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Melissa L. Nelken

I first became interested in the relationship between psychoanalysis and negotiation fifteen years ago, when I began teaching lawyers and law students negotiation skills. Most of the books on legal negotiation at the time focused on the bag-of-tricks approach to successful negotiation: the top ten ways to outwit your adversary. As I began to think about different approaches, one thing that consistently struck me was that when I gave a negotiation problem to a pair of students—a set of facts regarding a lawsuit or a business deal—the results of the negotiations based on those facts varied widely from pair to pair.[1] If there was a $50,000 range within which settlement was possible under the instructions, there would be settlements throughout the range. Each pair of students would have reached a mutually satisfactory end point that was clearly dictated only partially by the information they had received from me.

Some of the differences could be explained by some students' learning the top ten list better than others: if you reveal your bottom line to your opponent, it will be difficult to settle much above it. But, having said that, I began to wonder why some people *do* consistently reveal their bottom line, or do the spiritual equivalent; why others routinely mow down their opponents in single-minded pursuit of the last possible dollar; and why still others pursue a collaborative approach that benefits both parties.[2] How, in other words, do

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1. Gerald R. Williams used similar observations as the starting point for a taxonomy of legal negotiation based on negotiator "styles" (cooperative or competitive) and effectiveness (rating them as effective, average, or ineffective). Legal Negotiation and Settlement (St. Paul, 1983).

2. In the last fifteen years the study of legal negotiations has burgeoned. Many writers have explored and attempted to explain differences in negotiation results in terms of lawyers' negotiation styles ("competitive" or "cooperative") and strategies ("adversarial" or "problem-solving"). See, e.g., *id.;* Gary T. Lowenthal, A General Theory of Negotiation Process, Strategy and Behavior, 31 U. Kan. L. Rev. 69 (1982); Carrie Menkel-Meadow, Legal Negotiation: A

people help and hinder themselves in the process of negotiating? How might it be possible to help people become more aware of what they're doing, more able to choose how to respond in a specific situation? Psychoanalysis has been central to my thinking about these questions and to the way I have come to understand the negotiation process.[3]

The Psychoanalytic Viewpoint and the Legal Viewpoint

Psychoanalysis focuses on mental processes that are unconscious: the wishes, fears, beliefs, and defenses that motivate our actions without our being aware of them. It asserts that our conscious stance in the world results from a complex internal process, going back to earliest childhood, that involves compromises among conflicting feelings.[4] Indeed, we all develop mechanisms for remaining *un*aware of many of our conflicts, and much of psychoanalysis as a therapy is taken up with exploring and understanding these so-called resistances. The influence of our primary caretakers affects our sense of who we are and who we should be, by way of our identifications with them. In addition, our feelings—positive and negative—about important figures in our past are readily transferred to the present, where they inevitably color, and sometimes dominate, our reactions to those we encounter in daily life.[5] Ambiguity, ambivalence, and overdetermination are central to psychoanalytic thinking: we don't resolve conflicts so much as learn more and more about their multiple facets and ramifications. The value of the analytic process for the individual lies in a growing capacity for self-observation and the concomitant ability to make choices about behaviors that had previously seemed immutable.

Law, by contrast, is aggressively rational, linear, and goal-oriented. Law, many lawyers say, is based on facts, not feelings; it is logical; and success is measured by whether you win or lose in court or by the dollar amount of settlements. Lawyers must *act* on behalf of their clients, and there is a pre-

Study of Strategies in Search of a Theory, 1983 Am. B. Found. Res. J. 905; Carrie Menkel-Meadow, Toward Another View of Legal Negotiation: The Structure of Problem Solving, 31 UCLA L. Rev. 754 (1984); Robert M. Bastress & Joseph D. Harbaugh, Interviewing, Counseling, and Negotiating (Boston, 1990). For a comprehensive text on general negotiation, see Roy J. Lewicki et al., Negotiation, 2d ed. (Burr Ridge, Ill., 1994).

3. Bastress and Harbaugh, *supra* note 2, provide an extensive discussion of various "helping theories," including psychoanalysis, at the beginning of their book. Their primary focus, however, is on the application of these theories to the counseling role of lawyers, not to negotiations. And with the exception of a brief discussion of the lawyer's possible countertransference reactions in the lawyer-client relationship, their exposition of helping theories, including psychoanalysis, is geared toward helping the lawyer understand her client better. My focus is on using psychoanalytic ideas to help lawyers understand themselves better.

4. Sigmund Freud, New Introductory Lectures on Psychoanalysis, trans. James Strachey (London, 1964) (1933) and Charles Brenner, An Elementary Textbook of Psychoanalysis, rev. ed. (Garden City, 1974) are two of the best-known introductory works on the subject. See also Andrew S. Watson, Psychiatry for Lawyers (New York, 1968) for a psychoanalytically informed approach to psychiatry and law.

5. Such transferences are ubiquitous in human relationships. They create significant problems only when they interfere with accurate, reality-based assessment of the other person—whether it's dealing with a client as if she were your big sister or assuming that the smiling gray-haired man on the other side of the negotiating table is like your grandfather.

mium on reaching sound decisions quickly. In law school, students are taught that how they feel about the cases they read is irrelevant; what matters is the soundness of their logic. Unlike medicine, for example, law is still taught largely as an exercise in abstraction, based on case reports and analysis of judicial opinions.

Resistance to the human dimension of the lawyer's work is built into most law training. Few law students have any contact with actual clients in a clinical setting before graduation; and even courses that simulate aspects of law practice other than trials—such as interviewing, counseling, and negotiation—are relatively uncommon.[6] As a result, many new lawyers are unprepared to deal with the actual people who become their clients and have little idea how to translate classroom theory into practice. Indeed, since the profession idealizes the lawyer as the amoral agent of her client's ends—having no wishes, hopes, or fears of her own—the impact of the lawyer's personal conflicts on her ability to function in her professional role is officially denied and is seen as a failing, rather than as a vehicle for learning.

A Psychoanalytic Approach to Negotiation

Introducing psychoanalytic ideas in a legal setting poses a challenge, then, to the received wisdom of the lawyer. As one student said to me many years ago: "If I'd wanted to learn about feelings, I wouldn't have gone to law school." Her comment reflected not only personal discomfort with the inquiry I was encouraging, but also a sense that such an inquiry was out of place in legal education.[7] Yet the process of lawyering, as distinct from legal theory, inevitably involves the lawyer deeply in the hopes, fears, and conflicts of her clients; and these inevitably arouse responses in the lawyer, no matter how much the professional ideal would have us believe otherwise. In addition, in representing her clients, the lawyer has no choice but to be who she is: her own conflicts, and attitudes toward conflict, will inform every task she undertakes on a client's behalf.[8]

Negotiation, for example, is at the heart of what lawyers do. Since more than 90 percent of civil lawsuits never go to trial, even those lawyers who handle lawsuits and not business deals spend a significant amount of time

6. Even at my school, where there are as many as eight courses in negotiation taught during an academic year, the small class size means that only about a quarter of our students have any systematic introduction to the topic while in law school.

7. My own introduction to the application of psychoanalytic ideas to law came at the University of Michigan in the early 1970s, where Andrew Watson, a psychoanalyst who was professor of both psychiatry and law, cotaught the negotiation class at the law school. I was not in the class; but the approach intrigued me, and I came back to it when I began teaching interviewing and counseling as part of Michigan's clinical law faculty in 1979.

8. The studies cited in note 2 *supra* have been tremendously useful in helping us organize our thinking about the complex process of negotiation. But conscious understanding of the pros and cons of adopting a competitive versus a cooperative style, or an adversarial versus a problem-solving negotiation strategy, takes us only so far. Without some appreciation for what *motivates* the inclination to choose one style or strategy rather than another, it is difficult for negotiators to *change* their negotiation behavior in the heat of conflict. It is here that I think psychoanalytic theory has the most to offer the study of negotiation.

negotiating—not just details like the timing of discovery but the ultimate resolution of the dispute itself. Lawyers tend to think that they will somehow be able to stay out of the way when they negotiate, that the process will go on outside of them. In fact, most are unaware of the extent to which their own needs and conflicts enter into the negotiation process.[9] Everyone has heard stories of lawyers so competitive that they poison deals that could have been made to the benefit of their clients; there are also lawyers whose need to accommodate those they negotiate with leads them to give away the store, to the detriment of their clients. Without some degree of self-understanding, then, some attention to feelings, lawyers run the risk of missing much that is central to competent representation.

Approaching negotiation psychoanalytically, I try to acquaint lawyers with the idea of unconscious mental processes and the influence of such processes over them, illuminating the internal and interpersonal dynamics at work in all negotiations. Beyond questions of conscious style and strategy, every negotiator apprehends what is at stake in a negotiation and what is going on between the parties to it in terms of internally motivated expectations about human relationships. As one woman said, "I always enter negotiations thinking that the other side is in a better position and that I am at their mercy."[10] By developing a capacity for such self-observation, a negotiator becomes more aware of the dynamics of negotiation, of how her and her opponent's responses to each other and to the conflict embodied in the negotiation affect what both of them do and say on behalf of their clients. This increased self-awareness enables her to make choices about how to handle the negotiation that would not otherwise be open: to behave, in fact, more rationally, more like the ideal lawyer. For example, she might recognize that her insecurity about a particular negotiation stems from her own conflicts about aggression or from her reactions—most notably, transferences—to her opponent. That realization may enable her to prepare for and to conduct the negotiation differently, with less chance of falling into counterproductive behaviors.

An understanding of the interpersonal dynamics of conflict has benefits as well for the lawyer-client relationship, since clients inevitably suffer when their lawyers insist on divorcing the professional encounter from the emotional underpinnings of the dispute involved. Client dissatisfaction with legal representation often results from the lawyer's inability to see the client's emotional self as anything but an impediment to sensible, rational management of the legal problem the client brings.[11] A lawyer who has developed some under-

9. Certainly there is little in the standard law curriculum to dissuade anyone from the view that the practice of law, like the study of it, is a purely rational enterprise. For a discussion of how the unspoken needs and wishes of *both* lawyer and client shape their interaction and the outcome of their work together, see William L. F. Felstiner & Austin Sarat, Enactments of Power: Negotiating Reality and Responsibility in Lawyer-Client Interactions, 77 Cornell L. Rev. 1447 (1992).

10. This and all quotations that follow come from journals kept by my negotiation students during the course of the semester.

11. Client control is a big issue for many lawyers, who already feel vulnerable enough in their professional roles to the vagaries of opposing counsel and judges. See Douglas E. Rosenthal, Lawyer and Client: Who's in Charge? (New York, 1974); Felstiner & Sarat, *supra* note 9.

standing of her own internal conflicts will be better able to tolerate the client's feelings and to incorporate them with the legal facts in seeking a satisfactory resolution of a particular dispute.

The Power of Assumptions

One of the things that happen when two lawyers sit down to negotiate is that they tend to make certain assumptions about each other, even if they have never met. Even if they do not meet, but talk on the telephone, they make assumptions, and their assumptions can determine what happens in the negotiation. For example, I sometimes begin a negotiation seminar with some variation on the prisoner's dilemma game. In the original version, two prisoners who are not permitted to communicate are encouraged to incriminate each other. If neither one does so, both will go free; if both do, both will spend a short period in jail. If only one of them incriminates the other, the one who is incriminated goes to jail for a long time and the other is released. Enlightened self-interest calls for a strategy of silent cooperation here; but how is it to be achieved?

If one asks the participants how they decide what to do under these circumstances, the most common response will be couched in terms of the negotiator's expectation of what the other side would do: "I wanted to say nothing (the cooperative bid) but I thought he would try to trick me, so I had to incriminate him." From a psychoanalytic point of view, we might say that the wish to take advantage of the other is denied and projected; the speaker then sees himself as ratting on his fellow criminal only in self-defense.[12] Imagine the speaker's surprise when his opponent attributes a similar motive to him! Putting the two sides in separate rooms, so that the parties do not even know who their opponents are, highlights the issue of where they get their presumed knowledge about each other.

Since a course in negotiation is no place to go into the determinants of a person's projections, of what use is it to a negotiator to know that they occur? First and foremost, it makes the negotiator aware that she may be under the sway of powerful assumptions about her opponent which may not be accurate and which warrant further checking. The woman quoted above who always went into negotiations thinking that her opponents had the upper hand went on to say, "What I need to realize is that they wouldn't be across the table from me if they didn't have some desire to settle. Keeping this in mind helps me not to enter on the defensive."

The lesson is not quickly learned, by any means. We all trust the accuracy of the lens through which we view the world, and it is only through repeated confrontation with its distortions that we begin to question it. Nonetheless, when a negotiator begins to ask herself whether or not a certain conviction she has about her opponents might be internally generated, she becomes more attuned to seeking information from the other side to test the accuracy

12. The childhood version of this is captured by a friend's description of her younger sister's way of justifying aggression to their parents: "Sally hit me, so I hit her first."

of her perceptions. Since bargaining for information is at the heart of negotiation, realizing that there are powerful internal forces motivating one's perception of the other actors in a negotiation opens up the whole question of what *other* assumptions—about the strength or weakness of each side's case, about what is important or unimportant to the other side—are being treated as if they were facts. Increased efforts to test reality accurately by gathering information from the other side, rather than working from internally generated assumptions, reduce the anxiety inherent in the negotiation process. Such efforts also produce better—because more reality-based—outcomes.[13]

In addition, when someone realizes how many different meanings can be read into the simple choices involved in a game like the prisoner's dilemma, she begins to think more carefully about *the* meaning she tends to attribute to another's words, and even to her own.[14] When she tries to explain how it is that incriminating the opponent in the first round of a multiround prisoner's dilemma game did not mean that she was not interested in cooperating in the future, she begins to wonder why she had to say "Let's cooperate" in such a convoluted way. What often emerges is a recognition of underlying anxieties about opening with an optimistic bid—such as fearing being taken advantage of or being perceived as weak. When these anxieties can be acknowledged and explored, it becomes possible to choose not to act on them. But without encouragement to look beyond the available rationalizations for her conduct, a negotiator is likely to persist in counterproductive behavior, even in the face of a conscious awareness that cooperation is essential to success in this game.

Once I broach the idea that one's own internal reality—the assumptions, anxieties, and conflicts that are part of who one is—has a lot to do with what happens when one negotiates, those who don't reject the notion out of hand tend to be intrigued. Law students are interested because they often feel stifled by the narrowly rational atmosphere of law school; and lawyers who have practiced for any length of time have usually found that in the heat of negotiations what continues to trip them up is an inability to respond flexibly and to grasp the dynamics of a situation. As one man commented, "It is particularly hard for us as law students to learn to negotiate effectively, because to do so we necessarily have to unlearn our reliance on rules."

Without the formality of courtroom procedures, lawyers are left to their own devices in negotiations, and they learn quickly that their personal reputations will be affected by how they conduct themselves: "I had the idea that these negotiation problems were *games* we were to play-act—unreal, theoretical problems like the rest of what I analyze, criticize, or play out in my other classes. How naive and ridiculous for me not to know that every action I take in class has some real-life impact." It soon becomes clear that, in order to

13. Many questions go unasked in negotiations because of fear of what the answer will be, as if you could get rid of something by closing your eyes to it. What is seldom realized is that the feared answer then assumes the power of truth and governs the negotiation, whether or not it is based in reality.

14. Sometimes the most useful lessons along this line come from an increased awareness of the ways in which one's own comments are subject to misinterpretation, leading to increased efforts to communicate clearly.

understand the process as it unfolds, they need to call on many skills beyond the logical analysis and forceful argumentation in which they have been so thoroughly trained.

Learning What You Already Know

Unlike most of what gets taught in law school, negotiation is not actually a new subject to anyone. Everyone negotiates all the time—with family, friends, coworkers, teachers, anyone with whom there is a conflict or a possibility for joint action. This means that someone who thinks she is learning about negotiation for the first time as a lawyer actually has a lifetime of experience in the subject to draw on—or to stumble over. Identifications with parents and other significant people have a powerful impact on how people negotiate, as they do on every other aspect of their lives; and transference reactions are intensified by the level of conflict and anxiety inherent in a negotiation.

Thinking about how her approach to negotiation as well as her negotiation style have been shaped by past experiences helps a lawyer to organize her present experience in a way that maximizes the possibilities for learning. Since she herself is the one negotiator she can't walk away from, the more she can become aware of what motivates her own behavior in negotiations, the more able she will be to step back in the heat of the moment and to reflect on whether what is happening really serves the interests of her client. Along the way, she will also gain considerable skill in reading what is going on in her opponents.

One way to get people to utilize what they already know about negotiation but are largely unaware of—to make it available to them as they make choices in legal negotiations—is to have them keep journals, in which they reflect on what takes place during negotiations and also explore experiences that they have never thought of before as negotiations. Writing about the negotiation styles in their families of origin, they begin to see where they got some of their ideas about what you should or should not do in a negotiation, what works and what doesn't, and how power is manifested or disguised in the process.

Looking at current negotiations in their lives outside class, both personal and professional, they begin to see certain patterns in the way they approach conflict, based on these family models, and certain situations that are particularly anxiety-producing for them. One woman wrote that although her Korean-born parents think she is "too American" to understand the unspoken messages that characterize their speech, she finds that her own negotiating style suffers from the same cultural indirectness: "I also skirt around saying what I really want and hope that the opposing negotiator understands what I want through some cosmic energy transference." A man who described his father as harsh, both intellectually and physically, said, "Now, I realize I remove myself from situations that remind me of negotiations with my father. I anticipate hostility sometimes where there is no danger of it arising. This sometimes leads me to make concessions to assure that the danger level is never reached."

As in psychoanalysis, making connections of this sort is only a first step toward actually being able to behave differently in the heat of negotiation. But

by linking up what happens in negotiation with what happens in the rest of life, lawyers begin to think more about what part they play in what happens to them (and to their clients) at the negotiating table. And, of course, the same lessons are borne in on them time and again as they negotiate against different people, so they can confirm their initial insights and begin to work them through.[15] As one woman commented, "I have always known I have a temper that surprises people when it finally shows up and a sharp tongue, and that I avoid conflict like the plague, but I never thought of these things as being part of my 'negotiation style' or things that will show up in my business life as well. Since they will indeed, however, I am glad to know about them but frustrated by how hard it will probably be to change them."

The Professional Ideal

In addition to the personal issues that arise in the negotiation process, every lawyer confronts the idealization in American legal culture of an aggressive, competitive stance towards others, based on the adversary model of the courtroom. As society's hired guns, lawyers are supposed to shoot first and ask questions later. Indeed, many highly competitive people are attracted to law and to the tangible evidence of "winning" it provides in terms of courtroom victories and megadeals. Those who are able to identify with the adversarial role often behave more aggressively in their professional capacity than they do in their personal lives.[16] They are rewarded and reinforced by the professional ideal and are often quite unable to see its drawbacks and limitations—for example, in situations where a long-term relationship is more important than a short-term victory.[17]

For many others the overriding competitive ethos produces considerable conflict, however much it may unconsciously be part of what attracts them to the profession; and it confronts them every time they negotiate. For example, one woman spoke of the "shame" attached to being other than a competitive negotiator.[18] Thinking about the sources of that shame in the professional

15. Like Molière's *bourgeois gentilhomme,* who was astonished to learn that he had been speaking prose all his life, people often find the very fact that we negotiate all the time to be a useful insight, because it means that there is an almost endless supply of negotiation experiences to learn from, from the mundane to the momentous.

16. A common result on an instrument like the Thomas-Kilmann Conflict Mode Instrument is that those who score high in competitiveness, when responding in terms of their professional behavior in a conflict situation, rate themselves as highly accommodating in situations of personal conflict.

17. One of the drawbacks to a consistently adversarial negotiation strategy is that it is inefficient in so many situations. See Leonard Greenhalgh, The Case Against Winning in Negotiations, 3 Negotiation J. 167 (1987); Menkel-Meadow, *supra* note 2 (both articles); Roger Fisher & William Ury, Getting to Yes (Boston, 1981). There are *some* true one-shot deals, however, such as many personal injury cases; and in these situations, an adversarial strategy can be highly effective, whether combined with a competitive or a cooperative negotiation style.

18. Despite the professional ideal, Williams found that only 24 percent of the lawyers he studied actually took a competitive approach to negotiation, while 65 percent had a cooperative approach. He also found that only 25 percent of the competitive lawyers were rated as effective, while 59 percent of the cooperative ones were, an indication that clients are not necessarily well served by the carryover of the adversary model to the negotiation table. Williams, *supra* note 1, at 19.

ideal, as well as in the more personal meanings it has, allows people to evaluate the strengths and weaknesses of the ways they *do* approach negotiations, and to consider that any single focus—whether it is on winning or on maintaining a relationship with the opponent—will be inappropriate in some situations and appropriate in others. One woman expressed her dilemma this way: "I think I will have to realize that people's feelings, and personal relations, while important, should not always be so paramount to me that I give away the store, especially in a legal negotiation setting. I don't want to be a negotiator who crumbles when someone is tough or stubborn. I would like to use my strengths—reasonableness, perceptiveness, and willingness to discuss things—to overcome the weaknesses associated with being an other-directed person in the realm of legal negotiations."[19]

The importance of cultural sensitivity in what is rapidly becoming a global economy underscores the need to rethink the emphasis in American law on competitive behavior as the royal road to success in negotiation. The competitive ideal can be puzzlingly remote to those who have been brought up in a different mold. A woman whose Buddhist family had escaped to the United States after years in prison and refugee camps in Southeast Asia was viewed as unusually competitive and aggressive by her family's standards—"the nail that sticks out," as they put it. Reflecting on her negotiation experiences over the course of a semester, however, she saw herself in a quite different light: "This is the first time that I come to face how different I am from the others. My assumptions about people, my values, the way I deal with conflict, how I get what I want and how I treat others and want to be treated, all these I discover are not exactly in line with most of my classmates. These differences are all the product of the way I was brought up."

The "shame" of not being singlemindedly competitive will in fact prove to be a strength in many negotiations, including those with people whose cultural values are different from ours. An aggressive, competitive lawyer can quickly find himself facing a stone wall rather than a deal if he overlooks the importance of allowing his counterpart to save face, for example, in the course of a negotiation.

The Benefits of Thinking Analytically

Although the exploration of such sensitive topics is often difficult—I have occasionally had students tell me that they simply could not write on a particular topic, or talk about it in class—most people find that their increased understanding of what goes on *in them* during a negotiation has tangible benefits in terms of the results they achieve. One man wrote, "I now see that all

19. Leonard Greenhalgh and Roderick W. Gilkey, in a study of male and female negotiators, found that those with a masculine sex role orientation (as distinct from their biological sex) were more likely to have an "episodic orientation" to negotiations, viewing them as a one-shot deal like a sports contest, while those with a feminine sex role orientation tended to have a "continuous orientation," seeing negotiations as part of an ongoing relationship and avoiding tactics that might disrupt the relationship. Our Game, Your Rules: Developing Effective Negotiating Approaches, *in* Not as Far as You Think: The Realities of Working Women, ed. Lynda Moore, 135 (Lexington, Mass., 1986).

that is subjective and emotional about a negotiation is an integral part of it, and that I ignore the 'subcurrents' at my peril. I also see that personal wants and needs are less likely to take on the force of compulsions, or work against me in unpredictable ways, if I am aware of them." The more people are able to make sense of their experience of a negotiation, the less it feels like something that just happens to them. As they develop a capacity for self-observation, they are more able to stop and think about what is happening and to modify their behavior accordingly. One student, for example, realized that saying no to a proposal in negotiation was unthinkable to her because she grew up with a father who always said, "When I say jump, your only question should be 'How high?'" As she began to learn that she could be assertive without disrupting all possibility of communication, she became a much more effective negotiator. She also became able to make conscious use of her attunement to the needs of others in productive ways, such as to build consensus in a group negotiation setting.

The best tribute to this approach that I have received came from a woman who wrote at the end of a semester: "I don't think my strengths and weaknesses have changed much at all, but I am better able to recognize them when they appear, to see what they are and, in tranquility, to see where they come from. This skill has been much improved over the last fifteen weeks, and I think it's a highly valuable one. So I guess I do have one more arrow in my quiver—the strength of dealing with my own worst enemy." In the long run, skills acquired through such self-observation take a negotiator further than any top ten list ever will. Although learning about feelings is hard and unfamiliar work, especially for lawyers, the potential benefits—to the lawyers themselves and the clients they serve—make it a critical addition to our ways of thinking about and teaching negotiation.