MEDIATION SERVICES

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WHAT'S YOUR BATNA?

Recently I was at the world-renowned Straus Institute for Dispute Resolution at Pepperdine University School of Law[1] for its ***Mediating the Litigated Case*** program. It's a sophisticated six-day program that draws attendees from all over the world. In my class, there were lawyers and judges from Brazil, Denmark, Uganda, Nigeria, Lebanon and Canada.

After discussing negotiation in mediation for a couple days, Professor Peter Robinson asked, "Who has heard the term BATNA?" I knew the term from my readings and other mediation training programs over the last few years. But almost nobody else raised their hand. These were 36 students from all over the world and all over the United States, including many accomplished trial attorneys representing both plaintiffs and defendants. I was surprised.

BATNA is a term first coined by Roger Fisher and William Ury in their ground-breaking book ***Getting to Yes***.[2] BATNA is an acronym for **B**est **A**lternative **T**o a **N**egotiated **A**greement. Simply put, it's your best outcome if you go forward with your dispute without settling in mediation. And it's a crucial piece of information to have *before* the mediation begins because it allows you to properly and rationally evaluate the offers and counteroffers that will take place at mediation.

At the most basic level in a case only about money damages, knowing your BATNA means knowing how much you will spend getting to the end of the case – regardless of how the case concludes. That includes, at a minimum, attorney fees, expert witness fees, time cost of participation for parties and miscellaneous other costs, such as for court reporters or videographers and subpoena and witness fees.

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[1] Since 2006 Pepperdine has been ranked #1 in Dispute Resolution by ***U.S. News & World Report***.

[2] Fisher, Ury and Patton. ***Getting to Yes. Negotiating Agreement Without Giving In.*** Penguin Books 1991.

It also includes the hard numbers that come out of any result at the end before the client actually receives any money. All of those costs have to be factored in before even considering how the jury or judge will rule. You of course also need that calculation based upon an objective evaluation of a myriad of factors that obviously can't be addressed here.

Why is this important? From a defense perspective, there may come a time when the amount that can be paid to settle at mediation may be less than the cost to defend the case through the end of trial. That means that the best deal that you can make is a settlement at mediation because your BATNA actually costs more. There may be reasons why you might choose to pay more for a trial than you can in settlement – such as when the verdict or decision might have significance in another matter – but those situations are likely few and far between. And you need to know when you are actually making that decision, rather than just doing it in the heat of battle – which mediation can sometimes be.

From a plaintiff's attorney's perspective, there may come a time when the amount offered meets or exceeds what your client would ultimately receive after trial. It's critical to quantify all of the amounts that get paid *before* your client from the amount that you recover at trial. That includes your attorney fee and costs and any liens that need to be paid. Compromises available at mediation may not be an option after a trial has occurred. That means that the deal that you can make at mediation can sometimes provide more money to your client than a similar or even significantly greater award at trial. Again, there are reasons that you still might not settle, but you need to know when you're making that type of a decision.

None of this is rocket science.[3] But since the great majority of lawsuits resolve in mediation, it's more important than ever to be prepared for mediation just as much as you would be prepared for trial. Compare how many of your cases resolved by trial as opposed to by mediation in the last two years. Then compare how much time you spent preparing for mediation to the time spent preparing for trial. Going into mediation, if you don't know everything that you will need to know for trial – or at least have enough information to reasonably factor in the known and unknown – you may just miss the opportunity to reach the best resolution for your client.

[3] I'm an attorney. I was told there would be no rocket science.

There is a corresponding concept to BATNA. It's WATNA. You immediately know what that is. It's your **W**orst **A**lternative **T**o a **N**egotiated **A**greement. Not surprisingly, it's important to not only consider your best outcome, but also your worst. That means taking a dispassionate, objective look at the other side's case – putting yourself in the shoes of the other attorney.

And finally there's one more term that you can look at more easily once you've determined your BATNA and WATNA. It's your MLANTA – the **M**ost **L**ikely **A**lternative **T**o a **N**egotiated **A**greement. As the mediation progresses you need to know when the negotiation – in particular the offers from the other side – have progressed from your WATNA into your MLANTA and maybe even all the way to your BATNA.

As an attorney, you need to recognize when you pass up an amount at mediation that you probably can't beat even if you end up with the best alternative to that negotiated agreement. And even if you never receive an offer at your BATNA, you need to know when you will be taking a significant risk by going to trial with a most likely result that represents only a marginally better return.

So – know your BATNA at mediation and don't dismiss offers that meet or beat it – unless there is some other good reason to do so and your client knows that you can't and won't improve the bottom line by trying the case, even when you win.

See you at mediation.