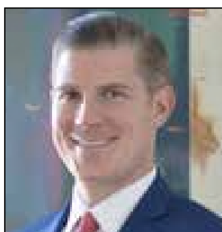
Bargaining, Bottom Lines, and BATNA: Re-Learning the Skill of Negotiation

By Michael J. Cahalane and Andrew R. McConville



Michael J. Cahalane and Andrew R. McConville are partners at Cetrulo LLP in Boston. They concentrate their practices in products liability, toxic tort, and pharmaceutical litigations in state and federal courts throughout New England. Cahalane and McConville also represent several companies as National Coordinating Counsel. In that capacity, they manage all aspects of the client's defense. Cahalane and McConville also teach undergraduate and postgraduate courses, including in conflict resolution and negotiation skills. McConville was formerly a judge advocate in the Marine Corps, where he served as trial counsel and then as a trial advocacy instructor at the Naval Justice School. Cahalane is a vice chair for the FBA's Corporate and Association Counsel Division. © 2020 Michael Cahalane and Andrew McConville. All rights reserved.

Teaching negotiation skills to undergraduates can be a welcome diversion from the contentiousness of mass tort and product liability litigation. One of the more remarkable observations from instructing college students about the art of bargaining is how quickly many of them grasp the key concepts, including the role relationships play in conflict resolution and how the fluidity of leverage can instantly change the landscape of a negotiation. Perhaps we should not be surprised by the ease with which they comprehend basic theories because humans seem to have an innate ability to negotiate. For instance, even young children, without any training, have a knack for how to effectively negotiate for dessert, higher allowance, or a later bedtime.

What is surprising, however, is how lawyers, particularly litigators, have a tendency to abandon the intuitive skills of conflict resolution. It is as if, like Maslow's Hammer, once the lawyer understands the power of the trial as an instrument for resolving disputes, he forgets about the other tools in his chest.[1] As a result, when he is required to negotiate, he does so inefficiently and ineffectively. Consequently, the typical settlement negotiation in a product liability case falls into a familiar pattern:

1. Defense counsel waits for a settlement demand;
2. Plaintiff's counsel issues an unrealistically high settlement demand;
3. Defense counsel calculates some fraction of the demand and asks the client or insurance carrier for settlement authority equal to that amount, using facts of the case to justify the request;
4. The client begrudgingly approves the requested authority;
5. Defense counsel makes a settlement offer, usually as irrational as the initial demand;
6. The parties proceed to trade counteroffers, making only incremental progress, while defense counsel racks up bills "defending the case," the plaintiff remains empty-handed, and the case languishes on the docket;
7. The case settles before trial, often during mediation, with the parties "meeting in the middle" at a figure that was attainable months, or even years, earlier.

This is not how a negotiation should be conducted. This approach to conflict resolution is known as "positional bargaining." As *Getting to Yes*—perhaps the seminal text on the fundamentals of negotiation—explains, positional bargaining involves repeatedly taking and then surrendering bargaining positions, a process that is inefficient and rarely results in a mutually beneficial deal.[2] Litigators must resist the temptation to resort to positional bargaining and, instead, adopt a more enlightened approach to negotiation designed to get better results for their clients while also saving time and money.

There are at least five key strategies that lawyer-negotiators, particularly litigators, should employ to unlock their dormant bargaining skills and return to a more productive and cost-effective approach to negotiations. These five tactics are addressed below:

Identify and Strengthen Your BATNA

The goal of every negotiation should be for the parties to end up in a position superior to than if they had not negotiated.[3] The Best Alternative to a Negotiated Agreement, or BATNA, is the bargainer's fallback plan if a deal is not reached. All negotiators should determine what they will do if they do not make a deal so that they can compare any proposed bargain against that scenario. If the proposal is inferior to the BATNA, it generally should be rejected.

The litigator's BATNA is often taking a case to trial to let a jury resolve the dispute. Accordingly, to effectively evaluate a potential settlement, the litigator needs to realistically evaluate her trial risk; that is, the *chance* of an adverse verdict as well as the *magnitude* of a potential verdict. This is her BATNA. Studies have shown, however, that litigants exhibit a high incidence of decision-making error when evaluating trial risk.[4] Consequently, before abandoning settlement negotiations, litigators should carefully assess likely trial outcomes.

BATNAs are fluid and, in the litigation context, fluctuate during the life of a case and even during trial. Accordingly, a litigator can constantly improve her bargaining position by bolstering her trial posture. She

should track down exculpatory witnesses, retain experts, develop legal arguments, and refine the trial presentation, all with the goal of strengthening her BATNA and improving her leverage at the bargaining table.

Beware of Bottom Lines

BATNA is often confused with a *bottom line*, a distinct negotiating position. A bottom line is the worst acceptable outcome to a successful negotiation. If a party is unable to negotiate a result equal to or better than her bottom line, she should generally not make the deal and, instead, rely on her BATNA. The bottom line is a term that is frequently used in a negotiation to signal to the other side that a party is at the limit of its authority.

In the litigation context, plaintiff's counsel often claim to make "bottom line demands," and defense counsel often bluff that they have extended all of their settlement authority. There is nothing inherently wrong with "cutting to the chase" and giving the other side your best offer (in fact this strategy is likely more efficient than the traditional incremental dollar-for-dollar offer/counteroffer approach). Bottom lines are dangerous, however, when they are used as a bluff. When a party says he has offered his last dollar or made his lowest possible demand, he should mean it. If he subsequently moves below his bottom line (or offers more money) his credibility is lost. When a negotiator gains a reputation for misrepresenting his bargaining position, he will never be trusted and will not be effective. Litigators should be wary about making bottom-line demands and only do so when it is truly their last move.

Rely on Data, Not Demands

The positive impact of data in decision-making is undeniable. It is used effectively in nearly every aspect of our society from finance to marketing to healthcare. Data is just as powerful in resolving conflicts.

In the typical litigation negotiation paradigm recounted above, the defense lawyer waits for the settlement demand before requesting settlement authority from his client; however, the settlement demand is only relevant in that it might shed light on how *plaintiff's counsel* values the case. The demand should be irrelevant to how *defense counsel* values a case. Defense counsel should be able to independently evaluate a case using objective data such as verdict research, set offs, and prior settlement history. Using objective data to evaluate risk, independently value a case, and make an appropriate settlement recommendation to the client is what lawyers are paid to do. If a lawyer needs to know the other side's demand before he can request authority, he is not doing his job. Defense lawyers do not need a settlement demand to request authority. They should be able to evaluate the case based on objective criteria and seek authority even before getting a demand.

Seek Early Resolutions

As noted above, cutting to the chase by offering a bottom line may be an efficient way of negotiating because it expedites the bargaining process and saves costs, but it may not yield the best results. This approach frequently gives rise to bad deals because the party who offers a true bottom line often surrenders too much and leaves value on the bargaining table.

There is a middle ground between starting at unrealistic extremes and cutting to the chase. By valuing the case based on objective information, a negotiator should be able to use the data to engage in realistic settlement discussions rather than drag them out over the course of the case. Indeed, the Federal Rules of Civil Procedure empowers courts to intervene early in the life of a case to promote settlement and "facilitat[e] in other ways the just, speedy, and inexpensive disposition of the action."[56] As soon as discovery has allowed the parties to reasonably evaluate liability and damages, the lawyers should begin exploring early resolution options.

Think Creatively

We often view negotiations as involving a single issue: how much will you pay for a car or how many vacation days will you get at your new job. The truth is that negotiations, even those that initially appear focused on one issue, such as money, are usually multifaceted. There are often terms or other intangible components of a bargain that are relevant but may not be immediately apparent. Lawyers should think creatively to identify both their own and their opponents' interests that may have value in a negotiation. For example, timing of payment, release terms, admission of fault, confidentiality, or a simple apology are all bargaining chips that litigators should consider raising in a negotiation as a way of finding an inventive solution to a case. By thinking creatively about interests underlying the parties' bargaining positions, a lawyer may be able to reach an accord that would otherwise be unattainable.

Conclusion

Litigators are trained to attack the other side's case and win at all costs. While these may be successful strategies in the courtroom, they are frequently counterproductive at the bargaining table. When litigators are asked to negotiate, their legal training often clouds their ability to bargain. They rely on their opponent's expectations to inform their own valuation of a case and then they engage in a painstakingly slow retreat of positions until they reach (or do not reach) an acceptable point in the middle. This approach to conflict resolution is neither effective nor cost-efficient. Instead, litigators should bolster their BATNA, avoid bottom lines, use data to inform strategy, explore early resolution when possible, and think creatively to find resolutions. In short, litigators need to awaken their latent bargaining talents and re-learn the skill of negotiation. ⊙

Endnotes

[1]Maslow, Abraham H, The Psychology of Science: A Reconnaissance (Harper & Row 1966).

[2]Fisher, Roger, William Ury, and Bruce Patton. Getting to Yes, at 4 (Penguin 3d ed. 2011 New York).

[3]*Id.* at 102.

[4]*See* R.L. Kiser , M.A. Asher, and B.B. McShane, *Let's Not Make a Deal: An Empirical Study of Decision Making in Unsuccessful Settlement Negotiations*. Journal of Empirical Legal Studies 5: 551-591 (2008).

[5]Fed. R. Civ. P. 16(c)(2)(I) and (P); *see also* Fed. R. Civ. P. 26.

[6]John Lande, *The Movement Toward Early Case Handling in Courts and Private Dispute Resolution*. Ohio St. J. on Dis. Resol. 24, 81. (2008).