

Know Thine Enemy!
"Know thine enemy as thyself." -- Sun Tsu, The Art of War

By Richard G. Halpern

It's a familiar piece of wisdom that few would dispute. But through a quirk in human nature, most of us tend toward a serious error in following this dictum. All too often, we mistake knowing ourselves --our motivations, our needs, our values -- for truly knowing our enemies. We tend to assume that our adversaries are like us in basic ways, and plan our strategies accordingly. "What would I do, in this situation?" we often ponder.

This is, I suspect, a genetically-coded feature of human nature, and generally a useful one. It allows us to trust others, to be sensitive to people's feelings. It makes empathy possible; indeed, without this trait, human interaction would be a pretty miserable experience.

But when it comes to negotiating a settlement on behalf of an injured victim, attributing your motivations to your defense adversary is a prescription for disaster. It is not only critical to "know thine enemy"... it is critical to understand that the enemy is not like "thyself" when it comes to negotiation objectives.

As plaintiff's counsel, you want as large a settlement as possible for your client, but you will be satisfied with a fair settlement. In most cases, so will your client: once a fair offer is on the table, the plaintiff may not permit counsel to push for more. Thus plaintiff and counsel often enter settlement negotiations assuming that the objective on both sides is to reach a "fair settlement."

This is invariably *wrong*.

The objective of the defense is to get the settlement below fair, and to place relentless pressure on the vulnerable plaintiff until an inferior offer is accepted. Remember, "fair," for the defense, is not a victory but a loss. The defense's rhetoric is intended to lull you into believing otherwise, but this is a fact. Thus the defense is prepared to avoid fair by manipulating the victim's emotions.

The plaintiff has been through hell, and is desperate to get some relief. Anxiety and hopes peak as a settlement conference nears, and then, when the defense offers a pittance, despair sets in. This is exactly as the other side has planned it. With the next upward move in the offer, the plaintiff's emotions soar again. The defense well understands that this particular roller-coaster ride takes a tremendous cumulative toll. Unless you have prepared your client for this strategy to make him settle for less than fair, he is vulnerable.

No aspect of settlement negotiation illustrates the danger of imputing your motivations to those of your opponent more than the question, "What does your client need?" When the defense asks this, watch out! Unless you "know thine enemy," it is a potent trap, an invitation to what I call "needs-based negotiation."

You indeed are seeking what your client needs, for what your client needs is a fair and just settlement. The other side has no interest in what your client needs --zero. But it has a great deal of interest in getting you to commit to a figure. The defense team comes to the table with a specific amount of money allocated for settlement. There may be more they can offer if it becomes necessary, but there is always an absolute limitation on how far they will go. Do you suppose that concern, appreciation or even analysis of the injured plaintiff's likely needs has anything to do with the setting of that figure? Of course it does not. The figure is the product of business, financial and tactical calculations, involving the company's risk in trial, its available resources for this and all its other claims, and other long and short term calculations, such as possible precedent value of the case to future plaintiffs.

But your answer to the "need" question is critical to them. If the total cost of the needs you present is within the allocated funds, there will probably be an agreement on a settlement figure in relatively short order. If the figure is outside the allotment, the defense will reject it and begin chopping away at your assessment of the plaintiff's needs. Whatever plaintiff's counsel's reply to the need question, the defense wins. Either it settles the case for a figure it has determined to be acceptable from a business perspective, or it has successfully shifted focus in negotiations to your plaintiff's "needs."

This shift always benefits the defense. For one thing, you are diverting attention away from issues of general damages, such as physical pain and emotional suffering. These are the factors that can produce the largest jury awards, and because the defense has difficulty predicting their impact, it is in the defendant's interest to reduce their role. Needs-based negotiation places focus on only part of the plaintiff's case --special damages. In reality, the defense already knows those needs through the life care plan, the medical expert reports, and the economic loss study -- all provided to your adversary in advance of the negotiation.

The defense has used the answer to the need question to set a ceiling on the settlement, a ceiling that it will methodically lower if it can. The irony is that your client's long term needs cannot be so neatly defined: what an injured plaintiff needs is to know that he or she will never have a financial problem in the future. If you allow the defense to set a ceiling now based on your answer to the need question, you may have ensured that your plaintiff's true needs will never be met.

Know thine enemy. When the defense asks "What does your client need," banish the thought that this demonstrates any interest in the plaintiff's welfare. Remember the mindset of your adversary.

"Why is that relevant to our settlement discussion?" you could respond. The defense may then say, "Well, it is our desire and objective to satisfy your client's needs," which gives you the opportunity to ask, pointedly, "If my client's needs surpass the amount of coverage available, are you going to pay for them anyway?" This question may surprise the defense, leading them to blurt out, "Well, no, we will only pay up to a certain limit," to which you should respond, "Well, if you are not going to pay for my client's needs if they surpass the policy limit, then why should I bother answering the question? It is not relevant to these discussions."

Another thing you must understand about your enemy: good faith, or the lack of it. You are making a good faith attempt to settle the case, and assume your adversary is as well. Once again, your friendly genetic coding has set you up for a fall. Think about it: Is it logical to assume that the defense is negotiating in good faith? Have they not victimized your client with useless motions and frivolous discovery requests, all designed to create delays so that the plaintiff's physical and financial plight begins to undermine his ability to hold out for a fair settlement? How frequently, do you think, is the defense convinced that justice dictates these tactics?

True: the defense is not negotiating in bad faith 100% of the time. But you cannot afford to assume that your approach to negotiation is being shared, for most of the time, in my experience, it is not. Your current case may be one of those times.

"Know thine enemy," in the context of settlement negotiation, means understanding the mindset, history, motivations, and decision-making process of the other side. To do this, you must understand that you are not negotiating against another attorney. Much of the time your attorney adversary is all but removed from the decision-making process--a messenger rather than a decision-maker. Defense counsel may be kept in the dark regarding considerations that are key to defense decisions, decisions that are made far away from the site of negotiations in the offices of the claims carrier. Justice, fairness, compassion, concern for the long term interests of the injured: these factors simply are not likely to be part of the equation, and if you think they are, you will be out-manuevered.

Your enemy is concerned about one thing: profit. Its calculations are aimed at maximizing long and short term business returns, minimizing risk, and optimizing opportunities for profit. Every proposal, every tactic, is in some way linked to these objectives.

The defense is different from you. Understand those differences, and base your strategy accordingly. And when someone on the other side of the table says, "Hey, we're interested in the same thing you are," just remember:

They're *not*.