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## Complacency no more: It's time to brush up your negotiation skills

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Dean Thomas Guernsey and Professor Paul Zwier's *"Advanced Negotiation and Mediation Theory and Practice"* sets out to instruct trial lawyers on the negotiation process with a goal of making "conscious, thoughtful choices" in negotiations, whether arising out of civil or criminal litigation.

Guernsey is both president and dean of Albany University School of Law in New York, while Zwier teaches law at Emory University in Atlanta and is the director of education of NITA. They approach this topic as scholars. It was refreshing to know that at these two law schools, students are being taught the fundamentals of negotiation and, importantly, are learning that strategy and preparation serve lawyers well in any field they choose to pursue.

The book begins with the premise that "people do things for reasons other than a rational business or economic judgment." The first four chapters address strategic planning and urge an "integrated systematic approach" to negotiation. The authors highlight specific styles of interaction and then offer a menu of options from which lawyers may choose to engage, depending on their own personality, the particular client, the nature of the conflict and the perceived style of their adversary. They cover game theory, economic theory and even international politics.

Guernsey and Zwier devote a chapter to the social psychology of negotiation, which I found fascinating. They encourage a great deal of preparation, which should include identifying the client's goals, analyzing the information each side may share or decide not to share, and strategizing about how maximum success can be achieved.

The authors acknowledge that personality and personal style dictate the approach to a particular dispute as much as the facts. They provide a detailed analysis of position-bargaining contrasted with problem-solving approaches and highlight how a "win-win" approach can be effective in certain disputes. Trial advocates must consider the circumstances of the particular negotiation and consciously select the strategy and style best suited to the situation.

The authors suggest that every negotiation begin with an "ice-breaking" stage designed to both develop rapport and gain insight into some valuable, albeit informal, information about what is important to those in attendance. For example, if they arrive with a suit bag in tow, the inquiry will be about flight time and travel plans. If, on the other hand, they arrive early and are accompanied by family members, you may want to know who is important for moral support and who is actually going to be relied on in the decision-making.

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As in every mediation, the next phase involves setting the agenda. Sometimes, for

Friday, September 16, 2011

### Government

#### Political wrangling may cripple the NLRB

The National Labor Relations Board may be sidelined from issuing new decisions due to a 2010 U.S. Supreme Court decision and party squabbling in Washington.

#### U.S. Court of Appeals for the 9th Circuit DNA profiling case could be ruled moot

A major en banc showdown over arrestee DNA profiling set for oral argument next week might get knocked off the 9th Circuit's docket on mootness grounds.

### Intellectual Property

#### Judge allows Oracle's copyright claim against Google to move forward

A San Francisco federal judge on Thursday rejected Google Inc.'s bid to dismiss a claim that it infringed Oracle Corp.'s copyrights on Java in portions of its Android operating system.

### Alternative Dispute Resolution

#### Mediator at Heart

Robert L. Dossee brings a wealth of experience to resolving complex cases, beginning in his days as a state court judge and continuing into his dozen years as an appellate justice and at JAMS.

### Tax

#### Broadcom co-founder owes IRS

The 9th U.S. Circuit Court of Appeals on Thursday ruled against Orange County billionaire Henry Samueli in a tax dispute with the IRS.

### Personal Injury & Torts

#### Stabbing victim's mother files claim with MTA

The mother of a man stabbed to death while riding a Red Line subway train alleges it tolerated dangerous conditions and negligent security in a claim that is considered a precursor to a lawsuit.

### Corporate

#### ACC names new vice president

The Association of Corporate Counsel on Wednesday announced a new vice president, making this the third major staff appointment for the organization since replacing its president in July.

### Litigation

#### Attorney for eBay accuses Craigslist of initiating criminal probe

A lawyer for eBay Inc. accused Craigslist Inc.

those of us who mediate day in and day out and I think it's all too easy to skip this phase or forget to articulate the specific items. The authors submit that it is essential to assure that all participants are "on the same page" as the negotiation moves forward. They also recommend that care be taken to get agreement on the order of the agenda, suggesting that "the party who controls the agenda has a strategic advantage."

The agenda-setting phase is followed by what Guernsey and Zwier term "information bargaining," during which they remind negotiators to ask open-ended questions and get to interests, rather than limit the discussion to positions. Interestingly, they provide a great degree of latitude here, acknowledging that there are three options: the truth, a lie or hiding/blocking. Indeed, they specifically draw on the American Bar Association's Rules, which permit some bluffing in negotiation, to back up their argument that it's not unethical to refuse to reveal information in a negotiation.

The chapter on information bargaining goes into great detail about how to maximize needed information and offers specific techniques that those of us who do this daily may sometimes overlook. I found the section on rhetoric particularly interesting. The authors list several classical rhetorical elements: be detailed, provide multi-dimensional reasons (give the buyer several reasons why the offer is a good one), take care to provide balanced arguments, be emphatic and emotional, be sensitive to negotiations that demand subtlety and use threats sparingly, but strategically.

Guernsey and Zwier call the next phase "crisis and outcome": whether the crisis leads to agreement or impasse. This is the crucial moment in negotiation, and usually only happens late in the day after the other phases have been exhausted. In the section on outcome, there are great reminders about the wrap up of a negotiation, whether it ends in settlement or not. The authors remind trial advocates that it is as important to end on a positive tone as to break the ice at the beginning of the negotiation.

The book includes two interesting chapters on international and multi-party negotiation, which are insightful and very specific to Japanese, Chinese and Palestinian cultures. It ends with a chapter on ethical considerations under the ABA Model Rules of Professional Conduct.

In 200 pages of text, 16 are devoted to mediation (Chapter 9). The authors' premise is that a third-party mediator can be useful where all attempts at direct negotiation have failed. At that point, they advocate utilizing strategic evaluation to determine which ADR (alternative dispute resolution) process and which professional would best serve the disputants.

I found the book refreshingly optimistic in its creative problem-solving ideas, especially considering that it is written for trial advocates. For example, it included some analyses of negotiation in criminal law (plea bargaining) and transactional bargaining for terms within a business deal. There is a particularly useful synopsis of the various styles of negotiators and mediators in a chart at pages 160-61.

Many ADR professionals have been mediating for years following a long career as trial advocates, but have never studied the reasons why, for instance, we make small talk at the beginning of a negotiation or why difficult disputes all settle in the last hour allotted for the negotiation, whether it's 5 or 9 p.m.

In the end, I was sorry I had so liberally annotated the book while reading it for this review, as it is one I would like to give to clients and colleagues as a guidepost for thoughtful and deliberate preparation for negotiation in a myriad of disputes. For those who teach negotiation, I would definitely recommend picking up a copy and using it as assigned reading. And for mediators, who are students of negotiation like myself, reviewing the handbook every few months may bring us out of complacency and back to the careful preparation that facilitates the best outcome when mediating challenging disputes.

*Thomas F. Guernsey, Paul J. Zwier, "Advanced Negotiation and Mediation Theory and Practice: A Realistic Integrated Approach" (National Institute for Trial Advocacy 2005). This book is available on Amazon.com and other booksellers by searching for ISBN 978-1556819506.*

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Thursday of initiating a federal criminal probe into its business dealings.

## Constitutional Law

### **Deep-six DOMA: A distraction in troubled times**

Defenders of the Defense of Marriage Act should find more meaningful constitutional activities to occupy their time. By **Bruce J. Einhorn** of Pepperdine University School of Law

## Perspective

### **The correct approach to a right of publicity claim**

The substantive law and procedural considerations you should know for right of publicity litigation in California. By **Charles J. Harder** of Wolf, Rifkin, Shapiro, Schulman & Rabkin LLP

## Alternative Dispute Resolution

### **Compacency no more: It's time to brush up your negotiation skills**

It pays to understand what works in negotiations and why. By **Jan Frankel Schau** of ADR Services Inc.

## Intellectual Property

### **Hotfile getting hotter: The cyberlocker site fires back at Warner Bros.**

Fighting fire with fire, Hotfile has accused Warner Bros. of copyright fraud and abuse. By **Nick Solish** of Bryan Cave LLP

## Litigation

### **E-Discovery: Production of documents in plastic bags scores low on 'bell curve'**

Those who still treat the discovery process as a nuisance only to be tolerated will pay. By of Cal State University Dominguez Hills

## Government

### **Redistricting maps face first challenge**

A Republican-backed group announced Thursday it would file the first lawsuit challenging the new state Senate redistricting maps.

## Real Estate

### **Why high-end buyers of real estate need to be cautious**

With large sums of money on the line, high-end buyers of real estate are wise to be pro-active about their purchase. By **Bradley P. Boyer** and **Sandra K. Wootton** of Ropers, Majeski, Kohn & Bentley PC

## Judicial Profile

### **Jay C. Gandhi**

U.S. Magistrate Judge Central District (Los Angeles)

## Bar Associations

### **New State Bar president speaks his mind**