

# In the Arena: A Primer on the Lingo of Negotiation and Persuasion

By Robert A. Creo

**E**arlier columns have addressed the lawyer's identity and reputation, explored self-awareness, perpetual learning, professional growth through civic service, persuasion and emotion — specifically, fear and anxiety — the preparation and self-control necessary for engaging at the bargaining table and making initial proposals and negotiation strategies.

This column continues the exploration of effective communication and persuasion by exploring words of art, phrases, abbreviations and jargon commonly used in negotiation and argument in both transactions and litigation.

Let's listen in on a negotiation observed by a law-student intern of landlord counsel involving negotiating terms of a long-term commercial lease (clients not present).

Landlord Counsel: There is too much hair on this deal. The FMV of the FEPs alone justifies the SF rate. You also have a sweetheart deal on the SD. This is why I sent you all the information on the base rental rates in the area last week.

Tenant Attorney: We made a concession on the Phase 1 during DD, despite the DEP concerns.

Landlord Counsel: That is counterfactual. This isn't my first rodeo.

Tenant Attorney: Your client has rose-colored glasses. We have gone tit-for-tat with you so far, but not on this one. I know you have your target and I know you think my client will not walk due to our sunk costs, but we do have a BATNA. The Smith property is in play and only two miles away. It's a way-above-average property.

Landlord Counsel: Just like your clients to be bad actors to try to insert themselves in that situation to take advantage of it. We all know that piece is only viable from the halo effect if the zoning gets changed on Beaver Road, which is far from a done deal. It's not a proper benchmark. We have a win-win here if you accept these final tweaks.

Tenant Attorney: What you frame as tweaks are big hills. Again, you are self-serving and unrealistic. Let's cut to the chase. I am running low on horsepower. What is your bottom line?

Landlord Counsel: I am not going to bid against myself. I made the last proposal. You're up in the box.

Tenant Attorney: I will go one more month on the SD and another \$1 on the SF. That's it. Take it or leave it.

Landlord Counsel: Getting closer ...

Tenant Attorney, interrupting: Nope. That's it.

Landlord Counsel: I feel like we are caving ... Hmm ... but ... Done, if we add an ADR clause with AAA. Deal?

Tenant Attorney, with pause: I will call my client to recommend and confirm, but I think we are there. [Handshake.] You have schmoozed me once again. [Leaves room.]

Landlord Counsel, turning toward law student: Why do I feel like I just shook hands with the devil? This was too easy. My client will blame any losses or bad outcomes on me. [Reflective pause.] What do you think? Really?

Law Student: I feel I was watching a foreign-language film without benefit of subtitles.

## Negotiation/Trade Jargon and Cognitive Heuristics or Traps

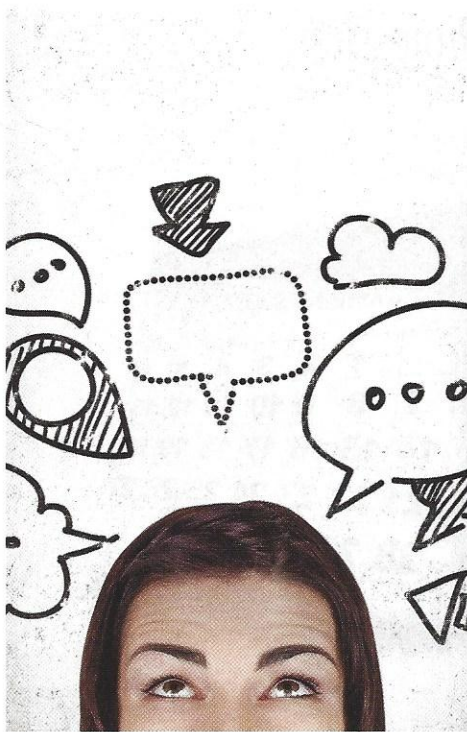
Most of the dialogue is familiar and easily understood by veteran lawyers and executives. In the courtroom it is customary for lawyers to use more formal language, especially when there is a record.

### References and Additional Sources

- Max H. Bazerman, *Judgment in Managerial Decision Making* (1986)
- Barry Goldman, *The Science of Settlement: Ideas for Negotiators* (ALI-ABA, 2008)
- Roger Fisher, William L. Ury, Bruce Patton, *Getting to Yes* (2011)







When in the arena of the judge's chambers or the negotiation or mediation table, however, language is more relaxed, with linguistic shortcuts and use of analogies common. My experience as a negotiator and mediator is that informal phrases dominate face-to-face exchanges in small groups.

Let's unpack some of the negotiation conventions, expectations and psychological factors stated or otherwise represented in the lease negotiations. In future columns we will address other cognitive biases and irrationality, but let's start here with a few seen above, such as "base rates," "BATNA," "halo effect," "regret aversion," "reactive devaluation" and "winner's curse."

#### Base Rate

The background condition or situation that existed before the event or action.

It is also utilized in conjunction with benchmarks, such as fair market value (FMV) or other comparables.

#### BATNA: Best Alternative to a Negotiated Agreement

BATNA was coined by Roger Fisher, William Ury and Bruce Patton in their book *Getting to Yes*. BATNA advocates for parties to consider their full range of options, including the best alternatives. The BATNAs here are for the tenant to find other suitable space and the landlord another tenant. Once considerable time and money have been invested in the potential deal, it is more difficult to walk away from these "sunk costs," so BATNA sometimes is obscured by the momentum of the negotiations and transactional costs expended to date.

#### Halo Effect

The inclination to believe that once it is determined that a person or place has positive quality, there are additional spillover positive qualities and effects. Counsel expressly mentions it above to rebut the point made by opposing counsel.

#### Overconfidence Effect and Bias

A person's subjective confidence in judgment that is greater than warranted by the objective evidence or risk analysis. It is expressed as "rose-colored glasses" here.

#### Reactive Devaluation

This is the inclination to discount or reject proposals, irrespective of their merits, because they originate from the opposition. Landlord counsel here is suspicious of the last increase in the offer on the security deposit (SD) and the \$1 per square foot (SF). This is related to "winner's curse," which happens after a deal is finalized.

#### Winner's Curse

The negative feeling if we perceive our negotiation goal was reached too easily. This is captured in the phrase of counsel: "I just shook hands with the devil." People second-guess themselves even after they agree to a deal. There is always the fear that they left money on the table that could have been realized if they had only held out longer in the bargaining process.

#### Bidding Against Self

A common and mostly overused phrase that can easily lead to a breakdown in negotiations. This is when a negotiator declines to make any additional concessions or movement until the other party makes an affirmative act by changing its last position. It can lead to early impasse when a party makes a proposal that the opposition believes is so extreme that any response is counterproductive or a sign of weakness.

#### Cognitive Load

Scientists have discovered that most people have a limit to their own capacity for sustained concentration and dialogue. It is the norm for people to be able to remember and mentally juggle seven things, plus or minus two. In other words, five to nine items or concepts are the range of mental competency for a typical person, which is often called the "cognitive load." It is the "horsepower" required to complete a task or an engagement as noted above by counsel. Negotiators are wise to recognize when they are approaching their peak physical and mental capabilities and respect these limitations. ☞



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## TAKEAWAYS

- Speak naturally, while using appropriate lingo and shortcuts.
- Be aware of psychological limits and bias.
- When your goals are met, stop and avoid regret.