

## **I Love a Petard**

*By Richard G. Halpern*

**Petards, for those of you who have forgotten your medieval history, were explosive devices that had a tendency to blow up the very people who tried to use them on their enemies. Seeing this happen to an adversary was especially satisfying, and thus there is special glee in discovering that a favorite weapon of the claims community in bygone days is now a useful device for the plaintiff's attorney who wants to light a fuse under the defense.**

This petard is the release tactic. Years ago, before fuzzy-cheeked whippersnappers became the norm rather than the exception in claims offices, when a grizzled veteran of the claims wars decided that negotiations on a lawsuit had gone far enough, he would send a check and a release to plaintiff's counsel. This, he knew, would create an immediate dilemma. Even though the check was for less than the demand, it was for more than the last offer. Suddenly plaintiff's counsel had to balance an immediate check in hand against the uncertain verdict in the bush. Once counsel showed his client the check, representing a certain and immediate pay-off, the uncertain future payoff seemed less inviting. Most plaintiffs took the check.

Well, this tactic is even more effective when employed against the claims community. At the point when negotiations seem to have stalled, plaintiff's counsel sends a signed, witnessed and notarized release to the claims representative, requiring only a check to complete the transaction. The tables have now turned. Faced with the insurance company's imperative to protect its flanks and settle cases, the claims rep is placed under terrible pressure to take the release. Usually they do: certainly they have in the vast majority of cases in which the Halpern Group has used the release tactic

The beauty of the release is that it has all the force of a "take it or leave it" final offer, but avoids the disadvantages of that intemperate approach. If it is turned down, your bluff hasn't been called: you can continue negotiating. But the release creates pressure similar to a "take it or leave it"... some measure of closure, of agreement, is within reach, but might never return if rejected. And unlike a stated ultimatum, the release avoids stirring up resentment and defensive recalcitrance.

The release tactic works in cases of all sizes, but remember, it is an end game maneuver. It should never be used for posturing: if you send the release, you should feel that it is likely to be signed. This means that the figure is your bottom-line reasonable amount of damages, and probably slightly below the verdict range. After all, if the defense feels it can do just as well losing in trial, it might decide to roll the dice. Use the release tactic when you are looking for fair value, and you suspect the claims rep will know it's fair. If you get greedy, the tactic will fail.

The release is especially effective in settlement conferences delivered in judge's chambers. The judge will smile at the prospect of clearing the docket, only increasing the pressure on the defense. In mediation, use the release as a momentum change just as you're ready to snap your briefcase and leave. Be cool...bravado here undermines your purpose. Let the release do all the talking.

There are two more points to keep in mind. Make sure your release includes a deadline clause, which states that if the check for the specific amount is not received by 12:00 noon on a date certain (make it 14 days from receipt), the release is null and void. And if confidentiality is an issue in the case, include a confidentiality clause in the release. If you don't, you're giving the claims rep an easy out, and a built-in alibi if he's questioned about why he turned down a sure thing.

**Remember, never say that the release represents your final demand. Like any good petard, your release will have the last word more often than not: Boom.**