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SUCCESSING AS A YOUNG LITIGATOR

## The Lessons of BATNA

By Joseph Siprut

Young litigators may recall—not without some feelings of nostalgia—the first time they heard the phrase "BATNA" uttered in Negotiations class. BATNA—best alternative to negotiated agreement—is a powerful dynamic that underpins much of negotiation. But its lessons are easily forgotten—particularly by the young litigator. Let's consider an example of this principle in action and reflect on the lessons BATNA teaches.

Suppose your client wishes to settle a dispute with a party that has not yet resulted in the filing of a lawsuit. Your client essentially concedes both liability and the amount of damages, and the lawyers are brought onto the scene only to negotiate and draft the formal settlement agreement. Because the "plaintiff" is based in a different state than your client, and because proper venue lies in your client's home state, opposing counsel requests a confession of judgment clause in the settlement agreement. As he explains it, if your client defaults under the terms of payment provided for by the settlement agreement, counsel does not want his client to have to incur the expense of filing suit in a foreign state. This strikes you as reasonable—but should you agree to it?

The real question is: why would you agree to this? Consider each side's BATNA. Under the Settlement Agreement sans confession of judgment, if your client does default, the plaintiff may have to incur the cost of litigating in a foreign state. But if proper venue and jurisdiction lie in your client's home state, then, stated literally, what is the plaintiff's best alternative to a negotiated agreement? His BATNA is to file suit—and incur the expense thereof—in exactly the same manner that he would under the Settlement Agreement in the event of a default. In other words, because your client's BATNA is stronger than the plaintiff's, the plaintiff has no leverage. Accordingly, there is no reason to waive any of your client's rights by agreeing to a confession of judgment clause.

Of course, we can imagine other factors added into the mix that might change this conclusion. Perhaps chiefly, if the plaintiff is willing to accept a reduced payment amount in exchange for the confession of judgment, the correct play may well be to agree to these terms. But in the original example, we are assuming that your client is willing to pay the plaintiff all of the claimed debt—i.e., the maximum amount of damages the plaintiff could hope to recover in any subsequent lawsuit. If that's the case, then because your client's BATNA is higher than the plaintiff's, the first conclusion probably follows: don't agree to the confession of judgment.

Each of us has probably experienced the inclination to try to "compromise" and reach the middle ground in negotiations too early, as if the halfway point between two offers is an objectively correct one. As the foregoing example illustrates, this is generally a mistake. By taking full account of each side's BATNA, the correct view for a given negotiation (or a particular issue in the context of a larger negotiation) may be that no compromise at all is warranted. In other words, notwithstanding the cries of unreasonableness by the other side, a "take it or leave it" offer may be the correct play if the other side's BATNA is weak enough.

Put simply, pay more attention to BATNA and do not simply assume that the middle ground between each side's starting point is where the negotiation will, or should, end.

*Joseph Siprut is a litigation associate at Novack and Macey LLP, in Chicago.*

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