

The Dominant Thought

By *Richard G. Halpern*

USING YOUR DEMAND TO TAKE THE HIGH GROUND



DEFENSE SETTLEMENT INSIDER JOINS HALPERN GROUP

Osborne Brings 34 Years of Experience

Richard G. Halpern's keen understanding of insurance industry tactics, psychology, and organizational imperatives have been a key factor in his success working with plaintiff's counsel to negotiate top settlements for their injured clients.

"But the depth of Frank Osborne's understanding of how the claims community thinks, plans, and calculates has me in awe," Halpern says. "This man has been intimately involved with every aspect of the claims and settlement process, and he has totally mastered the mindset and tactics of the defense in negotiating personal injury settlements."

That is why The Halpern Group recruited Osborne, a 34-year veteran on the defense side, to join the staff and apply his experience and knowledge to achieving optimum settlements for plaintiffs. "Frank and I had worked across the table on many cases, Halpern relates, "and I found him to be the consummate professional: fair, honest, knowledgeable, and tough. For some time I had thought about what an asset his skills and background would be to The Halpern Group and the plaintiff's bar. Finally, I decided to approach Frank, and was thrilled to discover that he was interested in joining us."

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Will the Real General Pickett Please Stand Up?

General Pickett's doomed charge into an artillery barrage and the entrenched Union line on Cemetery Ridge was the climax of the bloody battle of Gettysburg, and the harbinger of the Confederate defeat ahead. The three day battle had included a myriad of attacks, retreats, maneuvers, tactics, heroes, blunders, lucky turns and fateful twists, but the stage had been set for Pickett's final spectacular failure in the earliest moments of the conflict, when Brigadier General John Buford set Union forces on the high ground, the gently sloping ridges and hills on the outskirts of the town. That fateful choice ensured that it was the Confederate forces that had to come out into the open, under fire, attempting increasingly perilous tactics to mount a successful attack uphill. Had Buford acted differently, it could have well been Northern troops taking that fatal march across the open field on July 3, 1863.

In your own battle for your injured client, your decision regarding the how, how much, and when of your initial demand has the same critical impact as Buford's choice of ground. Miscalculate, on any of these three elements, and you will have unwittingly sown the seeds of your own futile Pickett's charge. Use the demand to turn your adversary into Pickett, and you can make the defense charge into your own well-armed line.

Making Them Come at You: *When to Demand*

The first invitation to relinquish the high ground may arrive right after you've sent our your representation letter, announcing that you have been retained, will be filing suit, and that all inquiries should come to you. The defense may respond with a collegial call: "Want to discuss a settlement? This is nothing but a siren call to come down off the ridge. You don't know the value of the case yet; if you make a demand, the defense has learned something very valuable: you're not planning on taking the case to trial. There goes your high ground: the threat that you want to go to trial, because you know you've got a winner.

The proper answer to this invitation to a premature settlement is, "We're not prepared to make a demand at this time. The defense hates this answer, because it only serves to give them heartburn. What do you have? What are your intentions? Now they have to come at you. But a premature demand can destroy your case. The defense knows then that they have the high ground, and that they can wait you out. When they turn up the pressure, you'll blink first.

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The Dominant Thought: Taking the High Ground

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The appropriate time for a demand is when you have the case fully evaluated. It doesn't hurt to keep the defense wondering about your initial demand as long as possible. If they feel you are ready, willing, and eager to go to trial, and not chomping at the bit to settle, then settlement becomes their objective, not yours. That's when a fair and just settlement becomes possible.

How Much to Demand

Too high a demand can knock you right off the high ground.

Let's say you've evaluated your case at \$2 million, and you demand \$10 million. Here's the response you'll get every time:

"Sorry, we can't make an offer against a demand that high." And you are suddenly General Pickett:

- The focus is now on you, the show-boating attorney, not on the fair value of the case.
- The plaintiff is now the party being unreasonable, justifying defense delays, and giving the defense a persuasive argument to enlist any judge as an ally.
- There is no longer any pressure on the claims person in charge of the file, for no one upstairs is going to fault him or her for not negotiating against such an absurd demand.

Now the defense can sit back on its ridge, and make you come at them.

You hold the high ground by using the demand to send a message, or, more accurately, a series of messages:

1. "I'm not a settlement attorney; I'm a trial attorney. I'm eager to go to trial on this case. But if we can reach agreement on a fair settlement for my client, good."
2. "This isn't a used car bargaining session. There's a life at stake. I take this seriously."
3. "There's a good reason for this figure; I didn't pull it out of the air. It's reasonable. Don't assume I'm going to lower it. This isn't a game."

You send this message with a reasonable demand... say, \$4 million on your \$2 million case. Now the pressure is squarely on the defense. It has to make a reasonable offer or risk settlement discussions collapsing. Then the result (a larger verdict?) is their fault, and potentially career threatening. The defense doesn't know for certain that there will be a second chance to put money on the table. You have the high ground.

Remember, holding the high ground means being the party that is certainly open to settlement but not pushing for it. They have to convince you to settle, by making a fair offer. They have to come at you.

How To Make The Demand

You don't want to consider the format of your demand until you're secure about the timing and the amount. Then you make your demand in written form. And you keep it simple. Don't go on and on about the strength of your case; indeed, if the defense isn't well enough into discovery to know all about

your case, your demand is premature. If your demand includes information, you're giving the defense something for nothing. If your demand is couched as an argument, you weaken it, no matter how persuasive your advocacy. Why are you selling the demand so hard? Are you afraid to go to trial? Do you have the high ground, or are you the one marching across the field?

In a demand, less is more. It is sufficient to write:

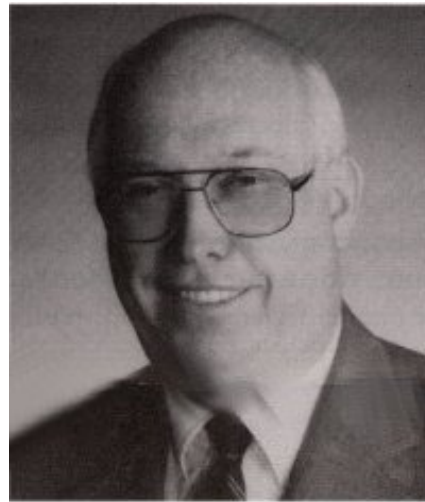
"Thank you for your patience. We did not have sufficient information to formulate our demand earlier, but now a fair figure is clear: \$4 million. I look forward to your timely response.

You have communicated confidence, strength, and a willingness to settle for a fair figure. Now it's up to the defense. But they are now waiting with the gallant Virginians in that grove of trees preparing to march into the open, into enemy gunfire. You put them there.

And now they have to come at you.

Defense Insider joins Halpern Group

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Halpern explained that Osborne will assist counsel on several levels. "He'll evaluate the plaintiff's case, and let you know what the defense is likely to focus on as its flaws and strengths. Then he'll help develop a strategy that effectively trumps the defense approach to the case." "For Osborne, leaving his long-time colleagues in the insurance industry was a bittersweet experience. But he relishes the new challenges ahead. "I'm looking forward to making a difference," he says. "From the defense side, I used to see attorneys accepting settlements well below what the defense was willing to pay. Now I'll be in a position to help stop that from happening, so that plaintiffs can get maximum settlements. I'm also looking forward to being able to offer injured victims the wide range of settlement options devised by The Halpern Group. It's going to be quite a change." "But we had to ask: why, after 34 years, would Osborne switch sides?"

"A great deal has changed over the years, and not all for the better," Osborne replies. "I don't want to make any general statements that might unfairly impugn some of the fine professionals I've worked with through the years. But with the changing conditions in the structured settlement business and different priorities in the insurance industry, I was not as comfortable sitting on that side of the table. It's time I applied my skills and experience to helping plaintiffs." Plaintiff's counsel wishing to consult Frank Osborne regarding a case may contact him directly at 1-800-426-1950, or by calling The Halpern Group main office, at 1-800-524-1631.

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KNOW THINE ENEMY!

By Richard G. Halpern

"Know thine enemy as thyself."
— Sun Tsu, The Art of War

It's a familiar piece of wisdom that few would dispute. But through a quirk in human nature, most of us tend toward a serious error in following this dictum. All too often, we mistake knowing *ourselves* — our motivations, on needs, our values — for truly knowing our enemies. We tend to assume that our adversaries are like us in basic ways, and plan our strategies accordingly. "What would *I* do, in this situation?" we often ponder.

This is, I suspect, a genetically-coded feature of human nature, and generally a useful one. It allows us to trust others, to be sensitive to people's feelings. It makes empathy possible; indeed, without this trait, human interaction would be a pretty miserable experience.

But when it comes to negotiating a settlement on behalf of an injured victim, attributing *your* motivations to your defense adversary is a prescription for disaster. It is not only critical to "know thine enemy"... it is critical to understand that the enemy is *not* like "thyself" when it comes to negotiation objectives.

As plaintiff's counsel, you want as large a settlement as possible for your client, but you will be satisfied with a *fair* settlement. In most cases, so will your client: once a fair offer is on the table, the plaintiff may not permit counsel to push for more. Thus plaintiff and counsel often enter settlement negotiations assuming that the objective on *both sides* is to reach a "fair" settlement.

This is invariably *wrong*.

The objective of the defense is to get the settlement *below* fair, and to place relentless pressure on the vulnerable plaintiff until an inferior offer is accepted. Remember, "fair," for the defense, is not a victory but a loss. The defense's rhetoric is intended to lull you into believing otherwise, but this is a fact. Thus the defense is prepared to avoid fair by manipulating the victim's emotions. The plaintiff has been through hell, and is desperate to get some relief. Anxiety

and hopes peak as a settlement conference nears, and then, when the defense offers a pittance, despair sets in. This is exactly as the other side has planned it. With the next upward move in the offer, the plaintiff's emotions soar again. The defense well understands that this particular roller-coaster ride takes a tremendous cumulative toll. Unless you have prepared your client for this strategy to make him settle for less than fair, he is vulnerable.

No aspect of settlement negotiation illustrates the danger of imputing your motivations to those of your opponent more than the question, "What does your client need?" When the defense asks this, *watch out!* Unless you "know thine enemy," it is a potent trap, an invitation to what I call "needs-based negotiation."

When the defense asks "What does your client need," banish the thought that this demonstrates any interest in the plaintiff's welfare

You indeed are seeking what your client needs, for what your client needs is a fair and just settlement. The other side has no interest in what your client needs zero. But it has a great deal of interest in getting you to commit to a figure. The defense team comes to the table with a specific amount of money allocated for settlement. There may be more they can offer if it becomes necessary, but there is always an absolute limitation on how far ~ they will go. Do you suppose that concern, appreciation or even analysis of the injured plaintiff's likely needs has anything to do with the setting of that figure? Of course it does not. The figure is the product of business, financial and tactical calculations, involving the company's risk in trial, its available resources for this and ~ all its other claims, and other long and short term calculations, such as possible precedent value of the case to future plaintiffs. But your answer to the "need" question is critical to them. If the total cost of the needs you present is within the allocated funds, there will probably be an agreement on a settlement figure in rela-

tively short order. If the figure is outside the allotment, the defense will reject it and begin chopping away at your assessment of the plaintiff's needs. Whatever plaintiff's counsel's reply to the need question, the defense wins. Either it settles the case for a figure it has determined to be acceptable from a business perspective, or it has successfully shifted focus in negotiations to your plaintiff's "needs."

This shift always benefits the defense. 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.

The defense has used the answer to the need question to set a ceiling on the settlement, a ceiling that it will methodically lower if it can. The irony is that your client's long term needs cannot be so neatly defined: what an injured plaintiff needs is to know that he or she will never have a financial problem in the future. If you allow the defense to set a ceiling now based on your answer to the need question, you may have ensured that your plaintiff's true needs will never be met. Know thine enemy. When the defense asks "What does your client need," banish the thought that this demonstrates any interest in the plaintiff's welfare. Remember the mindset of your adversary.

"Why is that relevant to our settlement discussion?" you could respond. The defense may then say, "Well, it is our desire

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Know Thine Enemy

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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 may surprise 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 if they surpass the

Think about it. Is it logical to assume that the defense is negotiating in good faith

policy limit, then why should I bother answering the question? It is not relevant to these discussions."

Another thing you must understand about your enemy: good faith, or the lack of it. You are making a good faith attempt to settle the case, and assume your adversary is as well. Once again, your friendly genetic coding has set you up for a fall. Think about it: Is it logical to assume that the defense is negotiating in good faith? Have they not victimized your client with useless motions and frivolous discovery requests, all designed to create delays so that the plaintiff's physical and financial plight begins to undermine his ability to hold out for a fair settlement? How frequently, do you think, is the defense convinced that justice dictates these tactics?

True: the defense is not negotiating in bad faith 100% of the time. But you can-

not afford to assume that your approach to negotiation is being shared, for most of the time, in my experience, it is not. Your I current case may be one of those times.

"Know thine enemy," in the context of settlement negotiation, means understanding the mindset, history, motivations, and decision-making process of the other side. To do this, you must understand that you are *not* negotiating against another attorney. Much of the time your attorney adversary is all but removed from the decision-making process—a messenger rather than a decision-maker. Defense counsel may be kept in the dark regarding considerations that are key to defense decisions, decisions that are made far away from the site of negotiations in the offices of claims carrier. Justice, fairness, compas-

sion, concern for the long term interests of the injured: these factors simply are not likely to be part of the equation and if you think they are, you will be out-maneuvered.

Your enemy is concerned about one thing: profit. Its calculations are aimed at maximizing long and short term business returns, minimizing risk, and optimizing opportunities for profit. Every proposal, every tactic, is in some way linked to these objectives.

The defense is different from you. Understand those differences, and base your strategy accordingly. And when someone on the other side of the table says Hey we're interested in the same thing you are, just remember:

They're *not*.

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And for more articles on settlement negotiation strategy visit the Halpern Group website at www.halperngroup.com.