

## THE HALPERN LETTER LAUNCHED

Seeking to fulfill the need for timely information on settlement and litigation issues, The Halpern Group announced the inauguration of a new publication for plaintiff's attorneys: *The Halpern Letter*.

*The Halpern Letter* will be a one- to two-page informal informational letter designed to keep plaintiff's attorneys apprised of developments that may affect their client's settlement options, new strategies in negotiation, and analysis of the litigation scene. It will be published eight times per year, with occasional special issues.

Why the new publication? "The greatest weapon the plaintiff's bar has in forcing a fair settlement is knowledge," explains Halpern Group President Richard G. Halpern. "Even though 95% of all cases are settled, the defense has always had the edge in knowledge about settlement options, and it's been relatively easy to keep that edge. Attorneys don't go into trial law because of a keen interest in IRS provisions, the insurance business, and investment options, and it's practically impossible to keep up with a field as dynamic as structured settlements without devoting full time to it. Our mission is to assist plaintiff's attorneys as they seek the best possible settlements for their clients, and one essential part of that mission is keeping the plaintiff's bar informed, helping attorneys cut through the misinformation promulgated by insurance companies, and alerting attorneys to malpractice pitfalls. Our Fax Alert Network accomplishes part of this, by publicizing fast-breaking developments. *The Settlement Strategist* is useful, because it contains "white paper" discussions of major issues and articles on tax, settlement and strategy issues. But it's only quarterly, and I kept hearing attorneys say that this or that article might have made a big difference if it had been on their desks a month earlier. Of course, we put new materials on our Web page every week, but we have no way to make sure that every lawyer who needs the information will access it.

"So we realized that there was a gap in our information distribution process. *The Halpern Letter* will be a free-form piece that will ensure that our readers have the benefit of our insight, analysis, and research when it's fresh and current."

The first *Halpern Letter* will be mailed out in February, and will generally appear in the months when *The Settlement Strategist* does not have a new issue

## The Dominant Thought

By  
Richard  
Halpern



## ROMMEL, YOU MAGNIFICENT BASTARD, I READ YOUR BOOK!

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At a memorable moment in the movie *Patton*, George C. Scott as the General crows as his tactics foil the North Africa strategy of Rommel, the German "Desert Fox."

"Rommel, you magnificent bastard," he shouts, "I read your book!" For Rommel had published his innovation in the art of war, and Patton, a keen student of military history, possessed the ultimate advantage: he knew his opponent's mind. Rommel was defeated before the engagement had begun.

You've written a book, too. It describes your approach to tort cases, your negotiation strategies, the kinds of cases you are willing to take on, and whether you tend to settle or go to trial.

The other side has read it. And while you're not facing General Patton, or even George C. Scott, you've got a big problem.

The first step to a solution to your problem is to recognize what Rommel apparently didn't: your opponent really does have a book on your litigation habits, unless you're just starting out on your legal career. How? Well, the claims community has a very efficient information network. In products liability cases, for example, there are typically two insurers involved, the primary insurer and the excess insurer. Between them, the two claims people share

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## "..AND WE'RE NOT GOING TO TAKE IT ANYMORE!"

*by Jack Marshall, Editor-in-Chief*

The call comes in. It is typical of many The Halpern Group receives, a plaintiff's attorney seeking an evaluation of a defense proposal for an annuity-based structured settlement.

"The defense has picked a broker and decided on an annuity," the voice is saying. "I guess that's the way it's done."

There it is: the white flag, the surrendered sword. "That's the way it's done." Words of total submission, the product of brainwashing as insidious as any portrayed in *The Manchurian Candidate*. For plaintiff's attorneys by the thousands have internalized the absurd fiction that the defendant rather than the plaintiff ought to control the choice of structured settlement.

Like most completely illogical developments, this one accumulated slowly with deceptively logical steps. The insurance industry invented traditional structured settlements, so it had the expertise. Plaintiff's attorneys were busy enough already; why re-invent the wheel? Logically, they left the expertise in the hands of The experts. After all, the insurance companies did the lobbying to get defense-controlled structured settlements supported by the U.S. tax laws. Of course, it was entirely self-serving: it both made settling claims easier and helped sell annuities. Still, annuities were alien Creatures to many in the plaintiff's bar, while the inhabitants of the insurance planet lived with them, understood them, created them. It all seemed so natural.

"That's the way it's done."

Some asked questions, especially when the annuity companies started floating belly-up to the top of the tank. The insurance industry worked hard to keep them off the scent, implying that defense-controlled structured settlements were the only form of structured settlement (false) and that it was somehow a tax violation for plaintiffs to take lump sums and structure their own settlements (outrageously false). Most plaintiff's counsel kept in line.

"That's the way it's done."

No.

It is time for the blindfolds to come off, the spell to be lifted. Formerly unimpeachable insurance companies are being hounded for blatantly fraudulent sales practices: the veneer, so audaciously thin to begin with, can be brushed away by a child. These people never cared about the injured plaintiff... haven't they opposed the plaintiff's interests at every step? The defense creates these victims, insists upon (as a condition of settlement) being released from all future liability, and yet maintains that they, not the plaintiffs, must dictate the design of the bulwark upon which the plaintiffs' futures rest. If we were designing the structure settlement ground rules today, such an argument would provoke derisive laughter; it would be deemed the invention of some puckish satirist... Mort Sahl, perhaps, or Tom Lehrer. Mark Russell.

"Entrust the delicate futures of our injured plaintiffs to the insurance companies?" plaintiff's counsel would ask incredulously. "How absurd! How droll! Well, let the laughter commence. But the joke has been on the plaintiffs long enough. Plaintiffs should control their own destinies. Of course. Plaintiffs should control their own structured settlements. How could it have been otherwise? It's time to create a plaintiff-controlled structured settlement.

Much as Peter Finch urged in the film *Network*, injured plaintiffs need to rush to the rooftops and shout, "We're mad as hell and we're not going to take it anymore! Then they need to take control of their own settlement destinies, with the support and assistance of the plaintiff's bar.

That's the way it's done.

## The Dominant Thought

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everything they know about plaintiff's counsel, and they supplement that information with calls to their colleagues in other companies. Meanwhile, the defense attorney usually represents many insurance companies. It isn't too hard to envision how your "book gets circulated to eager readers.

Does your book include a chapter on demanding high so you have plenty of room to come down? Your opponent will be happy to take that into consideration.

Is your book titled, *Trial Lawyering Without the Trial?* Forget about using the threat of a jury trial as leverage in settlement negotiations.

Are the pages filled with tales of small cases? The defense will have gauged your ability to get the most out of a large one.

Make no mistake: the "book on plaintiffs counsel is a significant factor in determining defense strategy. On multiple occasions, we have seen insurance companies *raise* their authorized settlement figures by one to two million dollars in response to a change of plaintiff's counsel!

In litigation, as in most pursuits, "Don't tamper with success" is a deadly adage. First of all, what looks like success to you and your client might actually be a victory for the defense, if they had rated the case at a higher value.

The key principle to remember, however, is that predictability makes you vulnerable, just like Rommel. Chess masters routinely discard their most successful openings, because they know that opponents will eventually figure out a way to counter them. If a poker player always bluffs with the same cards, the tactic becomes useless.

To avoid making your adversaries into Pattons, you must avoid being predictable. Include these chapters in your book, however, and you are providing no assistance to the enemy:

- Always make a demand that is fair.
- Let the injury speak for itself.
- Be willing to go to the jury.
- Don't take on dubious cases.

Fortunately, whatever the hook on your litigation techniques says, you can adjust, and work it to your advantage. But there's a book to be written on the defense, too, and in your hands it is dynamite... because unlike you, *they realistically can't change their tactics.*

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# The Dominant Thought

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You can change your tactics, and you should, based on the book you have kept Of the defense and the defendant's liability carrier. And if you aren't keeping such a book, you are forfeiting one of your greatest weapons.

Let's leave General Patton for a minute and reflect on the technique of Ted Williams, the last man to bat over .400 in the major leagues. Early in his career, Williams began keeping a book on opposing pitchers - how they pitched to him in various situations, the patterns and strategies they displayed. Did a pitcher throw the same pitch after getting a swinging strike on a fastball, or did he switch to a curve? What pitches were in the pitcher's repertoire? What pitch did he like to throw to a tough hitter in a crucial moment in the game? Williams continued to build his book, resisting the ridicule of established veterans who felt that all a good hitter needed to do was to "hit the pitch, not worry about what the pitch would be.

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## If enough plaintiff's attorneys keep books on the defense and its allies, baseball pitchers will have some new company on the endangered species list.

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History notes that Williams, more frequently than any other player, was able to predict his home runs, commenting after striking out that "if he throws me that pitch again with two strikes, I'll hit it out of the park. Today, virtually all successful major league hitters keep "books on opposing pitchers, and hitting has reached such impressive levels that sports analysts talk about pitchers being "an endangered species. It's no coincidence. If enough plaintiff's attorneys keep books on the defense and its allies, baseball pitchers will have some new company on the endangered species list.

But make sure you're putting the right information in your book, because there is some data that the defense *wants* you to use. Example: databases on jury verdicts and settlements. To a great degree these are controlled by the defense, and they are potentially misleading. With some notable exceptions, the cases that the defense permits to go to the jury are the weakest cases for the plaintiff. Even when the plaintiff prevails, the jury verdict is not going to reflect the proper

damages of the stronger cases, which have been settled. And the settlements? Why is it, do you think, that defendants insist upon confidentiality with some settlements and not others? They are writing a book that they want Patton to read, because it will warp his strategy. Not everyone agrees with me on this, but my counsel is, be wary of verdict and settlement databases. They can steer you right into your adversary's clutches. There is much more valuable - and reliable - information on which to base your book.

Some members of the defense team are relatively easy to profile. It is certainly a good idea to glean whatever information you can on defense counsel from colleagues who may have opposed him or her. Is defense counsel skilled, experienced, lazy, confrontational, quick to grasp details or dumb as a box of hammers? It doesn't hurt to include this data in your tactical considerations, but defense counsel is usually not your principle adversary. You should also investigate the defense's experts, by checking transcripts of their previous testimony on point in other cases, but this is probably standard operating procedure for most readers. No, the meat of your book on the other side concerns the liability carriers and their claims representatives... how they negotiate, and their predictable patterns.

To appreciate this, it is critical to grasp how the defense gets its marching orders. Your opposing counsel gets them from a claims representative, who is in turn little more than a messenger to and from the shadowy ivory tower figures that make up the claims committee. They are your real adversaries. The claims rep is intentionally isolated from the human aspects of the litigation process, with no contact with the defendant or plaintiff's counsel. His job is to eschew emotion, and make decisions based on pre-determined statistical calculations, calculations determined far away, in that ivory tower.

The weakness of this structure is that it produces a consistent strategy, like the pitcher who always throws a fastball in a tight spot. Keep a book on the patterns, and you'll discover that:

- Carrier A's opening offer is always the amount that when averaged with the plaintiff's demand will equal what it is willing to pay, and not a penny more...
- Carrier B's opening offer will always be 25% of the reserve (the actuarial estimate on what it will take to cover the likely adverse verdict)...

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- Carrier C, more concerned about accelerating the process, starts at 50% of the reserve...
- And Carrier D will make no offer until the first trial adjournment.

Once you have determined these patterns, you are ready to adjust your own strategy accordingly. "The Release Tactic, for example ["I Love a Petard, *Settlement Strategist*, Summer 1995], in which a plaintiff's counsel delivers a signed release of liability requiring only a signature and the requested check from the defendant to settle a claim, derives its strength from established patterns of insurance company behavior. Remember that you are placing icebergs in front of a giant ship that is incapable of quick moves or timely adjustments. If you have completed the book that tells you where the carrier is headed, you have the information necessary to gain the upper hand.

So heed the lesson of Patton, and the example of "The Splendid Splinter. Don't write your own book of predictable strategies, for your adversary will read it with glee. Instead, keep a book on the other side's established patterns, and plan your strategy accordingly. You may not have a movie made about you, or get elected to the Hall of Fame, but you'll make a lot of clients very happy.

In my book, that's the best reward of all.

## About The Halpern Group

The Halpern Group provides customized structured settlement services 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
- The Settlement Fund Management Trust (the flexible alternative to traditional structured settlements)
- Free subscription to The Settlement Strategist
- Membership in The Halpern Group Plaintiffs Counsel Fax Alert Network

# DISABLING MYTHS DEBUNKED!

In his final book, the late scientist Carl Sagan brilliantly dismantled popular myths and superstitions that impede human progress. Personal injury litigation is also bedeviled by disabling myths, long-held misconceptions passed down from lawyer to lawyer without critical examination. There are many that lurk in the plaintiff's attorney's subconscious, subtly (or not so subtly) undermining effectiveness and success.

We now vanquish two such myths, with pleasure.

Standing in for Dr. Sagan is Halpern Group President Richard G. Halpern.

## **Myth #1. The plaintiff must make a demand before the defense can make an offer.**

**Halpern:** *Where is this written? Yes, it's true some states require an official "demand" as part of initial pleadings, but that's just a number. The defense likes to perpetuate this myth as an extension of the maxim "my wallet, my rules." Well, the plaintiff's claim is a financial asset, and my asset, my rules sounds good to me. When you get right down to it, "demand before offer is just a tradition, one that I'm confident was dreamed up by a claims rep. Whoever goes first in the negotiating process risks ceding control over the whole process to the other side. A bad idea. It's an especially bad idea for the plaintiff, because withholding the demand for as long as possible has great tactical value.*

*Remember, the defense has to justify its expenditures on a particular case, and the plaintiff's demand is what is used to*

*do that. The defense is slower to approve litigation costs than the plaintiff, who can generally execute discovery more quickly and has more flexibility in developing the case. Mounting expenses without a demand to support it places terrible pressure on the defense. Give them a demand and you're doing them a favor. Hold back, and just watch: they'll beg for a demand, and usually will resort to an offer if they don't get one. And the plaintiff has won Round One.*

## **Myth #2. It is easier to get a fair settlement before the complaint than after.**

**Halpern:** *Baloney. This is wrong because it counters basic truths of human nature.*

*There are two primary motivations: the desire to achieve the satisfaction of a presently unfulfilled need, and the desire to maintain the fulfillment of a presently satisfied need. Or in short, "Getting it, and keeping it." At*

*the beginning of litigation, the motivations stack up this way. The defendant has money (a presently satisfied need) and wants to keep it. The plaintiff requires money for redress (a presently unfulfilled need). Prior to the filing of the plaintiff's complaint, the defendant's fulfilled need has not been threatened. There is no motivation to make a fair settlement offer.*

*I'm not Oliver Stone, but this myth, like the previous one, must have been cooked up and spread by the claims community, because it certainly serves its objectives. Think about it: no claim, no litigation; no litigation, no expenditures. No threat of trial, no justice. Prior to the complaint, time is the enemy of the plaintiff, who is suffering damages without redress. If sufficient time is allowed to pass, the pressure on the plaintiff can lead to plain tiff-control problems for counsel, and detrimental decisions. With a timely complaint, however, time becomes the enemy of the defense, and the looming trial becomes a threat to the defense's presently satisfied need. Then is when you are most likely to get a fair settlement offer.*