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The Changed BATNA

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By Professor Elayne E. Greenberg

Introduction

This column invites readers to consider whether the adjudicated outcome should be relied on as a realistic benchmark for advocates and mediators. In everyday dispute resolution practice, advocates and mediators regularly consider an adjudicated decision to be a realistic point of comparison to a negotiated or mediated outcome. For example, when assessing the merits of settlement, lawyers preparing for a legal negotiation and mediation frequently consider the likely adjudicated outcome as their best alternative to a negotiated agreement (hereinafter BATNA). In mediation, mediators often focus parties and their lawyers on the cost, time and likelihood of a favorable adjudicated decision as part of the mediators' reality testing with parties who are ambivalent about settling.

Despite this reliance on an adjudicated outcome, however, we also know that only 5 percent of civil cases and 1.8 percent of federal cases are actually adjudicated to decision.[1] Does it make sense to use an adjudicated outcome as a measure of settlement reasonableness or alternative to settlement if such a measure only represents a small percentage of actual legal resolutions? Are there more realistic BATNAs and viable alternatives that should be used? This provocative discussion takes place in three parts. Part One explains why using an adjudicated decision as a BATNA may not be as helpful as we think. Part Two explains how ethical mandates may require adding other factors to the assessment of alternatives. Part Three suggests alternative BATNAs. I then conclude by cautioning that this discussion about the changed BATNA is actually part of a broader discussion about the changing reliance on the rule of law.

Part One: Why Isn't an Adjudicated Decision a Helpful BATNA?

It is a well-touted tenet of negotiation practice that skilled negotiators should always have a strong BATNA prior to beginning any negotiation.[2] A strong BATNA is a negotiator's power. It is a negotiator's protection against making a bad deal and a useful measure to assess and compare the attractiveness of any proposed settlement options. After all, why would a negotiator opt to agree to a settlement that is less attractive than the negotiator's BATNA?

In the settlement discussions of legal disputes, however, lawyers often posture that their BATNA is getting an adjudicated decision even though their calculation of a BATNA may reflect cherry-picking information and not the reasonableness of any proposed settlements. Lawyers further justify and bolster this BATNA, by selectively finding case precedent that supports their position.

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Let's dispel this fantasy of accurate risk assessment. Research shows that a litigator's ability to predict their success in obtaining a favorable court outcome is unreliable.[3] Furthermore, since less than 5 percent of cases are adjudicated to decision, it is highly unlikely that even if settlement efforts fail and the case is tried in court that the case will be resolved by an adjudicated decision. Rather, at every stage of a litigated case, courts are pushing attorneys to settle. Sophisticated lawyers appreciate that a judge's interim decisions regarding court motions filed may, depending on the judge's ruling, increase or decrease a lawyer's leverage in case settlement. However, the likelihood of your case being adjudicated to decision is slim. Thus, we see trials vanishing and settlements increase.[4] Another likely vulnerability in using the adjudicated case to decision as your BATNA is the adjudicated cases may be stale law and less likely to reflect current legal thinking. Moreover, adjudicated cases to decision may only be representative of those litigants with power and/or money to afford the escalating cost of justice.

Part Two: Why Is This an Ethical Problem?

When lawyers rely only on the adjudicated decision to comply with their ethical obligations as advisors[5] and as advancers of their client's interests,[6] lawyers may not be presenting clients with a full picture or realistic information sufficient to help them make informed decisions about the appropriate means to achieve the client's objectives. Specifically, Rule 1.4(b) of the New York Rules of Professional Conduct provides:

> A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Comment 5 of this Rule fleshes out the lawyer's ethical obligation to provide her client accurate information about the adjudicated outcome (italics for emphasis):

> Explaining Matters [5] The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so. Adequacy of communication depends in part on the kind of advice or assistance that is involved. For example, when there is time to explain a proposal made in a negotiation, the lawyer should review all important provisions with the client before proceeding to an agreement. *In litigation a lawyer should explain the general strategy and prospects of success and ordinarily should consult the client on tactics that are likely to result in significant expense or to injure or coerce others.* On the other hand, a lawyer ordinarily will not be expected to describe trial or negotiation strategy in detail. The guiding principle is that the lawyer should fulfill reasonable client expectations for information consistent with the duty to act in the client's best interest and the client's overall requirements as to the character of representation. In certain circumstances, such as when a lawyer asks a client to consent to a representation affected by a conflict of interest, the client must give informed consent, as defined in Rule 1.0(j).[7]

Furthermore, Rule 2.1 Advisor Comment 5 reinforces a lawyer's ethical obligation to provide her client with realistic information about the consequences of pursuing either dispute resolution or litigation to resolve her dispute:

> In general, a lawyer is not expected to give advice until asked by the client. However, when a lawyer knows that a client proposes a course of action that is likely to result in substantial adverse legal consequences to the client, the lawyer's duty to the client under Rule 1.4 may require that the lawyer offer advice if the client's course of action is related to the representation. Similarly, when a matter is likely to involve litigation, it may be advisable under Rule 1.4 to inform the client of forms of dispute resolution that might constitute reasonable alternatives to litigation. A lawyer ordinarily has no duty to initiate investigation of a client's affairs or to give advice that the client has indicated is unwanted, but a lawyer may initiate advice to a client when doing so appears to be in the client's interest.[8]

Thus, the New York Rules of Professional Conduct implicitly require attorneys, as part of their ethical obligation to inform their client, to educate their clients about *reasonable* and *realistic* options to settle their case. If an adjudication decision has less than a 5 percent chance of occurring, then that should be factored into the discussion that the lawyer has with the client.

When parties then opt to mediate their case, the mediator, as part of his or her ethical obligation to ensure mediation participants' informed consent, will use reality-testing strategies to help participants fully understand the benefits of settling in mediation rather than proceeding in court to an adjudicated decision.[9] According to the Model Standards of Conduct for Mediators STANDARD I. SELF-DETERMINATION provides:

> A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation, including mediator selection, process design, participation in or withdrawal from the process, and outcomes.[10]

When referencing the adjudicated decision as part of their reality-testing, however, mediators often focus on the risk tolerance of the parties and the ambiguity of success. Should mediators also discuss the low probability of ever receiving a favorable adjudicated decision? As part of a mediator's ethical obligation to conduct a mediation with informed mediation participants, should a mediator reference other measures as well?

Part Three: Other BATNAs?

If the adjudicated outcome is not a sufficient BATNA or a helpful benchmark by itself, what are some more realistic alternatives or additional considerations? For some parties, walking away from the entire dispute is a more attractive option that saves them emotional and financial resources. For other parties, using the court for interim decisions will provide the added leverage for settlement or the relief desired. Still others may consider objective data or business norms to find a more helpful alternative. And, of course, those devout parties might rely on the

power of their faith to shine the light on more favorable courses of action.

Increasingly, however, we now see how parties are effectively using the power of all forms of media as their BATNA in lieu of hoping for a favorable adjudicated outcome.[11] Growing numbers of disgruntled consumers are realizing their power against large corporations when the consumer broadcasts their complaints online rather than seeking an adjudicated decision in court.[12] In another example, eBay, Air BnB, Facebook and Google have each removed the pre-dispute clauses for sexual harassment claims that were part of their employment contracts after the employees of each of these companies coordinated and publicized protests against such pre-dispute clause.[13] In another dazzling example of the power of the media, Jay-Z masterfully spotlighted the paucity of neutral diversity in his own arbitration with the American Arbitration Association that is likely to finally motivate ADR providers to achieve meaningful diversity in their ADR rosters.[14]

Conclusion

As our access to justice becomes more challenging and as it becomes even more unlikely your legal case will be resolved by an adjudicated decision in your favor, a natural corollary is that you should also consider other benchmarks and BATNAs in addition to going to court for an adjudicated decision. Therefore, advocates and mediators need to ensure that clients have accurate information about the probability of receiving an adjudicated decision if their case gets tried in court. Moreover, each client has different values, different risk preferences and different approaches to resolving legal conflicts. Advocates and mediators cannot assume all litigants are alike and need to take the time to appreciate from the client's perspective, what might be a favorable BATNA.

Every action causes a reaction. So, too, does the changing justice reality that is being altered as we shift our BATNA. Thus, this discussion has a broader implication than just about a changed BATNA. Our prescient and esteemed colleague Owen Fiss named the elephant in the room that is implicit in this discussion. How will this increasing reliance on ADR and decreasing reliance on the court affect the rule of law?

Endnotes

1. Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, J. of Empirical Legal Studies (Nov. 4, 2004).
2. *See* Roger Fisher & William Ury, Getting to Yes (Penguin Books, 2011).
3. *See* Randall Kiser, Beyond Right and Wrong: the Power of Effective Decision Making for Attorneys and Clients (Springer, 2010).
4. *See, e.g.*, Owen Fiss, *Against Settlement*, 92 Yale L.J. 1073 (1984); Marc Galanter, *supra* note 1.
5. *See* New York Rules of Prof'l Conduct (N.Y. State Bar Ass'n 2009), https://www.nysba.org/DownloadAsset.aspx?id=50671.
6. *Id*.
7. *Id*. at 7.
8. *Id*. at 103-04.
9. *See* F. Peter Phillips, *Can You Recognize When You're Being "Reality Tested"?* Business Conflict Management LLC Blog (Mar. 1, 2010), http://www.businessconflictmanagement.com/blog/2010/03/can-you-recognize-when-youre-being-reality-tested/.
10. *See* Model Standards of Conduct for Mediators (Sep. 2005), https://www.americanbar.org/content/dam/aba/migrated/2011_build/dispute_resolution/model_standards_conduct_april2007.authcheckdam.pdf.
11. Amy J. Schmitz & Colin Rule, The New Handshake: Online Dispute Resolution and the Future of Consumer Protection (2017).
12. *Id*.
13. *See, e.g.*, Adi Robertson, *eBay and Airbnb Will End Mandatory Arbitration for Sexual Harassment Claims*, The Verge, Nov. 12, 2018, https://www.theverge.com/2018/11/12/18089398/ebay-airbnb-end-forced-arbitration-clauses-sexual-harassment-discrimination-google-protest-backlash; Jena McGregor, *Google and Facebook Ended Forced Arbitration for Sexual Harassment Claims. Why More Companies Should Follow*, Washington Post, Nov. 12, 2018, https://www.washingtonpost.com/business/2018/11/12/google-facebook-ended-forced-arbitration-sex-harassment-claims-why-more-companies-could-follow/?utm_term=.e5497e9867f3.
14. *See Judge Halts Arbitration in Jay-Z Suit Because of Racial Bias*, Forbes Magazine, Nov. 29, 2018, https://www.forbes.com/sites/legalentertainment/2018/11/29/jay-z-successfully-halts-arbitration-due-to-racial-bias/#287f44126f5a; See also Caroline Simson, *Jay-Z Adds Star Power to Diversity Concerns in Arbitration*, Law 360, Dec. 14, 2018, https://www.law360.com/articles/1111523/jay-z-adds-star-power-to-diversity-concerns-in-arbitration.