, but you also want the estate to receive just compensation, and the questions that are asked make you

feel uncomfortable (if not intimidated). If you try to play the damages down, like a lot of people do, you will not be taken seriously. But, on the other hand, if you exaggerate any of your damages, you will be labeled as a faker or money-grubber. Of course, it is best to consult an attorney before you speak with an insurance adjuster. Don't exaggerate your damages -- that is just another form of lying.

#### #5: DON'T GIVE A RECORDED STATEMENT

We have all watched the news programs that tell of the latest investigations or indictments for wrongdoing. Have you noticed how many times the newscaster stated that the accused or involved party was unavailable for comment, or they have no comment? Well, there's a good reason for this -- they don't have all the information and they know that if they say something wrong, it will be used against them. I have previously explained the hidden dangers of giving a recorded statement to an insurance adjuster. There are times when giving a recorded statement to an adjuster may be in your best interest, but only an experienced lawyer will know when to do so. Don't give a recorded statement without counsel.

#### #6: DON'T SIGN A MEDICAL RELEASE

When your loved one is fatally injured in a traumatic event, which was not their fault, they are generally viewed in the eyes of the law as a victim. They should be compensated as a victim. The insurance adjuster, however, doesn't view them as a victim, but as a claimant, a money-grubber (someone who is motivated to get something they don't deserve). The more the insurance adjusters cheat the estate out of a recovery, the more applause and promotions they receive. When you are told that the estate won't get any recovery until you sign a medical release, you feel like you don't have any choice in the matter. But when you sign

the medical release, you are providing the insurance company, which is against you, a powerful tool to discredit your fatal injury claim. I have seen this scenario work out hundreds of times. The motivation of the insurance company to get any record that can be used to disprove or minimize your fatal injury claim. You have to ask yourself whether giving the insurance adjuster access to your family member's medical history is necessary and wise. Don't sign a medical release authorization without legal counsel's advice.

### #7: DON'T REPRESENT THE ESTATE YOURSELF

There is a common saying in the practice of law, "Don't hire yourself to act as your own lawyer." The reason for this is that the client lacks objectivity. Objectivity means that you can analyze the law correctly and evaluate the facts of the case in a neutral way. That way you are not overlooking a key weakness in your case. I have known many who represented themselves, and even filed their own lawsuits, but in the end finally come around to the obvious need to have a professional oversee and handle their legal matters. If you had a common cold, you would likely go to the local grocery store and buy some cold medicine. But if you had a severe laceration on the leg, you wouldn't likely stitch your leg. Many people try to represent themselves because they think it will be like treating a common cold. By the time they realize that a professional is needed, a lot of damage to their claim has already occurred. Don't represent the estate yourself.

### #8: DON'T HIRE THE WRONG LAWYER

By now you know that handling your own fatal injury claim has many significant challenges, and you have come to the conclusion that hiring a lawyer is the best decision for you. As I pointed out in chapter two, not every lawyer who takes personal injury cases has the necessary experience to provide excellent representation.

There are plenty of average lawyers who are looking for quick answers to solve their client's complex problems, because they don't have the experience and knowledge to answer their own questions. Hiring an inexperienced, but well-intended lawyer, to handle your case will be no substitute for an experienced lawyer with a thorough knowledge of complex personal injury law, and trials and appeals. And, if you expect to collect any money from the insurance company, you had better hire a lawyer that knows insurance law inside and out. Without question, having no lawyer is a worse mistake than hiring an inexperienced lawyer. But since you are wisely choosing to hire a lawyer, hire a good one. Don't hire the wrong lawyer for your case.

### #9: DON'T JUST "DO NOTHING"

Last, but not least, the ninth way of ruining your fatal injury claim is to be undecided about what to do. That's right. Just sit on the fence post in a perpetual state of indecision. This often resembles "doing nothing" about your claim. The problem is that "doing nothing" is actually "doing something" after all, but not the "something" that will help your case. While you wait week after week, month after month, the clock is ticking on the statute of limitations on your claim, witnesses vital to your claim are not interviewed and move out of the area, evidence about the collision is destroyed, the police officer can't remember the collision anymore, and a whole host of other negative things happen to your claim while you are making no decisions.

So, as it turns out, waiting around for things to get better on their own actually worsens the situation. Many individuals, though, have difficulty taking the first step to meet with a lawyer. The insurance industry and big business have teamed up to advance a negative view of personal injury lawyers. Pejorative names like "sharks" and "ambulance chasers" are commonly used by

insurance adjusters and the insurance industry. But when you have been helped by a good lawyer, your view about lawyers will change. A lot of people find out that lawyers do a lot to help their local communities over and above providing legal services for individuals who have been injured. Take the step to make the phone call to schedule the free consultation with a competent personal injury lawyer. You'll be glad you did.

Don't just "do nothing" about your claim -- instead, hire the right lawyer.

## Conclusion

The purpose of this guide is to educate you on the basic facts that you must know in order to achieve the best result possible regarding your fatal injury claim. Your family member was not able to avoid the circumstances that caused their fatal injuries, but you can avoid the unnecessary pitfalls of dealing with the insurance adjusters who are motivated and trained to devalue your claim, if not destroy it altogether.

It would be my pleasure to be of further assistance to you by speaking with you personally about your fatal injury claim. You may call my law office at 1-304-594-1800, or reach me by email at [jrobinette@labs.net](mailto:jrobinette@labs.net), or text at 1-304-216-6695. You may also visit my law firm's web site at <http://www.robinettelaw.com>.

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