

Summer 1995

## The Dominant Thought



**B**

y:  
*Richard Halpern*

## I LOVE A PETARD

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 plaintiffs 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 plaintiffs 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 plaintiffs 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 payoff, 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, plaintiffs 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

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## NATIONSBANK ALLIES WITH THE HALPERN GROUP

"NationsBank has worked with many financial representatives of tort victims, but when it comes to establishing a formal relationship, The Halpern Group was the only choice."

With that statement, NationsBank Senior Vice President Allen Snook announced that the country's third largest bank was teaming with The Halpern Group to create the first money management system designed specifically for the victims of personal injury.

"There is nothing comparable in the marketplace," explained Halpern Group President Richard Halpern. "These collective trust funds involve no loads~ no redemption charges, and no fees. Mutual funds involve fees for management and administration that add up to an average of 1 percent of assets annually. But most important of all, these new Plaintiff Recovery Management Funds reflect the experience of The Halpern Group in addressing the financial needs of injured victims, and the expertise of NationsBank in managing investments. The funds will be managed with a whole different set of priorities, based on the very special requirements of personal injury plaintiffs."

The new funds respond to a need that has been central to The Halpern Group's work with plaintiff's counsel and their clients over the past 13 years. "When a settlement has to last a lifetime, you can't subject an injured victim to the same kind of investment risks that the average investor will accept," says Risa Lower, Halpern Group vice president. "Money managers, local banks, financial planners -- and especially 'Uncle Harry who's a whiz at the stock market' -- they tend to treat injury settlements like any other investment capital. NationsBank is responding to what we've told our clients all along: security has to be the number one priority. They have experience working with injured plaintiffs, and they have set up the Plaintiff Recovery Management Funds to put that experience--and ours--into practice."

The Halpern Group's experience is put into practice by the Settlement Fund Management Trust, a major breakthrough for the plaintiff's bar developed by Richard Halpern in 1993. The Trust avoids the dangers of unstable annuity issuers and provides investment flexibility... flexibility that is now fully exploited by NationsBank money management techniques. "The NationsBank funds were created specifically to provide a funding vehicle for our Settlement Fund Management Trusts," says Lower. "Our Trusts have a 70% discount on trustee fees, and the Plaintiff Recovery Management Funds have no fees at all. Every attorney owes it to his or her client to at least consider this exciting new option."

## ATTORNEY ALERT

### NEW DEFENSE INSURANCE INDUSTRY POSITION EMERGING CONCERNING STRUCTURED SETTLEMENTS

In the course of The Halpern Group's consulting on plaintiff personal injury cases throughout the United States, we often detect emerging trends in defense negotiation tactics.

The following tactic has surfaced in several cases recently.

At some point in the negotiation of a personal injury settlement, the defense inquires about plaintiff's interest in a structured settlement. Plaintiff's counsel, in response, indicates that the plaintiff may be interested in a structured settlement, and meets with his or her client. Later, plaintiff's counsel advises the defense that the plaintiff is not interested in the structure. Often the structure had been tentatively

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By Steven Siegel

Confused about constructive receipt? If so, you have a lot of company in the plaintiff's bar.

Constructive receipt is the tax law doctrine that says that income is taxed to you before it's actually received if it is credited to you, set aside for you, or made available so you so that you can draw on it at any time. However, there is no constructive receipt of income if your control of it is subject to substantial limitations or restrictions. [Treas. Reg. 1.45 1-2(a)]

This rule has special significance in a structured settlement. If your client settles be a lump sum and provides a release, then later wants to structure, it is too late. ~'our client will have a tax-free receipt of the present value of the U.S. government bond or annuity that funds the settlement, but any interest earned on the bond or annuity is going to be taxable to the plaintiff. A similar result would follow if you obtained a final judgment with all appeal opportunities expired or exhausted, and :hen tried to structure. Again, constructive receipt will have already occurred.

But for the plaintiff's attorney who plans ahead, there is a great deal of time to maneuver within the negotiation process before constructive receipt becomes an issue. If you merely discuss a structure in negotiations, constructive receipt does not apply. If you know how much the defendant will spend on the structure or the cost and present value of the bond or annuity being used to fund the settlement, there is ~o constructive receipt. The IRS has made this clear. [PLR 8333035 and PLR 9017011] As long as you are still negotiating, constructive receipt will not apply.

The key to the settlement process is your agreement to release the defendant in exchange for an acceptable settlement. As you discuss the amount and timing of the payments to be structured, as well as whether U.S. Government Treasury Bonds or annuities Mill be used to fund the structure, you are still negotiating. A mutually acceptable settlement s a condition of the release agreement; without both the settlement and the release, no final agreement has been reached. There is no constructive receipt.

As a trial attorney, you know that representing your client in settlement negotiations requires you to maintain as much control over the situation as you possibly can. You have every right in the course of negotiations -- and perhaps the responsibility -- to demand not only the amount you want to receive for your clients, but also the specific ;settlement product that ensures your client's protection, and even a specific settlement broker that you can be certain will keep your interests and your client's interests in proper focus. It is critical that you have the structure, broker, and tax consequences that are in ,our client's best interests before the release that triggers constructive receipt.

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agreed to, but the plaintiff had a change of heart. Although one might think that there would be no compelling tax or legal reason why the defense should not be willing to just change the settlement to cash, in some cases the defense responds by stating that the plaintiff must take the settlement as previously discussed, or the defense will either file a motion to compel the settlement, or file an action against the plaintiff and plaintiff's counsel for breach of contract!

There are several compelling reasons why the defense might try to force a structure. They may own the life insurance company that is issuing the annuity, thus creating a profit in a subsidiary; they may own a structured settlement brokerage firm, thus earning the 4% general agent's commission on the sale of the annuity; they may have a structured settlement program that requires either compensation to the liabil-

-ity carrier on each case, or an annual flat fee from the structured settlement broker to the liability carrier for the right to structured settlement

In any event, this is a situation to be avoided, and it is relatively easy to do so.

At all times, make it clear, verbally and in writing, that your client has not agreed to a structured settlement until you and your client are absolutely certain, and it is time to reduce the agreement to a formal written settlement agreement and release.

As annuity-based structured settlements have become less popular (due to the well-publicized failures of several major annuity issuers), the defense may be trying to use strong-arm tactics to achieve results that rational evaluation would reject. Keeping all dealings with the defense on a clear, unequivocal, and documented basis was always good practice; it is even more so now.

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majority of cases in which the I-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.

### READERS....

To add your name to The Settlement Strategist mailing list, receive previous issues, or to join the Plaintiff's Counsel Fax Alert Network -- all at no charge to members of the! plaintiff's bar-- just call 1-800-524-1637.

# ADVISING PLAINTIFFS ON FINANCIAL MATTERS: A LAWYER'S DILEMMA

*By Michael Daigneault  
and Stephen Rodman*

*[Michael Daigneault is president and founder of Ethics, Inc., and a lecturer, writer, and teacher in the field of business and legal ethics. Stephen Rodman is a legal researcher and writer. Ethics, Inc. provides consultation as well as In-house and CLE training in legal ethics. Readers interested in more information should call 202-508-9216.]*

Beyond the purely legal scope in which lawyers operate daily, many form such bonds of trust with their clients that they begin acting as financial advisers as well. An attorney is authorized to offer more than just legal advice, and good attorneys create financial tools such as trusts or spendthrift provisions to protect a client. The question is just how far an attorney should go in rendering advice on financial matters.

## The Scope of Advice

An attorney has an affirmative duty to advise a client beyond the narrow legal scope of the law. Rule 2.1 of the ABA's Model Rules of Professional Conduct<sup>2</sup> allows an attorney great latitude in the areas of advice he or she may offer to a client. The Rule states, "In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation.

The Rule makes fairly clear that an attorney should raise both legal and non-legal issues to a client. As the comment to Rule 2.1 states, "A client is entitled to straightforward advice expressing the lawyer's honest assessment." An attorney can, and should, tell a client when a lump sum payment or other type of settlement is not in his or her best interest. In dispensing financial advice, an attorney can go beyond the realm of pure legal matters by suggesting financial conveniences, such as trusts and spendthrift provisions, that may be beneficial to the client. In discussing the structure of a potential settlement, the attorney can recommend certain tools which can be used to protect the client's long term well-being.

Although an attorney can advise a client as to financial options that are available, there is a level of detail involv-

ing finance and investment that attorneys should be careful about entering. The comment to Rule 2.1 states "matters that go beyond strictly legal questions may also be in the domain of another profession.... Where consultation with a professional in another field is itself something a competent lawyer would recommend, the lawyer should make such a recommendation. A competent attorney must know when to step aside and let a financial planner take over. In essence, financial advice offered should flow from and have a reasonable nexus to the legal advice being rendered. For example, it may be prudent for an attorney to defer to a financial adviser in such areas as investment banking and stock investing. When an attorney advises on purely financial matters, the lawyer may believe that the client is looking to him or her for financial advice, whereas the client may believe the attorney to be acting purely as a lawyer and a fiduciary on the legal aspects of a financial transaction.<sup>3</sup> That may present a liability problem.<sup>4</sup> While an attorney can suggest certain financial options, that attorney should refer the client to a financial advisor for advice on the specific, highly technical world of finance and investment.

## Who Decides?

No matter how strongly an attorney believes that a client should seek a long term settlement, there are certain ethical considerations by which that attorney must abide. First the lawyer must always remember that he or she is the agent for the client. Rule 1.2 of the ABA's Model Rules of Professional Conduct states that "A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. Thus even if the attorney disagrees with the client's reasoning, he or she must ultimately comply with the desires of that client. An attorney may advise a client that a settlement offer is not in the client's best interest, but it is the choice of that client whether or not to accept the offer.

In a similar vein, an attorney must inform a client as to any offers for settlement that have been received. In the comments to Rule 1.4 the ABA states "A lawyer who receives from opposing counsel an offer of settlement in a civil controversy..., should promptly inform the client of its substance unless prior discussions with the client have left it

clear that the proposal will be unacceptable. If an attorney receives a settlement offer that does not meet the long term security interests of the client, that settlement offer must still be presented to the client. Withholding such information, even if the attorney believes it to be in the best interests of the client, is a violation for which the attorney can be disciplined.

One course of action an attorney can contemplate when a client refuses to consider long term settlement options is to terminate representation. Rule 1.16 states, "A lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client, or if... a client insists upon pursuing an objective that the lawyer finds repugnant or imprudent. It is possible that an attorney will feel so strongly that only a long-term security settlement can protect his or her client's interests that withdrawal may be the best course - even if the client disagrees. Care should be taken here as some courts do not regard a client's refusal to accept an attorney's advice on settlement options as sufficient enough grounds to withdraw from the case if such withdrawal will prejudice the client.<sup>5</sup> In such circumstances it appears than an attorney who terminates his or her relationship with a client due to disagreements over acceptance or rejection of a settlement may be sanctioned.

## Available Options

So what duty does an attorney owe a client to guarantee his or her long term financial security? Probably nothing beyond the usual scope of advising. It should be noted, though, that during the usual scope of advising, an attorney may have the responsibility of trying to persuade a client to do what is in his or her best interests. In order to fulfill that responsibility, a competent attorney may be compelled to call in a financial advisor.

Possibly the best action an attorney can take is to discuss settlement options early on in the relationship. The attorney should discuss all available options and the repercussions of each option. In many circumstances the earlier the idea of long-term security is mentioned to a client, the greater the likelihood that he or she will accept it. Not only does this help set the scope of future negotiations and the final settlement, but it allows the attorney a possible opportunity to withdraw from the

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## Advising on Financial Matters, Continued from Page 3

relationship early in the relationship so there will not be any material adverse effect on the interests of the client. An attorney should thus raise the issue of long-term security before an offer of settlement is on the table.

If the attorney does not raise the issue of long-term security until after the final settlement, there is less flexibility for both the attorney and the client. An attorney can still raise the possibility of creating a trust or some other financial instrument which will provide a safety net for the client. However, it may be wiser at this point to refer the client to a financial advisor who has expertise in the areas of finance and investment. A financial advisor will probably be able to offer the client a greater degree of flexibility in investment options and it avoids liability for the attorney in making nonprofessional investment decisions. Thus, it is probably easier for a financial planner, and not an attorney, to assist a client once a lump sum settlement is finalized. The attorney can even refer the client to a specific advisor as long as the attorney does not obtain a fee from the financial advisor for the referral.<sup>6</sup>

### The Bottom Line

From an examination of the Model Rules of Professional Conduct, it does not appear that an attorney owes any special duty to a client who appears likely to squander a large settlement. As with any client, an attorney does owe a duty of competence and diligence. That duty may include the responsibility of trying to persuade the client what is in his or her best interests. The attorney

should inform the client as to his or her options prior to settlement, and the attorney should provide any legal, and if so desired, financial advice that other competent attorneys would provide. The attorney also has the option to refer the client to a professional financial advisor for specific advice on investments.

An attorney should never underestimate the incredibly persuasive position he or she holds vis-à-vis a client. The nature of an attorney-client relationship renders a client susceptible to the professional advice dictated by the attorney. The attorney, has the opportunity, and possibly the responsibility, to employ any legitimate rhetorical or persuasive device which will lead the client towards the wisest outcome. Usually, the attorney will be able to convince the client to do the right thing-to act in that client's best long-term interests.

### Footnotes

1. ABA Model Rules of Professional Conduct, Rule 2.1.

2. We have used the ABA Model Rules in our analysis as the vast majority of states now use some version of the Model Rules as the basis of regulating and disciplining members of the bar.

3. See, e.g., In re Pappas, 768 P2d. 1161 (Ariz. 1988). It should be noted that most legal malpractice insurers do not cover recommendations extending to investments, because this is beyond the scope of professional services. See, General Accidents Insurance Co. v. Namesnik, 790 F2d 1397 (CA 9 1986).

4. If the attorney is intent on advising the client on which stocks to purchase or which mutual funds will return the highest yield, he or she should make it clear that the advice is not given in his or her capacity as an attorney.

5. See, Imhoff v. Hammer, 305 A2d 325 (Del. 1973)

6. If the attorney retains a fee for the referral, it may be deemed a partnership between legal and non-legal professionals and thus subject to different rules. See, ABA Model Rules of Professional Conduct, Rules 5.4, 5.7.

## **ABOUT THE HALPERN GROUP**

The Halpern Group consults to plaintiffs' counsel in three major areas: case strategy, settlement negotiations, and financial settlement options, including structured settlements. All Halpern Group services focus on obtaining a fair and just settlement, without resorting to trial, that ensures the long term welfare and security of the injured plaintiff.

Halpern Group founder and president Richard Halpern is a long time teacher, lecturer, and practitioner in settlement negotiation techniques, and is also widely recognized as one of the country's foremost authorities on the financial and practical aspects of structured settlements.

It is most appropriate to use The Halpern Group in problem cases, cases involving substantial damages, class actions, and cases where the plaintiffs long term financial needs require careful planning. In general, it is useful to think of The Halpern Group as providing the same support to plaintiffs' counsel that the defense routinely receives from the liability carrier or corporate risk-management personnel.

The Halpern Group will not accept a case unless it believes that its efforts will make a difference. If you have questions about how The Halpern Group might assist in one of your cases, call Jack Marshall or Risa Lower at 1-800-524-1631.