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**LAWYER
NEGOTIATION**
Theory, Practice,
and Law

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Lawyer Negotiation Theory, Practice, and Law

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*To my wife, Diana, with whom I never have to negotiate, because she is magnanimous
and fulfills all of my needs.*

*To my wife, Helaine, who has taught me how much dispute resolution depends on the
learning of psychology and the art of understanding people.*

SUMMARY OF CONTENTS

<i>Contents</i>	<i>xi</i>
<i>Preface</i>	<i>xxi</i>
<i>Acknowledgments</i>	<i>xxiii</i>
Chapter 1: Negotiation and Conflict	1
Chapter 2: Perception, Fairness, and Settlement Psychology	15
Chapter 3: Competitive and Cooperative Negotiation	45
Chapter 4: A Combined Approach and Choosing a Style	75
Chapter 5: Negotiation Step by Step — The Beginning	101
Chapter 6: Negotiation Step by Step — The Middle	133
Chapter 7: Negotiation Step by Step — The End	171
Chapter 8: Telephone and Cyber Negotiation	201
Chapter 9: Gender, Culture, and Race	227
Chapter 10: Negotiation Ethics	255
Chapter 11: The Law of Negotiation	293
Chapter 12: Obstacles to Agreement and Negotiation Assistance	329
Chapter 13: Mediating for Negotiation Advantage	367
Chapter 14: Negotiated Settlement Policy and Limits	403
<i>Appendix</i>	<i>441</i>
<i>Bibliography and References</i>	<i>443</i>
<i>Table of Cases</i>	<i>455</i>
<i>Index</i>	<i>457</i>

PREFACE

This book is based on three key assumptions: First, to represent clients effectively, lawyers must be skilled negotiators. Second, lawyer negotiation differs from direct negotiation between parties because lawyers are professional agents for clients and therefore have unique responsibilities and potential conflicts. Finally, a negotiation textbook should be interesting to read; bring together the latest, best, and most provocative writing on negotiation; and lend itself to interactive teaching.

Our book, therefore, has a different perspective from most other texts on negotiation. It focuses on *legal* negotiation — the settling of substantial legal claims in which the disputants are represented by attorneys. Although the emphasis is on negotiating settlements of disputes, negotiation of deals and transactions is also fully covered. This book includes a chapter on obstacles to reaching agreements and assisted negotiation. Another chapter covers mediating for negotiation advantage. The reality is that lawyers now regularly use mediation to conclude difficult negotiations of litigated disputes and need to understand how mediation works and how to use it as a creative negotiation tool to best meet their clients' needs. Most students enrolling in a negotiation course will not take a separate mediation course, and if they do it is more likely to focus on how to be a mediator rather than an advocate in the process, as emphasized here.

The text is practical while grounded in theory, and lawyer-focused but also enriched by interdisciplinary knowledge. This book includes many questions designed to provoke critical thinking about the readings and stimulate class discussion. Accompanying role-plays provided in the Teacher's Manual allow students to apply the readings and bring the text material to life. These role-plays again center on the types of disputes in which students are likely to find themselves as practicing lawyers — cases with significant legal claims, as opposed to neighborhood quarrels or purely personal conflicts. There is also a comprehensive bibliography to give students access to a wide variety of writings on negotiation and mediation by scholars and practitioners in the field.

We have deliberately chosen very recent writings on negotiation, so that teachers will not need to prepare supplements to assign entirely up-to-date material. Readings have been carefully edited to keep the material interesting and lively. Additional notes extend the topic coverage, including game theory, decision analysis, use of computer software, apologies, and collaborative law practice. We also take advantage of new technology, and of students' increasing preference for electronic and video formats. Items that have traditionally gone into a paper appendix now appear on the book's Web site. This makes this book easier to carry without sacrificing depth, allows readers to download specific rules or laws for discussion or study, and permits us to update the book's appendix between editions whenever new rules or standards pertaining to negotiation are promulgated. A DVD is also available

to professors to illustrate some of the points and enhance the role-play discussions.

The book's fourteen chapters are designed for a semester course with readings assigned before class so that class time can be devoted to exercises, role-plays, and discussion. The first chapter explores the nature of conflict and the second the role of perceptions and settlement psychology. We then analyze both competitive and cooperative bargaining, and provide help in combining the approaches and choosing a style. After setting out an analytic structure to help students make sense of negotiation and understand styles, we offer a step-by-step explanation and comparison. The negotiation process and outcome-enhancing skills are covered in three chapters providing instruction from preparation to writing the agreement. Following a chapter of new material on telephone and cyber negotiation, students are guided to explore issues of gender, culture, and race. They are encouraged to negotiate within their comfort zones. Separate chapters examine negotiation ethics and the law of negotiation. Obstacles to negotiation are reviewed, and the use of mediation to fill client needs advantageously is then presented. Finally, there is an exploration of negotiation policy and limits.

A note about form: To focus discussion and conserve space, we have substantially edited the readings and have deleted most footnotes, references, and case citations. Deletions of material are shown by ellipses, but omitted footnotes and other references are not indicated. The footnotes we have retained in excerpts carry their original numbers, while our own footnotes appear with either asterisks or sequential numbering, as appropriate. Cited authority in the text usually appears only by author name and year of publication, with a full reference in the bibliography.

This book is the culmination of our combined decades of teaching and negotiating in legal contexts. Although our acknowledgments follow, we are particularly grateful to the many students and lawyers whom we have had the pleasure of teaching negotiation and from whom we have learned much about what works in a negotiation class.

April 2006

J.F.
D.G.

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We are thankful for the support and assistance we have each received from the staffs and librarians of the law schools at the University of San Francisco and Suffolk University, especially USF reference librarians Lee Ryan and John Shafer. Special thanks go to the anonymous reviewers, whose comments on the draft text were insightful and very helpful in refining the contents of this book. We are most grateful to the students and lawyers whom we have trained and worked with in negotiation and mediation. They have inspired us and guided what we have selected here to present to the next generation of lawyers.

Finally, we are indebted to the many authors and publishers who have granted their permission for us to edit and include parts of their publications. More specifically, we thank the following sources for permission to publish excerpts of their work:

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