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ON MEDIATION: What's your BATNA?

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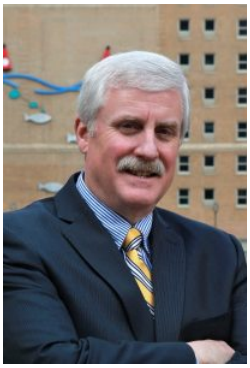

Following a 30-year career as a litigator, Jim Mathie now mediates cases full time both from his offices in downtown Milwaukee and throughout the state. He can be reached at jmathie@mathiemediation.com.

In my column last month, I used a term – BATNA – that may not be familiar to everyone.

If you haven't heard of it before, it's no surprise. About a year ago I attended the Mediating the Litigated Case program at the Strauss Institute for Dispute Resolution at Pepperdine University School of Law. The six-day program draws attendees from around the world. In my class, there were lawyers and judges from Brazil, Denmark, Uganda, Nigeria, Lebanon and Canada.

After discussing negotiations for a couple days, this question came up: Who has heard the term BATNA?"

I knew the term from my readings and other mediation programs over the last few years, but almost nobody else raised their hand. I was surprised.

The term BATNA was first coined by Roger Fisher and William Ury in a groundbreaking book titled "Getting to Yes." BATNA is an acronym that stands for Best Alternative to a Negotiated Agreement.

Simply put, it's what you will do if you don't settle. It's a crucial piece of information to have before a mediation begins because it allows you to properly and rationally evaluate offers and counteroffers.

BATNA can be a tricky idea and has been interpreted in two very different ways. In "Getting to Yes," it's a low bar for settlement — a point below which you should not settle. Yet it has also been interpreted to mean the best outcome that could be achieved outside a negotiated agreement. That makes it a high bar — meaning you should always settle when an offer meets your BATNA.

That alternate definition has given rise to terms like WATNA (worst …) and MLATNA (most likely …), which are supposed also to be considered.

The easiest way to think about BATNA is to concentrate on the word "alternative." In a litigated case, your best alternative, indeed perhaps your only alternative, will be trial. So evaluating your BATNA means evaluating what will happen at trial.

At a basic level, in a case only about money damages, knowing your BATNA requires determining how much you will spend getting to the end of the case — regardless of the trial outcome. That includes, at a minimum, attorney fees, expert-witness fees, and the time cost of participation for parties and miscellaneous other costs, such as for court reporters or videographers and subpoena and witness fees. It also includes — on the plaintiff's side — any amounts, such as liens, that will come out of any verdict before the client receives any money. That's your trial cost.

Then you also need to think about how the jury or judge will rule. That means taking an objective look at the issues that will be dealt with and the likelihood of your seeing various outcomes. Whether you use decision trees or some similar system to do this, you need to look at both sides of the case. Ultimately, your evaluation should take into consideration a reasonable range of results.

Now combine your trial cost with your reasonable range of results. On the defense side, you add your trial cost and on the plaintiff's side you subtract it. That's your BATNA. In the context of a trial, it's a range of figures rather than a single number.

Why is this important? Because it helps you better evaluate how offers put forward during mediation stack up against the risks involved in going to trial.

From a defense perspective, there may come a time when the amount that can be paid to settle at mediation will be less than the cost of defending your position at trial. That means that, because going to trial will actually cost more, the best deal that you can make is a settlement at mediation.

There may be reasons why you might choose to pay more for a trial — getting a verdict or decision might be important for reasons other than money — but those situations are probably rare and you need to be aware of why you are making that type of decision.

From a plaintiff's attorney's perspective, an amount offered at mediation may meet or exceed what your client would ultimately receive after trial. For example, lien compromises that can be reached at mediation may not be an option after a trial has occurred. That means that the deal that you could make at mediation could provide as much or more money to your client as an award at trial.

Again, there are reasons that you still might not settle, but you need to be fully aware of your reasons for making such a choice.

As an attorney, you need to recognize when offers made at mediation are approaching a range where you should be seriously considering them. But even if you never receive an offer that reaches into your BATNA range, it's critically important to recognize the amount of money over which you are deciding to go to trial.

That amount — the difference between the offer and your BATNA range — is the figure to weigh against your trial risk and your confidence in the BATNA range that you have determined.

None of this is rocket science. But since the great majority of lawsuits are resolved either in mediation or shortly afterward, it's now more important than ever to be prepared for mediation just as much as you would be for trial.

Compare how many of your cases in the past two years were resolved by trial rather than by mediation. Then compare the time you spent preparing for mediation with 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 consider both the known and unknown — you may just miss an opportunity to reach the best resolution for your client.

See you at mediation.

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