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## STONE SOUP: LEARNING HOW PEOPLE ACTUALLY PREPARE FOR NEGOTIATION AND MEDIATION

DECEMBER 4, 2017 | JOHN LANDE | [LEAVE A COMMENT](#)



We all say that preparation is important – it’s more popular than mom and apple pie – but we have only vague ideas about how people actually consider possible alternatives. This includes the negotiators themselves. We sometimes list general factors or approaches, but usually that’s as far as we get.

I will go out on a limb and suggest that none of us has a good understanding of how negotiators actually use alternatives in real-life negotiations. If I was a betting person, I would bet that negotiators generally don’t do it in the rational way we preach. And considering how important everyone says preparation is, I think it would be good to learn how people actually do it.

So I developed the following set of questions that students might ask. You might assign students to interview people about the most recent case in which they did a substantial amount of preparation. This would be appropriate for litigation and transactional matters. These questions are designed for negotiations but could be adapted for other processes such as mediation. And, of course, you could omit or modify some of these questions and add others.

- Describe what you thought, before the negotiation, what would happen if you wouldn’t have reached agreement. [This should focus on the process, in some detail. Rather than

simply saying something like “go to trial” or “make a deal with someone else,” students should probe what subjects think would happen in the pretrial process or process of reaching agreement with someone else.]

- In this interview, I will use the term “outcome” to mean “outcome if you wouldn’t have reached agreement.” Before the negotiation, what do you think the outcome would have been (if you hadn’t reached agreement)?
- How did you come to this conclusion?
- What sources of information did you base your conclusion on? [This might include consulting lawyers, experts, official documents, websites, discovery in litigation, legal authorities, etc.]
- What factors did you consider in estimating this outcome? [This might include outcome of summary judgment motions, effectiveness of particular witnesses, admissibility of particular pieces of evidence, ability to establish various elements of a cause of action or defense, assessments of decision-makers’ predispositions, whether attorney’s fees or punitive damages would be awarded, outcome of an appeal, risk of non-enforceability of the decision, etc.]
- Did you consider several possible outcomes (if you hadn’t reached agreement)? [If so,] Please describe the different outcomes you considered.
- What do you think that the other side actually thought the outcome would be (if you hadn’t reached agreement)?
- Before the negotiation, did you consider what the other side expected the outcome would be?
- Before the negotiation, in considering possible outcomes, did you write out calculations on paper or in a computer?
- Before the negotiation, in considering possible outcomes, did you use software designed to do this?
- During the negotiation, did your analysis of possible outcomes change? [If so,] How and why?

- What figures [or possible outcomes] did you think about when you considered making offers or responding to offers? [This question is intended to see which of the alternatives to a negotiated agreement (ATNAs) the subjects used in their cases. **Students should use plain English, not our negotiation jargon**, to learn how people analyzed their options. They should take note of the language the subjects use.]
- [If the negotiation resulted in an agreement:] How did the agreement compare with the possible outcomes you considered in preparing for the negotiation [or that you revised during the negotiation]?
- [If the negotiation didn't result in an agreement:] How did the other side's last offer compare with the possible outcomes you considered in preparing for the negotiation [or that you revised during the negotiation]?
- In what ways did the negotiation turn out as you expected?
- What surprised you about the process or outcome of this negotiation?
- How did your analysis before the negotiation [if any] of what would happen if you didn't reach agreement affect your decision-making process? How did it affect the outcome?
- Looking back on the process, what else would you have wanted to know before you engaged in the negotiation? Why would that have been important?
- [For repeat-player negotiators:] How was this negotiation similar to most negotiations in your experience? How was it different than most of your negotiations?

A variation of this assignment would involve interviews of people who actually used the alternative to a negotiated agreement (such as going to trial) to find out how they analyzed these alternatives when considering whether to reach agreement.

Of course, negotiators generally will not be able to provide complete and accurate responses about their cases. But probing these questions should help us better understand how people actually analyze their options.

If we explore this, I expect that we would find that while people often talk a good game about analyzing options, many people – including professional negotiators (like lawyers) – don't do it at all or are very sloppy. I expect that we would also find that some negotiators analyze options in creative, sometimes surprisingly effective, ways. This would be useful stuff for us and our students to know.

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