The Lawyer as a Negotiator: An Adventure in Understanding and Teaching the Art of Negotiation

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LAW SCHOOL DEVELOPMENTS

Once a year this department will carry figures on law school registration. In addition it will provide a medium for the description of experiments in curriculum, teaching method, and administration. Like “comments,” the typical law school development note will be characterized by brevity and informality; unlike them, it will be descriptive rather than argumentative and will deal primarily with devices which have been tested in actual operation. As a general rule, the authors will gladly answer inquiries and, to the extent available, upon request supply copies of materials referred to.

THE LAWYER AS A NEGOTIATOR: AN ADVENTURE IN UNDERSTANDING AND TEACHING THE ART OF NEGOTIATION

*James J. White

Experience is the best teacher—of some things.1 Experience teaches the hog to answer the sound of the feed pail; it teaches the foolhardy and garrulous freshman to be a hesitant and mute senior; sometimes it even teaches the poor teacher to be a good one. Yet observation of the hog responding to the rattle of an empty pail, of the student misreading case after case, or of the teacher antagonizing one class after another tells one that there are some things which experience often does not, and perhaps cannot, teach.

Thus any user of this fabled teacher, “experience,” has two problems. First, if he is to teach anything more difficult than answering to every rattle of the pail, he must devise a teaching supplement to make up for the observed deficiencies. Second, because we do not fully understand exactly why or how experience teaches, he must simulate the real thing as nearly as possible to avoid losing the essence of experience by the omission of some crucial, but apparently unimportant, aspect.

In the fall of 1965 we enlisted experience as a teacher in an experimental seminar called “The Lawyer as a Negotiator.”2 We gave the students

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1Many writers have urged the inclusion of more “experience” in law teaching. The suggestions of the following writers range from modest to cataclysmic in quantum of change proposed and from brilliant to asinine in the quality of thought revealed. See, e.g., Cantrall, Practical Skills Can and Must Be Taught in Law Schools, 6 J.LEGAL ED. 395 (1949); Cavers, “Skills” and Understanding, 1 J.LEGAL ED. 395 (1949); Cutler, Inadequate Law School Training: A Plan to Give Students Actual Practice, 37 A.B.A.J. 203 (1951); Frank, A Plea for Lawyer-Schools, 56 YALE L.J. 1303 (1947); Frank, Both Ends Against the Middle, 100 U.P.A.L.REv. 20 (1931); Frank, Why Not a Clinical Lawyer-School, 81 U.P.A.L.REV. 907 (1933); Mathews, Negotiation: A Pedagogical Challenge, 6 J.LEGAL ED. 33 (1953); Mueller & James, Case Presentation, 1 J.LEGAL ED. 129 (1948).

2Despite its importance to nearly every lawyer, the skill of negotiation has commanded very little time in law school curricula even by comparison with other skill
experience not by simulation but by making them negotiate with one another for their grades in the course. In this as in many other “experience” courses the teaching supplement consisted of readings and of classroom participation by the students and teachers. However the supplement differed from the standard trials and appeals or legal writing course in that a psychiatrist was a full partner in the teaching and in the discussion and analysis of the student negotiations.

The students were required to participate in four negotiations and to complete a series of assigned readings and write a term paper. The assigned readings were of two kinds. Readings of one type described and analyzed the negotiation process in several of the contexts in which lawyers participate as negotiators. Readings of the other type, written by psychologists, social psychologists and psychiatrists, dealt with the psychic aspects of interpersonal relations as they relate to negotiation.

I. THE STUDENT NEGOTIATIONS, A DUPLICATE TOURNAMENT

The negotiations were the structure about which the seminar was built. They gave the student an opportunity to use, and to recognize use of, the negotiating techniques suggested in the assigned materials and in the classroom. They also gave him a chance to examine his emotional reactions to negotiating stresses and to observe the reactions of his classmates. Finally, they provided specific examples for the psychiatrist's discussion in class.

Each student engaged in four negotiations. One was the negotiation of a labor-management contract. Another was the negotiation of a shopping center lease between the landlord and a department store tenant. A third was a divorce settlement negotiation, and a fourth was the negotiation of a settlement in a personal injury case.

At the first session the students were divided into two groups of 12 each. Each of the groups was subdivided into six smaller teams of two each. No student was shifted from one group to the other, but the members of each team within each group were changed after each negotiation.

In each negotiation, each of the six two-man teams in one group opposed a two-man team from the other group. All of the teams from one group

courses. Professor Mathews' experiment during the late 1950's at the Ohio State Law School is the only other law school course or seminar with which I am familiar which was devoted exclusively to the negotiation process. He has described it in JOURNAL OF LEGAL EDUCATION, supra at note 1. It differed from our seminar in that it apparently did not involve work with a psychiatrist nor the study of psychological materials about the negotiation process, nor did it incorporate a process of competitive negotiation of the same problem by separate groups of students.

Specific attention was given to the problem of negotiating a lawsuit settlement in a seminar offered for a time by Professors Mueller and James at Yale Law School. See Mueller & James, supra note 1. Of course, student lawyers in legal aid clinics are getting negotiating experience at more than fifty law schools. No doubt some of the law school seminars and courses associated with those clinics also give attention to the negotiation process.

The psychiatrist was Dr. Carl P. Malmquist of the University of Michigan Medical School. Dr. Malmquist's contribution to the preparation and presentation of the seminar was great. He and the writer are the "we" who speak throughout the article.
represented the same side in the negotiation (as for example the tenant's side); those from the other group represented the other side. All six negotiated the same problem in six different rooms at the same time. Each negotiation was tape-recorded. In three of the negotiations the students were given 24 hours in which to reach an agreement; in the fourth they were given seven days.

A written statement was given to each student a week prior to the commencement of each negotiation. This statement contained a general description of the problem and an agenda of the items which were to be negotiated and, if possible, agreed upon. With minor exceptions the same general description and agenda were given to both sides. In addition each statement contained confidential material which was not disclosed to the other side. This confidential material was principally a statement, framed in terms of "points," of his hypothetical client's minimum and maximum expectations in the negotiation. For example, the instructions might say: "You will receive one

4 The following are examples of the statement concerning the labor negotiation problem:

LABOR NEGOTIATION: INFORMATION TO MANAGEMENT

At the present time your business is good, your inventories are low, and you anticipate substantial competition from a new entrant into your market in the near future. Although you believe that you can easily compete with this new entrant, you believe that it would be disastrous to your business to give him a foothold during any shutdown of your operation. Because of the low state of your inventories you believe that you could continue operation and sales for only about a week during a strike. For these reasons you have been instructed by the company president to avoid a strike at almost any cost. You are convinced that you will have to make some significant concessions to the union in order to prevent its striking.

Business is pretty good. Cost studies and area patterns are such that you can afford up to a 10% wage hike but you hope to be able to settle for 5%. Twenty-five points for lowest wage settlement, 20 points for second lowest.

You will not tolerate the union shop as a matter of principle. It is not economically disadvantageous to you at the present time, but it is psychologically repugnant. You appreciate the problems of the union leadership; they are in political trouble with their members because there are a large number of free-riders due to the open shop, and because of past failures to win impressive gains. You suspect that if you refused to grant the union a substantial settlement it might be the downfall of the union. You do not desire to destroy this union or oust its leadership. If you break this union's back you can anticipate an organizing drive by a more militant union. Twenty-five points for maintaining open shop. Twenty points for union security short of a union shop.

The union demand for larger vacation for employees of five or more years is not acceptable to you. Ten points for not granting.

The union demand for arbitration of grievances is seen by you as a challenge to management prerogatives and as the beginning of a dangerous crusade on work rules. You are not adamantly opposed to improvement in grievance procedure for it has been a problem to you during the existing contract, but arbitration is not desirable. Twenty points if you maintain the status quo. Fifteen points if you yield some concessions to the union but stop short of compulsory arbitration of all disputes.

Granting the request that union stewards be allowed to meet on company time is viewed as inevitable by you. It is a common provision within the area and the industry. You are not particularly opposed to granting this but would like to trade it off. Five points for not granting.

The seniority changes that the union is demanding are viewed as a fairly important challenge to your prerogatives but they would not work much change in current practice. Major changes in business level or modernization might be
point for each cent per hour of wages received in excess of 4¢ per hour.” Thus the student could compute precisely the number of “points” any settlement would produce for him. He did not know his opponent’s point structure

hurt if union succeeded in getting this change. You do not anticipate a downturn in business of major proportions within contract period nor have you any current plans to modernize. Fifteen points for not granting.

Twenty points deducted from score (even if it gives a negative score) for failure to arrive at complete settlement. A minus 50 score will be given unless you agree on at least one agenda point.

The following information was given only to the union teams:

LABOR NEGOTIATION: INFORMATION TO THE UNION

Rather than strike you will settle for as little as 2¢ per hour wage increase. The absolute maximum which you can expect to get would be a 20¢ per hour increase and you would be pleased with a 14¢ an hour settlement. You will receive 10 points for any settlement of more than 13¢. The highest wage settlement among the six labor representatives will receive 25 points. Second highest will receive 20 points; third 15; fourth 10; fifth 5; and sixth 0. (These two rewards will be cumulative; e.g., if the highest settlement were 14¢ that would get 35 points.)

The union shop is a very important demand for you. There has been dissatisfaction with the current leadership, of which you are a part, and you anticipate a rival organizing drive in case your settlement is not a favorable one. Many new people coming into the plant have not been joining the union. You are not sure that non-members would support a strike. Union morale is at low ebb because of the number of freeloaders and because you have produced no significant accomplishments in the past several years. You will receive 10 points for a union shop, 0 points if the shop remains open, and 5 points for some lesser form of union security such as checkoff or membership maintenance.

Previous settlements have been unsatisfactory under the present contract and you want a contract provision providing for the compulsory arbitration of grievances. This demand is important to you because it enhances your prestige. Something less than compulsory arbitration of all grievances might be acceptable to you if your other demands were met. You will receive 10 points for compulsory arbitration of all grievances; 5 points for compulsory arbitration of some but not all grievances. You will receive 0 points if the contract remains the same with no provision for compulsory arbitration.

You would like to get an extra week or two weeks of vacation for workers with five years’ seniority. This is not a must demand with you and you might be willing to use it as a lever for getting greater concessions in other areas. You will receive 5 points if you get an additional five days or more vacation; you will receive 0 points for any increase which is less than five days.

Your studies indicate that there is a strong possibility of automation within segments of your industry within the next decade. It is not an immediate threat but to protect yourself you would like to strengthen the seniority provisions of the contract. You would like for these provisions to provide that unless a man is demonstrably superior, jobs and promotions are to be given to the man with greatest seniority. Your present contract provides only that management shall consider seniority as a factor in promoting. In fact management has generally given consideration to the seniority factor; therefore this provision would not materially change the practices presently in existence but it would benefit you if automation comes. You will receive 7 points for any substantial strengthening of the seniority clause.

Management has been harassing the union by refusing to allow union stewards to meet during shift time. You want a contract provision specifically allowing the stewards time for union business on company time. This is a common provision both in your geographical area and in your industry. You
nor could he find out the actual settlements of others negotiating the same side in his group until he had concluded his negotiation.

The students were neither encouraged to prepare, nor discouraged from preparing, for the negotiation; they were permitted to negotiate for as long as they pleased provided they reached an agreement by the deadline and did not talk with any other team before they concluded their negotiation.

Each student was informed that his grade in the course would depend in part upon his success in the negotiations. He was told that his point score on the negotiations would be placed on a curve with the other 11 persons in his group to determine his grade, and that unless his team reached an agreement on at least one item on the agenda, he and his partner would receive the point equivalent of a failing grade for that negotiation. If he reached agreement on some but not all of the items on the agenda he received only that number of points which corresponded to the value placed on those items by his client.

The example of the duplicate bridge tournament inspired the concurrent negotiation of identical agenda. It also offered the model for a somewhat arbitrary but identical point structure. This contrivance of negotiation of the same problem at the same time under the same point scale by all of the students provided an objective basis upon which to give a grade, namely the number of points acquired by the student in manipulating his opponent. The standard was made objective and unambiguous to stimulate the student's motivation to acquire that grade and to remove any fear that the instructor, influenced by class standing or by his own opinion of the student, might apply a more subjective standard. Moreover, this grade motivation was heightened, perhaps unnecessarily, by distributing a tabulation of the results of each of the negotiations after its conclusion. This tabulation showed the standing of each team in both groups. Thus each student was told not only how well

will receive 10 points for getting two or more hours per week per steward. You will receive 0 points for time less than two hours.

The present contract contains a provision which permits management to discharge any employee whose wages have been garnisheed three or more times. You regard this as an arbitrary and unreasonable interference with your members' personal affairs and wish to have that provision removed from the contract. You will receive 5 points for its removal.

Unless you reach an agreement on at least one of the points described above, you will receive –50 points. Your score when compared with the scores of others negotiating on your side will be used in determining your grade in the seminar.

6 For example, for the divorce settlement negotiation, the tabulation was:

<table>
<thead>
<tr>
<th>TEAM NO.</th>
<th>Remarriage</th>
<th>All-Mony</th>
<th>Cust-Tage</th>
<th>Custody</th>
<th>House</th>
<th>Total</th>
<th>Position</th>
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</thead>
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<tr>
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<td>0</td>
<td>4</td>
<td>5</td>
<td>2</td>
<td>0</td>
<td>11</td>
<td>2</td>
</tr>
<tr>
<td>4</td>
<td>0</td>
<td>–1</td>
<td>5</td>
<td>0</td>
<td>0</td>
<td>4</td>
<td>6</td>
</tr>
<tr>
<td>6</td>
<td>0</td>
<td>1</td>
<td>5</td>
<td>1</td>
<td>0</td>
<td>7</td>
<td>4</td>
</tr>
<tr>
<td>8</td>
<td>0</td>
<td>2</td>
<td>5 1/2</td>
<td>0</td>
<td>7 1/2</td>
<td>3</td>
<td></td>
</tr>
<tr>
<td>10</td>
<td>3</td>
<td>6</td>
<td>2 1/2</td>
<td>0</td>
<td>11 1/2</td>
<td>1</td>
<td></td>
</tr>
<tr>
<td>12</td>
<td>0</td>
<td>–2</td>
<td>5</td>
<td>3</td>
<td>0</td>
<td>6</td>
<td>5</td>
</tr>
</tbody>
</table>
he had done but also how well his competitors in his group and his opponents in the other group had done.

**Negotiation With the Client**

In the divorce negotiation six female and six male undergraduate students served as “clients” and conveyed the confidential information to the student lawyers. These divorce clients also had the power to accept or reject any settlement which the student lawyer reached. The law students were informed that the teacher had established point totals for the various possible settlement combinations and that these totals conformed to the priorities which his client had been instructed to maintain. However, the law students were given the point structure for the principal agenda item, the alimony and support payment question.

The presence of a “client” served two purposes. The first was to promote class discussion of the problem of client-negotiation and to give the student a hint of the frustration which he will surely face in practice when a client rejects a desirable settlement which he and the opposing lawyer have tentatively agreed upon. The second was to give the student some practice at finding out his client’s priorities. The student needed to determine and pursue these to maximize his point score and to insure his client’s acceptance of his settlement.

We had only partial success in illustrating client intransigence. The “husbands” were undergraduate freshmen and all bent readily before the demands and advice of their law student attorneys. The “wives” were juniors and sophomores and did not bend so readily; indeed, some are reported to have given convincing portrayals of the vengeful woman eager to drive a hard bargain with an unfaithful husband. The ambiguity about the point structure seemed not to detract from the negotiation. It may have increased the verisimilitude in that the students could not resolve an impasse by “trading points” as a few had done in the other mock negotiations.

**Money as a Motive**

In the personal injury negotiation we offered the successful students a nominal monetary reward in place of a high grade. The instruction sheet informed the student that he would receive a contingent fee based upon the size of the settlement. Here failure to settle resulted in a “trial” which con-

<table>
<thead>
<tr>
<th>TEAM</th>
<th>RIBIAGE</th>
<th>ALL-MONY</th>
<th>COSTAGE</th>
<th>COT-</th>
<th>TODY</th>
<th>HOUSE</th>
<th>TOTAL</th>
<th>POSITION</th>
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</thead>
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<td>0</td>
<td>14</td>
<td>15</td>
<td>40 1/2</td>
<td>3</td>
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<tr>
<td>3</td>
<td>0</td>
<td>11</td>
<td>0</td>
<td>14</td>
<td>15</td>
<td>40 1/2</td>
<td>3</td>
<td></td>
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<tr>
<td>5</td>
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<td>6</td>
<td>3</td>
<td>14</td>
<td>15</td>
<td>37 1/2</td>
<td>6</td>
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<td>0</td>
<td>14</td>
<td>15</td>
<td>38</td>
<td>5</td>
<td></td>
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<tr>
<td>11</td>
<td>0</td>
<td>14</td>
<td>0</td>
<td>15</td>
<td>15</td>
<td>44</td>
<td>1</td>
<td></td>
</tr>
</tbody>
</table>

6 The students were given the following instructions:

**SETTLEMENT FEE**

1. The fee set out above for specified settlements is the probable one which you will receive for that settlement under the terms of your contract with
sisted of flipping a coin with the teacher and the opponent to determine the fee. The probabilities were such that the coin flipping would likely produce a lesser fee than any of the most likely settlements would produce. One hundred dollars were divided among the students. The sums received ranged from $10 for the highest to $1 for the lowest. The latter was awarded to a lawyer who did not settle, but went to trial.\(^7\)

**The Success of the Student Negotiations**

If one defines negotiation as the acquisition of a valued object by the manipulation of another person, the “mock” negotiations were in fact “real” negotiations. The discussion had to be carried on in the vocabulary of the hypothetical problem—“the company is in financial straits; a pay raise is out of the question”—but these words and the settlements arrived at were only symbols representing the grade which the student sought. Because each student on the same grading curve negotiated the same side of the same problem, grade deviation, to the extent possible,\(^8\) measured manipulative skill, not deviation in the strength of the various cases.

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\(^7\)The student reports and the classroom discussion of this negotiation indicate that money was no greater incentive to reach a settlement than grades had been. Some students reported that they were less motivated by the prospect of the money than they had been by hope of receiving a high grade. It is not possible to tell whether the apparent ineffectiveness of the lucre motive is explained by the fact that the offered reward was too small, that final exams were too near at hand or that the three prior negotiations had sated the students’ interest. Whatever the meaning, I am sufficiently well satisfied with the grade as a motivating device that I plan to use it exclusively next year.

\(^8\)The grade was not a perfect measure of the student’s manipulative skill. In part it reflected the ability of each student’s negotiating partner. It also reflected...
During or shortly after the first negotiation most of the students realized that they were in fact engaged in a negotiation for a grade. Some of them, however, were not much concerned about grades. We attempted to mobilize any latent nonacademic pride in those by distributing the summary sheet described above. The combination of grade incentive and public comparison produced heights of emotion quite foreign to the breasts of most third year law students.

In two of the 24 separate negotiations students reached agreement on no points whatsoever. On at least three occasions students became so angry with one another that one team walked out of the negotiating session. On numerous other occasions the tape recordings and student reports reveal anger, strained tempers, and hostility.

The tape recordings and the students' reports of the negotiations provided data for stimulating classroom discussion. This discussion concerned the pervasiveness and efficacy of the stereotyped negotiating techniques; it also covered the full range of the psychological materials from a consideration of the effect of emotions upon the negotiations to an examination of the importance and utility of non-verbal communication.\(^9\)

Both the reports and the tape recordings indicated that the negotiations caused the students to think about the negotiating techniques and to apply some of them. It was also apparent that the experience in and class discussion of the early negotiations caused some of the students to change their tactics in the later negotiations in response to the data acquired about the various techniques and about their own and their opponent's emotional responses.

Both the students and the teachers were pleased with the negotiations. They gave the student an experience much like the real thing. They offered him a valuable reward which he could acquire only by engaging in the same process in which he will engage daily in his professional life. His engaging in it aroused emotions which appeared to be close facsimiles of those which he will sometimes experience in negotiation for his clients.

The landlord-tenant negotiation gave a good example of non-verbal communication of information. One landlord's counsel opened the negotiation with a rental demand of $2.00 per square foot, but ultimately settled for $.65. Though his opponent was certain (and correct in his belief) that $.65 was the landlord's minimum, he was unable to explain how he had come to that conclusion. A close listening to the negotiation tape recording revealed that the landlord's counsel had made offers of $2.00, $1.25, $.70, and $.65. His statements accompanying each demand had been similar but not identical. On each occasion the landlord's counsel intimated that he would go no lower, but this "intimation" moved by imperceptible stages toward an unqualified statement of the finality of his last demand. After hearing the tape recording, the opposing negotiator decided that he had subconsciously sensed this finality by the decrease in equivocation and through the reduction in the increments of change in the landlord's offers from $.75 to $.55 to $.65. Apparently the opposing student was making a subconscious extrapolation based upon the change in size of these increments.

Another student used the device of a large increment of change in his offer followed by smaller increments of reduction to mislead his opponents in a later negotiation.
Although the student negotiations were the vitals of the seminar, the psychiatrist deserves a position almost as prominent in the seminar's physiology. His role was like that which the law teacher holds in a traditional course. He, like the law teacher, has a greater understanding of the material to be covered than the students have. He is already familiar with the jargon of the psychologist and psychiatrist and he is more fully aware of the total psychological and psychiatric geography and of the frontiers of knowledge about interpersonal relations. Thus he can draw analogies which the students cannot see and can suggest questions which outline these frontiers of knowledge and indicate the direction in which he thinks those frontiers are likely to be pushed.

Much classroom discussion was devoted to an examination of the meaning and relevance of the psychological materials. Since many of these materials were the results of rather simple experiments and since the writers seldom made the jump from this experimental conclusion to the more complex negotiation process, the psychiatrist was indispensable in indicating the relevance of these materials by leading the discussion among the students.

He also contributed important information about the ethical problems which the negotiator will almost certainly face. In the two classroom sessions devoted to ethics the class discussed 21 hypothetical situations. In these hypothetical situations the student was asked whether an ethical or moral inhibition would cause him to refuse to perform an act which ranged from the innocuous (playing golf with an opponent) to the clearly unethical (bribing one's opponent). Between these extremes we provided the student with a spectrum of proposed activities, each of which presumably facilitated a favorable settlement but which became progressively more questionable ethically. At three ethical problems split the class almost evenly. (1) In the first the student was told the following story: “You are negotiating a personal injury settlement for the defendant. The son and wife of the lawyer who is opposing you have recently been injured in an auto accident themselves. The opposing lawyer's son is still in a coma and may die. You would normally settle this case against this plaintiff's lawyer for about $10,000; you have authority to settle at that figure. Because of the plaintiff's lawyer's need for money to meet medical costs for his wife and son and because of the mental stress resulting from his child's hovering near death, he will probably accept $5,000 in settlement of the case.” Half of the students indicated that they would push for a $5,000 settlement; the other half said they would not.

(2) The second situation: “Your opponent in a labor contract negotiation has been having marital trouble. His wife has sued him for divorce. You understand that his wife 'has nothing on him' and for that reason is not likely to get a favorable divorce settlement. Last night you saw him in a bar with a beautiful young blonde who was not his wife. At the conclusion of today's negotiation will you give your opponent a little wink and say, 'That was a good-looking woman you were out with last night?'” Fourteen said they would; ten said they would not. (In a variation of that hypothetical only five students responded that they were willing to use an opponent's apparent homosexual acts against him.)

(3) The third situation: “You are representing the husband in a divorce. The husband has claimed that his wife is pregnant with another man's child. He has indicated to you that he has not slept with his wife for nearly a year. Your detective has found no evidence of the wife's having sexual relations with another man. Moreover, the maid has revealed to you that your client, contrary to his story, return-
the outset of the first class devoted to ethics we required each student to
state in writing which if any of the 21 acts he would refuse to do on the basis
of some moral or ethical inhibition. Because the students were committed
to one position in writing and because there was little agreement among the
students on the point in this continuum from the innocuous to the evil beyond
which they should not go, these two class periods produced a spirited discus-
sion. Since the bluff—the telling of an intentional untruth—is a central
negotiating ploy, we gave extended consideration to the ethical problems
associated with it.\textsuperscript{11} The psychiatrist made contributions here in examining
the various student responses to the suggested questions and considering the
psychological defenses which some of them appeared to have erected.\textsuperscript{18}

Helpful as the psychiatrist was in defining terms and examining ethical
problems, his most vital contribution to the course was none of these; rather
it was the analysis with the students of the emotional forces which the tapes
and student reports showed to exist in those negotiations. Without this kind
of analysis of the emotional forces and the concomitant study of the non-verbal
communication of these forces, a course dealing with the negotiation process
may be no more than an abstract recitation of comparatively superficial nego-
tiating techniques. With the skillful participation and analysis of a psychiatrist
the importance of emotional forces becomes apparent.

The psychiatric materials, highlighted by his explanation, give one glimpses
of an exciting psychiatric landscape. They hint that this landscape may be
one in which ambiguity, anger and anxiety all fit in an ordered, if complex,
relation to one another and to the negotiation process as a whole. The
psychiatrist, like many good teachers, suggested at least one question about
this psychic landscape for every answer he gave; yet I believe the participation
of a psychiatrist or his equivalent would be vital to the success of the course.

III. Course Materials

The materials collected for the course were a hotchpot. We found nothing
which gave comprehensive coverage to the field of negotiation or which
touched even superficially on all of the points deserving of coverage. Ac-
cordingly we assigned one book dealing exclusively with personal injury,\textsuperscript{13}
two books dealing exclusively with labor negotiation,\textsuperscript{14} and a series of excerpts
ed about once every two weeks and stayed overnight during the past year. You be-
lieve that the husband is lying to you, but he sticks to his story even when confronted
with the maid’s claim. Will you refuse to use this argument of an illicit relation-
ship in your negotiations with the opposing lawyer?” The students split evenly.
Half of them would use it; half of them would not.

\textsuperscript{11} In response to the psychiatrist’s probing about bluffing and other such tech-
niques, the students came to the surprising agreement that one with a defective con-
science is probably a better lawyer and certainly a better negotiator than a person
with a normal conscience.

\textsuperscript{12} For example, Dr. Malmquist suggested that the stereotyped psychological barrier,
denial, is probably erected to ward off attacks of conscience. This defense consists
of a conscious denial of the existence of the presence of an ethical problem.

\textsuperscript{13} Philip J. Hermann, \textit{Better Settlements Through Leverage} (1966).

\textsuperscript{14} Edward Peters, \textit{Strategy and Tactics in Labor Negotiations} (1955); Carl
from books and articles dealing with the settlement of personal injury cases.\textsuperscript{15}

The psychological materials were drawn from a variety of sources. Probably the best psychological material was a piece entitled, "Transference Phenomena Within the Negotiation Process," written by the participating psychiatrist.\textsuperscript{16}

Other psychological materials dealt with intolerance of ambiguity, anxiety, cognitive dissonance, the anal personality, and non-verbal communication.\textsuperscript{17}

These were of varying quality and relevance and undoubtedly represent only a small fraction of the psychological materials which are relevant to the negotiation process.

The materials written by persons who are not psychiatrists or psychologists are useful descriptions of the negotiation process, but few of them go beyond a description of what "works" and when it works.\textsuperscript{18} Much of their analysis is not helpful to one who wishes to learn about the art of negotiation. It tends to focus on what to do; it seldom articulates why the proposed techniques are effective or even how one is effectively to invoke the technique. Doubtless many of the writers are able negotiators but they lack either the conscious understanding of their own negotiating skill or the verbal skill necessary to transmit that understanding to another.

The psychological materials suffer from flaws which are different but no less debilitating. Psychologists and psychiatrists have their own vocabulary which contains such words as ego, id, and others capable of understanding only after preliminary study which the typical law student has not had. When this vocabulary difficulty is coupled with the experimental psychologist's hesitance to generalize on the basis of his findings, the problem becomes formidable for those who would use the materials as a basis for understanding the negotiation process. To mitigate those difficulties we devoted substantial class time to a discussion of the psychiatric and psychological materials.

Thus the written materials used in the course were of uneven quality and demanded much of the teacher and the student. The negotiation process awaits comprehensive written coverage both by laymen and by behavioral scientists. Until such coverage is available, teachers of courses dealing with


\textsuperscript{16} Malmquist, Transference Phenomena Within the Negotiation Process, Nov. 1965 (unpublished pamphlet in University of Michigan Law School Library).


\textsuperscript{18} Mr. Hermann's book, op. cit. supra note 13, exemplifies both the best and the most mediocre in this field. His dealing with the "leverage of uncertainty" shows great insight about the kinds of motivation and forces which may be at work in the negotiation process. On the other hand his exhortations to prepare well and work hard are neither novel nor helpful.

\textsuperscript{19} Journal of Legal Ed. No. 3—7
the process will have to struggle to provide the common thread to connect the concepts now loosely ordered under the name of the negotiation process.

IV. DOES THE CURRICULUM HAVE A PLACE FOR A NEGOTIATION COURSE?

One who would urge the inclusion of a negotiation seminar in a law school curriculum must address himself to at least two questions:

1) What can one teach about the subject?
2) Of what value to the student is the knowledge so acquired?

These questions sometimes prompt two seemingly contradictory answers. In one breath a respondent may say that the ability to manipulate others is intuitive and certainly not teachable. In the next he may state that an ability to negotiate can be readily acquired in the first month of practice. Surely a well-designed law school course can teach anything that such a brief experience can teach; thus the answers appear to contradict each other—the ability cannot be taught, yet it is one readily learned. Likely the answers are not contradictory; they probably state but one doubt, namely that no one has any more than a superficial understanding of the process and that this superficial understanding can as well be acquired in practice as in law school.

What Can Be Learned

The experience at Michigan will not fully answer the questions posed nor will it put this doubt to rest, but a recitation of what seemed to be learned can form a basis for discussion and dispute. First, and I believe least important, the course materials and discussions catalogued many of the stereotyped negotiating techniques which are applicable in a variety of settings. An example of these techniques is the whipsaw. Here the negotiator indicates to his opponent that a third party is fairly straining at the leash to accept the negotiator’s offer if the opponent does not do so. Doubtless law school professors have recurring dreams which feature them as the manipulators of this technique in their salary negotiations with a stuffy dean.

Secondly, we sought to expand the student’s awareness of negotiation as a process and of the lawyer’s role as a person manipulator. The materials defined “negotiation” to include every situation outside the courtroom in

\[19\] One can easily distill several typical negotiating techniques from the various writings on the topic. Among those which we discussed in the course were the large demand, i.e., the technique of asking for an amount greater than one expects in order to be able to retreat to his expectations; the false demand, i.e., inserting requests in the bargaining which one does not really seek in order to have something to yield; and Boulwareism, a technique which takes its name from a negotiator who gave only one offer to the union on a take-it-or-leave-it basis.

Perhaps the most generalized technique which we discussed is that of procuring the first offer from one’s opponent. When one bargains for any commodity of uncertain value, whether it is a lawsuit or an item of personal property, it is always desirable to have the other party make the first realistic offer.

\[20\] I excluded the lawyer’s role in the courtroom not because I believed it is generically different or any less manipulative but because that segment of a lawyer’s activities is customarily and traditionally given separate consideration both in law school courses and in legal literature.
which one person is attempting to manipulate another. These ranged from the well-defined conflict of a lawsuit settlement to the ill-defined and poorly-perceived conflict which may exist between lawyer and client or lawyer and employee. The student was encouraged to look at the entire process and to distill elements common to all its species from those which are present only in certain species of the negotiation process. For example, he was asked not only to explain the apparent effectiveness of anxiety stimulated by uncertainty as a force in personal injury negotiation, but also to speculate whether anxiety in some form played a part in other species of negotiation. As a result of this experience we hope that our students will understand their role as manipulators in situations where they would formerly have been unaware of it; we hope that skill which might have been reserved solely for lawsuit settlements will now be freed for other situations.

A third separable segment of knowledge transmitted to the student was a map of the teachers’ conception of the frontiers of knowledge about the art of negotiation. This map was clumsily constructed by raising the unanswered questions which we believed most relevant. Among these were questions concerning the ethical limits which the lawyer’s conscience and the collective conscience of the bar should and do place on one’s use of the manipulative forces at his command. Other questions dealt with the extent and importance of non-verbal communications; these were prompted by a study of some of the writings in the embryonic investigation of that phenomenon. Still other questions suggested the extent of our knowledge and the magnitude of our ignorance about the relation between uncertainty and anxiety and about the relation of the latter with one’s willingness to agree. It is our hope that these unanswered questions, like those in a traditional course, will stimulate the students’ thought and leave their antennae so tuned that they will be receptive to the answers when their experience or the fruits of future research yield them.

The students’ experience in one of the mock negotiations and our classroom discussion of that experience perfectly illustrate the fourth, and in my opinion most important, segment of knowledge conveyed to the students—an appreciation for the importance of emotional forces in negotiation. In that negotiation each team had decided to be utterly unresponsive to the other’s overtures. Each hoped that its silence would cause anxiety in its opponents and that the opponents would purchase their freedom from that anxiety by accepting a less favorable settlement than they would if they were not so anxious. At their first meeting the parties sat in each other’s presence in complete silence for more than an hour before they conducted a brief discussion of the issues. Their second and final session ended with the angry departure of one team; they did not agree on even one of the items on the agenda. In failing to agree the students had committed themselves to a failing grade on that negotiation. Each student had done this despite the fact that he was not in direct grade

21 See e. g., Birdwhistell, supra note 17.

22 Herrmann argues in his book that in effect there is a direct relation between anxiety and willingness to agree. Herrmann, op. cit. supra note 13. Our experience in the student negotiations and common sense suggest that the relation is not so simple and direct. Indeed, it is my hypothesis that some persons may resolve their anxiety not by a capitulation but by a premature departure from the negotiating table.
competition with the persons on the other side of the issue but with the other persons in his own group who were negotiating the same side of the issue. An agreement on any agenda point, however small, would have produced a passing grade for both teams. Thus the only apparent gain from a failure to agree was the gratification of the student's desire to injure his opponent by causing him to receive a failing grade too. Each student was willing to accept a failing grade for that gratification. In its report each side blamed its failure to agree on the intransigence of the other side.

In the classroom session following this negotiation and with the knowledge that half the teams had failed to reach a complete agreement on the negotiation under discussion, we distributed materials on the "anal personality." The anal personality is one characterized in part by a stubborn, unyielding attitude. The air in the classroom bristled with hostility on that day. Even one unfamiliar with psychiatrist talk apparently recognizes that such a label is not one of complete approbation. I will long remember the looks which some of the students aimed at me and the psychiatrist. During that class period the psychiatrist probed the question why one will sacrifice what appear to be his best interests for the gratification of a desire such as that to injure his opponent. He also probed the significance of the fact that each side had shifted the blame for non-agreement to the opponents.

The students were very heavily engaged on that day: each of them had negotiated the problem under discussion; half of them had fallen short of a complete agreement; now the psychiatrist and teacher were calling them dirty names. Through this rather intense experience and other similar but less dramatic ones we believe that most of the students acquired an appreciation of the importance of irrational, emotional forces in the negotiation process generally and of the effect of those forces on themselves specifically. Of course appreciation does not equal solution, and whether these students will be able effectively to control their own emotional responses and obviate or manipulate them in others, we can only speculate. Certainly the student reports, half of which listed this aspect of the course as the most fruitful, showed a keen appreciation of the importance of emotion. In several cases the students reported that they had changed their techniques in later mock negotiations in an attempt to avoid adverse emotional responses.

In summary, what can one teach about negotiation? Our experience in our initial semester causes us to believe that one can teach at least the following things: 1) a knowledge of some of the stereotyped techniques which are used in many negotiating settings; 2) a heightened awareness of the negotiation process, of its pervasiveness, and of the lawyer's role as a person manipulator; 3) some suggestions about the direction in which the psychologists and psychiatrists are likely to push the boundaries of knowledge about personal interactions in the negotiation setting; 4) an appreciation of the importance of irrational emotional forces in the process generally and some understanding of one's own emotional reaction in the negotiation situation.

23 Michaels, op. cit. supra note 17.
24 Ibid.
25 The psychiatrist alleviated the hostility somewhat by admitting that he and everyone else who had withstood the rigors of graduate training in law or medicine had some of the qualities of the anal personality.
What Value, This Learning?

The second question posed above—of what value to the student is the knowledge so acquired?—calls forth flights of speculation and intensity of feeling in the academic community that are wonderful to behold. A canvass of some of the obvious arguments may take us a short way toward an answer. The basic difficulty one faces in attempting to answer the question so posed is to determine how to define or measure “value.” Perhaps it should be measured in terms of frequency of use of the knowledge so acquired; perhaps the relative expense and difficulty of acquiring the knowledge elsewhere is a better or only a complementary measure of its utility; or perhaps the value of a body of lawyer-knowledge should be measured by the quantum of favorable change in his client’s status which the lawyer can produce because of his possession of that knowledge.

If frequency of use is the measure of value, then any unit of knowledge about the negotiation process has a high value. A preliminary study conducted among the lawyers in Washtenaw County indicated that nearly two-thirds of them spent more than 25% of their working hours in some form of negotiation. Professor Conard’s study and others indicate that lawyers settle more than 100 potential personal injury lawsuits for every four they take to judgment. Thus any knowledge about the process will have a high frequency of use, at least if it is stored by the lawyer in such a way that he can retrieve it readily.

However, if the knowledge which we have offered in law school can be acquired at a small cost in practice, then it should be given a value no greater than that cost. I know of no empirical data which reflect either the cost per unit or the quantum of knowledge about negotiation acquired in practice. To be sure, many have become superlative negotiators without reading one word on the topic and without setting foot in a classroom where the topic was discussed; yet I believe that the process is not readily taught by experience. The fact that some have mastered the art without training does not prove anything about the many who have not mastered it; nor does it prove that the masters could not have been better had they been trained.

The lawyer without training may never give systematic consideration to the negotiation process and may never therefore accomplish even the superficial process of cataloguing and attempting to understand the stereotyped techniques. It is even less likely that the busy attorney will take the time after a negotiation to analyze the extent to which his own and his opponent’s irra-


27 Conard, Morgan, Pratt, Voltz & Bombaugh, op. cit. supra note 16, at 154-55. Professor Conard’s findings are corroborated by Roger B. Huntz & Gloria S. Neuwirth, Who Sues in New York City? (1962), at 39, and by the reports of the caseloads of the United States district courts. For example, in the fiscal year ending June 30, 1962, of the 54,426 civil cases that were terminated in the U.S. district courts only 6,202 or 11.4% were terminated during or after trial. 1962 Ann. Rep. of the Director of the Administrative Office of the United States Courts 204. These statistics do not take into account the disputes settled without initiation of suit.
tional impulses affected the negotiation. He will rarely have the benefit of the impartial comments of his former opponent and he will never have the opportunity to have one trained in the behavioral sciences observe and analyze all facets of a negotiation in which he engaged. Moreover, these emotional forces which are so deeply involved in the process may themselves stand in the way of his own understanding.\(^{28}\) Because of the intrusion of his emotions as a screen, because of the pressure of his work and because of the absence of an impartial observer and lack of any external stimulus to cause evaluation, I think it likely that many lawyers who are frequently engaged in negotiation learn little from their experience.

Indeed, one might argue that it is the knowledge conveyed in the traditional courses which has low value because of its ease of acquisition in practice. Today’s law graduate is trained to understand that the law is changing, that he must continually read the advance sheets and study the new statutes and treatises if he is to be a competent practitioner. Through the law review, moot court, and legal research courses he is given extensive practice in the art of using a law library and in learning new bodies of substantive law. He is taught to be suspicious of the black letter and alert for legal fictions. He has no such training in the systematic acquisition of knowledge about a process such as negotiation, nor are there written materials which will carry him as far down the road to such knowledge as they will in the substantive areas of law. I conclude, therefore, that if value is measured in terms of the ease or difficulty of acquiring the knowledge elsewhere, knowledge about the negotiation process has a relatively high value, at least by comparison with knowledge of the substantive law of many fields.

An analysis of value in terms of power to produce favorable change in his client’s status leads one into almost orbital speculation. One need not look far for examples of day-to-day lawyers’ work in which the knowledge of the substantive law is easily acquired or of comparative insignificance in the lawyer’s role. Among these might be the criminal law, where the defense attorney is not often concerned with law school “legal” problems but is principally engaged in negotiating with the prosecutor for reduction in the

\(^{28}\) Dr. Watson suggests that just such a problem exists in learning the art of counseling:

While it is true that experience is the best teacher, it is only if the pupil has the capacity to perceive the questions and answers which the teacher puts forth. It is just at this point that personal blindspots such as those mentioned above get in the way of the learning process.

The best way to gain skill in counseling is through the help of a skilled counselor in going over one’s own experience in counseling. As you may know, this is routine practice in the field of psychiatry, clinical psychology and social work, and there is no reason why it could not be utilized by lawyers as well. It should be possible for lawyers to seek assistance from skilled counselors, who could help them with specific situations from their legal counseling practice, by going over the case material and helping them to see the emotional issues which are present. I have on many occasions, helped lawyers analyze such material and it has usually been possible for them to see parameters of emotional activity and involvement of which they were not previously aware. Merely pointing them out helped clarify the nature of these interactive processes and permitted them to return to their client and explore the problems more fully and productively.

(Watson, *The Lawyer as Counselor*, 1 J.FAMILY L. 7, 17 (1965).)
sentence; the divorce law, where the substantive law is relatively simple, and
the lawyer's job is to work out an agreeable settlement with the other party;
and indeed, the personal injury arena, where only a handful of all the cases
are tried, and where the dispute frequently depends upon the truth or fiction
of some alleged fact. In each of these situations knowledge of the substantive
law gives the lawyer little power to produce favorable change for his client,
and the list would not be hard to expand.

Of course the fact that knowledge of substantive law does not give the
lawyer power to produce favorable change for his client does not mean that
conscious knowledge about the negotiating process does give him such power.
Indeed, one can argue that the importance of the knowledge which the seminar
carried about negotiation was so small when compared with the importance
of intuitive elements in negotiation that this knowledge would give only an
insignificant power to influence others even in situations in which negotiating
ability is paramount.\footnote{A similar controversy has existed for some time among psychiatrists about the
relative importance of the training one receives to be a psychiatrist and the in-
tuitive and personal elements which he brings to the process. See, e. g.: SYDNEY
TARACHOW, AN INTRODUCTION TO PSYCHOTHERAPY (1963); PAUL A. DEWALD, PSY-
CHOTHERAPY: A DYNAMIC APPROACH (1964).} I have no convincing answer to this argument; its
answer must await more thorough and sophisticated investigation by psychia-
trists and others.

V. CONCLUSION

Our one year's experience with the negotiation seminar has convinced me
that we can presently impart a substantial body of knowledge about negotiation
to the student. Although I am less certain about the value of the knowledge
imparted than I am about its quantum, I believe that this knowledge will be of
great value to the student in his professional life and is likely of greater value
to him than the knowledge gained in many of our traditional courses of the
same number of semester hours. Moreover it is likely that this body of
impartable knowledge will grow in somewhat direct proportion to the growth
in the understanding of psychiatrists and psychologists of non-verbal com-
munication and of interpersonal processes generally. I am convinced that a
jointly taught seminar dealing with negotiation would be a useful addition
to any curriculum.

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relative importance of the training one receives to be a psychiatrist and the in-
tuitive and personal elements which he brings to the process. See, e. g.: SYDNEY
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