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PROBLEMS WITH THE SYSTEM OF NEGOTIATION MODELS, PART 2

FEBRUARY 10, 2015 | JOHN LANDE | LEAVE A COMMENT

In Part 1, I argued that there are fundamental problems with the system of negotiation models. In this part, I describe actual negotiation cases from my study to illustrate the problems.

As you read about them, consider that I am now focusing primarily on problems with descriptive theory – basically a kind of language enabling us to describe negotiations with more or less accuracy. Having a good descriptive theory can provide a foundation to develop prescriptive theories about what actions are likely to produce particular effects and help people to better enact their particular DR values in practice.

With that in mind, consider the following cases.

In one case, a husband in a divorce was concerned about the welfare of his wife and children and not merely maximizing his own financial situation. The lawyers discussed the parties' interests, which presumably helped them negotiate. Although the lawyers started on a "good footing" with each other, the parties were very anxious about the financial arrangements and filed motions for temporary court orders to govern the situation while the case was pending. Both lawyers tried to focus their clients on negotiation, and they reached agreement on temporary issues without a hearing. Before reaching an agreement, the parties exchanged three to five offers dealing with varying combinations of the amount and length of maintenance and responsibility for the debts.

Was this an interest-based negotiation (IBN)? On one hand, the lawyers discussed the parties' interests and the husband was concerned about the wife's welfare to some extent. On the other hand, the parties apparently had a tense relationship during the process and reached agreement only after a considerable exchange of offers.

What would make the process clearly positional negotiation (PN) or IBN? Would it matter if satisfying both parties' interests was the primary consideration in the negotiation? What difference does it make that the lawyers apparently were focused on satisfying both parties' interests but the parties themselves may have had much less concern for each others' interests? Would it make a difference if only one party was concerned about the other's interest?

Is a critical factor what the negotiators thought or said when they exchanged offers? For example, would it matter if the negotiators crafted their offers to maximize their own gain (hoping that their offers would be the bare minimum needed to get the other side to accept) or to accommodate the other side's real interests?

Does it matter how much of the negotiation involved an exchange of offers? For example, in one case, it appears that the exchange of offers may have been a relatively small part of the negotiation, working out details of an agreement in principle. In another case, the parties may have given lip service to addressing each others' interests but most of the process involved exchange of partisan offers.

Would it have made a difference if the negotiators analyzed a range of options instead of exchanging offers?

Would it have made a difference if the agreement "created value" for the parties?

In a case involving a labor grievance, apparently there was little or no direct discussion of the parties' interests between the opposing parties although the agreement was obviously tailored to satisfy the interests of the negotiators. Should this be considered as an IBN case?

The relationships between the opposing sides were extremely adversarial as the lawyers "[fought] over everything." At the beginning of the final negotiation, the company lawyer said that the union initially "dug in its heels" and took a hard position. After a difficult negotiation involving an exchange of three to five offers by each side, the parties reached an agreement that was tailored to the interests of the employee, union, and company.

Again, it is hard to determine whether this was an IBN case or, if not, what changes in the process would make it fit into the IBN model. Although there was apparently little direct discussion of the negotiators' interests, the negotiators presumably developed theories about the other side's interests, which probably were pretty accurate.

Would it have made a difference if there was an explicit discussion of the parties' interests? Would it be enough if the negotiators had a certain level of concern for the other side's interests in crafting offers even if they did not discuss the interests explicitly?

Would it have made a difference if the negotiators considered a range of options, such as in a brainstorming process?

Would it make a difference if the tone of the negotiation was more friendly?

These questions illustrate a fundamental conceptual confusion about the meaning of IBN, a cornerstone of contemporary negotiation theory. This is reflected in loose talk by academics and practitioners who seem to consider a process as IBN if the negotiators are friendly or make even cursory reference to parties' interests.

Professors Milton Heumann and Jonathan Hyman observed similar confusion in their study of New Jersey lawyers. Although lawyers in that study reported that, on average, they used a problem-solving process in up to 33% of their civil cases, the researchers "seldom" heard "stories about the interests of the parties" when observing actual settlement negotiations. Moreover, in interviews about the cases, the lawyers described "little about the underlying real-world interests of their clients and the opposing parties." The researchers found that "[e]ven the word 'need' was turned to positional, not problem-solving, use," typically referring to "what dollar amount would be sufficient to settle the case." Milton Heumann & Jonathan M. Hyman, Negotiation Methods and Litigation Settlement Methods in New Jersey: "You Can't Always Get What You Want," 12 Ohio St. J. on Disp. Resol. 253, 255, 306 (1997).

In my study, I also found confusion about what factors would be necessary to consider a negotiation to be a PN. And I documented a third model, which I call "ordinary legal negotiation" (OLN), which is completely missing from traditional negotiation theory. OLN involves a process resembling ordinary conversation (rather than an exchange of offers or analysis of interests and options) in which lawyers try to reach agreement based on shared legal or other norms.

Merely adding new models to the system of negotiation models (or modifying them) doesn't solve the problems. The models still assume that multiple variables are highly correlated with each other, all negotiators are using the same model, and the model doesn't change throughout a case.

So I believe that we need to replace the system of negotiation models. In another post, I will suggest a way to develop a new system or – in Kuhn's terms – a new paradigm.

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