

## **The Infant Death Tax Surprise**

*by Richard G. Halpern*

The subject is taxes . . . specifically death taxes. Let's say you have a grievously injured infant plaintiff, and you negotiate a \$3 million settlement that his parents accept, hesitantly, even though you are certain that the offer is both fair and in the plaintiff's best interests. The settlement is final, the amount is tax-free, but, sadly, the infant dies shortly thereafter, something that everyone knew might happen.

Now the settlement becomes part of the infant's estate, and he has died intestate, with a whopping tax bill that takes a large chunk out of the \$2 million net recovery. The parents are surprised, and angrily they tell you that had they known about this possibility, they would have insisted on a larger settlement, perhaps \$4 million. Are you in jeopardy? You just might be. Not that the tax problem can be avoided: an infant cannot make out a will, so any settlement entails the risk of death taxes if the infant-plaintiff dies. But that is the point: the tax threat is a material consideration in the decision to accept a settlement, and there is a growing consensus that in advising a client regarding settlements, attorneys cannot define their roles too narrowly. What is reasonable -- or actionable -- may rest on the client's expectations . . . and it's not much of a stretch to presume that clients would expect counsel to alert them to the possibility of future tax bites out of a "tax-free settlement." And a malpractice suit could raise its ugly head.

Why take the chance? In cases where it's appropriate, explain the death tax consequences up front, before settlement, or refer your clients to a tax specialist. You will have side-stepped one of the hidden land mines in the settlement process.