

Needs-based negotiation: The Case for Arachnophobia

By Richard G. Halpern

"Come into my parlor', said the spider to the fly." This beginning of an old nursery rhyme has taught generations of children that the acceptance of some appealing invitations may be the first step toward disaster.

But now that we are older, wiser, and perhaps even trial lawyers, some of us may think that we can ignore the basic lessons of our youth. Don't believe it. For a modern recasting of the tale of the hospitable arachnid might begin, "Just tell me your client's needs, said defense counsel to plaintiff's counsel." A plaintiff's counsel who responds positively to this invitation to a needs-based negotiation may be unwittingly serving his or her case up as lunch for the defense. **Remember:** the defense team comes to negotiation with a certain amount of money allocated for settlement. True, there may be more that they can put on the table if necessary, but there is always a limitation on how far they will go. The existence of this limit means that a needs-based demand from the plaintiff will have one of two results. When the total cost of the needs plaintiff's counsel presents is within the allotted funds, the defense will agree to that sum. If it is not, the defense will reject the offer and begin challenging the plaintiff's assessment of needs. This is a lose-lose proposition for the plaintiff, because the needs-based demand only results in a settlement if it is low enough to please the defense. To grasp the full impact of agreeing to a needs-based negotiation, the savvy plaintiff's attorney must understand how the defense determines what it will pay in settlement. There are two components of the defense's calculations. The first is the probable verdict range should the case go to trial. The second includes considerations not directly related to the verdict, but having impact on the defendant. These non-verdict considerations loom especially large with defendants who are self-insured. The defense assesses the probable verdict range by considering: the likely liability allocation between a defendant and plaintiff; issues of special damages like medical, life care and wage loss; the relative talents and reputations of opposing counsel; the probable jury appeal of the plaintiff, plaintiff's counsel and plaintiff's experts; and finally, general damages, such as physical pain and emotional suffering. Non-verdict considerations of the defendant include: the limits of the policy, which defines an insurance company's responsibilities to the defendant; the exposure of the insured defendant beyond the policy limits; the instructions of the insured, such as in a policy limits case where an insured wishes to settle; and whether or not there are any legal issues in the case that, if tried, could create a precedent that would benefit future plaintiffs. **The alert reader will have noticed that "the plaintiff's needs" appear nowhere in this overview of the factors which govern what the defendant will agree to pay in settlement.** When you let the defense persuade you to bring the plaintiff's needs into the negotiation, what you are really doing is serving the defense's needs, in several ways. 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. Once you have framed the negotiation in terms of need, the defense will attempt to satisfy your client's needs by proposing a structured settlement. Since they have to make a little look like a lot, they're going to attempt to "satisfy your client's needs" by quoting the most competitive carrier available for the annuity, rather than the safest. Now this may expose your client to maximum risk of commercial failure, but that's not the defense's problem. And with your client's needs addressed by a structured settlement, the cost to the defendant is far below the present value of the plaintiff's injuries indicated by your life care planner's and economist's reports. The defense request for a needs-based negotiation would seem to imply that there is some genuine desire to satisfy the needs of your client. But the opposite is true. This approach results in such a totally inflexible mode of settlement that the realities of your client's future condition are virtually ignored. For regardless of the nature of the emergency, you cannot invade a structured settlement in the future. It is totally inflexible. Any type of settlement that is supposedly based on needs, and that is simultaneously based on a fixed and determinable future income stream is a contradiction in terms. Future needs are difficult to predict in the present, and thus one of the

elements you must achieve in settling your case is the flexibility to fulfill the injured party's future needs that may be unforeseeable. The rigid structured settlement is truly the web that can entangle a plaintiff whose counsel accepts the defense spider's hospitality. How do you best decline the spider's entreaty to enter into a needs-based negotiation? There are many good responses. When asked to tell the defense your client's needs, you can ask "Why is that relevant to our settlement discussions?" 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 will often confuse 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, even if they surpass the policy limit, then why should I bother answering the question? It is not relevant to these discussions." **Other effective responses to an invitation into the needs-based "parlor" include:**

* "My client needs not to have been a victim of your client's negligence." "My client needs to have his lifestyle restored to the way it was before your client's negligent act." "My client needs to never have had the acute physical pain that she has endured all this time." "My client needs to never have had to endure the acute emotional suffering that resulted from your client's negligence."

* "My client's needs are well known to you from all of my experts' reports. If you have an offer to make, why not make it?"

The rhyme from your childhood can still serve you well if it reminds you to treat needs-based negotiation as a trap baited by the defense.

When the spider wants you in the parlor, it's time to spin a web of your own.