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WHAT'S A BOTTOM LINE?

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Everyone knows that a bottom line in a lawsuit is an immutable "line in the sand" that is accurately reported to mediators and counterparts as the least that a plaintiff would accept or most that a defendant would pay.

Not really. During the life cycle of a case, lawyers start with vague and tentative bottom lines, and they develop more precise and confident bottom lines as the case progresses. People typically are not candid with others – and sometimes even with themselves – about their real walkaway point (or "trip wire") for ending negotiations. Indeed, "bottom line" claims are standard negotiation gambits using wildly inflated numbers that experienced negotiators and mediators routinely assume to be false.

In the common "positional negotiation" game, parties may repeatedly reduce their bottom line expectations when they find that their counterparts are unwilling to be "reasonable." Conversely, parties may increase their bottom line if they discover favorable evidence or legal authority or if they gain some other strategic advantage.

The malleability of bottom lines is demonstrated daily by parties who walk into mediations with certain bottom lines in mind, and walk out having settled for much less favorable terms.

This post describes the nature of bottom lines, how they work in practice, and how lawyers can help clients make better decisions by carefully determining their bottom lines with the clients.

The Nature of Bottom Lines

Bottom lines are much more important for parties and lawyers to consider than BATNA values, which are only one part of the assessment needed to develop bottom lines. That's because negotiators do (or should) base their strategies and decisions on the bottom lines, not the BATNA values. ("Reservation point" is the dispute resolution jargon for bottom line, but is meaningless to normal human beings.)

In our LIRA book, Michaela Keet, Heather Heavin, and I suggest that negotiators should determine their bottom lines by assessing the expected court outcome (aka BATNA value) and adjusting it based on the expected future tangible litigation costs and value of intangible interests.

These assessments necessarily are imprecise and subjective. It's usually very hard to predict court outcomes and future tangible costs because there are so many variables. If you ask lawyers to estimate the probability of success of cases they are very confident they would win, usually they won't say more than 80%. The amount of legal expenses depends on how much the parties want to fight, which is hard to predict.

The value of intangible interests is inherently subjective. Consider two plaintiffs, X and Y, with identical cases and the same expectations about likely court outcome and future tangible costs of litigation. X is very risk averse, and Y is very willing to take her chances in court. So X's bottom line will be lower than Y's bottom line. In other words, X will be willing to accept a smaller settlement than Y.

Parties generally have multiple intangible interests, which they generally don't consider explicitly or value numerically. For example, intangible costs may include stress, anxiety about the litigation process and outcome, effect on relationships and reputation, and desire to avoid distraction from other activities, among many others.

Although the litigation process generally harms parties' interests, sometimes they may receive a positive intangible benefit from the process. For example, a plaintiff may value having a "day in court" experience and be willing to reject favorable offers relative to the expected court outcome. Similarly, a defendant may want to send a message that she won't be intimidated into settling easily and thus be willing to reject favorable offers relative to the expected court outcome.

There are parallels in transactional negotiations. Potential contracting parties set bottom lines when they negotiate possible deals. They consider the net benefit of a possible deal as a trip wire to end negotiation if they can't reach agreement producing a minimum level of expected benefit compared with the value of the status quo or other possible deals.

The amount of benefit from a commercial deal may be uncertain due to various factors such as availability of financing, diligence of contracting partners, production efficiency, consumer reaction, market competition, and government actions, among others. So, in considering whether to make a deal, parties estimate the net revenue as well as the costs of making and consummating the deal. They may also consider various intangible consequences such as effect on public image, development of business relationships, and increased tech-

nical capabilities, among others. Thus, careful parties and lawyers consider such factors in determining the minimum net benefit to make it worth proceeding with a deal.

How Bottom Lines Really Work

Consider the life cycle of a legal dispute where plaintiff P, who seeks monetary damages, hires a lawyer. Before consulting the lawyer, P probably tried – unsuccessfully – to negotiate with the defendant. Both parties had bottom lines that the other wouldn't exceed.

At the beginning of the case, P's lawyer does an initial case assessment of the three elements of a bottom line – expected court outcome, future tangible costs, and future intangible costs – and may develop a rough, tentative bottom line. As the case proceeds, the lawyer conducts a factual investigation, applies legal principles to the evidence, and consults with P to develop more precise and confident estimates of the elements of the bottom line.

Lawyers vary in how carefully and explicitly they conduct assessments producing bottom lines. Some lawyers do careful calculations and thoroughly help clients assess their intangible interests. Other lawyers rely only on vague "gut" feelings and don't engage clients in the assessment process. The resources and effort invested in the process often are proportional to the amount at stake and complexity of the issues, among other factors.

At the outset of the "positional negotiation" game, P and his lawyer may decide on a bottom line. With this in mind, they agree on a much higher initial demand because they expect to make a series of concessions and ideally settle for more than their bottom line. They calibrate their successive offers hoping to end up with such an agreement.

In "interest-based negotiation," the negotiators focus on the parties' interests and options for satisfying both parties' interests. They keep the bottom line in mind as the walkaway point to end the negotiation if they can't reach agreement.

Similarly, in "ordinary legal negotiation," lawyers think of the bottom line as the walkaway point if they can't reach agreement based on the norms for comparable cases.

Parties use the same negotiation processes in transactional negotiations. Some are "positional negotiations" in which both parties try to maximize their partisan advantage. In those situations, parties use their bottom lines to plan and implement their negotiation strategies, starting with extreme opening offers. In "interest-based" and "ordinary legal" negotiations, the negotiations focus on parties' interests or general norms (such as industry standards or going rates) and use the bottom lines as walkaway points.

How Lawyers Can Help Clients Make Better Bottom Line Assessments

Lawyers should have candid conversations with clients about these issues at the earliest appropriate time in a case and throughout a case at key decision points. Lawyers have an ethical duty to provide candid legal advice, but that's often hard because of numerous cognitive, motivational, and social biases as well as lawyers' financial self-interest in some cases. There are great pressures to be overly optimistic based on a "conspiracy of optimism" between lawyers and clients.

So it requires self-conscious effort and good communication for lawyers to provide candid assessments of likely legal consequences and to help clients develop realistic assessments of their intangible interests. Lawyers generally are familiar with the various ways of estimating court outcomes.

Most lawyers probably don't explore clients' intangible interests explicitly and thoroughly. This post lists a series of questions that lawyers can use to help clients assess their intangible interests.

To help set a bottom line, lawyers can encourage parties to place dollar values on their intangible interests. For example, if P is worried about continuing litigation and going to trial, P's lawyer can ask, "Assuming that you could get $Z if you went to trial, how much would you accept to settle this case today?" Similarly, in transactional negotiations, lawyers can ask clients how little tangible benefit they would be willing to accept if they satisfy certain intangible interests.

In litigation, lawyers often implicitly ask clients about intangible interests toward the end of difficult negotiations when the counterparts' offers are near or below their clients' bottom lines. It's generally better if lawyers and clients have this conversation explicitly well before then.

Conclusion

Like "BATNA," a "bottom line" is a surprisingly complex concept in theory and practice that people often misunderstand. Practitioners can improve their clients' decision-making by carefully assessing key elements in their cases and engaging clients in the assessment process whenever appropriate. This can help produce good negotiation strategies using well-developed bottom lines as needed.

ASSESSING INTERESTS AND RISKS BATNA BOTTOM LINE DISPUTE RESOLUTION PRACTICE FOR TEACHERS AND STUDENTS NEGOTIATION