

ONLINE!

The Halpern Group will unveil its new Web Site on August 1, 1996.

"This has been in the works for a long time," explains Vice President Risa Lower. "So much of what The Halpern Group does involves informing the plaintiff's bar about opportunities, products, and strategies that can benefit their injured clients, and the Web Site seemed to be the perfect vehicle to improve the information flow."

The site was designed by consultant Lauren Larson, who formerly ran ATLA's database research service, The Exchange, and who had a primary hand in designing both its databases.

"Our essential commitment is to continuously update new critical and state of the art information for the plaintiff's trial bar," says Lower. "This is going to be a living Web Site. Settlement for injured plaintiffs is a dynamic field, so there will be no problem finding plenty of new information to put on-line on a regular basis."

The Web Site will include seven major categories:

Contact The Halpern Group Online!

Web Page:
www.halperngroup.com

E-Mail Address:
info@halperngroup.com

- Information about The Halpern Group and the expertise of the staff.
- How and when to use Halpern Group products and services.
- Litigation on class actions and mass torts.
- Products, structured settlements, and settlement alternatives.
- News releases and special alerts.
- Articles, white papers, and The Settlement Strategist.
- Settlement negotiation and strategic services.

"The combination of this new resource, *The Settlement Strategist*, and our Fax Alert Network should make it easier than ever for plaintiff's attorneys to outmaneuver the defense and reach settlements that meet their injured clients' needs," says Lower enthusiastically. "Technology is great, but it takes on special significance when it benefits profoundly injured people."

CONFESSIONS OF A TRUST OFFICER

By Dick Moore
Halpern Group Vice President

Your case is nearing settlement. As you and your client work your way through the alternatives - whether to structure or take cash, and what to do with the cash if you do - you will probably consider the option of a trust administered by a corporate trustee.

And why not? The trust department of a bank, when staffed by caring, competent professionals, can provide extraordinarily valuable service to many clients, including tort victims. A bank-managed living trust, with its attributes of professional investment management, privacy, and financial guardianship, would seem to be the perfect vehicle to meet the needs of tort victims. And it can be, but only if the trust officers are fully familiar with the special circumstances, needs, and concerns of injured plaintiffs.

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The Dominant Thought

By
Richard Halpern



HOW TO GIVE PLAINTIFFS CONTROL OF THEIR DESTINY

"Ignorance is bliss," said the poet. Where legal malpractice is concerned, however, ignorance can be disastrous. The precaution I am about to describe will be the standard of practice in time, - and thus malpractice if ignored. On the other hand, the readers of this column - are dedicated to providing excellent practice, not just the standard. Ignorance may be bliss to poets, but poets don't have injured clients.

An important transformation occurs in the completion of a structured settlement, a transformation that few plaintiffs attorneys and fewer plaintiffs accord proper attention. The essence of this transformation is that the defendant's liability carrier assigns its obligations to pay damages to a third party, usually an assignment company. Once this has been done, the defendant, the liability carrier, and the defendant's attorneys are out of the loop completely. If the annuity carrier is seized, there is usually no way for the plaintiff to come back to the defendant and its carrier to recover the lost funds.

This being the case, it would seem to be obligatory for plaintiffs counsel to exercise great care in the process of determining what broker and settlement product will be used in a structured settlement. Defendants like to dictate both the broker and the product; not surprising, since this is usually the continuation of a lucrative long term

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The Dominant Thought

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business relationship with each. The broker so chosen has no loyalty to the plaintiff (whose future is in his hands), only to the defendant's liability carrier, on whom he depends for future business.

The strategy I'm about to describe developed out of musings on some ironic features of this process.

Irony 1: Given that the defendant liability carrier demands to be absolved of all liability and responsibility once the settlement is finalized, how do they have the gall to insist on naming the broker and settlement product that will be only critical to the *plaintiffs* future welfare, when the plaintiff will be carrying all the risk, and the defendant's carrier none?

Irony 2: The defendant's insurance company has opposed the plaintiffs interests to the last. Why would any plaintiff meekly trust that same company to choose the settlement vehicle and broker? Whose interest is likely to be reflected by that choice?

Irony 3: In the wake of unprecedented failures by annuity carriers, how could any plaintiff, or plaintiffs attorney, permit the defense to choose an annuity vehicle for the settlement without attempting to find a safer alternative?

The root of all these ironies is tradition... the defense traditionally has chosen the broker and settlement vehicle. But like single-earner households, the 21-year old voting age, and shiverers, this tradition must change with the times. The plaintiff must choose the broker and vehicle. Of course. It's the plaintiffs future at stake.

This is how it's done.

STEP ONE

In your initial demand letter, spell out the broker and settlement product you and your client have agreed is in your client's best interest. Include language like the following:

"We are aware that the defendant traditionally dictates the settlement product and broker. However, since your assignment of liability in the final settlement agreement will relieve you of any future legal responsibility should your choices of product and broker prove unwise, I believe my client must be permitted to make the ultimate selection. Therefore, the final settlement agreement must contain language designating _____ as the broker and _____ as the settlement product. The plaintiff assumes all responsibility, risk, and liability for future loss. To this end, the following clause should be included in the settlement agreement:

"The parties to this settlement agreement acknowledge and affirm that the choice of structured settlement broker and vehicle were conditions of settlement imposed by the plaintiff during negotiations, and thus the plaintiff shall bear full responsibility for the consequences of these choices."

STEP TWO

When the defense says "No," (if they say yes, then you don't need Step Two), and insists on *their* choice of broker and product, your response is direct. "All right, but fair is fair. Please include this language in the final settlement document:"

"The parties to this settlement agreement acknowledge and affirm that the choice of structured settlement broker and vehicle were conditions of settlement imposed by the defendant during negotiations, and thus the defendant shall bear full responsibility for the consequences of these choices,"

After all, you may point out, you can hardly permit your client's adversary to dictate product and broker and then leave your client naked without recourse if they have chosen badly. If the defendant agrees to this language, you have preserved legal recourse for your client, and performed due diligence. But the defendant is very unlikely to accede to this tradition-busting language without a fight.

STEP THREE

Suppose the defense says, "Neither of these alternatives are acceptable, so if you insist on one or the other, perhaps we should eschew a structure and settle with cash."

Fine. Then you raise your demand by 10 percent to compensate for the lost opportunity to structure.

STEP FOUR

The defense decides to try "hard ball" and says they will not increase their cash offer. They have just demonstrated bad faith by putting their own interests (that is, the insurance company's interests) above the insured, their true client.

Ethical attorney that you are, you should call their attention to this. And the Court's:

"Dear _____:

This letter memorializes our discussions regarding settlement of the above-referenced case, in which we represent the plaintiff, _____.

We want to make the following clear and beyond dispute:

1. We presented an opportunity to settle this case within [the defendant carrier's] policy limits, with fair terms and with no risk to your client.

2. This offer was rejected for reasons unrelated to this case, solely because you insisted on your choice of broker and settlement vehicle.

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About The Halpern Group

The Halpern Group provides customized structured settlement products to the plaintiffs bar, as well as alternative financial settlement options and negotiation assistance.

For information on any of the following, or a general information packet, call 1-800-524-1631:

- The U.S. Treasury Bond Structured Settlement Trust
- Special Needs Trusts, including Medicare Eligibility Trusts
- The Settlement Fund Management Trust (the flexible alternative to structured settlements)
- Free subscription to The Settlement Strategist
- Membership in The Halpern Group Plaintiffs Counsel Fax Alert Network

The Dominant Thought

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3. We also agreed to this requirement, insisting only that your choice of broker and settlement product be documented as such in the settlement agreement. You also refused to meet this reasonable requirement.

4. Subsequently, you refused to accept our increased demand, made necessary by your position to a fair structured settlement agreement.

5. As the last settlement package discussed was acceptable to both sides regarding its cost to the defendant carrier and its benefits to the plaintiff, the only issue now in dispute involves the choice of structured settlement product and broker.

This issue, unlike other terms of the settlement package, is of no import or significance to the insured, and does not affect the insured's rights, interests, or welfare. Its only importance lies in its effect on [the defendant carrier's] own business interests.

You have demonstrated bad faith by placing [the defendant carrier's] own business interests above the interests of the insured defendant, your client. Because this conflict of interest makes it impossible for you to render effective representation, we request that you inform your client immediately that he should retain private counsel.

Please supply us with a copy of your letter so notifying the defendant, as well as the name and phone number of defendant's private counsel. We will, in due course, notify you of our communications with this attorney.

Sincerely,

"

Checkmate.

It should be obvious that the safest course for the defense is to accept your choice of broker and product. That's what the defense will do, once this strategy becomes commonplace.

By that time, lots of injured plaintiffs will be protected.

And by that time, not allowing your plaintiffs to avoid the defense's self-serving choice and take control of their own destiny may well be malpractice.

UNDERCOVER JUROR: BEHIND CLOSED DOORS IN A MED-MAL CASE

by Jack Marshall, Editor

I've studied the institution of the jury, argued a case before a jury, and even directed "Twelve Angry Men" three times; but I was reasonably certain that, like most attorneys, I would never have the opportunity to actually serve on a jury.

Now I know what the "Twelve Angry Men" were angry about...

But due to design or inattention, both advocates chose not to hold my law degree or employment with a litigation consulting firm against me, and I found myself empaneled on a six member jury in a medical negligence case. It was only one four-day trial, but it provided some valuable and unexpected insights on how a jury sees and hears what trial lawyers put before them. Perhaps you will find them thought-provoking.

SIX CRANKY JURORS

Now I know what the "Twelve Angry Men" were angry about- having to serve on a jury at all. My fellow jurors felt unlucky, ill-used, and inconvenienced, and their attitude heavily influenced their take on the proceedings. They were annoyed that the parties hadn't settled, and seemed to hold the plaintiff responsible for this. They were impatient to the point of anger with the meandering presentations and vague lines of questioning.

MISSING PIECES

Evidence that was not presented may have influenced the jury more than the evidence that was. This case involved a series of doctors, operations, and treatments on various eye ailments, with the defendant ophthalmologist being sued for negligence resulting in the loss of the plaintiff's sight. One of the doctors closely involved in the episode in question was conspicuously absent from either witness list, although his name kept appearing in testimony. Jurors repeatedly mentioned this, and seemed to infer that the real culprit had somehow negotiated his way out of the proceedings, to the defendant's detriment.

COMPETENCE BACKLASH

This isn't new to me, but the intensity of it was. In this case, the defense attorney was markedly quicker, better prepared, and more articulate than the plaintiff's attorney, who was genial, sincere, plodding, and inept. The jury felt sorry for the plaintiff, who it felt was not getting the best representation, and therefore made every effort to give her the benefit of the doubt on issues where the presentation of her case seemed weak. Meanwhile, the defense attorney's obvious enjoyment of his repeated cross-examination coups and periodic slam-dunks of the plaintiff's counsel caused him to be regarded as arrogant and unsavory.

EXPERT EXPERTS

The defense used local professors and practitioners as expert witnesses- the plaintiff used a battery of out-of-state experts from expert witness firms. The latter were slick, articulate, and forceful, with terrific credentials. The defense's experts were impeached on the grounds that they worked with, or had been taught by, or belonged to the same organizations as the defendant. But still it was no contest: the Virginia jury virtually discounted the testimony of the out-of-state expert experts, and in fact took their proficiency at testifying as proof of their status as "hired guns. Score one for the locals.

JFK

The jurors saw conspiracy everywhere. The very first witness for the plaintiff was the doctor who performed the eye procedure that produced the side effects which the defendant allegedly had misdiagnosed. Why was he testifying for the plaintiff? Why wasn't he the one being sued? The jury smelled a deal, and the suspicion that this defendant was being used as a scapegoat poisoned the plaintiff's case. Another plot: the plaintiff's husband, a thick-set, glowering man, testified briefly and sat silently observing the rest of the trial. Several jurors became convinced that he was "manipulating his wife and that this relationship somehow held the key to the trial.

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Confessions of a Trust Officer

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My 20 years experience as a trust officer have left me with tremendous respect for the professionalism of my colleagues. But those 20 years have also taught me this: the typical trust officer, like the typical financial planner or broker, is unlikely to be familiar with the world of the tort victim. Nor is that the only problem: trust officers are often controlled by institutional biases that can work against the interests of these most fragile of clients.

Unless a trust officer acquires an understanding of the tort victim's world... he may injure rather than help your client.

Unless a trust officer acquires an understanding of the tort victim's world and steps back from his traditional approach, he will have the same effect as a broker or financial planner: operating on a set of flawed assumptions based on the healthy, un-victimized investor, he may injure rather than help your client. This understanding is not something that can be mastered over night, for the differences are profound.

RICH CLIENT, POOR CLIENT

The typical trust client may not be rich, but most are at least comfortable, receiving enough income from investments, or having sufficient outside resources that they are unlikely to have to make sudden, significant demands on the principal of the trust. Frequently, the trust supplements still effective earning power, and the client can endure the ups and downs of a volatile market to achieve later growth in principal. Even an older beneficiary who may be more dependent on trust income has reached a point in life where expenses are relatively low and predictable. A bank's minimum account size requirements ensure that its typical trust clients do not dwell in the low end of the income spectrum.

There are no similarities between this client and the plaintiff in a personal injury law suit. The plaintiff's settlement isn't a supplement to anything. It represents all that a plaintiff has to compensate for a loss of earning power, to provide a source of funds to live, and to provide liquid assets for large future medical expenses. Its size is determined as much by a policy limit as it is by the needs of the plaintiff. If any of it is lost, there is no earning power to

rebuild it. One only has to look at an analysis of a life planner in a tort case to see that even the largest settlements do not allow for much leeway or luxuries.

ONCE A VICTIM...

While a large percentage of typical trust clients are relatively sophisticated about investments and understand the movements of the market, most tort victims are not. Any downward shift in the value of the portfolio causes these clients serious anxiety. They need and deserve constant reassurances that their funds are safe. An even greater threat to the funds are the demands of family members and "friends. The trustee must be prepared to help the victim-client guard their settlement funds against dissipation by generosity.

MAXIMIZE AT ALL COSTS

Trust officers are usually suspicious of structures. They do not understand them, nor do they understand the reasons a guaranteed stream of payments is valuable for a tort victim. They are likely to argue against them. More importantly, they do not realize that the step from a structure to a managed portfolio should only be a very small one, taken by the client not to gain an investment bonanza, but only to add a little flexibility to an otherwise rigid schedule of payments. If a plaintiff chooses a trust over a structure, he's motivated by concerns over the safety of annuities or by the desire to add flexibility when interest rates are low. It is a decision based on conservatism not the desire to seek maximum return at a higher risk.

What the trust officer must understand is that the tolerance for risk of a tort victim... is likely to be less than that of a typical customer...

Trust officers associate large accounts with the opportunity to invest in stocks foreign securities and the like. But for tort victims, the size of their account has nothing whatsoever to do with the ability to take risk. The size of the funds is the direct result of the extent and long term consequences of the injury they have suffered. The larger the funds, the less margin for error the victim-client is likely to have for investment purposes. What the trust officer must understand is that the

tolerance for risk of a tort victim with a million dollars in assets is likely to be less than that of a typical customer with only a tenth of that amount.

THE FUTURE IS SOON

Trust officers, both by preference and by the rules under which they work, favor investment in common stocks. The terms of many trusts go so far as to dictate that the trustee's primary responsibility is to make the trust grow for its inheritors, not to preserve principal and generate income for its current beneficiary. This philosophy dictates common stock investments. I know of one trust department that insisted that all trusts under its supervision have an equity position of at least 25%. This approach is antithetical to the interests of tort victims. The fund at hand is there to provide for the tort victim and his family in the present and immediate future. It is not a fund of money to be passed on to the next generation until the tort victim's needs are met.

BEARS NOT ALLOWED

Trust officers, brokers and financial planners stress the importance of having equities included in a portfolio, emphasizing that stocks are the best way to achieve growth in the face of inflation and citing the positive long term returns that equities historically have provided. The same message is trumpeted by the media almost daily as more and more money flows into equity mutual funds. A trust officer will point out to clients the fact that the stock market has averaged a 10.5% annual return since 1926, and can show a persuasive list of one, two, and five year periods in which equities have shown substantial gain. But key to equity investing for the tort victim isn't the long term positive gain that may be achieved. Far more important are these facts: stocks as an investment vehicle fell 48% from January of 1973 to October of 1974, and hidden in the 69-year positive history of the stock market is a 15-year period when stocks produced an average annual return of only 0.6%. This return included dividends earned, so the value of the dollar invested in the stock market actually fell during this period.

For the tort victim, a similar 15-year downturn or an 18-month free-fall can be disastrous. Steady, predictable, continuous growth is essential.

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Confessions of a Trust Officer,

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Fortunately, there *are* trust officers who have accumulated the requisite knowledge and understanding of injured victims (indeed, becoming one of them was how I came to know The Halpern Group). In the hands of such a trust officer, a bank-managed living trust can be a God-send, the perfect way to ensure flexibility, sufficient fund growth, and security. Obviously, The Halpern Group takes great pains to ensure that its special needs trusts and settlement fund management trusts are managed only by those with the proper orientation and experience, with whom we consult on an ongoing basis.

Ask them to describe their investment strategies, and how they differ from their approach to... uninjured clients.

But if you are choosing a trust department on your own, beware. Satisfy yourself that the department has officers with significant expertise in managing the assets of tort victims, meaning that they have managed more than just a dozen or so cases. Ask them to describe their investment strategies, and how they differ from their approach to the assets of uninjured clients. If this question produces a shrug, a puzzled expression, or a response involving fixed asset allocation models, you will know why.

And you will know to go elsewhere to find a trustee.

NEW DIVISION TO OVERSEE STRUCTURED SETTLEMENT SERVICES

Spurred by a large increase in demand for structured settlement services, The Halpern Group has created a separate division devoted exclusively to serving the technical needs of the plaintiff's bar in structuring settlements



Karen Karsen

Spearheading the effort will be Karen Karsen, who brings expertise, perspective and 11 years of experience to her new role. "The Halpern Group has a special opportunity now to help the entire plaintiff's bar achieve better and safer settlements for their clients,"

CONFLICT OF INTEREST: STRUCTURED SETTLEMENT MALPRACTICE?

Seeking to expand their client base, increasing numbers of structured settlement brokers that have previously worked exclusively or predominantly for the defense are now aggressively promoting their services to plaintiff's counsel.

There is an invitation you must think hard about before accepting. It could well be an invitation to settlement malpractice. Because these firms derive the bulk of their income from liability carrier and self-insured clients, their natural conflicts of interest render them dangerous allies for injured plaintiffs.

When the defendant's liability carrier is also a client of a defense structured settlement broker retained by the plaintiff, the broker is frequently required to obtain the carrier's permission to represent the client.

Proper representation, however, is unlikely when the plaintiff is seeking help from the structured settlement broker to protect the plaintiff **against** the maneuvers of the liability carrier, who may enable the same broker to earn hundreds of thousands of dollars in yearly commissions... far more than the broker will earn from any plaintiff.

A conflict likewise exists if the liability carrier is **not** a client of the plaintiff-retained structured settlement broker. That liability carrier is a potential client for the broker, and the broker will be naturally reluctant to foil the liability carrier's efforts to persuade the plaintiff to accept a potentially inadequate

settlement. In fact, a defense structured settlement broker working for the plaintiff will often make a side arrangement with the **defendant's** structured settlement broker, promising to get the plaintiff to accept the defense broker's settlement proposal in return for a percentage of the commission.

For many reasons, an annuity-based structured settlement may not be in the best interest of a particular plaintiff. However, the plaintiff's counsel who relies on a structured settlement broker with ties to annuity carriers will not be informed of this. Such a broker will not risk rejecting an annuity proposal or recommending any action against the economic interest of the structured settlement industry. Such an action could result in the loss of the broker's representation contracts with annuity carriers.

To protect themselves and their clients from structured settlement brokers with strong ties to the defense, plaintiff's counsel must be able to answer these questions about any potential broker:

1. Has this broker or firm been primarily occupied representing the interest of defendants and their liability carriers **against** the interest of plaintiffs? If so, is it likely that the broker will be able to reverse this orientation?
2. Would this broker be willing to take the consequences of blocking a bad proposal from a major carrier, when that carrier has the power to substantially reduce the broker's access to large commissions in the future?
3. Would this broker ever **not** recommend an annuity structured settlement, even in the circumstances where it was against the plaintiff's best interests?
4. If the defense structured settlement broker were required to stop dealing with one side or the other, are you confident that he or she would choose to stop working for the defense?

Common sense dictates that it is perilous for a plaintiff to rely on advice given by a party that depends upon the plaintiff's adversary for future income. This is the exact status of defense brokers now seeking plaintiffs as clients, and plaintiff's counsel must consider this carefully.

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Undercover Juror

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HELP!

With jurors not permitted to take notes, the avalanche of anatomical terms, medical jargon, and complex treatment explanations were virtually impossible to keep straight. The plaintiff's counsel produced a time line, but it was too small to read from the jury box. A display of relevant terms and definitions would have been a God-send, but none was provided. When a rare piece of demonstrative evidence appeared, such as the full-color off-the-shelf diagram of the anatomy of the human eye, it had more impact than any of the expert testimony. The jurors grasped on to it as if it were a life preserver. In general, it seemed as if both attorneys had completely forgotten how hard it would be for even the most observant jury to absorb the essential medical facts of the case. O.J. jury: I apologize.

BRING BACK L.A. LAW.

Both closing arguments went on too long. If compelling arguments were made in the first ten minutes, we had forgotten them by the time the summary had meandered to a close. And both attorneys also had inexplicable obsessions with one weak theory, and flogged their respective pet arguments in closing to the detriment of the jury's respect and attention. A Susan Dey 90-second closing might have won for either side.

WHAT IF THERE ISN'T A LAWYER ON THE JURY?

I ended up as jury foreman, and found that my biggest job was to explain the concept of causation to the members of the jury. Thanks to television, I suppose, all of my fellow jurors - mostly college educated, white collar, well read - insisted on framing the case in criminal terms. The plaintiff was "the prosecution; the question was whether the defendant was "guilty. I kept explaining that in a liability trial the defendant could be "guilty of negligence but not liable for damages if his negligence didn't actually cause the plaintiff's injuries. They just couldn't see it. Nor were they clear on how to measure damages. The first hour of deliberations were taken up by me teaching an impromptu seminar on proximate cause, general damages and special damages, all of which had been breezed through by the attorneys and the judge as if the jury were made up of third-year associates.

In the end, we found for the plaintiff, but just barely: she received \$10,000 out of the million or more her attorney requested. This was a very weak case in dozens of ways, yet there were plenty of factors that *could* have led a jury to award a substantial sum to the plaintiff. After all, she was in the throes of untreatable progressive blindness, and was a genuinely pathetic figure. Indeed, despite the fact that the defense had the stronger case,

the better attorney, and much clearer presentation, it seemed obvious that it was surprised at the small size of the jury verdict. So the obvious question is: why couldn't the plaintiff's attorney settle this spaniel of a case?

... why couldn't the plaintiff's attorney settle this spaniel of a case?

My unexpected turn in the jury box reinforced my appreciation of why The Halpern Group does what it does. In cases like this one, it is clear that plaintiff's counsel can best serve the client by taking control of the settlement process, and trying to achieve a settlement that is sufficient, safe, and secure. The failure to settle can be tragic, because when cases like this one go to trial, the plaintiff has traded an opportunity to get some desperately needed financial assistance for a ticket to a jury lottery. Here, the plaintiff lost that gamble. A sound settlement strategy, a realistic assessment of the weaknesses of the case, and a professionally executed negotiation might well have avoided a sad result.

A final footnote: I talked to the defendant's attorney after the trial, and asked him why, given my background with ATLA and The Halpern Group, he let me serve. "I knew we had the law on our side, he answered. "I figured a lawyer on the jury would help make sure they knew it, too.