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MEDIATION AND NEGOTIATION: LEARNING TO DEAL WITH PSYCHOLOGICAL RESPONSES

Andrew S. Watson*

It has become cliché to note that most attorneys spend a high percentage of their working time in mediation and negotiation activities. Their success in these relatively informal dispute resolution procedures enables the legal machinery to operate as smoothly as it does. Although the ability to “think like a lawyer,” the central focus of contemporary legal education, pervades mediation and negotiation activities, additional skills are essential for success in these “alternatives to litigation,” as they are now called in law-school circles. The additional skills are the psychological skills involved in all interpersonal processes. Proficient practitioners recognize that failure to understand their nature and to handle these processes effectively creates the risk of incapacitation.

While some rare individuals possess a seemingly inborn knowledge of interpersonal skills, the rest of us must be taught. Yet, most law schools teach very little about the complex psychological interchanges between human beings when they are negotiating or mediating a dispute. Even as the ability to think like a lawyer is being carefully honed, little is done to develop the ability to cope with the inevitably conflicting feelings that parallel lawyers’ thoughts as they confront the stresses of negotiation and mediation. Additionally, the personality traits of many people who elect to study law militate against the development of skills for coping with these psychological and emotional matters.¹ In this essay I analyze some of the emotional events that occur during mediation and negotiation; the analysis may help us understand many of the problems that arise during the development and application of these legal practice skills. Following the analysis I present a few suggestions about how this teaching might best be accomplished.

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1. Watson, *The Quest for Professional Competence: Psychological Aspects of Legal Education*, 37 U. CIN. L. REV. 93, 98-106 (1968).

I. LAWYER AS MEDIATOR—ROLE CONFLICTS

The *role* of mediator requires certain kinds of behavior that differ from behaviors required in other lawyer roles, such as trial advocate. "A mediator helps disputants toward resolving their disagreement. Unlike a judge or arbitrator, however, the mediator lacks authority to impose a decision on the parties: he can only facilitate the process."² The mediator stands between the parties, asserting no position of his own but, rather, drawing from them a solution that the parties and others perceive as fair and equitable. This vision of the role of mediator immediately conjures up an image of passivity. Clearly this is a relative term; a totally passive mediator would be worthless. A mediator's function, however, does involve passivity when compared with a negotiator's active pressing of his party's interest.

This relative passivity stirs a variety of responses in lawyers and sometimes generates problems associated with the negotiation process. To some, the mere suggestion of behaving passively is anathematic. They link such behavior, consciously or unconsciously, with images and issues of masculinity, power, weakness. When they occur at a conscious level, these images may create problems for attorneys and students. Unfortunately (or fortunately?), they can also tap archaic elements of psychological experience and thereby work their effects through the mechanisms and apparatus of the inner mind (the unconscious), where they are not subject to the rules of rational, cognitive thinking. An encounter with these psychological forces, either in oneself or one's opponent, instantly poses operational problems of great moment, which, if not resolved, may totally thwart the mission of a mediator. This is why self-knowledge is so vitally important. Tilting with real opponents challenges an attorney, but mobilizing antagonism and resistance from unconscious ghosts wastes energy and, in lawyers' operational terms, misuses "billable hours." The role of mediator may require a lawyer to surrender a substantial amount of the psychological control he exercises in other legal activities and to adopt a position that may threaten some of his psychological attitudes if he does not understand them and see them in clear perspective. This threat could cause problems separate from the substantive questions being mediated.

2. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29 (1982).

This description of unconscious attitudes toward the mediator's role may appear to contain a traditional male, "sexist" bias. To the extent that the bias exists, women's traditional aculturation may, at this time in history, make them more effective as "passive" mediators. Now that we have begun to break through these sexist stereotypes, both men and women may develop a new layer of conflict superimposed upon the old; whatever their own past images of male-female passivity, they may now have to "be sure" they do not behave in a sexist way vis-à-vis passivity. As individuals struggle with this double layer of concern for roles, it may lead to the loss of all spontaneity for awhile, but that is one of the costs of change.

In the mediation process, both parties to the mediation become the mediator's clients. It is his task to insure development of an equitable compromise. The higher visibility of mediation as a method of resolution of disagreements may require, for the system to remain viable, that mediation results appear equitable.³ The mandate that the outcome be fair to each side may require counsel to prevent some clients from conceding too much. While this position may be consistent with an attorney's encouragement in the face of a client's hesitance to press a dispute, it is contrary to an attorney's more usual focus of capitalizing on an opponent's willingness to concede.

Because the mediator is privy to all of the data for all parties, mediation, more than other lawyer transactions, may activate strong identifications with and reactions to issues and parties. Although these reactions may be strongly conscious or deeply repressed, a conscientious mediator would not ignore them, once they entered awareness. In fact, great effort should be made to apprehend and clarify any cues about their existence so that decisions about their management can be made on *rational* grounds and not in unconscious, defensive ways that further remove them from cognitive control. When obscured, these reactions are "acted out," expressed in behavior that is justified by a rationalized explanation that camouflages the unconscious reaction from the actor's awareness.⁴ Teaching about mediation,

3. See generally *id.* For a further elaboration of concepts of fairness in mediation, see Riskin, *Toward New Standards for the Neutral Lawyer in Mediation*, 26 ARIZ. L. REV. 329 (1984).

4. This has happened often enough in the history of the world's judicial as well as political affairs. For example, Hirsch has identified some blind spots in Justice Frankfurter's analyses. See H.N. HIRSCH, *THE ENIGMA OF FELIX FRANKFURTER* (1981). I agree with Hirsch's analyses and add a few analyses of my own. See Watson, Book Review, 80 MICH. L. REV. 742 (1982). See also J. FRANK, *LAW AND THE MODERN MIND*, ch. IV (1936); J. HOGARTH, *SENTENCING AS A HUMAN PROCESS* (1971).

then, should involve exploration of the psychological nature of this identification process. Efforts should be made to illuminate this process, to emphasize its normality, and to improve understanding of how the process weaves its way into operational importance in all decision-making by attorneys.

A few comments about the meaning of *role* are appropriate. This sociologist's term describes the complex collection of expectations that society imposes upon an individual's performance.⁵ For example, lawyers are expected to be "counselors." They may hope to limit their work strictly to issues of law but inevitably clients will drag in matters involving their lives and their emotional problems. Lawyers, if they wish to relate effectively with their clients, will have to deal with these matters. It is my personal observation that most lawyers who achieve reputations for effectiveness with clients have a knack for handling their clients' psychological problems. These lawyers know how to listen and how to make the client *know* that they have listened. It is surprising how many lawyers fail in this fundamental and central element of a lawyer's work. I would surmise that any lawyer who *can't* make his clients feel well listened to will have to perform with prodigious skill in the technical aspects of law in order to succeed in practice.

II. LAWYER AS NEGOTIATOR—PSYCHOLOGICAL TENSIONS

During the years I have taught negotiation, I have noted with intrigue the various psychological conflicts that the process mobilizes in students as well as practitioners. Some of these conflicts wax and wane as values shift over time; they also appear to gain substantial support from the intellectual and social "fads" of the day. For example, during the 1970's, awareness that the negotiator uses "power" in his operations often engendered considerable conflict in law students and lawyers. Some individuals needed to blind themselves completely to long-range conse-

Such action is neither strange nor to be criticized, but rather is one of the places in the judicial process where training efforts should assist judges to deal with such forces in a different way, so that their decisions may be more rational, equitable, and just. For many years this author has been conducting judicial seminars on the stresses of decision-making. One of the goals has been to help the judges *feel* and understand their own personal conflicts as they carry out their judicial roles. Most (but not all) of the participants seem to believe that they leave the experience better equipped to objectify their own subjective reactions to the many conflicts of their role. Their mastery is seemingly increased.

5. For a discussion of society's expectations in the context of sex roles, see T. PARSONS & R.F. BALES, *FAMILY, SOCIALIZATION AND INTERACTION PROCESS* 22-26 (1955).

quences as they moved to destroy their opponent's position. Other individuals, taking an opposite approach, were reticent to utilize their legal strength, feeling that it was not appropriate or "nice" for them to "take advantage" of their opponents. These polar attitudes greatly influenced the degree to which individuals "wanted to win" and the effort they invested in the negotiation; they also shaped the students' negotiating style. Both attitudes mirrored current social concerns about the appropriate use of authority and power. The young, who had not yet resolved this difficult value conflict, sometimes "acted out" their conflict in negotiation activities.⁶

A lawyer's view of the ethical duty to "zealously represent his client" will vary greatly according to the psychological conflicts the lawyer has about the negotiation process. This conflict has little to do with the *content* of the negotiation; rather, it relates to the internal, psychological process that negotiation activities trigger. To a very large degree this process is unconscious and "non-rational." While it can and will be influenced by experience, behavior which is largely controlled from these unconscious wellsprings of action will remain totally beyond any kind of conscious and cognitive control *unless* the person learning has had a "guided experience." Guided experiences are discussed below.

The process of negotiation is full of vigorous interchanges, many of which are likely, sooner or later, to stimulate aggressive impulses. This elicitation of aggression is commonplace. An opponent's aggressive response "legitimizes" an aggressive reaction. An opponent's passive response, on the other hand, may also stimulate aggressiveness; an activity-oriented attorney may have difficulty coping with inactivity. Aggression, a heavily conflicted emotion for many, is an emotion to which lawyers have a special sensitivity.⁷ The combination of a particular person's capacity to be passive with the negotiation process's requirement of extensive listening, can draw forth sufficient aggression to insure that unconscious "defense mechanisms" emerge, preventing rational responses to some of the important elements of the negotiation⁸ and precluding effectiveness. Although such aggressive behavior will be masked by various "explanations," the real reason will be unexpressed concerns over hurting and being hurt. The result will be a stalemate.

6. See *supra* text accompanying note 4.

7. See Watson, *supra* note 1, at 101-03.

8. See A. WATSON, *PSYCHIATRY FOR LAWYERS*, ch. IV (1978).

Attitudes towards "maleness" and "femaleness" will inevitably emerge in the negotiation process, regardless of the gender of the participants. Each of us has deep, unconscious, images of what we must do to be male or female. We wish to behave in ways consistent with the image we seek to project and avoid actions resembling the behavior of the opposite gender. Because little human behavior is biologically gender-linked, humans may select from a broad range of available behaviors; these behaviors are, however, socially gender-linked. This discontinuity between a broader biological and a narrower social range of behaviors can be a source of great personal discomfort and, more importantly, highly complicated, individual defensive actions that interfere with the negotiation process.

The question of whether any man can fully understand a woman, or vice versa, has been discussed in recent years.⁹ While limitations may always exist, if individuals cannot understand each other to some degree, there is little hope for the human race. Marriages (a form of ongoing negotiation) rely upon empathetic understanding, although recent marriage-divorce statistics cast a shadow on belief in cross-gender understanding.¹⁰

In the last analysis, the psychological dynamics of the negotiator are highly personal qualities. A skilled and thoughtful lawyer will "keep book" on his opponents and attempt to define and understand them in these psychological terms. Individual negotiators' attributes are finite in number, and their constancy and continuity will enable counsel to use them to predict an opponent's tactics and strategies. Lawyers follow this practice, for example, when they engage in "judge shopping."

Experienced negotiators acknowledge the wisdom of one person conducting the active discussion to keep the line of argument on track. One non-speaking team member can observe the non-verbal behaviors of the opponents and ponder their underlying implications. Often non-active members of a negotiating team broadcast vivid messages that powerfully communicate the team's intentions. When you discover a large stock of supplies behind one part of your opponent's lines, you may deduce that something important is scheduled to happen there.

A negotiator must constantly address the ubiquitous question of veracity, his own and his opponent's. At first glance, deter-

9. For a good discussion of this whole issue, see J. WILLI, *COUPLES IN COLLUSION* (1982). Chapter I sets forth the general proposition.

10. For an interesting discussion of this issue, see C. FOOTE, R. LEVY & F. SANDERS, *CASES AND MATERIALS ON FAMILY LAW 1073-78* (2nd ed. 1976). This contains statistical material exploring this complicated question.

mining what is a lie appears to be a simple task; it turns out to be a complicated matter about which much controversy exists in negotiation circles. It is my own impression that lawyers are inclined to over-diagnose lying and to include a variety of psychological distortions within its ambit; this makes lying a very difficult problem to which lawyers must respond.¹¹ It is probably best to reserve the term *lie* for those distortions made deliberately to mislead. A good negotiator, after clarifying and narrowing his definitions, should try to understand how he *feels* about lying. A powerful reaction to somebody else's lies suggests great concern over one's own honesty, and grappling with that kind of issue is always the first order of business in dealing with any psychological response.¹² In general, we are more frightened of our own impulses and feelings when we don't understand them. We handle impulses and feelings better when we know what they are and why we are afraid of them.¹³ We are then in a position to test our real vulnerabilities and take concrete measures to protect ourselves.¹⁴

It behooves working professionals to ground all standards, including those related to lying, on more rational bases than unexamined moral interdiction. Lying can be so advantageous superficially that some basis should be established for *not* doing it. The obvious reason is that others' knowledge of one's lying leads to a loss of credibility which, for a working professional, can only have destructive results. I would like to suggest a second reason. Even if others do not learn about a lie, the negotiator who lies knows that the lie occurred and must then recognize that others may successfully lie to him. This induces a paranoid attitude, a psychological burden that can never be totally put aside. The long-term costs of lying imply a cost-benefit analysis supporting

11. For a good analysis of the complexity of the concept of lying, see S. BOK, *LYING: MORAL CHOICE IN PUBLIC AND PRIVATE LIFE* (1978).

12. In fact, as a rule of thumb, all powerful responses to somebody else's behavior should send one running to a mirror for some self-evaluation. Any emotion which is so strong as to be beyond logical expectations probably reflects a personal identification with the trait. In other words, "I am afraid or critical of my own impulses to lie so I must stamp out all lying, hoping I may thus control my own." The trouble is that, because there is no conscious awareness of the desire to lie, there can be no conscious efforts to forestall the impulse.

13. See Hendin & Haas, *Combat Adaptations of Vietnam Veterans Without Post-Traumatic Stress Disorders*, 141 *AM. J. PSYCHIATRY* 956 (1984).

14. This is the vital psychological skill known to analytically oriented therapists as reality testing. See A. WATSON, *supra* note 8, at 80-81. For this substantive reference and others below, about psychiatric theory, I shall refer to my own textbook in the belief that it is a good starting point for the average legal reader. The text abounds with other references for those who wish to go more deeply into the subject.

the old admonition to do unto others as you would have them do unto you.

For those who deal with others, self-knowledge is a prerequisite to the development of self-objectivity and a sense of personal security. The principle has long been recognized. "This above all: to thine own self be true, and it must follow, as the night the day, thou can't not then be false to any man."¹⁵ Perhaps the highest acknowledgment of that concept occurs, in modern times, in the training of psychoanalysts. The trainee must substantially understand himself before he is permitted to turn his attention to others.¹⁶ This training requirement entails a personal psychoanalysis lasting three to five years, and sometimes more, exploring all areas of the trainee's unconscious, allowing what had previously been unconscious to become conscious and under the cognitive control of the mind, thereby removing or greatly diminishing the need for psychological defenses.¹⁷ This expensive learning process is impractical for most professions. Less extensive and less costly processes that promote insight and self-learning might be utilized in legal education. It is my contention that such awareness would greatly improve professional efficiency, enhance creativity, lessen professional stress, and facilitate more proficient interpersonal relationships among lawyers and between lawyers and their clients. This kind of learning can be incorporated into conventional law school teaching¹⁸ and into negotiation and mediation training.

Negotiators will profit from knowledge of their own prejudices. I do not even argue about whether prejudices exist; I acknowledge that debate occurs about the extent and nature of prejudices. Erikson¹⁹ notes that any well-reared child knows that everything that he learns in his own environment is Good/Right/Nice and everything outside his own surroundings is Bad/Evil/Not Nice. Everyone carries these values out of childhood into adolescence, when a wider sociability diminishes prejudgment as individuals learn to question their own archaic presumptions. Bluntly stated, prejudices exist. Although they may assume myriad subtle forms shaped by culture and family idiosyncrasies, all

15. W. SHAKESPEARE, *HAMLET*, Act I., scene iii., lines 78-80.

16. For a brief description of psychoanalytic training, see F. REDLICH & D. FREEDMAN, *THE THEORY AND PRACTICE OF PSYCHIATRY* 20-21 (1966).

17. A. WATSON, *supra* note 8, chs. III, IV.

18. See Watson, *supra* note 1, at 150-63.

19. E. ERIKSON, *TOYS AND REASONS: STAGES IN THE RITUALIZATION OF EXPERIENCE* 75-84 (1977).

prejudices stand as "Truths." The important question is whether they have been reevaluated, understood, and reintegrated in the thinking and decision-making of the adult individual.

III. TRANSFERENCE PATTERNS

Another important organizing principle, transference, and its counterpart in the observer, countertransference, assist psychiatrists in understanding human behavior.²⁰ Transference and countertransference are patterned behaviors that are substantially predictive of an individual's response to the multitude of stimuli from the external world. A transference response to a person is defined as

[T]he fusion of unreal attributes which the observer believes to be present in the observed, with those which are in fact present. The unreal attributes consist of "projections," which derive from some superficial likeness to an important person from the past such as a parent. The observer then treats the new person *as if* they were the original model. The part qualities are seen as the whole.²¹

Among the several definitions of transference, this one is somewhat controversial but, I believe, the most useful because it identifies and points the way for the intellectual procedures necessary to use the definition effectively.²²

These transference patterns reveal individual attitudes and feelings. They also may lead individuals to stereotype the observed behavior of others. Information about transference patterns can be elicited in some types of interviews. This information in turn allows conclusions to be drawn about individuals' behaviors.

The learned behavior that psychiatrists call *character* is adaptive in nature and relates to transference.²³ This psychological

20. A. WATSON, *supra* note 8, at 2-8.

21. *Id.* at 3.

22. For a further contemporary description using this approach, see Gill & Hoffman, *A Method for Studying the Analysis of Aspects of the Patient's Experience of the Relationship in Psychoanalysis and Psychotherapy*, 30 J. AM. PSYCHOANALYTIC ASSOC. 137, 138-43 (1982).

23. See A. WATSON, *supra* note 8, at 304-09. For perhaps the best and most comprehensive discussion of this interesting subject, see W. REICH, *CHARACTER ANALYSIS*, ch. IV (1949). This classical work was first published in book form in 1933; parts of it appeared

rather than moral character constitutes the complex set of behaviors by means of which a person is recognized. It consists of the automated, adaptational response patterns allowed by the individual's culture and adopted by the individual, even though they may sometimes cause distress in others. Some response patterns express compromise behaviors. For example, a brash, assertive, humorous speech pattern may allow an individual to express thinly disguised aggression. The same things said "with a straight face" would enmesh a person in deep social difficulty but said in "jest," the comments are acceptable—they are in character.²⁴

In accord with the proposition to know thyself, a lawyer should be aware of how her/his character looks and feels to others. "What do they encounter when they deal with me?" While a lawyer can do little to change this character, the individual can, like a good poker player, cut losses or bet good cards aggressively. This accords with the admonition to avoid a losing battle or, if you must fight, to lose as cheaply as possible.²⁵ Know your character assets and use them skillfully, even as you avoid the kinds of encounters with which you have difficulty. Let your partner handle those.

Similarly, your opponent's character qualities must be asayed. If he is a blustery, macho type, it will not do to collide with him and stimulate his fulminating masculine assertiveness. What might he do with a "soft," "yielding," non-aggressive person? Will he quiet down? It's worth an experiment, because jousting requires two parties. Such a pairing may force the negotiation into a more rational channel, allowing progress to occur.

How may a lawyer handle his opponent's character? First, learn to "diagnose" his behavior. One requisite assumption is that the observed character traits are purposeful. To determine the purpose one must, to use Reik's felicitous expression, "listen with the third ear."²⁶ For example: "Why does my opponent verbally beat upon me in such a way that I become angry and resistive to everything he says or does? Does my opponent have some need to fail at this procedure by alienating me? Does he hope to make me angry and irrational?" Or: "Why do all of my opponent's comments always sound as if they are subtly granting me

as papers six years earlier.

24. For a literary example, see O. WISTER, *THE VIRGINIAN* 30 (1902) ("When you call me that, *smile*.").

25. See 3 C. VON CLAUSEWITZ, *ON WAR* 243-44 (1956).

26. T. REIK, *LISTENING WITH THE THIRD EAR: THE INNER EXPERIENCE OF A PSYCHOANALYST* (1948).

permission for my moves? Do they need to feel always in control to be comfortable?"

I have been noting character-based behaviors of which the actor may have been completely oblivious and therefore unaware of the problems the behaviors caused in the negotiation setting. Sometimes the knowledge that such behaviors occur without malice, i.e., without "mens rea," helps one to cope with an unpleasant encounter. In some situations, knowledge is power.

IV. TEACHING SUGGESTIONS

Mediation and negotiation courses offer a special opportunity to teach law students about the non-rational, emotional reactions that have been described.²⁷ Unexamined, these feelings result in an accretion of defensive self-protection that tends to insulate an attorney from the crucial psychological facts of the process in which he is engaged. This insures an insensitive counsel who cannot engage his client "where he is at" but may impose counsel's prejudices upon the client to meet the attorney's emotional requirements.

These emotional reactions, ubiquitous in the activities in which lawyers are involved, can only be understood in the context of a "guided experience." How can this be done? The class or seminar should include a person who is skillful at turning the discussion toward the interaction stimulated by the problems of the negotiation or mediation. In these practice settings the feelings are *live* and real. Their exploration and analysis will generate in the negotiator insights about himself. He may then be able to generalize that self-awareness to other, similar lawyering experiences. For example, the negotiator who blinded himself to the long-range consequences of over-success could learn to recognize, understand, and evaluate the consequences of such activity and then learn to control his behavior. He will initially experience considerable discomfort when his behavior, forbidden by his value system, is brought to his attention. He should learn to recognize and to deal with his discomfort. Then he can deliberately *choose* the amount of assertiveness he wishes to display, based on the goals of the activity. Behavior could become rational, not remain irrational.

27. For a parallel discussion of methods for teaching students to recognize and handle emotional conflicts in clinical settings, see Watson, *Lawyers and Professionalism: A Further Psychiatric Perspective on Legal Education*, 8 U. MICH. J.L. REF. 248 (1975).

A "conventional" law professor working with a psychologically trained teacher for a semester or two will be able to assist students to recognize their emotional responses. Over the years, quite a few of my colleagues have acquired the knowledge to work with students in analyzing their reactions. Eventually my presence serves mainly through the "magic" of my expertise, since my colleague also is able to make most of the necessary interpretive comments.

Student mediations and negotiations can be video-taped and reviewed by those who are expert in reading body language and the psychological communication process.²⁸ Rather than being analyzed as failures of preparation or logic, the distortions and ineptitudes that occur may be seen for what they usually are, difficulties with some personal, psychological issue that arises in the encounter. The student tapes can be compared with real or simulated mediations and negotiations conducted by experts. The central teaching emphasis remains the psychological interaction process with its multiple dynamics of personal identification. This part of the process of learning lawyering skills is presently left largely to chance.²⁹

Legal education in general, and the negotiation process in particular, exaggerate the common human problem regarding the amount of ambiguity that a person can tolerate. The enduring quest for certainty lurks behind the negotiation process; this can and should become a specific focus for exploration in teaching about negotiation. Individuals vary in the length of time that they can endure ambiguity about one or multiple issues. A skillful negotiator must be able to tolerate such ambiguity for prolonged periods. In addition to understanding their own tolerance for ambiguity, lawyers should be able to recognize the ways they respond to others' needs for finality or non-ambiguity. For example, some clients will be so incapable of handling this source of anxiety that, without a great deal of special attention, they simply cannot cope with extended negotiations; they will clamor for quick settlement of any negotiation in which they are involved. Some co-counsel will have similar needs for certainty and will constantly press for closure, not on the merits of the issues but because of their own emotional discomfort with ambiguity. Each opponent will fall someplace along the spectrum of

28. For a general discussion of body language, see A. SCHEFLEN, *BODY LANGUAGE AND SOCIAL ORDER* (1972). This book contains many photographic illustrations.

29. This subject may be explored in the same contexts as interview dynamics. See A. WATSON, *THE LAWYER IN THE INTERVIEWING AND COUNSELLING PROCESS* (1976).

ambiguity-toleration capacity. While a lawyer may not ethically prolong procedures merely to harass, he should be highly sensitive to how the negotiation process impinges upon his opponent's emotions and behavior. Finally, judges, mediators, and other officials involved in these dispute-resolution mechanisms also have their respective tolerance levels. These levels will be visible, and comprehensible, in the methods the individuals use to make their decisions. Observing their behavior closely may enable counsel to better predict the decision makers' timing as well as their decisions on procedure and substance.

CONCLUSION

These psychological processes are just a few of those that routinely appear in the mediation and negotiation activities which lawyers perform. They have substantial relevance to the training processes used to teach and learn about negotiation and mediation. Exposed to teaching activities focusing on these psychological processes, students will experience some anxiety but, in the end, will be gratified by the increased psychological mastery they acquire. No human endeavor satisfies more than the acquisition of mastery of the self. Students recognize that they have many unanswered questions about the practice of law and they try to grapple with those questions as soon as possible. Their rush to summer jobs in law offices is probably related to that concern. They might also be more eager to plunge into the substance and process of the second and third law school years if they foresaw more learning about practice problems in those classes.

This is not to suggest that the intellectual learning that now occurs in the law school should be withdrawn. Rather, I am suggesting that another parameter should be added to the teaching and learning about the professional skills involved in practicing law. Skills training in negotiation and mediation provides ideal opportunities to approach explicitly several emotionally charged issues, even if we are loath to approach them elsewhere in the curriculum. Failure to address the highly charged emotional issues of law practice within skills-training courses runs the risk of making such courses an educational travesty.

