

SURGEON AND TEACHER SAMUEL LABOW M.D. JOINS THE HALPERN GROUP

The Halpern Group's development of unique case evaluation and litigation strategy services continued with the announcement that Samuel B. Labow, M.D., had agreed to become the Halpern Group's Medical Director.

Dr. Labow, past president of the American Society of Colon and Rectal Surgeons, currently (1994-96) serves as a Governor of the American College of Surgeons. He is recognized as one of the world's foremost experts in the field of intestinal cancer.



Dr. Samuel Labow

Halpern Group President Richard Halpern was enthusiastic over Dr. Labow's arrival. "I've known Sam for many years, and the expertise and insight he will bring to our clients' cases adds a whole new dimension to The Halpern Group," Halpern explains. "He is a brilliant surgeon, a teacher, and an analyst with a rare talent for making complex medical situations comprehensible. What his contributions can mean in any personal injury case involving medical issues is incalculable, the potential is so great."

Halpern emphasizes that Dr. Labow's role with The Halpern Group will not be to provide expert testimony himself. "His role will be far more significant. Dr. Labow will review case files to determine which medical experts are needed.

He will evaluate the reports of both defense experts and plaintiffs experts, and will give his assessment of the plaintiff's chances in trial. Moreover, Dr. Labow will examine defense expert reports with an eye to their flaws, and help develop deposition queries to expose these weaknesses. He'll help us abstract technical medical records, and develop an expert review process on medical malpractice cases.

Currently Dr. Labow is affiliated with North Shore University Hospital in Manhasset, set, New York, and St. Francis Hospital in Roslyn, New York. Dr. Labow's articles have appeared in numerous medical journals, and he is a Clinical Associate Professor at Cornell University Medical College's Department of Surgery. Notable among his professional associations, which include the AMA, the American College of Surgeons, and many others, is his Honorary Life Membership in the Colorectal Surgical Society of Australia. He has served on the Executive Council of the New York Society of Colon and Rectal Surgeons since 1980, with a term as president in 1986-87.

JOIN THE HALPERN PLAINTIFF'S COUNSEL ALERT NETWORK

The Halpern Group is instituting a Fax Alert program designed to give plaintiff's attorneys immediate access to developments that may affect their cases or practice.

Because The Halpern Group must closely monitor many diverse areas in order to provide its client attorneys with the very best advice, it often detects trends long before they are reported by the printed media. Halpern Plaintiff's Counsel Alerts will cover developments in financial markets; tax law rulings; new tactics by the defense firms, the insurance industry, or defendants themselves; legal malpractice warnings; and other useful information that you will want to have right away.

The Alerts will be sent as developments warrant, not according to any set schedule. There is no charge for this service. To join the Halpern Plaintiff's Counsel Alert Network, just call 1-800-524-1637 and provide your name and fax number.

The Dominant Thought

by
**Richard
Halpern**



NEEDS-BASED NEGOTIATION

THE CASE FOR ARACHNOPHOBIA

"Come into my parlor", said the spider to the fly."

This beginning of an old nursery rhyme has taught generations of children that the acceptance of some appealing invitations may be the first step toward disaster. But now that we are older, wiser, and perhaps even trial lawyers, some of us may think that we can ignore the basic lessons of our youth.

Don't believe it. For a modern recasting of the tale of the hospitable arachnid might begin, "Just tell me your client's needs, said defense counsel to plaintiff's counsel.' A plaintiff's counsel who responds positively to this invitation to a needs-based negotiation may be unwittingly serving his or her case up as lunch for the defense.

Remember: the defense team comes to negotiation with a certain amount of money allocated for settlement. True, there may be more that they can put on the table if necessary, but there is always a limitation on how far they will go.

The existence of this limit means that a needs-based demand from the plaintiff will have one of two results. When the total cost of the needs plaintiff's counsel presents is within the allotted funds, the defense will agree to that sum. If it is not, the defense will reject the offer and begin challenging the plaintiff's assessment of needs. This is a lose-lose proposition for the plaintiff, because the needs-based demand only

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ALLOWING YOURSELF TO BE DOUBLE-BRACKETED

If you're a plaintiff's attorney, you have probably participated in a bracketing-based negotiation at some point in your career. Either side of a negotiation may utilize bracketing, one of the oldest and most simplistic negotiation plays.

The technique is quite simple. The side that wishes to commence bracketing begins by determining the amount of money it wants to use as a target to settle the case. The bracketed then assumes a counterpunch strategy, letting the other party take the initiative.

For example, suppose plaintiff's counsel is seeking \$500,000 in settlement of an action, and defense counsel has requested an initial demand to get the negotiation started. With \$500,000 as the target settlement figure (as well as a fair and reasonable one), plaintiff's counsel assesses the defense's position, which at that moment has nothing on V the table, and then demands \$1 million.

The average of the zero position of the defense and the \$1 million position of the plaintiff is the \$500,000 that plaintiff's counsel seeks. If, in response to the million dollar demand, the defense were to respond with an offer of \$150,000, then plaintiff's counterpunch would be to drop the plaintiff's demands to \$850,000, so the sum of the defense position and the plaintiff's position still adds up to \$1 million and the average of the two positions is still \$500,000.

This tactic has nothing whatsoever to do with any of the real issues of liability or damages on the case, nor does it involve any cognitive evaluation process to determine whether the desired \$500,000 is, in fact, a realistic figure.

Nonetheless, plaintiff's counsel, in this hypothetical example, could continue this technique until either the case is settled or the defense tires of playing the game. This is bracketing, and it should be familiar to anyone reading this article.

Double-bracketing, however, is the negotiation counterpart of "double dipping." It can sneak up on either side. In a bracketing-based negotiation, the first party to introduce double-bracketing will successfully preclude the other party's use of the technique.

Take the same example as before: a desired settlement of \$500,000 with the defense responding to the \$1 million demand with an offer of \$150,000, and the plaintiff dropping the demand to

\$850,000. Let us assume that the sequence continues with the defense increasing its offer to \$200,000, and the plaintiff reducing its demand to \$800,000, continuing the bracketing. Assume the defense then offers \$300,000. To continue the bracketing, the plaintiff would reduce his or her demand to \$700,000, so that the demand and the offer add up to \$1 million, and still yielding an average of \$500,000.

At this point plaintiff's counsel

might notice some irritability creeping into the defense's negotiations. The defense may try one more time to settle the case by making a token increase, perhaps to \$325,000. At this point, the plaintiff can continue the bracketing, abandon it altogether, refuse to go lower, or force the issue by utilizing double bracketing—like this:

"Mr. Defendant, it is becoming clear to me that you have the figure of

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Plaintiff's Bar Tools:

"INDEPENDENT COUNSEL RESOURCES"

Developing a strategy for handling research is a serious business for the plaintiff's attorney, especially attorneys who do not have the support staff and resources of a large firm to relieve the burden. This is one of many areas where the defense typically has a significant advantage. Fortunately, there is no shortage of innovative lawyers who are looking for ways to even the odds. One of the foremost contributors in this category is Alabama trial attorney Francis H. (Brother') Hare, Jr. Hare was and remains a primary figure in the development of the Attorneys Information Exchange Group, which facilitates the sharing of key documents and information among plaintiff's counsel litigating cases involving similar products. Now he has launched a new service, Independent Counsel Resources.

Subscribers to the service receive four monographs during the year, each devoted to research and analysis of a critical issue in civil litigation. The monographs are between 50 and 75 pages in length, and include excerpts from recent court opinions, both published and unpublished, and selections from published literature. Each monograph is accompanied by a diskette of the material, and Independent Counsel Resources will regularly supplement each topic when there are significant new developments.

The first monograph in the new series is devoted to information sharing. As explained in Information Sharing's concise and clear introduction, the contents of the monograph gives plaintiff's counsel the ammunition necessary to oppose the entering of a restrictive confidentiality order that would forbid the attorney from disclosing discovery materials to litigants involved in other similar cases.

The selections from the literature are current (most of them 1990 or later), and are coherently grouped and annotated. Underscoring alerts the reader to key conclusions and especially useful sentences to quote in memoranda or briefs. The published opinions excerpted are similarly well-chosen, not overly long and directly on point. The monograph concludes with 12 pages of unpublished opinions, some of which include extremely persuasive language arguing for unfettered information sharing.

Future monographs will deal with other discovery issues, including a variety of discovery abuse topics, discovery from corporations and foreign countries, scope of discovery and defendant's response, the discoverability of computer databases, expert witnesses, and many other specific topics. The series will also include monographs dealing with various evidentiary issues, jurisdiction matters, confidentiality orders, pre-emption, and just about every other topic that might otherwise eat up a plaintiff's attorney's precious research time.

This is obviously a valuable service that responds to the research needs of attorneys who are not virtuosos on electronic databases and who realize that the days when AmJur was current enough for a winning argument are gone forever. It is a superb way for a small office attorney (and that's most of us) to build a user-friendly research library suited to the special needs of the plaintiff's bar.

For more information, contact Independent Counsel Resources, P.O. Box 130717, Birmingham, AL 35213-0717, call 205-951-2400, or Fax to 205-951-2404.

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\$500,000 in mind; after all, following each round of negotiation I find that the average of our two positions always winds up at \$500,000. Look: I can't settle this case for \$500,000. But my demand is \$700,000, and if \$500,000 is your target, let me suggest that, if you were to offer \$600,000, which would be midway between the \$500,000 and the \$700,000, I would be willing to recommend that figure to my client."

That's really it. That is all there is to double-bracketing. It merely stops the bracketing and allows you to move the settlement point up closer to your figure. Of course, if the defendant takes the initiative on double-bracketing first, then it is going to move the settlement point below the figure you originally targeted.

This technique will either heavily favor the side who is first to use it, or cause a breakdown in the negotiations. Either way, the use of double-bracketing usually leads to the conclusion of the negotiation. It is critical to know when, if ever, you should employ it.

First of all, you can't employ double-bracketing until you find yourself in the midst of a bracketing-type negotiation. At that point you might want to change to double-bracketing in any of three scenarios:

1. When the mid-point of the bracketed negotiation is of their choosing, not yours, and is too low for you to accept;
2. When you feel that they actually have enough money to settle the case but are taking too long in getting around to offering it; or
3. When you feel the need to stop the arbitrary bracketing-type of negotiation and get to real issues.

You must also be prepared when you find that your adversary is attempting to double-bracket. Your approach? Focus on the technique, not the offer. Feel free to say:

"You know, rarely have I been double-bracketed with such skill. However, that's not my figure (the double-bracketed

mid-point) and is, in fact, an arbitrary mid-point that seems to have been generated by your responses to my demands. I thought the movements in my position were large enough to show my good faith intent to allow you room to move toward a resolution. You, instead, have presumed that I am involved in bracketing you. That is not the case, so why don't we stop this and get to substantive issues?"

If you deliver this message with a light touch, the negotiation may very well continue. The key here is not to insult your adversary by your recognition of his or her attempt to double-bracket you.

There are obvious risks and benefits to the use of double-bracketing. The two primary risks are that you may anger your adversary by appearing to be too "slick," and that you may short circuit the negotiation process. The benefits of appropriate use of the tactic are (1) that it does bring the issues to a head quickly, and (2) that it can help, in some cases, to smoke out the position of your adversary. As a general principle, however, you should try to find more creative approaches to negotiation than bracketing. Perhaps the biggest benefit to double-bracketing is that it can put a stop to bracketing as a primary negotiation technique.

THE OUT-OF-POCKET CASH CRUNCH

by Steven G. Siegel

Ouch! A recent IRS Technical Advice Memo is a painful blow to the way that many attorneys handle out-of-pocket expenses.

The Service ruled that when a law firm's out-of-pocket payments to third parties on behalf of clients are eventually reimbursable by the clients, they must be treated as loans--and are therefore not deductible business expenses. Then, when the firm finally is reimbursed for the expenses, the firm is not treated as receiving taxable income.

The expense items cited in the ruling include court filing fees, expert fees, photocopying and other support service fees. Travel, meals, deposition costs and the like would also fall within this ruling.

What of those fees that are billed, but never recovered by the firm? here the news is better: the firm may claim a bad debt deduction, but only in the year its claim becomes totally worthless. This could be long after the expense is incurred.

For those expenses that are never billed to a client, the firm may claim a business expense deduction, but only in the year it makes a final determination not to bill the client. [TAM 9432002]

In light of this ruling, every attorney should review how he or she handles out-of-pocket expenses. The ruling means that if you are deducting the expenses, the IRS will deny your deductions. Obviously, this creates a serious hardship in cases with heavy up-front costs, a plaintiff unable to finance those costs, and a long delay until the ultimate recovery. The problem is one of timing, and the ruling clearly favors the IRS to the detriment of plaintiffs attorneys.

What about those costs that were deducted in the past and are finally recovered? Can you argue now that the recovery does not constitute taxable income? You can argue it, but it isn't going to fly. A firm tried this logic and lost in the U.S. Tax Court. The Court ruled that even though the firm was wrong to deduct the expenses initially, the 'duty of consistency' required that the firm must recognize income upon recovery of the expenses. [Hughes and Luce, LLP v. Commissioner, T.C. Memo 1994-55 9]

There is a cash flow solution: obtain a bank line of credit to finance the litigation. The interest charged is deductible as a business expense, but does, of course, add to the costs of the case. Otherwise, the plaintiff's attorney must, in the IRS' view anyway, go it alone as the proverbial "deep pocket."

Beyond this, your options are limited. The IRS has decided to treat plaintiffs attorneys as "deep pockets," carrying the initial financial burden for clients with no tax relief.

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results in a settlement if it is low enough to please the defense.

To grasp the full impact of agreeing to a needs-based negotiation, the savvy plaintiff's attorney must understand -how the defense determines what it will pay in settlement. There are two components of the defense's calculations. The first is the probable verdict range -should the case go to trial. The second includes considerations not directly related to the verdict, but having impact on the defendant. These non-verdict considerations loom especially large with defendants who are self-insured.

The defense assesses the probable verdict range by considering: the likely liability allocation between a defendant ---and plaintiff; issues of special damages like medical, life care and wage loss; the relative talents and reputations of opposing counsel; the probable jury appeal of the plaintiff, plaintiff's counsel and plaintiff's experts; and finally, general damages, such as physical pain and emotional suffering.

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Non-verdict considerations of the defendant include: the limits of the policy, which defines an insurance company's responsibilities to the defendant; the exposure of the insured defendant beyond the policy limits; the instructions of the insured, such as in a policy limits case where an insured wishes to settle; and whether or not there are any legal issues in the case that, if tried, could create a precedent that would benefit future plaintiffs.

The alert reader will have noticed that the plaintiff's needs appear nowhere in this overview of the factors which govern what the defendant will agree to pay in settlement.

When you let the defense persuade you to bring the plaintiff's needs into the negotiation, what you are really doing is serving the defense's needs, in several ways.

For one thing, you are diverting attention away from issues of general damages, such as physical pain and emotional suffering. These are the factors that can produce the largest jury awards, and because the defense has difficulty predicting their impact, it is in the defendant's interest to reduce their role. Needs-based negotiation places focus on only part of the plaintiff's case — special damages. In reality, the defense already knows those needs through the life care plan, the medical expert reports, and the economic loss study — all provided to your adversary in advance of the negotiation.

Once you have framed the negotiation in terms of need, the defense will attempt to satisfy your client's needs by proposing a structured settlement. Since they have to make a little look like a lot,

they're going to attempt to 'satisfy your client's needs' by quoting the most competitive carrier available for the annuity, rather than the safest. Now this may expose your client to maximum risk of commercial failure, but that's not the defense's problem. Arid with your client's needs addressed by a structured settlement, the cost to the defendant is far below the present value of the plaintiff's injuries indicated by your life care planner's and economist's reports.

The defense request for a needs-based negotiation would seem to imply that there is some genuine desire to satisfy the needs of your client. But the opposite is true. This approach results in such a totally inflexible mode of settlement that the realities of your client's future condition are virtually ignored.

"My client needs not to have been a victim of your client's negligence."

For regardless of the nature of the emergency, you cannot invade a structured settlement in the future. It is totally inflexible. Any type of settlement that is supposedly based on needs, and that is simultaneously based on a fixed and determinable future income stream is a contradiction in terms. Future needs are difficult to predict in the present, and thus one of the elements you must achieve in settling your case is the flexibility to fulfill the injured party's future needs that may be unforeseeable. The rigid structured settlement is truly the web that can entangle a plaintiff whose counsel accepts the defense spider's hospitality.

How do you best decline the spider's entreaty to enter into a needs-

based negotiation? There are many good responses. When asked to tell the defense your client's needs, you can ask 'Why is that relevant to our settlement discussions?' The defense may then say, 'Well, it is our desire and objective to satisfy your client's needs,' which gives you the opportunity to ask, pointedly, 'If my client's needs surpass the amount of coverage available, are you going to pay for them anyway?' This question will often confuse the defense, leading them to blurt out, 'Well, no, we will only pay up to a certain limit,' to which you should respond, 'Well, if you are not going to pay for my client's needs, even if they surpass the policy limit, then why should I bother answering the question? It is not relevant to these discussions.'

Other effective responses to an invitation into the needs-based "parlor" include:

"My client needs not to have been a victim of your client's negligence."

"My client needs to have his lifestyle restored to the way it was before your client's negligent act."

"My client needs to never have had the acute physical pain that she has endured all this time." "My client needs to never have had to endure the acute emotional suffering that resulted from your client's negligence."

"My client's needs are well known to you from all of my experts' reports. If you have an offer to make, why not make it?"

The rhyme from your childhood can still serve you well if it reminds you to treat needs-based negotiation as a trap baited by the defense. When the spider wants you in the parlor, it's time to spin a web of your own.