

Problems with Negotiation Theory

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March 10, 2026

A comment about the absence of interest-based negotiation in this conversation is a helpful reminder of how much of our conversation is organized around familiar – but often confusing – distinctions.

For most of my career, I used the traditional negotiation and mediation theories in my teaching and writing. I became increasingly dissatisfied with our theories and concepts, which led me to develop Real Practice Systems Theory to overcome the problems, as described below.

Problems with Traditional Negotiation Theory

Our labels “interest-based” negotiation and “positional bargaining” (and numerous variations) are often presented as if these were coherent, mutually exclusive approaches.

It’s not breaking news that this gives a false impression. Ten years ago, that was the general conclusion at the [Moving Negotiation Theory from the Tower of Babel Toward a World of Mutual Understanding](#) symposium. And there were lots of critiques before then.

My article, [A Framework for Advancing Negotiation Theory: Implications from a Study of How Lawyers Reach Agreement in Pretrial Litigation](#), analyzed how lawyers actually negotiate in pretrial litigation. The study reviewed textbook definitions of negotiation and analyzed detailed accounts of 32 real cases described by practicing lawyers. The analysis showed that the familiar models of “positional” and “interest-based” negotiation are not coherent concepts. Each model bundles together different elements that do not consistently occur together in practice. These include communication patterns, concern for the other side, value creation, tone, power dynamics, and the use of norms. In practice, these elements vary independently and often shift during a case.

The study also identified a very common negotiation process largely invisible in traditional negotiation theory, which I called “ordinary legal negotiation.” In this approach, lawyers try to reach agreements based on shared norms, most often expectations about likely court outcomes or typical resolutions in similar cases. For example, lawyers negotiating child support often begin with statutory support tables as a baseline and negotiate adjustments from that norm.

One reason the distinction between interest-based and positional negotiation can be misleading is that it focuses primarily on behavior *across the table* between negotiation counterparts.

At least as important is what happens *behind the table*, where parties analyze their situation, develop strategy, and decide what agreements make sense for them. In that setting, negotiators may consider elements associated with both approaches simultaneously rather than choosing one strategy or the other.

BATNA is the worst offender in our jargon IMHO. It's widely misunderstood, as described in my article, [What's the Matter With BATNA? It's Misleading and Doesn't Help Advance Parties' Important Interests](#). People often treat BATNA as the expected court outcome, but it actually refers to a *course of action* rather than the result of that action. Moreover, the expected outcome of that process fluctuates as people gain information during a dispute. Focusing on BATNA also prioritizes expected court outcomes over other important elements of parties' decisions, particularly the tangible and intangible costs of continuing a dispute.

Need for a New Theoretical Framework

These problems in negotiation and mediation theory led me to develop what I call [Real Practice Systems \(RPS\) Theory](#), which focuses on how practitioners actually work rather than relying on abstract models. Practitioners develop systems shaped by their experiences, values, knowledge, skills, and the kinds of parties and cases they encounter.

In mediation, these systems include practitioners' thoughts and actions before, during, and after mediation sessions. Mediators and attorneys representing clients in mediation can use the RPS framework to (1) become more conscious of how they think and why they act as they do in mediation and (2) intentionally improve their techniques.

Rather than relying on broad generalizations, RPS Theory emphasizes analyzing the particular circumstances of each negotiation or mediation as it unfolds.

I developed detailed [checklists for mediators](#), which are concrete manifestations of RPS Theory. These outline procedures mediators may use before, during, and after mediation sessions as well as ethical obligations and practice improvement. I developed parallel [checklists for attorneys](#) representing clients in mediation.

[Practitioners Peter Benner, Graham Boyack, Gary Doernhoefer, Brian Farkas, Clare Fowler, Laura Kaster, Jim McGuire, Paul Monicatti, John Sturrock, Jeff Trueman, and Tom Valenti raved about the mediation checklists.](#)

Traditional theories ignore most of the issues in the checklists. Practitioners with any theoretical preferences can find valuable ideas in them.

All this suggests that it may be time to give some of our favorite jargon an honorable retirement and focus on what negotiators and mediators actually do in the wild.