

University of Missouri School of Law

University of Missouri School of Law Scholarship Repository

Faculty Blogs

Faculty Scholarship

5-30-2017

WHAT THEORY DO PRACTITIONERS WANT?

John M. Lande

Follow this and additional works at: https://scholarship.law.missouri.edu/fac_blogs



Part of the [Dispute Resolution and Arbitration Commons](#)

WHAT THEORY DO PRACTITIONERS WANT?

MAY 30, 2017 | JOHN LANDE | 1 COMMENT

At the ABA Section of Dispute Resolution conference last month, Rishi Batra, Noam Ebner, Rebecca Hollander–Blumoff, Sanda Kaufman, and I led a session entitled, “Making Negotiation Theory More Helpful for Practitioners.” This session grew out of the [Tower of Babel symposium](#) last fall. We presented some of our own thoughts about negotiation theory and spent most of the session eliciting ideas from the audience, which are summarized in this post.

Rebecca led off by noting the applicability of negotiation theory in real life, such as the recent negotiations about health care reform. Rishi talked about why negotiation theory is helpful. Rebecca discussed the value of procedural justice theory. [Sanda argued that many of us have a bias for cooperation](#), which should be a tool to achieve parties’ interests rather than an end in itself. [I critiqued the integrative and distributive models of negotiation](#) and argued that we need better conceptions of what really happens in negotiation. [Noam described how changes in individuals and interactions affect negotiation](#).

Making Theory Work Better Theoretically

Some people find our field’s theoretical concepts to be very helpful. Negotiation theory can teach people how to name things they know (but didn’t know what they knew).

There isn’t a single negotiation theory – it comes from many different sources. For example, one person said that labeling using conceptual frameworks, such as Roger Fisher’s and Daniel Shapiro’s five core concerns, can be useful in understanding and dealing with emotions. Others pointed to the value of procedural justice, human needs, and social value theories. Social value theory involves people’s orientations about resource allocation. For example, people with cooperative orientations value equality, people with individualist orientations are concerned only about themselves, and those with competitive orientations are concerned about relative outcomes. Law schools tend to assume that people operate with individualist paradigms, which obviously isn’t always the case.

Some people criticized our theoretical concepts and language. One person said that we are “lost” in our theoretical jargon and judgments. Some suggested that we should do more to adopt the language of negotiators and laypeople about what’s really going on. For example, we might talk about presenting problems. One person suggested the value of narrative theory, which can help with understanding and planning processes.

There were several critiques of the two–model system of integrative and distributive negotiation in its various linguistic incarnations. For example, one person “hates” ‘win–win’ language,” because “someone always wins more.” Another questioned whether BATNAs (best alternatives to negotiated agreements) still work the same way as in the past because of reduced confidence in our society about objective facts. One said that people’s protection of their values should be considered as one of their interests, even though theory may not present them as such. Someone criticized the emphasis on interest–based negotiation, which isn’t used as much as the “hard stuff” of distributive bargaining and which students really need to know. Someone else suggested that we need to unbundle the binary models of distributive and integrative negotiation.

There was some question about the value of theory at all because some people do things intuitively without knowing the concepts. Much dispute resolution depends on individuals’ perspectives and the context, so the general theory isn’t that helpful. Some wonder if our body of knowledge is true. Was it ever true, or is it no longer true? Are people changing, as Noam suggests, in their patterns of attention and trust, for example?

Some people noted problems with how theory relates to practice. One person said that theory tends to lag after practice. So theorists need to hear from practitioners more and faster. Another noted that theory is persistent – it’s hard to get rid of after it has been accepted and outdated. It takes time for theory to be replaced or fundamentally altered. For example, good discussion of negotiation by email or video generally is not in our texts.

How Can Theory Help People in Practice?

We also discussed how negotiation theory could be more helpful in practice – and what should be included more in courses and trainings. I was surprised that people raised these issues less than the theoretical issues described above, though that may have been due to expectations about what this session was about.

Several people focused on lawyer–client relationships. Lawyers need more help in dealing with their relationships with their clients so that they can manage lawyer–client differences effectively. Lawyers need to represent clients zealously – or really “diligently” under the current rules – without getting too caught up in their clients’ stuff. Lawyers also need help rep-

resenting clients in mediation, coaching them in middle of process, and generally communicating bad news.

Lawyers need help deciding whether and when to file complaints and try cases rather than initiating negotiation at particular moments in a dispute. What factors, such as cost, determine the best times to negotiate and how should lawyers (and their clients) make these decisions?

How can negotiators effectively stimulate change in other side's conceptual framework?

Should negotiators negotiate monetary and non-monetary issues differently and, if so, how?

Our teaching focuses on settlement as a "magical moment" but provides virtually no guidance about negotiating drafts of agreements and drafting the agreements themselves. Also, what should lawyers do after settlement?

One person noted a gap in between ethical rules governing negotiation and practice of negotiation in the real world.

Hopefully, this discussion will help teachers, trainers, and practitioners think more productively and stimulate improvements in the way we do our work.

[← BATNA](#) [← EVENTS](#) [← FOR TEACHERS AND STUDENTS](#) [← OUR COMMUNITY](#) [← STONE SOUP PROJECT](#)

ONE THOUGHT ON "WHAT THEORY DO PRACTITIONERS WANT?"

Matt Milligan

JANUARY 11, 2019 AT 2:31 PM

This was an excellent read and was a reminder that my syllabus cannot possibly cover all the holes in our field.

This site uses Akismet to reduce spam. [Learn how your comment data is processed.](#)

