

Disabling Myths Debunked!

By Richard G. Halpern

In his final book, the late scientist Carl Sagan brilliantly dismantled popular myths and superstitions that impede human progress. Personal injury litigation is also bedeviled by disabling myths, long-held misconceptions passed down from lawyer to lawyer without critical examination. There are many that lurk in the plaintiff's attorney's subconscious, subtly (or not so subtly) undermining effectiveness and success.

We now vanquish two such myths, with pleasure.

Standing in for Dr. Sagan is Halpern Group President Richard G. Halpern.

Myth #1.

The plaintiff must make a demand before the defense can make an offer.

Halpern: Where is this written? Yes, it's true some states require an official "demand" as part of initial pleadings, but that's just a number. The defense likes to perpetuate this myth as an extension of the maxim "my wallet, my rules." Well, the plaintiff's claim is a financial asset, and "my asset, my rules" sounds good to me. When you get right down to it, "demand before offer" is just a tradition, one that I'm confident was dreamed up by a claims rep. Whoever goes first in the negotiating process risks ceding control over the whole process to the other side. A bad idea. It's an especially bad idea for the plaintiff, because withholding the demand for as long as possible has great tactical value.

Remember, the defense has to justify its expenditures on a particular case, and the plaintiff's demand is what is used to do that. The defense is slower to approve litigation costs than the plaintiff, who can generally execute discovery more quickly and has more flexibility in developing the case. Mounting expenses without a demand to support it places terrible pressure on the defense. Give them a demand and you're doing them a favor. Hold back, and just watch: they'll beg for a demand, and usually will resort to an offer if they don't get one. And the plaintiff has won Round One.

Myth #2.

It is easier to get a fair settlement before the complaint than after.

Halpern: Baloney. This is wrong because it counters basic truths of human nature.

There are two primary motivations: the desire to achieve the satisfaction of a presently unfulfilled need, and the desire to maintain the fulfillment of a presently satisfied need. Or in short, "Getting it, and keeping it." At the beginning of litigation, the motivations stack up this way. The defendant has money (a presently satisfied need) and wants to keep it. The plaintiff requires money for redress (a presently unfulfilled need). Prior to the filing of the plaintiff's complaint, the defendant's fulfilled need has not been threatened. There is no motivation to make a fair settlement offer.

I'm not Oliver Stone, but this myth, like the previous one, must have been cooked up and spread by the claims community, because it certainly serves its objectives. Think about it: no claim, no litigation; no litigation, no expenditures. No threat of trial, no justice. Prior to the complaint, time is the enemy of the plaintiff, who is suffering damages without redress. If sufficient time is allowed to pass, the pressure on the plaintiff can lead to plaintiff-control problems for counsel, and detrimental decisions. With a timely complaint, however, time becomes the enemy of the defense, and the looming trial becomes a threat to the defense's presently satisfied need. Then is when you are most likely to get a fair settlement offer.