Kluwer Mediation Blog

We Need Clearer Dispute Resolution Language

John Lande (University of Missouri Center for the Study of Dispute Resolution) · Wednesday, October 28th, 2020

In 2015, I retired as an American law professor. For most of my career, I used some of the basic concepts of our field such as negotiation, BATNA, positional vs. interest-based negotiation, and facilitative vs. evaluative mediation. I wasn't always comfortable with these terms, but I used them because I couldn't imagine shifting to alternatives.

As a result of my own and others' research, I now can imagine some alternatives and a process for developing them.

This post supports a proposal to develop clearer dispute resolution language. This could provide numerous benefits for research, practice, teaching, training, and collaboration within our field.

Imagine a world where we generally use the same language, particularly words that laypeople commonly use. This could improve communication between practitioners, parties, teachers and trainers, researchers, and students around the world. Although people would be free to use any language they want, agreement about the meaning of some important terms, and widespread use of those terms would help improve our communication and understanding.

Let's consider problems with some of our basic terminology that cause confusion and then a process for developing clearer language.

Negotiation

Negotiation is a basic process in our field, yet we can't agree on its essential characteristics. I reviewed thirteen general negotiation books in a variety of fields and found that definitions were all over the map. Various definitions indicated that negotiation is interpersonal, involves communication, interdependent parties, parties with differing interests, and matters of common concern. Definitions indicated that negotiating parties have goals to develop shared understandings, coordinate behavior, allocate scarce resources, or change people's relationships. Negotiation processes are defined as involving efforts to reach agreement and use reasoned discussion and problem-solving. In real life, some processes we think of as negotiation involve some of these characteristics, but not all of them.

Another illustration of the problem is the discussion between Andrea Kupfer Schneider, Noam Ebner, David Matz, and me resulting in four different definitions of negotiation. We couldn't agree whether "negotiation" requires that more than one person has some power, there is effort to

persuade others, there is some "pushback" between parties, people discuss their interests, they perceive they are negotiating, they are interdependent, they seek to reach agreement, their behavior appears to observers as negotiation, or there is an agreement or changed behavior.

In 2016, the University of Missouri Center for the Study of Dispute Resolution held a symposium entitled, *Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding*. One insight from the symposium is that we can help improve negotiation theory by clarifying our vocabulary. Theory is valuable only to the extent that it is meaningful within a particular community. If theorists use different terminology referring to similar concepts or use the same terms to mean different things, it is hard to develop coherent and useful theory.

BATNA

BATNA (the best alternative to a negotiated agreement) is a fundamental concept in dispute resolution theory, but many experts in our field misunderstand it. For example, many of us do not know that BATNA refers to a course of action (such as trial or self-help), not the *expected value* of a course of action. After identifying courses of action, people estimate the likely value of the courses of action. For example, trial is a course of action and the amount of a judgment is the value of that course of action. In this context, trial itself is the BATNA and the expected amount of the judgment is the BATNA value.

If you think that WATNA (the worst alternative to a negotiated agreement) is a useful concept, you misunderstand this concept too. Although one might consider the worst possible course of action (say, murdering an adversary), it's generally not helpful to do so. Instead, negotiators should consider the possible values of different courses of action and choose the course of action that seems best. Because the future is uncertain, negotiators should consider the range of possible outcomes from that course of action. For example, considering the course of action of going to trial, one should consider the best, worst, and most likely outcomes of the trial. The trial itself is the course of action and those outcomes are possible values that might result from the trial.

We could understand each other better if we used terms such as options and expected outcomes instead of BATNA, for example.

Negotiation Models

To frame a study of actual negotiation practice, I reviewed nine American law school negotiation texts, which illustrated great confusion about basic negotiation models. The texts identified two general models of negotiation, though they used different terms to describe them. The negotiation texts refer to one model as "distributive," "competitive," "adversarial," or "positional negotiation" and the other model as "integrative," "problem-solving," or "cooperative problem-solving." Although none of the texts use the term "interest-based negotiation," it is widely used in practice.

The texts describe different characteristics of "positional negotiation" including goals, assumptions, relationships, process structure, and tactics. For example, various texts identify the goal of maximizing negotiators' results, having zero-sum assumptions, treating the other side as opponents, using a counter-offer process of starting with extreme offers, and using various hard-bargaining tactics.

In describing "problem-solving negotiation," the texts generally refer to efforts to satisfy both parties' interests, create positive-sum outcomes, have an amicable and efficient process. The texts

list many specific techniques with very little overlap between them.

In my study, I interviewed 32 lawyers about cases they recently settled. I found that some cases fit neatly in the theoretical models, but many cases did not exhibit all the characteristics of a given model. For example, some negotiators used different models to address different issues or they used one model at one point and use another model at a later time in the process.

Mediation Models

Many academics and practitioners distinguish between "facilitative" and "evaluative" mediation. In Len Riskin's original formulation of the "Riskin grid," "evaluative" mediation refers to a combination of very different things. He later critiqued the concepts of facilitative and evaluative mediation, suggesting alternatives, but mediation academics and practitioners generally still use the old concepts and rarely use the new ones.

The differences in elements of "evaluative" mediation are illustrated by the results of a survey of civil mediators conducted by the American Bar Association Section of Dispute Resolution Task Force on Improving Mediation Quality. Varying percentages of mediators said that they believe the following techniques would be helpful in most cases:

1. give analysis of case, including strengths and weaknesses: 66%
2. recommend a specific settlement: 38%
3. make prediction about likely court results: 36%
4. apply some pressure to accept a specific solution: 30%

More recently, the ABA Section of Dispute Resolution's Task Force on Mediation Techniques analyzed 47 empirical studies from the past four decades that produced data about the effects of particular mediator actions. The Task Force found that researchers used a variety of terms referring to related but distinct concepts. For example, various studies defined "pressing" or "directive" actions that:

1. Press parties, push parties hard to change positions or expectations;
2. Urge parties to compromise, concede, or reach agreement;
3. Advocate for / agree with one side's positions / ideas; argue one side's case;
4. Push with bias for / against one side;
5. Tell parties what the settlement should be; press them toward that solution; try to make parties see things their way;
6. Control, dominate, direct the session.

See Roselle Wissler, *Methodologies and Terminology for Research with a Real-World Focus*, in Theories of Change for the Dispute Resolution Movement: Actionable Ideas to Revitalize Our Movement 263 (2020), which can be downloaded for free.

Moving Forward

A major problem with the terms described above is that they are so general that they don't fit the complexities of reality very well.

Rather than trying to develop consensus about such general terms, I think it would be helpful if our community could identify more specific, concrete terms that can be readily mapped onto specific

behaviors or concepts. For example, instead of focusing on overbroad models of negotiation and mediation, we could communicate more clearly if we focus on component elements of the models using commonly understood words. We would understand each other better if we refer to *elements* of negotiation models, such as the extent parties are concerned about each other's interests, use a friendly tone, use a particular procedure (such as exchanging offers), rely on particular types of norms, or exert power.

The Mediation Techniques Task Force recommended that we seek consensus about preferred language. This initiative might engage the range of stakeholders who might begin by reviewing academic and practice literature. It might involve discussion by experts; focus groups with academics, practitioners, and disputants; public forums; and/or public comments. It should not be limited to mediation.

Clearer communication could help in many contexts. For example, using clear language could be particularly valuable in dealing with disputants and other dispute resolution stakeholders. Professional jargon can promote communication between professionals but it confuses laypeople and thus excludes them from conversations. Jargon is helpful in some technical fields but it isn't helpful for dispute resolution, which benefits from active participation of a wide range of stakeholders.

Clearer language could help students in clinical and externship courses navigate the different worlds of practitioners, clients, and faculty. These courses could become more useful laboratories of knowledge at the intersection of academia and practice.

Using more uniform definitions could promote collaborations between researchers and practitioners to produce more useful theory and research.

This initiative could produce a standard list of keywords for bibliographic research, which could help authors reach interested readers and help researchers find what they are looking for.

Developing some common dispute resolution terminology could be a challenging task because much of our language has connotations reflecting strong feelings about what some believe are the "right" or "wrong" dispute resolution approaches. Ideally, we could develop less ambiguous, emotionally-charged terminology. We still would have strong philosophical differences but hopefully we would be able to focus more directly on the issues using a shared vocabulary, less distracted by reactions to the language itself. Indeed, using clearer, commonly-accepted language presumably would improve these discussions.[1]

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References[+]

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