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Paul J. Zwier, Thomas F. Guernsey, *Advanced Negotiation and Mediation Theory and Practice* (National Institute for Trial Advocacy Practical Guide Series 2008)

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Once in a while we mediate for attorneys who are actually trained in negotiation. In my opinion, those are “teaching moments” when I become the student, but they seem to come far too seldom.

Paul Zwier and Thomas Guernsey’s “Advanced Negotiation and Mediation Theory and Practice” sets out to instruct lawyers on the negotiation process with a goal towards making, “conscious, thoughtful choices”. Professor Zwier teaches law at Emory University in Atlanta, Georgia and is the Director of Education of NITA. Dean Thomas Guernsey is both President and Dean of Albany University School of Law in New York.

The book places special emphasis on counseling: identifying client’s goals and underlying objectives and assessing options and alternatives. The first four Chapters of the book address the strategic planning and offer an integrated systematic approach to negotiation. The authors address specific styles and strategies and then offer a menu of options for lawyers to engage, depending upon their own personality, the particular client and conflict as well as their adversary.

Like mediation, the authors suggest that every negotiation begin with an ice-breaking session, 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 are necessary as moral support and who are actually going to be relied upon in making an ultimate decision.

I recently read an article about networking and referrals that queried whether a referral source needed to be “beer-worthy”. In other words, would you trust someone with your referrals if you didn’t feel you could have a beer with the referral source? In some fashion, the ice-breaking phase is designed to begin to engender some trust and hopefully some rapport between the negotiating parties. It’s a time when hobbies, vacations, family matters can only be brought to bear with an aim towards setting a tone for positive interaction and also drawing the distinction between the dispute and the people involved in it. The authors correctly suggest that this phase should be as strategic and purposeful as each phase that follows.

The book begins with the premise that “people do things for reasons other than a rational business or economic judgment.” For that reason, they spend a chapter devoted to “The

Social Psychology of Negotiation” which I found fascinating. They advocate for a great deal of preparation, which should include identifying the client’s goals, analyzing the information which each side may share or decide not to share and strategizing about how maximum success can be achieved.

As in every deliberate mediation, the next phase involves setting the agenda. Sometimes, for those of us who mediate day in and day out, I think it’s all too easy to skip this phase and/or forget to articulate the specific items on it. The authors submit that it is essential to assure that all of the participants are “on the same page” as the negotiation moves forward. Too, they recommend that care be taken to get agreement on the order of the agenda, suggesting, “the party who controls the agenda has a strategic advantage”. The agenda-setting phase is followed by what the authors term “Information Bargaining”, during which they remind the negotiators to ask open-ended questions and get to the interests, rather than limit the discussion to the 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 upon the ABA’s Rules, which permit some bluffing in negotiation in order to back up their argument that it’s not unethical to refuse to reveal information in a negotiation.

The Information Bargaining Chapter goes into great detail about how to maximize the information you need and offers specific techniques that those of us who do this daily may sometimes overlook. I found the section on rhetoric particularly interesting. There, the authors list several classical rhetorical elements as key: be detailed, provide multi-dimensional reasons (as in 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 those negotiations which demand subtlety and strategic use of threats.

After sufficient information is exchanged, the bargaining begins, followed by what they term “Crisis and Outcome”: whether that leads to an agreement or an impasse. I found that particularly intriguing and may have described it differently, though I don’t disagree that this is the crucial moment in the negotiation, and usually only happens late in the day after all of the other phases have been exhausted.

The book offers Chapters on International and Multi-party negotiation, which are insightful and very specific and unique to Japanese, Chinese and Palestinian cultures. It ends with a Chapter on Ethical Issues under the American Rules of Professional Responsibility.

In 200 pages of text, there are 16 pages (Chapter 9) devoted to Mediation. It is these authors premise that a third party mediator can be useful where all attempts at negotiation directly have failed. At that point, they advocate utilizing the strategic evaluation to determine which ADR process and which Professional would best serve the disputants and why mediators can be effective, too.

The authors acknowledge that personality and personal style will 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 as effective as a zero-sum, adversarial bargaining in certain disputes. In the end, they suggest that lawyers and their clients take the time to prepare and choose which strategy is more likely to get the desired outcome.

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 towards the end of the book. I found myself

listing the qualities of evaluative, facilitative, transformative or integrated and checking to see how true to “type” I have become.

In the outcome section, there are great reminders about the wrap up of a negotiation: whether it ends in a settlement or not. The authors remind the Trial Advocates that it is as important to end on a positive tone, as it was to break the ice at the beginning of the negotiation.

Recently, I overheard a retired Superior Court Judge talking to a group of Women Lawyers about her brief and negative experience as a mediator. She described it as akin to the “Bazaar”, where the mediator was doing nothing more than haggling on behalf of two sides to a purchase until they got into the range of settlement within which everybody agreed. The authors in “Advanced Negotiation” specifically debunk this function and instead offer this: “The person who understands the deal, controls the deal.” Thus, they advocate and emphasize that planning and appropriately conducting negotiations will ultimately lead to fair and lasting resolutions.

Many of the members of IAM have been mediating for years following a career in litigation but have never studied the reasons why, for example, 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 at 5 P.M. 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 rely upon and give to clients and colleagues as a guidepost for the thoughtful and deliberate preparation for negotiation of 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 students of negotiation like myself, I will plan to review the handbook at least every few months to get me out of my own complacency and back to the careful preparation that facilitates the best outcome when mediating any challenging dispute. I found it invaluable.