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BATNAs and the Emotional Pains from “Positional Negotiation"

John M. Lande

BATNAS AND THE EMOTIONAL PAINS FROM “POSITIONAL NEGOTIATION”

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If you have problems with BATNA theory (best alternative to negotiated agreement), you aren’t the only one. Some people have privately shared their concerns with me, and I suspect that there are a lot of others who are “in the closet” and don’t express their concerns publicly because BATNAs are so widely taken for granted in our community.

George Siedel’s comment on my post, BATNA’s Got to Go — and Here’s a Better Idea, identifies a risk that people negotiating transactions could be liable for using BATNAs in bad faith. His comment cites an interesting article he co-authored on this subject, which he described in this guest post.

His comment prompted me to think about common emotional risks of “positional negotiation” in litigation, which often relies on parties’ assessments of their BATNAs.

This post describes the role of BATNAs in the “positional negotiation” game, pains it causes people in many roles, and some remedies to avoid and reduce these pains.

The Game

Getting to Yes recommends using BATNAs defensively, as “trip wires” to protect against making bad agreements.

Ironically, BATNAs probably are used more often offensively in ritualized “positional negotiation.”

Everyone knows the game – and even so, it can be very upsetting for everyone involved.

Each side seeks to maximize its outcome by starting with extreme positions, expecting that the parties will “close the gap” by making a series of counteroffers as each side tries to end up with the most favorable possible agreement.

Parties start with the most extreme position they can without the other side leaving in disgust. Everyone intuitively understands that parties who start with reasonable positions are likely to end up with unfavorable agreements. Faculty teach students about research demonstrating the partisan benefit of starting with extreme positions.

In negotiations and mediations of litigated cases where parties use this process, each side customarily justifies its positions with wild claims about the BATNA values. So each side has to concoct a series of cockamamie stories about why its case is so great and why the other side would get trashed if they went to trial. As they make a series of concessions, lawyers tell new stories that maintain the same basic fiction while creating new rationalizations for their moves in the counteroffer dance. Sometimes mediators help make up these stories to move the process along. In many cases, after the first few rounds of offers, lawyers don't even bother making up stories allegedly related to BATNAs. Instead, the process is purely an exchange of numbers devoid of any rationale other than as a tactic to maximize partisan advantage. Lawyers perform this charade even when they know that there is a good chance that the case would not go to trial, considering that only a tiny proportion of cases actually are tried.

The Pains

This is where the pains come in. Everyone knows that these stories are exaggerations at best and fibs at worst. If you gave truth serum to the lawyers, they would admit that they don't really believe their own arguments.

So why do they do it? Because everybody does it. It's expected. It's just "puffing." They would feel like suckers if they didn't do it. They would see themselves as bad lawyers, failing to protect their clients. They fear losing financial rewards and professional opportunities if they don't get good results for clients. Some combination of these reasons.

But many don't feel good about it. Even though they know the process is a bizarre kabuki dance, they still sometimes genuinely feel insulted, hurt, and angry. Probably most actually believe that there are appropriate norms that should govern instead of power and negotiation tactics. The cynicism wears on them. Some lawyers privately confess that they are tired just "moving money around" between parties in unprincipled ways.

The process also wears on some mediators who stage manage these dramas. Mediations, especially the marathon mediations, are emotionally draining for everyone, especially the mediators who struggle to cajole finicky actors making unreasonable demands. Lydia Nussbaum wrote an excellent article describing many factors contributing to mediator

burnout. Mediators can feel disheartened if they feel stuck leading exercises where they pass arbitrary numbers back and forth between opposing camps.

Parties get hurt too. Even when lawyers explain the game, clients often anchor their expectations on the negotiation positions – especially the most extreme ones. With each new concession, they feel a new loss – an unprincipled loss for no good reason. After they anchor on each new position, they can get whiplash, feeling a new loss with each new concession. In the end, they swallow a bitter pill when they settle for a much worse outcome than they expected.

Many parties have intangible interests that are at least as important as expectations about what might happen in court. These include closure, stress reduction, relationships, reputation, and ability to pursue other things, among others. By focusing so much on hyped court outcomes and by ignoring or giving short shrift to other interests, practitioners send the implicit message that the other interests aren't very important.

Many law students are disillusioned by this process. Most of their classes drill them on detailed legal principles, and then they come to our classes. We tell them that most cases are settled and that legal arguments often are just bargaining tactics in negotiation. Many of us teach them how to make cynical arguments as lawyers often do in practice and/or we teach "interest-based" negotiation techniques, which generally aren't used in civil cases. Many law students are cynical anyway by the time they graduate because we teach them to make disingenuous arguments in court too. So our negotiation lessons just pile on top.

Even many law professors feel the pain. Many of us aspire to teach students a "better way" to handle negotiations and mediations. Some agonize about whether to teach techniques we think are desirable but generally aren't widely used – or techniques we dislike but that are commonly used in the real world.

Some Remedies

In practice cultures where the predominant norm is to enact a ritualized counteroffer process, we can't prevent people from feeling these pains in all cases. The following approaches may avoid or reduce the pain in some cases.

Use Ordinary Legal Negotiation. Lawyers routinely do use BATNAs in a process that is mostly ignored in dispute resolution theory but that generally is more satisfactory. I conducted a study of settled cases and found that lawyers often used what I called "ordinary legal negotiation" (OLN). In OLN, lawyers try to reach a reasonable agreement based on shared norms, which typically are the expected outcomes in court or normal agreements in

similar cases. Lawyers often use this approach in family law, workers' compensation, personal injury, employment, and criminal law cases, among others. For example, there are common norms about parenting plans in divorce cases, which lawyers typically use as the starting point for negotiation. I cited a study finding that family lawyers often do not start with "extreme" or "ridiculous" positions that are "inconsistent with what 'everyone knows' about divorce."

Although there is some haggling and discussion of parties' interests, counterpart lawyers start negotiating around a shared norm. This is distinct from the extreme opening offers in "positional negotiation" and the primary focus on parties' interests in the *Getting to Yes* approach.

GTY advises using objective criteria as part of its interest-oriented approach, but these norms don't necessarily reflect parties' interests. In a divorce case, for example, a party may have an interest in a parenting plan different from the norm. In that situation, following the norm actually would *conflict* with that party's interest.

The *GTY* advice really is a defensive tactic to counter hardball "positional negotiation." It could work in some cases, though counterparts could easily claim that their (biased) BATNA assessments really do reflect an objective criterion – what the court would decide.

I suggested that lawyers "are more likely to use an OLN approach to resolve the ultimate issues in a case when (1) the lawyers know each other, (2) they believe that their counterparts are experienced and competent, (3) they want to maintain reputations for reasonableness, (4) there is a relatively clear body of applicable legal or other norms, (5) the facts of a case can be readily likened to arguably comparable cases, (6) there is not enough at stake to justify an all-out adversarial battle, and (7) using an OLN process is considered a legitimate negotiation method in the particular legal culture. Of course, not all of these conditions would be necessary for lawyers to use an OLN approach."

Although my qualitative study could not estimate the relative frequency of the different approaches, I am quite sure that lawyers use OLN *a lot more* in litigated cases than the *GTY* approach, which is so popular in our teaching (and which I preferred when I had a private mediation practice). Indeed, I suspect that lawyers use OLN more often than the prototypical "positional negotiation," which lawyers use more often in the relatively smaller proportion of highly-contested big cases.

To reduce the pain of negotiation by using OLN, lawyers should try to develop good relationships with their counterpart lawyers. I interviewed lawyers who reported surprisingly

good results by developing good relationships with counterparts reputed to be very tough negotiators.

Change the Game. *Getting to Yes* suggests negotiating about the "rules of the game" to suggest an alternative to the extreme counteroffer process. The LIRA book includes the following quote from Australian academic and practitioner John Wade, illustrating an effort to "change the game."

> I have seen competent lawyers say, "I am guessing that we will be apart on the facts, the weight of evidence, the interpretation of the rules, and what we think the different judges might do with this. Am I right?" (Nods and smiles). "But that after a year or two of negotiation and posturing, we will close the gap but still be a mile apart." (Nods and smiles). "So I was wondering: 'Is there any way to consider the business goals of our clients and try to find a satisfactory business outcome, before we go the old posturing route?'"

This gambit might or might not work in particular cases. It is more likely to be effective if the lawyers have a good working relationship.

Use Wise Assessment and Communication Techniques. OLN may not work in contested litigation cases with a lot at stake, and lawyers may not be able to avoid using a counteroffer process. Lawyers often get frustrated and sometimes fail to reach appropriate agreements because the process promotes bad communication.

The ABA has published several books providing advice about how to finesse painful counteroffer techniques, including the following. These techniques involve developing self-awareness, working well with clients, and using good assessment, advocacy, and mediation techniques.

Gary Friedman's book, *Inside Out: How Conflict Professionals Can Use Self-Reflection to Help Their Clients*, teaches lawyers and mediators how to access their internal selves and identify unacknowledged feelings, concerns, and priorities that can be central to resolving conflicts. It shows how professionals can improve the process and results by focusing on both their internal world and external dimensions of legal cases.

Ronda Muir's book, *Beyond Smart: Lawyering with Emotional Intelligence*, offers techniques for lawyers to recognize, understand, and regulate their own and others' emotions. Obviously, this can help lawyers deal with frustrating dynamics in "positional negotiation."

Jennifer Robbennolt's and Jean Sternlight's book, *Psychology for Lawyers*, provides an overview of psychological knowledge relevant for lawyering, and it applies empirically-based insights to offer suggestions for interviewing clients, counseling, negotiating, and mediating.

Litigation Interest and Risk Assessment, by Michaela Keet, Heather Heavin, and John Lande, describes how lawyers can help reduce clients' pain by systematically using LIRA techniques. This involves careful, realistic assessment of not only the expected value of the court outcome (aka BATNA), but also the tangible and intangible costs of litigation. It includes several chapters and appendixes describing how lawyers and mediators can help clients use LIRAs in managing different negotiation and mediation approaches. This post collects blog posts and other resources providing more details about using LIRA techniques.

My book, *Lawyering with Planned Early Negotiation*, encourages lawyers to build good professional relationships with their clients and the other side to avoid getting stuck in unproductive games and to get better results for clients. It includes chapters on planning and conducting negotiation, handling problems that arise, and using additional professionals when appropriate.

The Negotiator's Desk Reference, published by Mitchell Hamline DRI Press and edited by Andrea Schneider and Chris Honeyman, covers a wide range of topics relevant to "positional negotiation." *Negotiation Essentials for Lawyers* is a condensation of NDR offering very practical advice.

Dwight Golann's book, *Sharing a Mediator's Powers*, explains how lawyers can use mediators' help to maximize their effectiveness. It discusses how lawyers can affect mediators' assessments, use different negotiation strategies, and influence mediators to break impasses.

Spencer Punnett's book, *Representing Clients in Mediation*, provides detailed, step-by-step guidance for lawyers throughout a mediation process to get optimal results. It includes several chapters about strategically engaging in a counteroffer process.

Andy Little's book for mediators, *Making Money Talk*, describes common communication problems in a counteroffer process and solutions to those problems. It describes how to make the process work more smoothly instead of simply bashing and trashing each side's BATNA claims.

Dwight Golann's book, *Mediating Legal Disputes*, describes how mediators can work effectively with hostile lawyers and parties, deal with hard bargaining tactics such as "insulting"

offers, predict litigation outcomes without alienating disputants, and use impasse-breaking techniques.

Getting to Yes, published by Penguin Books, includes a section entitled, "Yes, But …" which suggests several techniques for countering "positional negotiation." These include improving one's BATNA, using "negotiation jujitsu," and "taming the hard bargainer."

BATNA FOR TEACHERS AND STUDENTS LAWYERING MEDIATION NEGOTIATION

2 THOUGHTS ON "BATNAS AND THE EMOTIONAL PAINS FROM "POSITIONAL NEGOTIATION""

★ John Lande

NOVEMBER 12, 2020 AT 3:02 PM

Dwight just published a short piece on this theme, Death of a Settlement, 46 Litigation 33 (2020). His articles are very consistent with the premise in this post about the pain that parties often feel, especially in "positional" negotiation and especially when their intangible interests aren't handled well.

★ John Lande

AUGUST 1, 2020 AT 3:53 PM

I want to add another publication relevant to emotional pain from negotiation. It's Dwight Golann's excellent article, Grieving Over Settlement: The Role of Loss in Settlement Negotiations.