

## The Dominant Thought

by  
Richard  
Halpern



## The Distortion and Destruction of ADR

### A grim fairy tale

Once upon a time, in a fabulous land called the United States of McPherson, there existed a fair and functional civil justice system.

The ultimate forum to resolve conflicts was called trial by jury. But in McPherson, there were alternatives before one reached the marvelous trial. These alternative forms of dispute resolution were called, interestingly, forms of alternative dispute resolution (ADR). And, the wise leaders of McPherson determined that it would be good to have three different forms.

In each conflict, the participants first attempted resolution by the alternative known as negotiation. The two sides came together with their representatives and presented their thoughts, perspectives and positions. Then they tried to develop a solution to the dispute.

But sometimes the participants were very angry about their conflict, and then negotiation didn't work. In these cases, where negotiation had brought the sides closer together but they couldn't quite agree, they went on to the next step of ADR, called mediation.

Mediation was generally most helpful following negotiation, because the sides had already aired their grievances and positions, and had already defined the parameters of a settlement. So the job of the mediator had nothing to do with justice, but only with bringing the

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## NOW: THE HALPERN GROUP!

Richard G. Halpern announced recently that his company, Richard G. Halpern Associates, has become The Halpern Group.

"The change isn't just cosmetic; it represents a very significant evolution in our business," explains Halpern, who founded the company in 1973.

"We want to expand our services, we want to be able to help more attorneys, and we want to increase the plaintiff's bar's understanding of what we can do for them. That requires a coordinated team approach, and a lot of specific expertise in addition to my own.

For the past 16 years, Halpern's primary associate has been Vice President **Risa Lower**, who has concentrated on structured settlement analysis, the coordination and implementation of negotiation strategies, and the administration of various settlement options.

New to The Halpern Group is **Steven Siegel**, a Harvard Law School graduate and "one of the most astute and talented tax experts I've ever worked with," according to Halpern (who has worked with many). Siegel is a new Halpern Group vice president, as is **Jack Marshall**, who is in charge of marketing and business development and also serves as general counsel. Also an attorney, Marshall for many years oversaw the development of member services for the Association of Trial Lawyers of America.



The Halpern Group

"When you're a unique business, it's sometimes very hard to explain to people what you do," says Halpern. "Our function is to provide the plaintiff's attorney exactly the kind of support, expertise, advice and strategic assistance that insurance companies routinely provide to the defense attorney. We balance the odds, and then some, because we know what to expect from them, but the defense never knows what to expect from us.

"It's been very frustrating to know that there are so many attorneys we could help get a better settlement for their clients, and who are still unaware of our abilities. I decided that we were obligated to reach out and make ourselves known, and also to make it known that there was a lot more to this company than Rich Halpern.

"I think The Halpern Group is going to make a lot of attorneys wonder why they didn't call us a long time ago."

### QUESTIONS? COMMENTS? SUGGESTED TOPICS?

**The Settlement Strategist** is designed to help you, the plaintiff's attorney, in areas where The Halpern Group has special expertise: case strategy; negotiation; alternative dispute resolution; and financial settlement options.

Let us know what information, issues, or topics you'd like to see in the newsletter, and we'll try to oblige. Call Jack Marshall at 1-800-524-1637 with your suggestions, or write The Halpern Group, 505 Morris Avenue, Springfield, New Jersey 07081. (Fax 201-379-3763)

## UNSOLVED MYSTERIES:

### What Are the Top Ten Negotiation Blunders, And How Can You Stop Making Them?

Only about 5% of all civil suits are settled by going to trial. That dynamic 5% gives attorneys a chance to use all the skills they may have developed in law school clinical programs, but therein dwells an irony: nothing you are likely to have studied in preparing for a legal career gives you background in the one skill central to success in the other 95% of your cases.

The missing skill?

Negotiation. It is something many of us pick up as we wander through the marketplace of life, as we buy cars or agree on nuclear non-proliferation treaties. We probably don't take courses in negotiation, except from Hard Knocks U., and most of us can only gauge our proficiency in it by assessing whether our negotiation efforts are successful (whatever that means).

The Halpern Group is preparing a pamphlet on the Top Ten Negotiation Blunders by plaintiff's counsel in settlement conferences, and this newsletter will periodically expand on one of them. There is a problem, however: the search for these gaffes uncovered 28 blunders, not ten. So, we invite readers to assist us in making the final choices: which of the 28 negotiation errors listed below have you committed recently? Which ones don't sound like errors? (That's a dead give-away.) And which ones do you not understand?

It's a useful checklist for you, and valuable information for us. Either check off your top ten and send it to us, or drop us a note or fax (201-379-3763) with the numbers you've selected. And if you can't wait to find out how to avoid one of the blunders listed, just call The Halpern Group 800 number, and ask Rich Halpern. It's one of his favorite topics.

So here, for the first time (not in order of priority!), is the list of Plaintiff's Attorneys' Top Twenty-Eight Negotiation Blunders:

1. Failing to Recognize the Proper Function of the Claims Community
2. Failing to Utilize the Power of Indifference"
3. Rebutting the Defense Position in Settlement Conferences
4. Treating "Pain and Suffering" as One Element of Loss
5. Allowing the Defense to "Trap" You into a "Needs Based" Negotiation
6. Attempting to Negotiate a Structured Settlement
7. Making a Settlement Demand Prematurely
8. Not Knowing When or How to Withdraw Your Demand
9. Making Unrealistic Settlement Demands
10. Misusing Verdict Data-Bases in Case Valuation
11. Staying at the Negotiating Table Too Long
12. Leaving the Settlement Conference Prematurely
13. Negotiating with a Time Limitation
14. Making Inappropriate Time Limit Demands
15. Allowing Yourself to be "Double-Bracketed"
16. Failing to Capitalize on Dramatic Events
17. Failing to Create and Maintain Credibility
18. Talking When You Should Be Listening
19. Taking "Absolute" Positions
20. Inadequate Presentation of General Damages
21. Painting Yourself Into a Corner
22. Focusing on What You Wish to Say Instead of What Is Being Said
23. Failing to Understand the Psychology of Negotiation
24. Failing to Understand Human Motivation
25. Agreeing to Mediation or Arbitration Before Having Tried Negotiation
26. Failing to "Paper" Your Adversary's File
27. Getting a Reputation for "Trial Reluctance"
28. Erroneous Mindset: "What Are They Going to Give Me?" versus "Release for Sale!"

## DEATH, TAXES, AND THE SUCCESSFUL PLAINTIFF

by *Steven Siegel*

Plaintiff's attorneys usually do not lose much sleep over the tax consequences to their clients of damages for personal injuries. The Internal Revenue Code is uncharacteristically friendly to victims of injury, excluding the money received as the result of a verdict or settlement from that most dreaded of all figures: taxable gross income.

So when a plaintiff receives a case verdict or settlement, the attorney typically collects his or her fee and arranges for the balance to go right to the plaintiff, tax free. No messy W-2, K-1, 1099, or H&R Block needed here: this income doesn't require reporting.

Similarly, periodic payments in properly set up structured settlements: require no tribute to Uncle Sam. Lump sums or periodic payments; it doesn't matter. That's why periodic payment plans are useful to avoid taxation on what might otherwise look like investment income to the IRS.

But any good cynic knows there must be a cloud to this silver lining, and there is: the deadly duo of the tax collector and the Grim Reaper -- death taxes. At his or her death, every citizen or resident of the U.S. is subject to an estate tax. And the decedent's estate includes the value of all property and assets-- including the value of an annuity or other payment which the beneficiaries of the dearly departed may receive in the future.

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**"It happens all the time: a settlement structure turning into a nightmare..."**

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Accordingly, when a plaintiff participates in a structured settlement and dies before receiving all the guaranteed payments, the current value of the payments due is included in the plaintiff's estate for federal tax purposes. It is added to all the other assets owned by the plaintiff, such as homes, bank accounts, insurance policies, and investments, and \$600,000 of the total is excluded from the tax. Everything over that amount is subject to federal estate I tax rates ranging from 37% to 55%.

This is a big hit by itself, but it's even worse than that. The tax is due within nine months of death! If the estate has assets other than the balance due on the structure, the family must use

**The Settlement Strategist** is a newsletter published by The Halpern Group, and is dedicated to providing information and inspiration to the plaintiff's bar.

Subscriptions are free of charge to all plaintiff's attorneys and their staffs. To receive future issues, contact Jack Marshall, Editor, **The Settlement Strategist**, at 1-800-524-1637.

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them to satisfy the estate tax liability. As a result, a plaintiff's family may be deprived of a substantial chunk of its current liquid assets; and if there are insufficient assets available to cover the tax, then the IRS can take all of each year's periodic payment as it is received -- plus interest!! This isn't some worst-case hypothetical. It happens all the time: a settlement structure turning into a nightmare for the very people it was designed to help.

This problem, like most, has solutions, but only if you anticipate it.

First, you may be able to plan the estate so that taxable assets do not amount to \$600,000 even when the value of the structured settlement is included. But assuming that that's not an option, the best solution is to give the plaintiff more control over the cash. And that means finding an alternative to traditional structured settlements.

Fortunately, there is such a beast: call it the settlement fund management trust.

The plaintiff can directly control the funds, of course, and plan his or her estate to minimize death tax obligations. Even if their obligations cannot be eliminated entirely, the family would still have the funds immediately available to satisfy whatever tax liabilities might arise. But direct control by the plaintiff means that the income collected could be taxable at income tax rates of nearly 40 percent, so better still is for the plaintiff to assign the funds to a trustee. The trustee may then invest the funds in tax-exempt securities that will deliver tax-exempt income like a structure, and, at the same time, be sensitive to interest rate fluctuations.

Now the family is protected. The plaintiff has reaped the benefits of a ii. structure (safety and tax free periodic payments), and by retaining some control over the money, has both permitted estate planning to take place and protected the family against death tax liability problems.

Nothing is certain but death and taxes, but a good plaintiff's attorney can do a lot to protect clients against the worst consequences of both.

## IT'S NOT TOO LATE...

If you want your clients to get the benefit of The Halpern Group's Settlement Fund Management Trust ©, but you already put them in a traditional annuity-based structure, don't despair: a new program permits you to apply this versatile option to existing structures.

To find out how, call The Halpern Group at 1-800-524-1631.

## Direct Examination

### "The Settlement Fund Management Trust"

["Direct Examination" will be a regular feature of The Settlement Strategist, using a Q&A format to delve into areas of interest to plaintiffs' attorneys. No leading questions, of course.]

**Q**: What is the Settlement Fund Management Trust?

**A**: The Settlement Fund Management Trust is a grantor trust. The plaintiff (or the legal guardian for the plaintiff) gives (or grants) the settlement fund to a trustee, who then manages the plaintiff's financial recovery according to the expressed wishes of the plaintiff. This Trust is designed to provide expert financial management, superior flexibility, unmatched security and maximum benefits to the plaintiff.

**Q**: Is defense cooperation required for the creation of the Trust?

**A**: No. The plaintiff may take his or her cash settlement or verdict award and place all or part of it into a Settlement Fund Management Trust without any cooperation or negotiation with the defense.

**Q**: Who is the trustee of the Settlement Fund Management Trust?

**A**: The trustee is a carefully selected commercial bank experienced in dealing with tort victims.

**Q**: Is there protection against commercial default?

**A**: Yes. The Trust funds are in the hands of a commercial bank acting as trustee. By federal law, these funds are protected against the bank's creditors.

**Q**: How are the Trust funds invested?

**A**: The trustee is generally directed to invest the Trust funds in financial vehicles chosen to best meet the future needs of the plaintiff. Due to the fact that these special plaintiffs have very low risk tolerance levels, the trustee will only consider the safest financial investments available, such as tax-exempt bonds or U.S. government-backed taxable bonds.

**Q**: Does the Trust provide protection against inflation?

**A**: Yes. The ability to move assets from one investment vehicle to another and take advantage of investments at higher yields assures the plaintiff that as interest rates rise, the trustee will be positioned to invest Trust assets in higher yielding vehicles. The trustee can also lock into longer term vehicles at higher interest rates if it appears that interest rates are likely to fall. Unlike annuities, where the plaintiff is locked into the initial rate of return, this Trust allows investment flexibility, and consequently, inflation protection.

**Q**: How are the Trust earnings taxed?

**A**: The initial deposit of settlement funds or verdict award dollars with the Trust is tax-free, since the money has come from a personal injury settlement or verdict. The taxability of future Trust earnings depends upon how the Trust funds are invested. If the trustee invests the funds entirely in tax-exempt vehicles, then the plaintiff will receive Trust income tax-free. Again, the flexibility of the Trust can allow for adjustment of the level of taxation to achieve the optimal result for the plaintiff.

**Q**: Can the Trust be altered, amended or revoked?

**A**: Yes. The Trust can be designed so that a competent plaintiff may alter or amend the terms of the Trust or revoke it at any time if that is desired. This power can, if desired, be limited by making it subject to the prior approval of a court of competent jurisdiction, particularly in cases involving infants and incompetent adults. In this manner, all plaintiffs can be protected against pressures brought on them by third parties or against their own temptations.

**Q**: What services does The Halpern Group provide in connection with the Settlement Fund Management Trust?

**A**: The Halpern Group provides a broad range of valuable services. It arranges substantially discounted trustee fees. It assists with the settlement strategies and negotiations with the defense. It consults on the design and creation of the Trust, and prepares custom-designed specimen Trust documents for review by plaintiffs counsel. It offers ongoing interaction with and advice for plaintiffs and their counsel, as well as ongoing interaction with the trustees.

# The Dominant Thought

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two sides to a point where they were both saying "yes" Often "yes," or the point of compromise, occurred at a fair and just point. (Sometimes it did not.)

When mediation failed, however, the dispute could move toward the next level of alternative dispute resolution: arbitration.

The three forms of ADR recognized in the U.S. of McPherson were so effective that only five percent of all disputes required a trial. This saved the taxpayers a great deal of money and benefited society as whole.

One day, a gnome from the Union of Liability Leprechauns (the ULL) started thinking about the system. The gnome was not interested in justice or anything like that, only in finance. He observed that when the mediation form of ADR was utilized appropriately --as a follow-up to negotiation--the gnome s peers in the ULL generally had to spend more money to resolve the conflict.

"Aha!" thought the gnome, "If mediation became the primary form of ADR and negotiation were eliminated entirely, then we would be able to discover the position of a McPhersonite and still make an inadequate and inferior offer!" ("And," the gnome thought happily, "since we can make our paltry offer through the mediator, the other side won't see us chuckling!")

When the gnome returned home and spoke to his fellow gnomes, his idea was hailed as brilliant. All of a sudden, the citizens of McPherson found that their system of alternative dispute resolution was becoming less and less effective. They had been tricked. Their representatives would agree to mediation as a first step, without negotiation, because the gnomes assured them that they would "come to the table" with sufficient money to settle the dispute. The representatives of the citizens of McPherson assumed that "sufficient money" meant a fair and just result. But the gnomes defined "sufficient money" as sufficient to settle the dispute to their own satisfaction, as determined by their internal decision-making process! It wasn't really a fair offer; just a tactic.

So the clever gnomes couldn't lose! With mediation as a first step, only two results were possible: they could settle the dispute with minimum expense; or they could walk away, never dealing directly with McPhersonite problems or demands, yet still having learned the position of their adversaries!

## RE-INVENTING THE PLAINTIFF'S PRACTICE

In four areas, trial attorneys now have an opportunity to exponentially increase their effectiveness and efficiency. They are:

- computer technology (naturally);
- professional networking in all its forms, including litigation groups, clearinghouses, and electronic bulletin boards;
- forensic sciences and demonstrative evidence; and, our topic:
- "unbundling."

"Huh?" you may ask. Well, "unbundling" is a relatively new term that describes a relatively new approach, at least in the law. It means taking a job that is a bundle" of related functions, and removing from that bundle the tasks that can be done better, faster, and less expensively by specialists, rather than doing them yourself.

For trial attorneys, this requires accepting a revolutionary concept: the days of the whirlwind lawyer who runs the office, attracts clients, develops strategy, finds experts, makes exhibits, negotiates settlements, tries cases and handles appeals, are over. With time at a premium, and most attorneys better at some of these functions than others, the practical way to litigate is contracting with specialists to simultaneously free up the attorney's time to do what he or she does best, and to increase the likelihood of success because each case is handled better.

Today trial attorneys can get superb assistance in many areas that are candidates for unbundling; they include legal research and writing; brief and deposition data bases; demonstrative evidence and exhibits; oral presentation coaching; case strategy; negotiation; and financial planning.

The Halpern Group is part of the unbundling revolution. By unbundling negotiation, for example, our clients find that they are conducting settlement conferences on a whole new level, achieving better results than ever before.

The successful trial lawyer of the future... the very near future... will have working relationships with many firms that will handle segments of the litigation process once thought to be solely the domain of the attorney handling the case. One way The Halpern Group hopes to contribute to the re-invention of the plaintiff's practice is by showing our attorney clients how rewarding the unbundling process can be... for both them and their clients.

But over time, the gnomes started to notice that this change in the sequence of settlement modalities was causing more trials. And this substantially increased the money they had to spend to settle grievances. So even though it was they who had perverted the ADR system, the gnomes decided to pay some McPhersonite legislators to change the "unfair" laws. The wisest McPhersonite saw this sad process for what it was, and gave it a name: "Tort Deform."

The system continued to break down, and the gnomes' calls for change became louder and more insistent. The raging dispute caused two important things to become lost in the debris of rhetoric.

The first was that underlying every grievance was a citizen who had suffered a very substantial injury because of another's negligence. The second was the concept of fairness. In the original system, if someone was found to be guilty of negligence, they were required to pay reparations. They were punished for being negligent. But the rhetoric had twisted the debate to focus on whether the victims of negligence should be

punished for being victims, by the elimination of their rights, and the negligent be rewarded, by having laws granting them Immunity.

The gnomes watched this metamorphosis with glee. They realized that no-body was focusing on the real issues any longer.

In all the confusion, the laws were changed. Negligent parties were absolved of being negligent. Victims lost their rights. Soon, no one bought insurance, for there were no risks left to insure against! Without insurance profits, the ULL ran massive budget deficits, and finally collapsed. Without litigation, the gnomes had no work, and starved.

The Union of Liability Leprechauns and the greedy gnomes became victims of their own evil plot, and the wonderful civil justice system in the United States of McPherson (which changed its name to the "United States of Palsgraf") was gone forever.

### **MORALS:**

1. "If it ain't broke, don't fix it."
2. "Beware of gnomes seeking mediation"