

## The Living Settlement Brochure

*by Richard Halpern*

Economist John Kenneth Galbraith first coined the phrase "conventional wisdom" to describe the commonly accepted assumptions that live long past the point where the conditions upon which they were based have changed. It's an ironic phrase, because nothing could be more un-wise than blindly accepting and acting on a popular assumption without analyzing whether it is still (or was ever) valid.

Litigation practice is littered with conventional wisdom, and nowhere is folly more insidious than in negotiation strategy. I, for one, am forever reassessing rules, traditions, and accepted practices, and frequently find that "conventional wisdom" is obscuring a valuable tactic. That is how I stumbled upon the "living settlement brochure."

The conventional wisdom in this instance involves the supposed undesirability of having the plaintiff attend a settlement conference or mediation. There's good logic behind that caveat: the defense wants the plaintiff present to dazzle, confuse, intimidate, or persuade. The plaintiff is the ultimate decision-maker, and giving the defense an opportunity to directly influence the plaintiff's thinking is dangerous, to say the least. Your client may be exposed to persuasive sales pitches for inappropriate structured settlements, or casual references to the defense counsel's victory record, or threats of long and expensive appeals. Meanwhile, of course, there is no equivalent (in personal or emotional terms) decision-maker on the defense side likely to be present at the proceedings. It appears that, by bringing in the plaintiff, you have put your side at a strategic disadvantage.

That's the conventional wisdom, and I have been a subscriber to it in good standing. What it obscures is this: there is a sub-group of plaintiffs who have special qualities. They are appealing and likable, and they can communicate with devastating emotional effect the experience of living every day with a disability or grievous injury. Their credibility is total, and no plaintiff's counsel, no matter how articulate, skilled or respected, can approach with a second-hand account what these individuals can convey about their plight... the pain of getting into braces every morning; the agony of using a bathroom (and the embarrassment of being unable to close the door); the daily emptiness of rolling over to see an empty bed where a catastrophically injured spouse once lay; or the sorrow of watching a brain-damaged loved one try to cope with a shattered life.

Coming from your mouth, the same story would be regarded by the defense as hyperbole, a calculated exaggeration designed to put your case in the best possible light. The plaintiff engenders no such skepticism. A plaintiff who can communicate his or her plight in an appealing and convincing manner functions much like a settlement brochure, only alive and thus far more powerful. The defense will know that the jury will be seeing and experiencing the same wrenching exposition from the plaintiff that is being shown to him as a preview. He will know that no amount of courtroom technique will overmatch true human tragedy, honestly expressed. You will have created an ideal environment for a favorable settlement.

There's another conventional wisdom hurdle to clear, however: Why expose your best trial weapon prematurely? This one has a simple answer. Your job is to get a fair and just settlement without exposing your client to the risk of trial if at all possible. Using your client before trial can advance that objective.

But beware: this isn't for every plaintiff. The unappealing plaintiff -- bitter or scowling, profane, physically or facially unattractive, slovenly, with substance abuse or other life style problems, who talks too much, or monotonously, or who is difficult to understand -- plaintiffs with these or other troublesome qualities were made to be subject to the conventional wisdom. Their presence can only backfire.

The attractive plaintiff, however, can be your living settlement brochure. Keep that thought well in mind, so you know when to discard conventional wisdom as unwise, and follow unconventional wisdom to a powerful negotiation strategy.