

**Mastering Negotiation**  
**(2018)**

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# Mastering Negotiation

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## INTRODUCTION

### *Discerning the Masters from the Novices*

“A negotiation is an interactive communication process that may take place whenever we want something from someone else or another person wants something from us.”<sup>1</sup>

Negotiation occurs when one party wants something from another, and there is no gross disparity in bargaining power.

If only one party to a negotiation has all the power, there will be no negotiation; to have a negotiation, all parties have to have some power. Tyrants and beneficent dictators have all of the power in a relationship; they do not negotiate because they do not have to. People in highly structured top-down organizations, like surgeons or those in the military, never learn to negotiate because they learn to either give orders or take them.

Most of us, however, negotiate through most of our relationships most of the time, whether it be negotiating with our teenage son over use of the car on Saturday night, buying a used couch at a garage sale, or trying to close a multimillion dollar transaction.

Negotiation is a skill.

You can improve any skill, but you cannot perfect it.

Tiger Woods will never play a round of golf and score 18. Roger Federer double-faults. Christina Aguilera forgets the words to the National Anthem.

The way to improve any skill is through study and practice.

Negotiation is unavoidable.

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<sup>1</sup> G. Richard Shell, *Bargaining for Advantage: Negotiation Strategies for Reasonable People* (Viking Penguin, 1999), 6.

We have two choices: (1) accept the fact that negotiation is a way of life in our culture and improve our skills so that we can negotiate with confidence; or, (2) do nothing about it.

Why would anyone select option (2)? Because they think that anyone can negotiate, that it is simply a matter of common sense?

Arrogance and ignorance is a bad combination.

... most people simply don't know how to negotiate. Our parents don't teach us how to negotiate, probably because their parents didn't teach them how to negotiate. And despite the fact that negotiating is a vital skill, we're taught nothing about it in school. That leads to the second reason there are so few negotiators: people don't think it's possible to learn how to become one. Since we're not taught how to negotiate we just assume it cannot be taught. The third, and I believe most powerful, reason is fear.<sup>2</sup>

How does one master the skill of negotiation? Let's start with some visualization.

This book will contrast two individuals: the master negotiator ("Master") and the novice negotiator ("Novice").

At a minimum, the Master has the skills of an "effective negotiator" described by Professor Gerald Williams, in *Legal Negotiation and Settlement* (West Group, 1983), as follows:

1. Legal acumen (skill in knowing and applying the law);
2. Preparation;
3. Reputation and ability as trial attorneys;
4. Creativity (ability to invent or create new alternatives);
5. Skillful use of tactics such as commitment, toughness, reciprocation, initial offers, and control of information flow; and
6. Awareness of and skillful use of the strength of their position.

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<sup>2</sup> Stephen M. Pollan and Mark Levine, *The Total Negotiator: Foolproof Strategies for Successfully Negotiating Your Way Through Every Situation* (Avon Books, 1994), 7.

The Master is not someone who works miracles, who can pull off remarkable “swindles” in every case, or who hypnotizes his or her counterparts<sup>3</sup> into barking like dogs and doing other things that they would not ordinarily do. The Master is simply demonstratively better than the Novice.

Like a successful baseball player, the Master may not hit a home run every time s/he bats, but s/he has studied and practiced basic principles (or “rules”) until they are second nature, and, therefore, s/he shows up for each negotiation, confident that s/he is well prepared. Novices just show up.

Masters have what Carol Dweck calls a “growth mindset”: they learn from experience and never stop polishing their skills. Novices don’t know what they don’t know.

And, after all, isn’t it just common sense?

A Master knows that every negotiation, no matter how serious the subject matter, is a game; every game has rules; and, s/he who follows the rules will be rewarded.

Novices never learn the rules for a successful negotiation, evaluate poorly, become too emotionally invested in their clients, lose professional objectivity, and may sabotage potential agreements.

Generally, the Master has learned them through study and experience; the Novice has not.

These rules that Masters know, however, can be hard to find and even harder to apply in the heat of battle.

What are they, and how do we apply them?

This book will be divided into three principal components, following the course of a typical negotiation.

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<sup>3</sup> I prefer “counterpart” to “opponent” or, God forbid, “adversary.”



I will start with pre-bargaining, address the bargaining stage, then the closure stage, and finish with some comments on methods for improving your negotiation skills.

I assume that you have read and mastered *Getting to Yes*, the “Bible” for negotiators. The concepts promulgated by Fisher and Ury are now well known and go without saying. If you have not read *Getting to Yes*, I recommend it to you. I cannot explain the ideas behind “principled negotiations” better than the original authors.

## The SHORT COURSE

### **1. Pre-bargaining:**

Rule 1: Be alert.

Rule 2: Build rapport.

Rule 3: Evaluate.

Rule 4: Plan for bargaining.

### **2. Bargaining:**

Rule 5: Work the people.

Rule 6: Work the deal.

### **3. Closure:**

Rule 7: Close mindfully.

### **4. Skill Development:**

Rule 8: Sharpen thy saw.

## **PRE-BARGAINING**

### **Rule 1: Be alert.**

#### **1.1 Know when you are negotiating.**

I once drove a girlfriend crazy because every time she would say, "Let's go to a movie," I would say, "I feel a negotiation coming on."

Got a laugh about the first 3 times. After that ...

"Dad, I'm a little short of cash."

"My firm represents the Jones Company. They hereby make formal demand for ..."

"Who will host the mediation?"

If you do not know that you are in a negotiation, chances are you will not do well.

Masters recognize sooner than Novices that they are in a negotiation, or that one is on the horizon.

They develop an "early warning system," which can be critical to outcome.

#### **1.2 Understand that litigation and negotiation are inseparable.**

Novices do not understand that filing a motion can improve leverage in negotiations; that settlement conferences and mediation have value as litigation tactics; and that an adjudication means negotiating on a new playing field.

Masters keep a vigilant watch on many diverse factors that affect the negotiation and understand that leverage can be ephemeral.

I had a custody case once in which I was representing a father who was concerned about his ex-wife's emotional stability. Since their divorce,

she had changed jobs several times, changed sexual partners several times, and had problems with her temper and her temperance.

On his behalf, I contacted her lawyer and requested that she submit to a psychological evaluation (the ex-wife – of course, you knew that).

When that request was ignored, we filed suit, requesting that the father have primary custody of the children.

Although his pleadings stated that he wanted full custody, what he really wanted was for his ex-wife to settle down, clean up, and focus on being a good parent.

I then proposed to my opposing counsel that we schedule mediation.

She refused because “your client wants custody of the children, and my client will never agree to that.”

She failed to understand that my client’s lawsuit was a negotiating tactic.

Had she understood this, she could have saved her client substantial legal fees.

This is a common scenario.

Many lawsuits wind up in court because lawyers do not understand that “positions” are always negotiable.

FBI hostage negotiator, Gary Noesner, refers to the interplay between tactics and negotiation as the “parallel approach” to crisis resolution, “in which we contrast the benefits of negotiation with the risks of resistance. Authorities negotiate in good faith, while simultaneously preparing for and showing their ability to undertake tactical action. Limited demonstration of tactical capability can help the negotiation process along by encouraging dialogue. Too little action can make the subject less likely to negotiate in earnest. Too much action might trigger

a firefight, which is what [Dr. Mike] Webster [a Canadian psychologist who works with the FBI] calls the ‘paradox of power’<sup>4</sup>

### **1.3 Be alert to the fact that (almost) everything is negotiable all of the time.**

Child abuse is non-negotiable.

Generally, if you are powerless, there are few, if any, chances to negotiate; otherwise, for most of us, it is important to recognize that even the most hardline ultimatums are negotiable.

Novices do not understand that everything is negotiable all of the time. They give up too easily. If you slam your briefcase and walk out of a negotiation session, they do not understand that this is a tactic; they interpret it as the end of the negotiation. They take “No” for an answer.

Masters understand that “No” is just a bargaining position, and “No” today does not mean “No” tomorrow.

### **1.4 Be alert to your state of mind.**

Masters understand that their attitude and self-control are critical to the success of the process.

“The very first thing I talk about when training new negotiators is the critical importance of self-control. If we cannot control our own emotions, how can we expect to influence the emotions of the other party?”<sup>5</sup>

Many attributes go into making a skillful negotiator, including such things as having a good memory, being ‘quick verbally,’ and handling stress well. But effectiveness is as much a matter of *attitude* as it is of ability. The best negotiators exhibit four key habits of thought that everyone, regardless of their style or IQ, can adopt to improve their negotiation results ...

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<sup>4</sup> Gary Noesner, *Stalling for Time: My Life as an FBI Hostage Negotiator* (Random House, 2010), 34, 35.

<sup>5</sup> Noesner, 110.

- **A willingness to prepare**
- **High expectations**
- **The patience to listen**
- **A commitment to personal integrity**<sup>6</sup>

## **1.5 Be aware that compromise is always in the air.**

I cannot remember conducting a mediation or being involved in a dispute that could not have been resolved through compromise. That does not mean that it always occurs.

Masters are always on the lookout for an acceptable compromise, especially as the gap between the parties narrows.

“Assume that you will end up in the middle, between the two opening negotiation positions. ... In little and in big things, we end up splitting the difference.”<sup>7</sup>

## **Rule 2: Build rapport.**

### **2.1 Lines of communication are critical.**

Never underestimate the power of miscommunication.

Without lines of communication there can be no negotiation.

That means that this rule is essential.

Lines of clear communication are the life-blood of a negotiation.<sup>8</sup>

Masters understand this; Novices do not.

Masters use charm and persuasion as often as possible; Novices get angry, use threats, and offend their counterparts.

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<sup>6</sup> Shell, 15.

<sup>7</sup> Roger Dawson, *Secrets of Power Negotiating: Inside Secrets from a Master Negotiator*, 2<sup>nd</sup> ed. (Career Press, 2001), 19.

<sup>8</sup> Larry L. Tepley, *Legal Negotiation in a Nutshell* (West, 1992), 4.

Novices too often focus on *static* elements of the problem, believe that they are “playing a winning hand,” and throw down the gauntlet, only to learn later that the *dynamic* elements of the situation have changed, their leverage has withered, and they have burned their bridges.

Masters nurture their lines of communication.

Where lines are weak, they seek to develop new lines.

To ease the stress of negotiating and improve the chances for a successful result, establish rapport with your counterpart.

“It is generally better to deal by speech than by letter ...”<sup>9</sup>

## **2.2 Understand what influences people.**

Masters know that there is a science concerning what influences us.

The best source of that information is “Influence: Science and Practice” by Robert Cialdini<sup>10</sup>.

Indeed, it is a modern-day classic and not only a must-read but entertaining to boot.

Cialdini is a psychology professor at Arizona State University. He has studied what causes a “click, whirr” response from us, what we will say yes to without reflection: automatic compliance.

Contrast the “click, whirr” to a “controlled response.”

He reports on six “weapons of influence”:

1. reciprocity (he calls it “reciprocation”).
2. consistency,
3. social proof (what does “everyone else” do?),
4. liking,

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<sup>9</sup> Francis Bacon, “Of Negotiating.” 1597.

<sup>10</sup> Robert B. Cialdini, *Influence: Science and Practice* (Pearson Education, Inc., 2009).

5. authority, and
6. scarcity.

### **2.3 Highlight similarities.**

One of Cialdini's weapons of influence is "liking."

Simply put, you want your counterpart to like you.

Elementary, my dear Watson. But, how?

Look for similarities between you and your counterpart and highlight them during your rapport building.

Masters connect in this manner.<sup>11</sup>

There are so many ways to do this.

"Where did you grow up?"

"Here."

"Me too ..."

"Where did you grow up?"

"France."

"I've always been interested in the history of France: the Gauls, the French Revolution, Napoleon..."

Masters also understand the converse: do not highlight dissimilarities.

Avoid phrases like, "I disagree."

The Master wants to stand beside his counterpart, not across from him.

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<sup>11</sup> For a more complete discussion of connecting, or "affiliation," as it is sometimes called, including the difference between "structural connections" and "personal connections," see Roger Fisher and Daniel Shapiro, *Beyond Reason* (Viking, 2005) at 54 et seq.



Masters understand that being liked trumps competence.

#### **2.4 When to establish rapport.**

The question of when to reach out to one's counterpart and begin building rapport is problematic.

A Master plays a stronger hand when he knows as much about the problem as he can before he approaches his counterpart and begins the rapport building process.

On the other hand, the exigencies of the situation may not always allow a Master the luxury of waiting to build rapport.

Timing, in this context, is more art than science.

Personally, when I am in doubt, I reach out to my counterpart and start building rapport before I have made a complete evaluation of the problem.

If you are proactive about rapport building, it is important to be honest, if not vulnerable, to your counterpart (i.e., admit that you don't have all of the facts).

Invite your counterpart to educate you.

"Playing dumb" is a great way to establish rapport and particularly effective with narcissists, as every *Columbo* fan knows.

#### **2.5 Rapport leads to trust; trust is built on reciprocity.**

One of the primary purposes of building rapport is to establish trust.

"A large part of the negotiator's job is to establish trust ..." <sup>12</sup>

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<sup>12</sup> Noesner, 34.

Try to reach an agreement with someone you do not trust. You can do it, but it is much more difficult than reaching an agreement with someone you do trust.

“What is the secret to creating and sustaining trust in negotiation? A simple but sturdy norm in human behavior: the norm of reciprocity.”<sup>13</sup>

Boiled down to its essence, the norm of reciprocity in negotiation amounts to a simple, three-step code of conduct. First, you should always be trustworthy and reliable yourself. ... Second, you should be fair to those who are fair to you. ... Third, you should let others know about it when you think they have treated you unfairly. Unfair treatment, left unnoticed or unrequited, breeds exploitation – followed by resentment and the ultimate collapse of the relationship.<sup>14</sup>

“Generosity begets generosity. Fairness begets fairness. Unfairness ought to beget a firm response. That’s the norm of reciprocity in relationships. ... Always take turns. After you make a move, wait until the other party reciprocates before you move again.”<sup>15</sup>

Another time-tested way to encourage the delicate process of establishing trust in working relationships is to give the other side something as a symbol of good faith. ... Behavioral economists have argued that gifts – especially gifts between unrelated strangers – often serve as signals regarding intentions to invest in a future relationship.<sup>16</sup>

“Among [hostage] negotiators, this process of trust building is called the ‘behavioral change stairway.’ You listen to show interest, then respond empathetically, which leads to rapport building, which then leads to influence. But influence does not accrue automatically.”<sup>17</sup>

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<sup>13</sup> Shell, 59.

<sup>14</sup> *Id.* at 61.

<sup>15</sup> *Id.* at 63.

<sup>16</sup> *Id.* at 69.

<sup>17</sup> Noesner, 12.

## 2.6 Masters persist at rapport building.

As plants need regular watering to survive and grow, relationships need nurturing.

This is especially important in cases where the parties will have a long-term relationship after closure.

Masters refuse to be goaded into an adversarial relationship by refusing to react to offensive conduct.

If you find it hard to establish rapport with the unreasonable, rude SOB on the other end of the phone, don't give up. There are several things you can do:

- Consider an “end run.” For example, if you are an attorney, and your counterpart is an attorney, and you find it impossible to communicate with him or her, consider having your client communicate with his client.
- Consider employing a mediator.
- Consider engaging another lawyer who you know has good rapport with your counterpart.
- Ignore belligerence. This was a tactic employed by JFK during the October missile crisis.
- Develop a back-channel. Kennedy used this tactic as well, using journalist John Scali as an unofficial liaison.

“... the best time for handling people problems is before they become people problems. This means building a personal and organizational relationship with the other side that can cushion the people on each side against the knocks of negotiation.”<sup>18</sup>

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<sup>18</sup> Roger Fisher and William Ury, *Getting to Yes: Negotiating Agreement Without Giving In* (Penguin Books, 2<sup>nd</sup> Ed. 1991), 36, 37.

Fisher and Ury tell us that “people problems” fall into three categories: (1) perception, (2) emotion, and (3) communication.<sup>19</sup>

“Facts, even if established, may do nothing to solve the problem.”<sup>20</sup>

Seek your counterpart’s advice about how to resolve the issue. You probably will not like what you hear, but he or she will feel better about you because you inquired.

“Apart from the substantive merits, the feeling of participation in the process is perhaps the single most important factor in determining whether a negotiator accepts a proposal. In a sense, the process *is* the product.”<sup>21</sup>

This rule suggests that intimidation tactics are ineffective, which, of course, is not true.

Masters understand, however, that persuasion is usually superior to intimidation as a negotiation tactic.

If intimidation “works,” it only works when the negotiating playing field is unbalanced for some reason, where one party has so much greater leverage than the other, that the interaction can scarcely be called a “negotiation.”

“Good negotiators rarely resort to threats. . . *Warnings* are much more legitimate than threats and are not vulnerable to counter-threats ...”<sup>22</sup>

As every parent who has raised a child to adolescence knows, intimidation more often than not results in passive-aggressive behavior and resentment.

## **2.7 Do not limit rapport building to your counterparts.**

Include their staff.

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<sup>19</sup> *Id.* at 22.

<sup>20</sup> *Id.* at 22.

<sup>21</sup> *Id.* at 28.

<sup>22</sup> *Id.* at 137.

If mediators are involved, build rapport with the mediator and his or her staff.

In some instances, you may find it helpful to establish and build rapport with your counterpart's spouse or partner.

Masters understand that there are no limits to rapport building.

## **2.8 Be proactive not reactive.**

Forget about "what s/he is up to."<sup>23</sup>

Masters know that their mental energy is best spent making their own plans instead of spending unknown hours speculating on the unknown plans and strategies of their counterparts.

## **2.9 Understand that the "how" is usually more important than the "what."**

"It is not only what you say that counts, but how you say it. Being sincere and genuine are powerful tools to gain influence."<sup>24</sup>

It really does not matter what people are saying if they are rude to one another.

Masters understand that the first step in reaching an agreement is often to establish civility.

If I speak to you in an angry tone, you are likely to focus more on my tone than the content of what I say.

You can intimidate people with anger, but you cannot persuade them with it.

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<sup>23</sup> This is a common issue for people with co-dependent personalities. For a more extensive discussion of that topic, please review my paper on "The Codependent Negotiator," posted at [tnoblelaw.com](http://tnoblelaw.com).

<sup>24</sup> Noesner, 12.

“... the calm and controlled voice of the negotiator can lower tension and create a more comfortable environment that encourages the [reluctant] subject to speak.”<sup>25</sup>

Never underestimate the power of flattery. Gary Noesner describes the 1985 hijacking of the Italian cruise ship, the *Achille Lauro*, and his negotiation with terrorist, Maged al-Mulqi, in attempt to secure a confession: “We appealed to his vanity, praising the efficiency of the operation and telling him it was among the boldest and most well-executed hijackings we had ever seen.” This tactic led to an important confession (“Mulqi seemed to sit up straighter with this acknowledgement of his abilities as a terrorist team leader.”)<sup>26</sup>

## **2.10 Understand priming.**

Priming is a concept developed by Daniel Kahneman. It’s about how certain words “prime” us to certain responses.<sup>27</sup>

In a famous study, John Bargh, a psychologist at NYU, asked students to make a sentence out of several seemingly random words.

He gave some of the students the words *he, yellow, instantly, and it.*

Others got *Florida, forgetful, gray, bald, and wrinkled.*

After the test, he asked each group to walk down a hall to another room.

The *Florida* group walked significantly slower than the others.

The concept of using priming to influence negotiations is limited only by the creativity of the Master.<sup>28</sup>

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<sup>25</sup> *Id.* at 45.

<sup>26</sup> *Id.* at 58.

<sup>27</sup> *Thinking Fast and Slow*, 50, et seq.

<sup>28</sup> For a more complete discussion of priming, please review *Thinking, Fast and Slow* by Daniel Kahneman (Farrar, Straus, & Giroux, 2011).

## **2.11 Be humble.**

Show me a know-it-all, and I will show you a Novice.

Masters are humble; they admit their weaknesses; they don't act like their client is a saint and yours is Satan.

Masters ask for help.

Masters are self-effacing.

## **Rule 3: Evaluate.**

### **3.1 Describe the problem.**

The more clearly you see the problem, the faster you can solve it.

Unfortunately, sometimes problems present themselves in a fog of misinformation or lack of information or bias, accompanied by errors and people problems.

Most problems are, in fact, a cluster of smaller problems.

Effective problem solvers often give a problem a graphic description: it's like quicksand or liar's poker or a tug of war.

If it helps, give it a smell and a taste and a sound.

You can view every problem from a myriad of perspectives: one man's trash ...

As you begin to describe the problem, consider framing.

### **3.2 Framing.**

Masters understand that how they frame a problem is critical to the outcome.<sup>29</sup>

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<sup>29</sup> For a more complete discussion of framing, see Kahneman at 363 et seq.

“Different ways of presenting the same information often evoke different emotions. The statement that ‘the odds of survival one month after surgery are 90%’ is more reassuring than the equivalent statement that ‘mortality within one month of surgery is 10%’.”<sup>30</sup>

### **3.3 Outline the issues.**

Every negotiation involves one or more issues.

Some people call them problems, and some call them challenges.

I call them issues.

### **3.4 Fractioning.**

Issues, analyzed, often lead to sub-issues.

In some cases, it is advantageous to break down issues into more subtle levels.

Masters refine issues, bringing the problem into increasing degrees of sharper focus.

Masters know that a single-issue dispute is the most challenging: two dogs and one bone.

Master Herb Cohen suggests that the remedy to the single-issue case is “fractioning.”

If, for example, negotiators have whittled a deal down to a dispute over “price,” Cohen suggests “fractioning” the price issue into:

- (1) when will the money be paid?
- (2) what form of payment?
- (3) what if a payment is missed? and
- (4) will money be held in escrow?<sup>31</sup>

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<sup>30</sup> Kahneman, 88.

<sup>31</sup> Herb Cohen, *Negotiate This!: By Caring, But Not T-H-A-T Much* (Warner Business Books, 2003), 133.



By breaking the problem down into sub-parts, we increase our options for reaching an agreement.

### **3.5 Evaluating with limited resources.**

Evaluating factual issues and legal issues is important, but, many times, the client does not have the resources for extensive discovery of factual issues and the time-consuming research that some legal issues require.

This problem often leads to negotiating “in the blind.”

If you do not have the resources to know everything you need to know going into a negotiation, do not be afraid to proceed; but do so armed with a Socratic approach.

In other words, ask a lot of questions, and don't pretend to know all of the answers.

Without regard to the resources of your client, Professor Seth Freeman (NYU and Columbia) recommends “funneling.”<sup>32</sup>

Funneling works as follows:

“Start by asking open-ended questions, that is, those that do not permit yes and no answers. For example, you might say, ‘Let me just listen first; can you tell me your perspective?’ This approach helps you avoid making false assumptions and jumping at wrong answers and helps you learn what the other person is thinking.

“You can then follow up with some narrower but still open-ended questions. For example, ‘You said that you’re concerned about upfront costs. Can you tell me more about those concerns?’

“Finally, when you think you have a clear idea of the situation, follow up with closed questions, that is, those that permit yes-or-no, numerical, or one-word answers.”<sup>33</sup>

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<sup>32</sup> Seth Freeman, *The Art of Negotiating the Best Deal* (The Great Courses, 2014), 14.

<sup>33</sup> *Id.*

### 3.6 Leverage.

“It is better dealing with men in appetite, than with those that are where they would be.”<sup>34</sup>

“The first basic skill of smart negotiating is an awareness of the leverage factors at work, plus the ability to apply leverage when it’s in your favor and make do when it’s not.”<sup>35</sup>

Leverage is negotiating power, plain and simple.<sup>36</sup>

It is the gas in your tank.

If you have no leverage, you are at the mercy of your opponent, although, as history teaches us, rare is the human relationship where one party has complete dominance.

Masters understand leverage; they know how to develop it and use it to maximum advantage.

They also know that leverage can be temporary.

Masters understand that you can take the good ground, but you may not be able to hold it; or, there may be better ground somewhere else tomorrow because the battlefield changes.

Leverage has a way of evaporating.

Masters understand that leverage is wonderful, but if you don’t use it, you will probably lose it.

Freund lists common leverage factors as:

1. necessity,

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<sup>34</sup> Bacon

<sup>35</sup> James C. Freund, *Smart Negotiating* (Fireside, 1993), 54.

<sup>36</sup> According to Freund (p. 33), the “four basic skills of smart negotiating” are: leverage, information, credibility, and judgment.

2. desire,
3. competition, and
4. time.<sup>37</sup>

These factors usually come along with the deal; they are intrinsic to it.

If someone steals your car, and you need another right away (I know you can rent, but work with me here!), you have less leverage than the person who can wait a month or two to see if the market will soften.

If you fall in love (translate = desire) with a Porsche, you have less leverage than the person who can live without one.

If three people want to buy your house, you have a lot more leverage than if no one will even stop to look.

If you have to get that premarital agreement signed because the wedding is tomorrow morning, you do not have as much leverage as you did a month ago.

“It’s the ability to walk away from the table if acceptable terms can’t be worked out that puts backbone into your bargaining posture.”<sup>38</sup>

Because leverage is rarely static, you can usually enhance your leverage, or develop leverage where you had none, through:

1. preparation,<sup>39</sup>
2. information,
3. number-crunching,
4. understanding your opponent,
5. exploring and developing other options,
6. timing, and
7. patience.

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<sup>37</sup> Freund, 43.

<sup>38</sup> Freund, 43, 44.

<sup>39</sup> “... one of the principal shared characteristics of legal negotiators who are viewed as effective is that they are prepared.” (Teply, 9).

**“The research on the importance of preparation is extensive. Nearly every research study on negotiation has confirmed its importance.”<sup>40</sup>**

“Good negotiators are patient, exercising a healthy dose of self-control.”<sup>41</sup>

“The most common mistake I observe (and am guilty of myself on occasion) is giving in to a sense of impatience, satisfying the need many of us feel for instant gratification.”<sup>42</sup>

Shell discusses what he calls “**normative leverage.**”

He defines this as “the skillful use of standards, norms, and coherent positioning to gain advantage or protect a position.”<sup>43</sup>

You maximize your normative leverage when the standards, norms, and themes you assert are ones *the other party views as legitimate and relevant to the resolution of your differences*. The best practice is therefore to anticipate the other side’s preferred standards and frame your proposal within them. If you cannot do this, prepare to argue for a special exception to his standard based upon the special facts of your case. Attack his standard only as a last resort.<sup>44</sup>

Note that we are talking about “the standards, norms, and themes you assert are ones the other party views as legitimate and relevant to the resolution of your differences.” (emphasis supplied).

How do you find out what s/he views as legitimate and relevant to the resolution of your differences?

Listen!

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<sup>40</sup> Shell, 15.

<sup>41</sup> Freund, 80.

<sup>42</sup> *Id.* at 88.

<sup>43</sup> Shell, 43.

<sup>44</sup> *Id.*

“By positioning your needs within the normative framework the other party uses to make decisions, you show him respect and, as a result, gain his attention and sympathy.”<sup>45</sup>

Standards and norms have power in negotiation in part because they carry an authoritative message about what the market, the experts, or society has determined to be a fair and reasonable price or practice. ... Psychologists have discovered a firm fact about human nature: We are inclined to defer to authority.<sup>46</sup>

**In fact, if we were searching for the definition of the Novice, we could simply say that s/he is one who fails to evaluate the leverage of a situation, more often than not, resulting in overconfidence bias.**

While s/he knows something about the problem, s/he is relatively unprepared.

S/he is either scared to crunch numbers or is inept in that regard.

S/he gives little thought to the strengths and weaknesses of the position.

S/he fails to explore and develop other options.

S/he does not consider the timing of making or responding to proposals.

Or, s/he does not exhibit the patience required to close the deal carefully.

Some say there are two types of leverage: positive and negative.

Positive leverage = what I can do *for* you.

Negative leverage = what I can do *to* you.

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<sup>45</sup> *Id.* at 45.

<sup>46</sup> *Id.* at 53.

Masters evaluate the risk tolerance of their clients and the other side, understanding that low risk tolerance affects leverage.

Masters evaluate the momentum towards agreement, knowing that momentum favors the party with the best leverage.

### **3.7 BATNAs.<sup>47</sup>**

BATNA = best alternative to negotiated agreement.

Fisher and Ury coined an acronym that has become commonplace nomenclature among negotiators.

Masters are familiar with BATNAs. Novices are not.

Masters understand that they can always improve a weak hand by developing their BATNA.

If your leverage is weak because you are selling something and few seem interested, you may improve your BATNA by lowering the price, remodeling the property, or waiting until market forces change.

If your lawsuit is weak, you may improve your BATNA by taking depositions, seeking more discovery or hiring an expert.

### **3.8 PIOC (people, interests, options, and criteria).**

Masters do a quick scan of every problem with respect to (1) the people problems, (2) their underlying interests, (3) options for solving the problem, and (4) potential criteria that could be employed (not necessarily in that order).

Fisher and Ury summarize their method of principled negotiation as follows:

**People:** Separate the people from the problem.

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<sup>47</sup> If you are not familiar with the acronym “BATNA”, that indicates remedial work is required as soon as possible. It has been with us for quite a while now.

**Interests:** Focus on interests, not positions.

**Options:** Generate a variety of possibilities before deciding what to do.

**Criteria:** Insist that the result be based on some objective standard.<sup>48</sup>

“Begin your preparation for negotiation by considering your own underlying needs and interests.”<sup>49</sup>

Many people fight over money.

But money usually symbolizes something else.

Is “feeling like a winner” what it is really all about?

Is it feeling like you are being treated fairly?

Look behind the money. You will find a lot of solutions there.

I will expand on the PIOC approach and add a few of my own methods of evaluation.

### **3.9 People problems.**

It is one thing to say “separate the people from the problem” unless the people *are* the problem.

Masters understand that sometimes the people are more of the problem than the problem, or that the problem can never be solved until the people problems are solved.

In those cases, wringing one’s hands about the fact that some parties are not addressing the “substantive issues” is most likely an unsuccessful strategy.

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<sup>48</sup> Fisher and Ury, 10.

<sup>49</sup> Shell, 30.

### 3.10 Interests.

Novices focus on facts, dollar amounts, legal issues, or personalities, but they tend to be one-dimensional.

Masters understand that negotiations more often resemble a complex matrix of factors.

... skilled negotiators see more than just opening offers, counteroffers, and closing moves when they look at what happens at the bargaining table. They see psychological and strategic currents that are running just below the surface. They notice where the parties stand in terms of the reciprocity norm. They look for opportunities to use what psychologists call the consistency principle to commit other parties to standards and then hold them to their prior statements and positions, and they know that the timing of a proposal is always as important as its content.<sup>50</sup>

“So when you formulate your goals, consider carefully what really matters to you. Sure, money is important. But identify your underlying interests and needs clearly.”<sup>51</sup>

“The basic problem in a negotiation lies not in conflicting positions, but in the conflict between each side’s needs, desires, concerns, and interests.”<sup>52</sup>

“Interests motivate people; they are silent movers behind the hubbub of positions. Your position is something that you have decided upon. Your interests are what caused you to so decide.”<sup>53</sup>

The FBI teaches hostage negotiators “the key to successful negotiation was to discern the subject’s motivation, goals, and emotional needs and to make use of that knowledge strategically.”<sup>54</sup>

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<sup>50</sup> Shell, xiv.

<sup>51</sup> Shell, 31.

<sup>52</sup> Fisher and Ury, 40.

<sup>53</sup> *Id.* at 41.

<sup>54</sup> Noesner, 34.



“Reconciling interests rather than positions works for two reasons. First, for every interest there usually exist several possible positions that could satisfy it. All too often people simply adopt the most obvious position. . . Behind opposed positions lie shared and compatible interests as well as conflicting ones.”<sup>55</sup>

“Ask ‘Why?’ One basic technique is to put yourself in their shoes.”<sup>56</sup>

“Ask ‘Why not?’ Think about their choice.”<sup>57</sup>

“The most powerful interests are basic human needs. In searching for the basic interests behind a declared position, look particularly for those bedrock concerns which motivate all people ... Basic human needs include:

- security
- economic well-being
- a sense of belonging
- recognition
- control over one’s life”<sup>58</sup>

“The purpose of negotiating is to serve your interests. The chance of that happening increases when you communicate them.”<sup>59</sup>

“People listen better if they feel that you have understood them. . . So if you want the other side to appreciate *your* interests, begin by demonstrating that you appreciate *theirs*.”<sup>60</sup>

### **3.11 Options and viable solutions.**

Is there a right or wrong answer?

More often than expected, there is.

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<sup>55</sup> *Id.* at 42.

<sup>56</sup> *Id.* at 44.

<sup>57</sup> *Id.*

<sup>58</sup> *Id.* at 48.

<sup>59</sup> *Id.* at 50.

<sup>60</sup> *Id.* at 51.

Many negotiators confuse moral issues, which should not be negotiable, with issues of opinion, which are.

We don't bargain over molesting children.

Masters ferret out the truly negotiable issues and explore the spectrum of viable solutions.

They know that Novices usually see only one way to solve a problem and, if it does not work, they give up.

Example: Father wants an extra weeknight with his kids from a prior marriage, and his ex says no.

At that point, a Novice gives up.

A Master will probe further and come up with multiple ideas to satisfy the needs and concerns of both parties.

“... effective negotiators care about being ‘fair,’ but they also are assertive about their goals. They push the other party to find the best solutions, not just the simplest compromises.”<sup>61</sup>

### **3.12 Experts.**

A Master knows early on when an expert opinion will increase leverage or increase the possibilities of reaching an agreement.

Fisher and Ury recommend *framing* a negotiation by “developing objective criteria.”

“At a minimum, objective criteria need to be independent of each side's will. Ideally, to assure a wise agreement, objective criteria should be not only independent of will but also both legitimate and practical.”<sup>62</sup>

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<sup>61</sup> Shell, 67.

<sup>62</sup> Fisher and Ury, 85.

“Having identified some objective criteria and procedures, how do you go about discussing them with the other side? There are three points to remember:

1. Frame each issue as a joint search for objective criteria.
2. Reason and be open to reason as to which standards are most appropriate and how they should be applied.
3. Never yield to pressure, only to principle.”<sup>63</sup>

“Agree first on principles.”<sup>64</sup>

In many negotiations, it is more efficient to use one expert for an issue than “dueling experts.”

“Agree on someone you both regard as fair and give him or her a list of the proposed criteria. Ask the person to decide which are the fairest or most appropriate for your situation.”<sup>65</sup>

If you are in a competitive negotiation, and your opponent will not agree to use neutral experts, engage your own.

### **3.13 Evaluate the game: cooperative or competitive?**

Masters have honed their instincts to know when they are swimming with sharks and when they are swimming with minnows.

Masters understand that a cooperative approach means that all of the parties agree that they have a problem to solve and go about the business of solving it.

They also understand that a competitive approach means that those really are Native Americans, General Custer.

Try a Red Bull!

A rumble is brewing!

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<sup>63</sup> *Id.* at 88.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.* at 90.

Masters know that valid research supports the notion that, while a cooperative approach may be more satisfying and lead to more efficient problem solving and wiser agreements, if you are cooperative, and your counterpart is competitive, you are likely to get plucked.

Professor Gerald R. Williams, in his landmark study of negotiated settlements in civil litigation, divides the universe of lawyer/negotiators into effective/ineffective and cooperative/competitive.<sup>66</sup>

He then contrasts the styles of effective/cooperative negotiators with those of effective/competitive negotiators and describes the differences as follows:

“cooperative effectives seek to facilitate agreement, they avoid the use of threats, they accurately estimate the values of cases they are working on, they are sensitive to the needs of their clients, and they are willing to share information with their opponent ... their strategy is to approach negotiation in an objective, fair, trustworthy way, and to seek agreement by the open exchange of information.”<sup>67</sup>

“The basic dynamic of the cooperative negotiator is to move psychologically *toward* the opposing attorney. Cooperative negotiators seek common ground. They communicate a sense of shared interests, values, and attitudes using rational, logical persuasion as a means of seeking cooperation. They promote a trusting atmosphere appearing to seek no special advantage for self or client. The explicit goal is to reach a fair resolution of the conflict based on an objective analysis of the facts and the law.”<sup>68</sup>

“effective competitiveness are seen as domineering, competitive, forceful, tough, arrogant, and uncooperative. They make high opening demands, they use threats, they are willing to stretch facts in favor of their clients’ positions, they stick to their positions, and they are parsimonious with information about the case.”<sup>69</sup>

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<sup>66</sup> *Legal Negotiation and Settlement* by Professor Gerald R. Williams (West Group, 1983).

<sup>67</sup> Williams, 22.

<sup>68</sup> Williams, 53.

<sup>69</sup> Williams, 24.

“The cooperative strategy, like the competitive, has limitations. Its major disadvantage is its vulnerability to exploitation, a problem compounded by the apparent inability of some cooperative types to recognize it when it happens. . . Competitive negotiators interpret cooperation as a sign of weakness. From their viewpoint, people who are strong and people with strong cases do not make concessions or admit weakness. When an opponent acts cooperatively with them, they actually increase the level of their demands and their expectations about what they will be able to obtain in the case”<sup>70</sup>

He is quick to point out that, “A negotiator’s effectiveness is NOT determined by the pattern he follows, but rather by what he does with that pattern.”<sup>71</sup>

Despite the risks of a cooperative approach, many Masters employ it at first. It’s always easier to go from a soft approach to a hard approach than vice versa.

Even FBI hostage negotiators will do this. Gary Noesner suggests saying something like, “Why don’t you let me help you? Give me something to work with, and let’s see what we can accomplish working together.”<sup>72</sup>

According to Noesner, among others, including Master Herb Cohen, “it’s much easier to go tactical after failed negotiations than to negotiate after failed tactics.”<sup>73</sup>

### **3.14 Where is the middle ground?**

Buddha called it “the middle way.”

Aristotle called it “the golden mean.”

Solomon threatened to cut the baby “in half,” not 60/40.

We are all hardwired to split the difference.

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<sup>70</sup> Williams, 53, 54.

<sup>71</sup> Williams, 47.

<sup>72</sup> Noesner, 34.

<sup>73</sup> Noesner, 155.

Where is the 50 yard line?

It will move.

A Master never loses sight of the middle ground.

#### **Rule 4: Plan for bargaining.**

##### **4.1 Negotiation plans.**

“I am convinced that you need to approach each negotiation with a well-conceived game plan.”<sup>74</sup>

Masters show up as prepared as possible in light of the fact that all negotiations come along with a set of uncertainties.

“Whatever method of negotiation you use, you will do better if you prepare in advance.”<sup>75</sup>

They develop strategies for each phase of the negotiation process: opening, middle game, and end game.

Like master chess players, they come to the table knowing how they are going to open the negotiations, whether they are “playing the white pieces” (and making the first offer), or the “black pieces” (responding to the first offer).

They understand that, from there, strategies have to be flexible because how their opponents respond to opening offers is unpredictable.

Nevertheless, they plan ahead as much as possible.

They also understand that sometimes you are simply in a fog.

When that occurs, plans are, by necessity, short term.

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<sup>74</sup> Freund, 23.

<sup>75</sup> Fisher and Ury, 85.

Freund suggests the following simple format for developing a negotiating plan:

- *What* do I want?
- *Where* do I start?
- *When* do I move?
- *How* do I close?<sup>76</sup>

Herb Cohen suggests that you prioritize objectives as:

1. must-haves,
2. would-likes, and
3. tradeables.<sup>77</sup>

Develop your own criteria that fits the situation, but write it down.

Putting your negotiation plan in writing will help you clarify it.

#### **4.2 Themes and mantras.**

“A positioning theme is a crisp, memorable phrase or framework that defines the problem you are attempting to solve in the negotiation.”<sup>78</sup>

Lawyers who argue their cases to juries know the importance of having a simple, unifying theme.

Masters develop mantras.

“In addition to making your message simple, make it memorable. Put your ideas in verse if you can; they will be more likely to be taken as truth.”<sup>79</sup>

Johnnie Cochran’s mantra in the O.J. Simpson murder trial was resounding: “if it doesn’t fit, you must acquit.”

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<sup>76</sup> *Id.* at 92.

<sup>77</sup> Cohen, 127.

<sup>78</sup> Shell, 51.

<sup>79</sup> Kahneman, 63.

Masters understand that this same technique works in negotiations.

Mantras are made to be repeated.

“... repetition induces cognitive ease and a comforting feeling of familiarity.”<sup>80</sup>

This is sometimes called the “mere exposure effect.”<sup>81</sup>

“Familiarity breeds liking. This is a mere exposure effect.”<sup>82</sup>

“... words that were presented more frequently were rated much more favorably than the words that had been shown only once or twice.”<sup>83</sup>

### **4.3 First offers and anchoring.**

Initial offers define the parameters of the “negotiation zone.”<sup>84</sup>

Whether to make the first offer is problematic and situational; there is no generic rule.<sup>85</sup>

As stated above, a thorough evaluation of leverage is important.

One party usually wants to change the status quo more than the other.

S/he who most wants change usually makes the first offer.

That is not always a bad thing.

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<sup>80</sup> Kahneman, 66.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.* at 70.

<sup>83</sup> *Id.* at 66.

<sup>84</sup> This is different from what some call the “ZOPA,” or zone of possible agreement, which is broader. The ZOPA includes not only the range of offers but that unknown zone of what someone will actually accept, which some call the “reservation value” or walk-away point. For a more complete discussion, see Deepak Malhotra and Max H. Bazerman, *Negotiation Genius* (Bantam, 2008).

<sup>85</sup> Although proponents of the magical qualities of anchoring would argue that you will get better economic results by making the first offer.



Studies have shown that most agreements are made closer to the initial offer than the initial response.

This is what negotiation nerds call “anchoring.”

The primary benefit of making a first offer in negotiations is that it establishes an *anchor*. An anchor is a number that focuses the other negotiator’s attention and expectations. ...The power of anchors is substantial. Research has shown that anchors affect even those with negotiation experience and expertise.<sup>86</sup>

Where to drop your anchor?

Studies on anchoring have concluded that “expressing offers in a range can be a wise move in a distributive negotiation, thanks to the anchoring bias.”<sup>87</sup>

How does this work?

Let’s say you are trying to sell your car. Instead of saying that you want \$7,000 for it, you say, “I’m asking \$7,000 to \$7,500.”

Or, suppose you are negotiating a salary. Instead of saying that you want \$75,000 a year, you say you have heard that comparable employers are paying \$75,000 - \$80,000 a year for comparable employees.

Scholars in this area break down anchoring ranges into (1) bolstering ranges, (2) backdown ranges, and (3) bracketing ranges.

Bolstering ranges are for optimists; backdown ranges are for pessimists, and bracketing ranges for Goldilocks.

A number of experiments have concluded that, “bolstering ranges – those that aggressively stretch the bounds of a single-figure offer – can

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<sup>86</sup> Malhotra and Bazerman, 27-28.

<sup>87</sup> “The Anchoring Bias in Negotiation: Get Ahead with a Range Offer” by Katie Shonk, Program on Negotiation at Harvard Law School (April 18, 2018).

be highly effective in price-haggling negotiations, thanks to the anchoring bias.”<sup>88</sup>

Masters make the highest (or lowest, as the case may be) first offer they can justify, while being careful not to go beyond that point.<sup>89</sup>

“One of the cardinal rules of Power Negotiating is you should ask the other side for more than you expect to get. ... What you should be asking for is your MPP – your **maximum plausible position**.”<sup>90</sup>

... research on setting goals discloses a simple but powerful fact: The more specific your vision of what you want and the more committed you are to that vision, the more likely you are to obtain it. ... Research on negotiation confirms that anyone who is willing to take the time to develop higher expectations will do significantly better and do so without putting his relationship or reputation with others at risk.<sup>91</sup>

... my general approach to the opening proposal lies well between the extremes of outrage and undue moderation. I advise making a first offer that is sufficiently reasonable to be viewed constructively by the other side and thus evoke a positive response. On the other hand, it should give you enough room to move deliberately to your expectation without being forced to stretch.<sup>92</sup>

“As a rule, negotiators lead richer, fuller, more rewarding lives than non-negotiators. That’s because in reaching for more, they almost always get it.”<sup>93</sup>

Justification is critical. Having a reason for every element of the offer greatly enhances its chances of success. Research indicates that if you

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<sup>88</sup> *Id.*

<sup>89</sup> Fisher and Ury, who are trying to discourage anything that smacks of “positional bargaining” correctly point out that “The more extreme the opening positions and the smaller the concessions, the more time and effort it will take to discover whether or not agreement is possible.” (*Getting to Yes*, p. 6).

<sup>90</sup> Dawson, 13.

<sup>91</sup> Shell, 24.

<sup>92</sup> Freund, 119. I am not sure that a first offer that evokes a *negative* response is not preferable in some cases.

<sup>93</sup> Pollan and Levine, 7.

ask someone for a favor, he or she will be more likely to do it when you give him a reason.<sup>94</sup>

“To avoid appearing arbitrary, express a rationale for your position.”<sup>95</sup>

“Negotiating often comes down to a battle of cogency. The more logical your arguments in support of a point, the greater your chances of resolving it on satisfactory terms.”<sup>96</sup>

That can be sound advice so long as you pay attention to the emotional factors involved; ignore them at your peril.

“The starting point you select should always be defensible.”<sup>97</sup>

“I always caution my clients against putting a figure on the table that they can’t back up with a plausible rationale.”<sup>98</sup>

The harder it is to come up with logic to support your position – the more you have to back into reasons that leave you feeling uncomfortable – the more concerned you should be that your counterpart will perceive your position as overreaching. So, developing a rationale furnishes a useful litmus test to determine whether the position you’re taking is defensible.<sup>99</sup>

Justification not only persuades the other side that your offer is reasonable; it establishes a precedent for rational negotiating.

Too often negotiations fail because one or both negotiators make offers that are arbitrary.

If I had to name the single most important rule for a negotiator to follow it would be this one: Where you start is critical to where you wind up. If you start too high, your opponent will either be ridiculous to the other

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<sup>94</sup> Robert B. Cialdini, *Influence: The Psychology of Persuasion*, (Quill/William Morrow, Rev. Ed. 1993), 4.

<sup>95</sup> Freund, 47.

<sup>96</sup> *Id.* at 73.

<sup>97</sup> *Id.* at 95.

<sup>98</sup> *Id.* at 119.

<sup>99</sup> *Id.* at 123.

extreme, or he will not talk to you. If you start too low, the bullies will kick sand in your face!

The goal of an effective negotiator is to have expectations that are high enough to present a real challenge but realistic enough to promote good working relationships. ... If you are basically a cooperative person, raise your expectations. Respectfully ask for more. Insist a bit. You will be amazed at the results.<sup>100</sup>

**The truly gifted negotiator, then, is one whose initial position is exaggerated enough to allow for a series of concessions that will yield a desirable final offer from the opponent, yet is not so outlandish as to be seen as illegitimate from the start.<sup>101</sup>**

Masters know when and when not to make a first offer.

My father always taught me to never make the first offer.

He was wrong.

There may be a number of good reasons to make the first offer, including motivation, lack of leverage, superior information, and to take control of an issue such as price.<sup>102</sup>

Masters know that first offers are almost always artificially high.

They do not get upset over that; they simply respond appropriately.

#### **4.4 Make the first offer simple: the power of cognitive ease**

How many situations do I see where people make an offer by sending a complex spreadsheet analysis or a lengthy complex document loaded with legalese in the smallest font available?

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<sup>100</sup> Shell, 16, 17.

<sup>101</sup> Cialdini, 40.

<sup>102</sup> Freund, 114.

Masters know that simple offers are more persuasive than complex offers.

To put this in the nomenclature of Daniel Kahneman, the more that you require of your counterpart's "System 2" thinking, the less persuasive you will be.

Kahneman even goes so far as suggesting certain fonts and paper products that promote cognitive ease.<sup>103</sup>

What sells is "cognitive ease."<sup>104</sup>

"The general principle is that anything you can do to reduce cognitive strain will help ..."<sup>105</sup>

"If you care about being thought credible and intelligent, do not use complex language where simpler language will do."<sup>106</sup>

#### **4.5 State the problem before the solution.**

Masters understand that if they offer their solutions before framing the problem, their counterparts may stop listening if they are not interested in the solution (or proposal).

If that occurs, they will never appreciate the problem.

"Dad, I need your car on Friday to take some of my friends to an event."

"No."

"Dad, a friend of mine was killed in a head-on collision a couple of days ago. A lot of his friends want to go to the funeral on Saturday, but they do not have transportation. Can I borrow your car for a couple of hours so we can all go?"

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<sup>103</sup> You will note that this book is (or should be) presented in 14 pt font. The paper, admittedly, could be improved upon.

<sup>104</sup> See *Thinking Fast and Slow* at p. 62 *et seq.*

<sup>105</sup> *Id.* at 62, 63.

<sup>106</sup> *Id.* at 34.

Describe the problem before you propose a solution.

“If you want someone to listen and understand your reasoning, give your interests and reasoning first and your conclusions or proposals later.”<sup>107</sup>

#### **4.6 Understand that goals are more important than bottom lines.**

What is the practical effect of having your bottom line become your dominant reference point in a negotiation? Over a lifetime of negotiating, your results will tend to hover at a point just above this minimum acceptable level. ... With experience, you should be able to keep both your goal and your bottom line in view at the same time without losing your goal focus. Research suggests that the best negotiators have this ability.<sup>108</sup>

“Your goal is only as effective as your commitment to it. ... you should make sure it is justified and supported by solid arguments.”

Masters have flexible goals and flexible bottom lines.

Novices have rigid bottom lines and no particular goals.

#### **4.7 The power of concessions.**

Making concessions triggers the law of reciprocity.<sup>109</sup>

When you do someone a favor, they will feel indebted to you for it.<sup>110</sup>

“Most of us find it highly disagreeable to be in a state of obligation. It weighs heavily on us and demands to be removed.”<sup>111</sup>

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<sup>107</sup> Fisher and Ury, 52.

<sup>108</sup> Shell, 29.

<sup>109</sup> *Id.* at 18.

<sup>110</sup> *Id.* at 30.

<sup>111</sup> *Id.* at 35.

“People need to feel that they have ‘earned’ concessions even when you are willing to give them away for free.”<sup>112</sup>

You are not going to prevail on *all* issues that arise in a negotiation, so save yourself for the significant ones. Let your counterpart take home a few trophies, too, especially on issues that aren’t that important to you or where the point he is making is unassailable.<sup>113</sup>

**... I’m convinced there’s a vital psychological dimension here. Each party needs to experience the satisfaction of seeing the other side move, in order to feel that the resulting agreement has been adequately bargained. Your refusal to budge will leave your counterpart with a nagging sense of having failed as a negotiator, an ominous mind-set that is potentially hazardous to the deal.**<sup>114</sup>

Masters understand the law of contrast.<sup>115</sup>

At the end of the day, after concessions are made, the other party will be satisfied with the deal only if the other party has made concessions, only if they see the contrast between where their counterpart started and where they ended up, how bad it could be, compared to where it became.

Give your counterpart something to say “no” to.

I had a client for many years and we went through numerous negotiations together. We had a pattern that persisted. I would say, “Propose x.” He would say, “They will never agree to that.” I would say, “Exactly!” Later in the negotiations, we would drop “x” as a concession. If you limit your offers to only what your counterpart will agree to, you will undoubtedly leave a lot on the table.

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<sup>112</sup> Shell, xiv.

<sup>113</sup> Freund, 82.

<sup>114</sup> Freund, 113.

<sup>115</sup> Cialdini, 12.

If you make the first offer, consider stating your maximum plausible position, as discussed above, and then softening it a degree or two to make a concession from what it could have been. This will set a good tone for the negotiations and more likely produce a successful result.

#### **4.8 Never lose sight of the forest.**

In every negotiation, it is easy for our minds to get fixed on the next step or some small point.

A Master approaches a negotiation attempting to envision how the entire process will play out and how he will accomplish the best outcome under the circumstances.

Stephen Covey's Habit 2: "Begin with the end in mind."<sup>116</sup>

Masters spend a lot of time on "the balcony."<sup>117</sup>

A Novice may have a magnifying glass of some degree, but a Master has a wide-angle lens.

#### **4.9 Understand when and how to mediate.**

"It is generally better to deal by ... the mediation of a third party than by a man's self."<sup>118</sup>

Masters know how to use the tools available to them.

They know when a mediator will facilitate an agreement and when a mediator is unnecessary.

Masters know when resolving a dispute by arbitration is preferable to court.

Novices wait too long before employing a mediator.

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<sup>116</sup> Stephen R. Covey, *The 7 Habits of Highly Effective People* (Fireside, 1989).

<sup>117</sup> William Ury, *Getting Past No* (Bantam, 1993), pp. 31-51.

<sup>118</sup> Bacon.



They let problems fester and parties become too invested in their “positions,” which are often uninformed and delusional.

By the time they get around to mediation, they have wasted considerable resources, and the momentum toward trial, and a result no one will like, is inexorable.

Masters are usually master manipulators, and mediation is no exception.

Novices come to mediation combative with the mediator, excluding the mediator from relevant discussions, relegating the mediator to the function of courier.

Masters understand that the mediator can help them sell their proposals.

They arm the mediator with persuasive arguments, legal briefs, or material evidence in support of their proposals.

They add a dash of charm and encourage their clients to endear himself or herself to the mediator.

But, then, I am a mediator, so I would give this advice.

## **BARGAINING**

### **Rule 5: Work the people.**

Gary Noesner describes the FBI's simple approach to complex negotiations: "Contain. Open communications to deescalate tension. Stall for time. Lower expectations. Make him bargain for everything."<sup>119</sup>

#### **5.1 Use your rapport.**

In Rule 2, we discussed building rapport, why it's important and how Masters do it.

Now is the time to cash in.

#### **5.2 Know what you want before you engage in bargaining.**

We discussed goals under Rule 4.6.

Masters do not go to the most preliminary, fundamental bargaining sessions without goals.

Novices just show up.

As I told someone recently, "I don't go to a thirty-minute meeting without an agenda."

#### **5.3 Push your theme.**

Having developed your theme in the pre-bargaining phase, now is the time to bring it out and test it.

If you find that it does not seem to make an impression on your counterpart, you may consider that as feedback and shift gears.

As in the pre-bargaining stage, be proactive, not reactive.

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<sup>119</sup> Noesner, 36.

## **5.4 Be detached.**

As Master, Herb Cohen, says, you have to learn to care, but not T-H-A-T much.

This is not easy; it requires tremendous self-discipline.

Staying detached, or objective, is especially important in the bargaining phase.

In the heat of battle, nerves can rattle and emotions can run high.

“When emotions run high, the danger of impasse increases.”<sup>120</sup>

Losing your detachment can be costly.

If you lose your patience, you lose your objectivity.

Masters know their own limits.

They leave the table before they are stretched too thin.

Novices stay too long or leave too soon.

## **5.5 Stay humble.**

As in pre-bargaining, humility is effective.

Self-deprecating humor is especially powerful.

Talk about your errors and stupid transgressions.

Be a nebbish.

Ask a lot of “dumb questions.”

It worked for Columbo, not to mention Socrates.

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<sup>120</sup> Williams, 50.

## 5.6 Be mindful.

To negotiate well, you do not need to be tricky. But it helps to be alert and prudent. The best negotiators play it straight, ask a lot of questions, listen carefully, and concentrate on what they and the other party are trying to accomplish at the bargaining table.<sup>121</sup> (emphasis supplied)

Mindfulness has gone mainstream!

What is it?

What does it mean to be “mindful”?

It means being present, being engaged in what is going on right there in front of you; it means, to employ a phrase from the flower-child culture, to “be here now.”

It means not being distracted.

It means turning your phone off.

It means focusing on the task at hand.

Try it.

Masters know that mindfulness is a powerful tactic.

Novices are checking their Facebook pages.

## 5.7 Be empathetic.

Masters put themselves in the shoes of their opponents.

The ability to see the situation as the other side sees it, as difficult as it may be, is one of the most important skills a

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<sup>121</sup> Shell, xiv.

negotiator can possess. ... To accomplish this task you should be prepared to withhold judgment for a while as you 'try on' their views.<sup>122</sup>

*"Empathizing* means seeing deeply from the other person's perspective. It's not the same thing as the slick salesman's approach because it's about understanding others in their world, not fashioning your own appearance of friendliness."<sup>123</sup>

Professor Freeman suggests developing a "currently perceived choice chart," as follows:

1. What is the choice my counterpart thinks he or she must make?
2. Why would your counterpart feel it's bad to say yes?
3. Why would saying no seem like a good idea to your counterpart?

He also advises using role simulation to role-play a negotiation ahead of time.

## **5.8 Be cooperative, but don't let your guard down.**

As stated above, it is crucial to evaluate whether you are in a competitive game or a cooperative game.

I have been in hundreds of negotiations but only a few dicey situations in drinking establishments in the wee hours; yet, there are similarities.

As a negotiation is like a poker game, it can also be like a bar fight.

Bar fights don't usually just happen.

Men drink too much.

Someone says something, and then a squaring off process ensues, banty rooster-like.

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<sup>122</sup> *Id.*

<sup>123</sup> Freeman, 11.

A woman might be involved or a bump or a slight.

If you have ever been in that situation, and I realize that I may be revealing more personal information than is prudent, you know that, more often than not, some jerk is just mouthing off and nothing is going to come of it.

Here's the kicker: you are not sure.

If your counterpart perceives you as weak, his belligerence may peak to a point of violence.

If he perceives you as a black belt, he will probably back down.

The sad truth is that you are not a black belt.

What's worse is that you do not know whether he is, or, for that matter, whether he has a concealed weapon.

What to do: be aggressive or humble?

Statistics show that cooperative negotiators are more effective than competitive negotiators.<sup>124</sup>

The Master studies the terrain before devising a strategy.

S/he understands that some negotiators are cooperative and some are competitive.

Being too cooperative with a highly competitive negotiator is a good way to get plucked.

"... pursuing a soft and friendly form of positional bargaining makes you vulnerable to someone who plays a hard game of positional bargaining. In positional bargaining, a hard game dominates a soft one."<sup>125</sup>

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<sup>124</sup> Shell, 13.

<sup>125</sup> Fisher and Ury, 8.

## 5.9 Listen - actively.

It is hard to overstate the importance of listening skills in bargaining. ... the best negotiators ... ask questions, test for understanding, summarize discussions, and listen, listen, listen. ... You often get more by finding out what the other person wants than you do by clever arguments supporting what you need.<sup>126</sup> (emphasis supplied)

Perhaps the best strategy to adopt while the other side lets off steam is to listen quietly without responding to their attacks, and occasionally to ask the speaker to continue until he has spoken his last word. In this way, you offer little support to the inflammatory substance, give the speaker every encouragement to speak himself out, and leave little or no residue to fester.<sup>127</sup> (emphasis supplied)

Listen actively and acknowledge what is being said. ... It has been said that the cheapest concession you can make to the other side is to let them know that they have been heard. ... Standard techniques of good listening are to pay close attention to what is said, to ask the other party to spell out carefully and clearly exactly what they mean, and to request that ideas be repeated if there is any ambiguity or uncertainty. ... Unless you acknowledge what they are saying and demonstrate that you understand them, they may believe you have not heard them.<sup>128</sup> (emphasis supplied)

Hostage negotiators employ active listening in their life-and-death cases. "By applying this approach, the negotiator can demonstrate empathy and show a sincere desire to better understand what the individual is experiencing. We know that people want to be shown respect, and they want

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<sup>126</sup> Shell, 17.

<sup>127</sup> Fisher and Ury, 31.

<sup>128</sup> *Id.* at 34.

to be understood. Listening is the cheapest, yet most effective concession we can make.”<sup>129</sup>

### **5.10 Listen - for CEM (content, emotions, and movement).**

One of the most important discoveries of neuroscience has been that, as one expert put it, “Aristotle was wrong.”<sup>130</sup>

**We do not make decisions based upon reason and logic; we make decisions based upon our emotional responses.**<sup>131</sup>

Emotions in negotiations has been a pet topic of mine for years.<sup>132</sup>

According to Fisher and Shapiro, in *beyond reason*<sup>133</sup>, we all have five core emotional concerns.

Addressing these concerns, we more easily influence others; failing to, we screw up and wonder why.

#### **The Five Core Concerns are:**

- 1. Appreciation: If you want to influence someone, first let them know that you appreciate them.**
- 2. Affiliation: Connect. No one wants to feel disconnected.**
- 3. Autonomy: Emphasize that the other person is free to choose.**
- 4. Status: Make the other person feel that he or she is important within the context of the situation.**
- 5. Role: And make sure that they play a *meaningful* role.**<sup>134</sup>

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<sup>129</sup> Noesner, 66.

<sup>130</sup> Mark Powers and Michael Hammond, “Reason or Emotion?” *Family Lawyer Magazine*. 24 Jan. 2015.

<sup>131</sup> “Logic and reason have their place [in decision making], but just not the place we always thought. In fact, [based upon recent findings in neuroscience] emotions rule our decision making.” *Id.* See also *The 7 Triggers to Yes: The New Science Behind Influencing People’s Decisions* by Russell Granger.

<sup>132</sup> See, e.g., “Emotion and the Art of Negotiation” at [tnoblelaw.com](http://tnoblelaw.com).

<sup>133</sup> Penguin Group (2005).

<sup>134</sup> If you see some overlap between number four and five, don’t blame me!



Note the similarities to the basic *interests*.

### **5.11 Stay vigilant about evaluating a dynamic situation.**

Negotiations can be very static and predictable, or they can be dynamic.

The Master changes his strategy as the problem changes; the Novice takes a stand and refuses to move, no matter the new information.

### **5.12 Learn and use tactics when you need them.**

A comprehensive review of negotiation tactics is beyond the scope of this short work.

I will mention a few:

Good cop/bad cop: This is one of my favorites because (a) everyone already knows it, thanks to generations of television; and (b) it works.

Sidekicks: a variation of “good cop/bad cop.”

As an only child, it took me years to appreciate the value of having someone with me during a negotiation.

If you have a sidekick, and your opponent does not, you have a tactical advantage.

Intimidation: No young professor hoping to make tenure would say this, but Master Negotiators use intimidation tactics.

Intimidation tactics are another tool in the Master Negotiator’s tool box.

Why?

Because sometimes they work.

If you have good leverage, intimidation can be especially effective.

Gandhi is rolling in his grave.

He knew that, if you use intimidation tactics in a negotiation with someone with whom you are having a long-term relationship, chances are the worm will turn.

Use intimidation judiciously.

Bluff: Perhaps the most common tactic and self-explanatory.

Take the high ground: another one of my favorites.

People respond to moral and ethical issues.

If you can frame an issue so that you are ethically/morally more right than your opponent, milk it.

The law of contrast:

Spend a lot of time emphasizing your counterpart's worst case.

Then, make them a "generous offer."

Flinch: No matter what they offer, act like you are having a heart attack!

Technology: Masters make good use of Excel, PowerPoint, Word, and the Internet. See Rule 6.2 below.

Seek small commitments: If you are successful, apply the "consistency principle," discussed in Rule 5.14.

Wisdom: Using wisdom can be an effective tactic, as discussed below.

### **5.13 Size up and pare down large groups.**

Every negotiator confronts situations where a two-party negotiation means two teams, or committees.

Committees tend to dilute the rapport between two individuals.

Establishing group rapport can be much more arduous than establishing rapport between a small number of individuals.

Take Israel and Palestine, for example.

This usually means negotiations within negotiations, as the members of each group negotiate a consensus on each issue before responding to the other side.

If every member of every group has to put in his two cents before you can respond to a proposal, the process is slow and tedious.

This problem can often be remedied if each group will appoint a representative.

The better approach, however, is to allow a mediator to select a representative.

“No matter how many people are involved in a negotiation, important decisions are typically made when no more than two people are in the room.”<sup>135</sup>

#### **5.14 Be alert for the “consistency principle.”**

Masters understand the “consistency principle,”<sup>136</sup> which states that we all have a strong psychological need to be consistent with our prior acts and statements.

If you are looking for tactics you can use to manipulate your opponent, consider trying to hook him with some small commitment and then following up with a larger request.

The goal of the consistency trap is to pre-commit you to a seemingly innocent standard and then confront you with the logical implications of the standard in a particular case – implications that actually turn out to run against your

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<sup>135</sup> *Id.* at 36.

<sup>136</sup> Shell refers to this concept as the “consistency trap” (p. 45).

interests. This is a form of intellectual coercion, and you should be ready to defend against it.<sup>137</sup>

For example, if you are in a negotiation over child support, and you represent the Mom seeking child support above the norm, consider asking the Dad something like, “You don’t want the children to suffer because of this divorce you wanted, do you Mr. Jones?”

If he takes the bait, the follow up questions might be: “And, you know how it would affect them if their lifestyle was substantially reduced? And, you know what that lifestyle costs?”

“You’ve always been generous with them, haven’t you?”

A Master will always use the consistency principle if he can while remembering that it works both ways.

A Master can stumble onto a slippery slope just as well as a Novice, but he probably recognizes and rectifies it sooner.

In a fight over money, when they are not getting as much as they want, Novices often react by accusing their opponent of being a skinflint or a cheapskate or by threatening him with going to trial if he does not loosen up.

Although counter-intuitive, it may be much more effective to remind the skinflint of all of his generous past acts so that he will act consistently with a pattern of generosity.

The consistency principle can also be invoked in order to persuade an opponent to act consistently with established standards and norms.

### **5.15 Understand and look for cognitive biases.**

This is a relatively hot topic.

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<sup>137</sup> Shell, 45.

If you are really interested in how cognitive biases affect decision making, read *Thinking Fast and Slow* by Daniel Kahneman.

Kahneman may be one of our most influential current thinkers, winning a Nobel prize for behavioral economics, the first ever awarded.

What is a “cognitive bias?”

Kahneman breaks the thinking process up into “System One” and “System Two.”

System One is intuition.

System One operates automatically when the mind confronts a new impression.

System Two kicks in when the mind has to stop and figure something out, as a grandmaster has to figure out a chess problem.

Unfortunately, using System Two requires a lot of mental energy.

Being relatively lazy, according to Kahneman, System Two develops rules of thumb, otherwise known as “heuristics.”

The problem with heuristics is that they come along with a bias.

These biases are what we call “cognitive biases.”

Let’s examine a few of the more relevant ones in this context:

Sunk cost bias: This is another way of saying “throwing good money after bad.” A person becomes so convinced he is right, he is “all in.” This can occur when the best evidence and best advice says, “Don’t!”

Halo effect: When you make a snap judgment that your lawyer/doctor/potential spouse is the greatest thing since sliced bread, and ignore all evidence to the contrary, this is called the “halo effect.”

Overconfidence bias: This is a very common bias among trial lawyers. They start believing their own BS!

Confirmation bias: No matter what the U.S. Supreme Court has said that is relevant to your case, you spin it in a way that helps you. Those who suffer from confirmation bias see life in the rear-view mirror through rose-colored glasses. Whatever happens after the fact, confirms their original opinions.

And, that's just a sample.

### **5.16 Exposure anxiety.**

Exposure anxiety is a cognitive bias that is based not on lazy thinking, but rather, the fear of being seen as weak.

“It is the belief that the failure to act in a manner perceived as firm will result in a weakening of one's position.”<sup>138</sup>

This is commonly known as “throwing good money after bad.”

What separates a successful gambler from an amateur is that the Master knows when he is on a run, when his investments are paying off, when he is winning, when he is “hot.”

A Novice persists when it is clear that the fates are against him.

### **5.17 Name the game.**

What do you do when your opponent is using a tactic on you?

Name the game.

“Are you trying to intimidate me?”

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<sup>138</sup> Zachary Shore, *Blunder* (Bloomsbury, 2008), 14.

“I understand that intimidation is a tactic that some people use, but, as far as I’m concerned, it’s just a waste of our time. Let’s focus on the issues.”

“Did you guys really think that the old good cop/bad cop was going to work on me?”

Name the game.

“Bluffing?”

### **5.18 Understand personality disorders.**

A Master is a better than average psychologist.

He profiles people, knowing that every opinion is nothing more than a working hypothesis about which he continues to gather information, careful not to be biased by his early impressions.

A Master can easily spot people with narcissistic, histrionic, or borderline tendencies; and, he knows how to interrelate with each of them.

Novices do not have these tools in their tool boxes.

### **5.19 Separate the introverts from the extroverts.**

My assumption is that we are all familiar with these different personality styles.

Unlike people with personality disorders, introverts and extroverts are not necessarily dysfunctional; they simply relate to reality differently.

For our purposes, it is important to understand that introverts typically take more time to make decisions and may be more reluctant to close, as discussed below.

For a full discussion of introverts, I recommend *Quiet: The Power of Introverts in a World that Cannot Stop Thinking* by Susan Cain.

## **5.20 Know how to counter anger.**

A Master expects anger and prepares for it; when it comes, he implements a plan to counter it.

A Master knows that there are many ways to counter anger, including:

- ignoring it;
- engaging with it;
- escalating;
- recess;
- humor;
- questioning; and
- charm

Novices react.

## **5.21 Manage expectations.**

Masters understand that it is much better for someone to be pleasantly surprised than to be disappointed.

As a result they tamp down expectations.

Novices are cheerleaders.

## **5.22 Wisdom is a powerful tactic.**

Why is “wisdom” wisdom?

We label certain aphorisms or methods of living as wise for a reason.

We memorialize these lessons of life in stories, fables, myths, and metaphors.

Masters understand that wisdom resonates with people.

One example is the “split the difference” rule.



“Split the difference” resonates fairness in all of us.

As a mediator, I use it as soon as I get the parties in the “fairness zone.”

I also use stories like “we shall see” for pessimists and “the blind men and the elephant” for those who do not understand that they have only one perspective on the problem while other people will always have different perspectives.

Buddhism, The New Testament, the Book of Job, Stoicism: weave wisdom into your negotiations. It will bolster the points you are trying to make.

Novices do not understand the importance of wisdom or how it can be used to resolve disputes and help people reach agreements.

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### *We Shall See*

There was once an old man who had one son and one horse, both of whom he valued very highly. One day the horse ran away and his neighbors came over to console him. “Oh what great misfortune,” they said, “your horse is gone! How will you ever afford to get another?”

The old man sat and smoked his pipe and only said, “We shall see.”

Then, a few days later, the horse came back, accompanied by several wild horses, tripling his herd. Again the neighbors visited, this time to congratulate the old man on his great luck. Again he merely sat and smoked and said, “We shall see.”

A short time later, his son was thrown from one of the wild horses and broke his leg in several places. The neighbors all arrived, calling out, “Ah great misfortune, your son will never walk again!” But again the old man merely sat quietly in front of his house and, between puffs of his pipe, said, “We shall see.”

Some time after that, the army came though the village, rounding up all the young men to press them into service and send them to the battlefield far away in the frozen north. But with his crippled leg the old man's son was left behind. Though crippled, he managed to care for his old father until his death many years later.

Lieh Tzu

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## **Rule 6: Work the deal.**

### **6.1 Attack the problem.**

A Master is well versed in principled negotiations, as described in *Getting to Yes*.

The “problem,” more often than not, is satisfying the interests of all involved.

He knows that the first tenet of their methodology is “separate the people from the problem.”<sup>139</sup>

Novices do not know what the problem is.

If they are attacked, they counter.

If they take it personally, they counter with personal attacks.

All the while, there sits the problem.

Like a smug Gremlin, like the nerdy cousin who comes for a visit and refuses to leave, the problem sits on the sidelines, basking in his existence, while the children kick sand.

Masters focus on the problem and bring the focus of their counterparts to the problem; they are not distracted by personal attacks.

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<sup>139</sup> The second tenet is “Focus on interests, not positions.” The third is “Invent options for mutual gain.” The fourth is “insist on using an objective criteria.”

## **6.2 Technology pays.**

Technology is not only a tactic; it increases your leverage.

Here's an example: one lawyer shows up for a negotiation with a legal pad, a #2 pencil, and a dumb phone. The other shows up with a laptop, printer, smart phone, and immediately requests the password for your Wi-Fi.

During the negotiations, the first lawyer is adding, subtracting, and doing long division on his legal pad, while the other is producing spreadsheets and written offers.

Who has the advantage?

Masters understand technology and use it to their advantage.

Novices may be Luddites, or maybe they just don't keep up.

A Master does not need to be familiar with the latest innovations, but he should be relatively up to date.

## **6.3 Use litigation if it improves your BATNA.**

As stated in Rule 1.2, some lawyers do not see litigation as a negotiation tactic.

To them I say, "I hope that your consciousness expands before you screw up too many situations."

The fact that most lawsuits are settled before trial is the best evidence that litigation can be a negotiation tactic.

A Master knows when litigation is his BATNA.

Novices believe that litigation and negotiation are mutually exclusive.

## **6.4 Crunch the numbers.**

Masters are good number crunchers, or they bring along good number crunchers.

Novices fiddle with their phones, looking for the abacus app.

## **6.5 Manage the clock.**

Watch a good football team in the final two minutes of a close game.

The best teams understand the concept of “controlling the clock”: when to hurry up and when to run out the clock, how to use time outs, whether to pass or run.<sup>140</sup>

Masters do not let other people rush them with artificial deadlines or excuses.

They have a well-developed instinct for when to accept a day of progress as a good day even though it did not meet expectations, when to recess, when to take meager winnings but live to fight another day.

This is when we play the Kenny Rogers song.

## **CLOSURE**

### **Rule 7: Close mindfully.**

#### **7.1 Don't blow the end game.**

Masters know how to close.

They consider every element of closure: when, where, documentation, and those pesky issues that we would all like to ignore after we think the deal is done.

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<sup>140</sup> I won't even mention the Seattle Seahawks here!

Not understanding how to control the clock, Novices either rush the end game or delay it interminably, with equally bad results.

Rushing the end game usually means slapping a contract together with little time or thought; its ambiguities and deficiencies inevitably result in disputes.

Novices rush the end game because they value closure more than wisdom or precision.

Masters never sign an agreement when they are tired, hungry, or distracted.

If you want to close, feed people!

A famous study found that Israeli probation officers were more likely to grant probation just after breakfast; as the morning wore on, and their blood sugar dropped and their hunger grew, they were less lenient.

Delaying the end game means failing to “strike when the iron is hot”; if you wait long enough, something will happen to prevent closure.

Time kills deals.

On the other hand, there is no science to support the notion that if you do not keep working the deal until the wee hours and keep everyone in one place until you close (something), the prospects of closing tomorrow diminish.

If a deal is fair today, what is wrong with letting people sleep on it? Because they might change their minds? If they do, maybe it did not really address their interests.

Muscling a closing is more likely to cause buyer’s remorse than giving the parties time to get comfortable with it.

Masters understand that closing a deal involving an introvert is different than one involving extroverts. Introverts need more

“acceptance time.” They like to mull over their decisions longer than extroverts.

Acceptance time is an important concept. Everyone learns something during a negotiation. It takes time to digest it and change one’s bargaining position accordingly: “people need time to get used to a new idea, concept, or approach.”<sup>141</sup> This is a compelling argument for multiple negotiation sessions.<sup>142</sup>

Adjustment time can be critical to assure that an agreement is implemented smoothly.

Novices run out of gas around closing time and just want to sign and go. Masters stay mindful and alert.

## **7.2 Have a closing strategy.**

In order to develop a closing strategy, you first ask: who wants to close more? Us or them?

If the answer is “us,” make it easy to close; develop a simple written agreement and circulate a draft early on; revise it as negotiations evolve; human nature being what it is, after several iterations, people will be inclined to sign something (enough is enough!).

As Fisher and Ury recommend, “give them something to say yes to.”

Don’t forget “cognitive ease” as discussed above.

If the answer is “them,” be coy; let them work to close; keep looking for concessions to request until an agreement is signed; and, even then, keep looking!

Masters will wrestle with this question while Novices ignore it.

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<sup>141</sup> Cohen, 207.

<sup>142</sup> See “Improving Mediation: Macro and Micro” at [tnoblelaw.com](http://tnoblelaw.com).

### 7.3 Understand that “fair” is a range.

Many negotiations break down because one person has a number in mind (his “bottom line”), and the other person has a number in mind, and one or both parties adopts a negative attitude about closing the gap.

One way that Masters avoid impasses like this is to understand that reaching agreements with people is rarely such an exact science that we can get things down to decimal points.

Whether you are trying to settle a personal injury case, buy or sell real estate, or dickering over a premarital agreement, hard to find is the book that says what the thing is worth.

How much will the jury award?

How much would another buyer pay?

And, if the solution to the various problems over which we typically negotiate were so easily found, there would be no reason to negotiate.

Thus, by the very nature of the beast, the “fair” resolution in every negotiation, the elegant solution, is a range, not a precise sum.<sup>143</sup>

By keeping this in mind, Master Negotiators are more flexible than Novices.

“... when I negotiate, I look for the *favorable middle ground* – where my client is pleased with the resolution and the other party is satisfied enough to do the deal.”<sup>144</sup>

### 7.4 Strive for a “wise agreement.”<sup>145</sup>

Any Method of Negotiation may be fairly judged by three criteria: It should produce a wise agreement. It should be

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<sup>143</sup> Unless you are an engineer or an actuary.

<sup>144</sup> James C. Freund, *Smart Negotiating: How to Make Good Deals in the Real World* (Fireside, 1992), 24.

<sup>145</sup> Those interested in this topic may want to review my article “Negotiating Wise Agreements?” at [tnoblelaw.com](http://tnoblelaw.com).

efficient. And it should improve or at least not damage the relationship between the parties. (A wise agreement can be defined as one that meets the legitimate interests of each side to the extent possible, resolves the conflicting interests fairly, is durable, and takes community interests into account). ... Arguing over positions produces unwise agreements. ... As more attention is paid to positions, less attention is devoted to meeting the underlying concerns of the parties.<sup>146</sup>

### **7.5 Pay attention to details, but don't sweat the small stuff.**

Here, again, the middle way is the correct path.

You can kill a deal by being too particular just like you can by delaying closure.

Masters are careful about closing, but they do not let petty issues prevent closing.

“Don't fuss with minutiae. Let your counterpart take home some trinkets, *even* where both the leverage and the logic are on your side.”<sup>147</sup>

### **7.6 Don't neglect emotional closure.**

Lawyers are great at analyzing legal issues, negotiating agreements, and closing agreements concerning *legal issues*.

But, in situations where people will have a relationship after they sign the agreement, they would be smart to make sure that they have tended to the emotional issues; otherwise, the legal agreement may suffer the consequences of any structure with a faulty foundation.

Many times, especially in family disputes, agreements addressing emotional issues can be, and should be, intricate and involved.

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<sup>146</sup> Fisher and Ury, 4-5.

<sup>147</sup> Freund, 88.



But, as Fisher and Ury advise, “an apology may be one of the least costly and most rewarding investments you can make.”<sup>148</sup>

### **7.7 Understand that no one wins them all.**

Negotiations are often like a combination of poker and chess.

While the strategy, tactics, and anticipation of a master chess player are important, even a Master can only do so much with a pair of jacks.

Masters are realists.

They understand that circumstances may not allow them to win them all, no matter how good they are.

### **7.8 Settlement Agreements.**

Masters understand that there are many different types of legal settlement agreements.

In my universe, we have principally “Rule 11 Agreements,” “Mutual Release and Settlement Agreements,” “Agreed Orders,” “Mediated Settlement Agreements,” and “Informal Settlement Agreements.”

### **7.9 MSAs in family law cases.**

A discussion of mediated settlement agreements in family law cases is beyond the scope of this book except to say: beware of them!

Masters who negotiate family law cases know that there is no contract more binding than an “MSA” in a family law case.<sup>149</sup>

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<sup>148</sup> Fisher and Ury, 32.

<sup>149</sup> See “Improving Mediation: Macro and Micro” at [tnoblelaw.com](http://tnoblelaw.com).

## **7.10 Use Zipf's Principle.<sup>150</sup>**

Zipf's Principle is also sometimes referred to as the "law of least effort." The idea is that when faced with a task, whether mental or physical, and multiple options to accomplish that task, a person will most likely choose the option requiring the least effort.

How does that apply to negotiations?

Consider "executive summaries." Instead of sending a 40 page proposal, by itself, creating a daunting task for your counterpart, include two pages of bullet points summarizing the proposal. If s/he trusts you, s/he will not read the 40 pages as carefully and be more inclined to close, assuming that your bullet points are acceptable.

"Laziness is built deep into our nature."<sup>151</sup>

Note the close relation of this principle to the principle of cognitive ease, discussed above.

## **IMPROVING YOUR SKILLS**

### **Rule 8: Sharpen thy saw.**

#### **8.1 Negotiation is a multi-disciplinary field.**

Negotiation is one of those subjects that cannot be constrained by strict definition.

A Master is not only a good number cruncher; he is a good psychologist and an excellent evaluator, as well as a wise counselor.

One of the challenges of becoming a Master is that there are so many interrelated topics to master.

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<sup>150</sup> See, "Trump Style Negotiation" by George H. Ross (2006), p. 60. He mistakenly refers to it as "Ziff's Principle of Least Effort," but I believe that you will find that "Zipf" is correct.

<sup>151</sup> Daniel Kahneman.

Novices rely on “common sense” or perhaps what they learned at their parents’ knees.

As you aspire to mastery, consider the following topics:

1. Negotiation theory
2. Law
3. Psychology
4. Dispute resolution
5. Problem solving
6. History
7. Wisdom
8. Decision making
9. Game theory

## **8.2 Go back to basics, and then go back to basics.**

“The most fundamental ideas in any subject can be understood with ever-increasing depth ... True experts continually deepen their mastery of the basics.”<sup>152</sup>

“Deep work on simple, basic ideas helps to build true virtuosity – not just in music, but in everything.”<sup>153</sup>

“Each complicated issue has several possible core ideas. You are not seeking ‘the’ essential idea; you are seeking just one – consider a subject and pare it down to one theme.”<sup>154</sup>

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<sup>152</sup> Edward B. Burger and Michael Starbird, *The 5 Elements of Effective Thinking* (Princeton University Press, 2012), p. 15.

<sup>153</sup> *Id.* at 17.

<sup>154</sup> *Id.* at 30.

### **8.3 Study great historical negotiations.**

There is much to be learned from studying historical negotiations like the Cuban Missile Crisis, the Camp David Accords, as well as more current international negotiations such as the Iran nuclear deal. At the time of this writing, the Trump administration is beginning negotiations with North Korea, which promise to be interesting if not instructive.

### **8.4 Study hostage negotiations.**

Although it seems that hostage negotiations have been with us forever, in fact, they are a relatively new phenomenon.

Hostage negotiations such as the Ruby Ridge incident in 1992, and the Branch Davidian siege in Waco, Texas in 1993, make for fascinating reading and give us an inside view of how the FBI trains and conducts negotiators.

### **8.5 Negotiation Study Groups.**

Since all but a handful of litigators negotiate and settle exponentially more cases than they take to trial, you would think that improving negotiation skills would have center stage at many state seminars.

That is not the case.

In fact, the Texas State Bar puts on a thimbleful of seminars designed to help lawyers improve their negotiation skills.

Law schools have only recently added courses on negotiation and alternative dispute resolution.

Improving negotiation skills not only affects the experience of the litigants; it affects the efficiency of our system of justice.

If we lawyers can improve, and that makes such good sense, how do we do it?

My concept may be best explained by what it is not: IT IS NOT ANOTHER SEMINAR.

I believe that the best learning experiences come from interactive discussion groups where there is no particular “expert” lecturing to the rest of us.

My concept is simple: a study group in which the participants of the group will determine all of the aspects of group progress: what to study, how best to learn, where to meet, how often to meet, and so on.

The only *given* is that the mission of the group will be to study ***negotiation*** and discuss how negotiation ***skills*** can be improved.

I introduced this concept to the Dallas Bar Association ADR Section in January of 2012.

Several groups meet regularly.

Please feel free to contact me if you are interested.

## **8.6 Recommended Reading.**

Here is a short list of books that impact the subject of negotiation, directly or indirectly, that have influenced many other books:

*Legal Negotiation and Settlement* by Gerald R. Williams: An excellent study of the differences between cooperative and competitive styles, based upon a study of actual cases.

*Getting to Yes* by Fisher and Ury: The Bible.

*beyond reason* by Fisher and Shapiro: an excellent explanation of how emotions impact negotiations and what to do about it.

*Influence: The Psychology of Persuasion*: by Robert Cialdini: Professor Shell, among many others, borrows liberally from Cialdini. His research and ideas have been highly (how else can I put it?) influential.

*Thinking Fast and Slow* by Daniel Kahneman: Kahneman is one of the great geniuses of our day, on a level of Darwin, Newton, and Freud. His research and theories on decision making are must reading, but not for the faint of heart. This is not an easy read.

*The Undoing Project* by Michael Lewis: Leave it to Michael Lewis to simplify the work of Daniel Kahneman and Amos Tversky and to weave it into a great story of two geniuses. If *Thinking Fast and Slow* is too deep for you, this is a good place to get your feet wet.

*Negotiate This!* by Herb Cohen: Chockful of tips and anecdotes, this book is both instructive and entertaining.

*Thirteen Days in September* by Lawrence Wright: If you prefer learning about negotiation skills by studying negotiations of historic proportions, Wright's description of the Camp David accords of 1978 will not disappoint. Jimmy Carter did some things right and some things not so right, but you be the judge.

I have posted a more extensive list of books on negotiation at [tnoblelaw.com](http://tnoblelaw.com).

## Conclusion

We are familiar with many of the concepts discussed in this book, e.g.

- Rapport
- Evaluating
- The importance of preparation
- Planning

Unless you study negotiation theory, you may not be familiar with concepts such as:

- Litigation's relationship to negotiation
- The 6 weapons of influence
- Proactive v. reactive negotiation styles
- The "how" v. the "what."
- Priming
- Framing
- Fractioning
- Leverage: factors
- Leverage: static v. dynamic
- Normative leverage
- Leverage: positive v. negative
- BATNAs
- PIOC method
- Interests
- Framing with objective criteria
- Cooperative v. competitive negotiations
- The importance of themes and mantras
- Anchoring
- The nuances of first offers
- The importance of stating the problem before the proposal
- Goals v. bottom lines
- Concessions and the law of reciprocity
- The law of contrast
- The importance of detachment
- Mindfulness in negotiations
- Empathy in negotiations

- Active listening
- Listening for CEM
- Five Core Emotional Concerns
- The consistency principle
- How cognitive biases affect negotiations
- Exposure anxiety
- How to counter anger
- How to employ wisdom
- Closing strategy
- Emotional closure
- Negotiation as a multi-disciplinary field

If you will study negotiation theory for just one hour per week for ninety days, I guarantee you that you can go from the person who gets sand kicked in his face by the bullies at the negotiation beach to a negotiator with a new sense of skill and confidence.

Negotiation is a skill.  
Study and practice.  
That is the path to mastery.



## Negotiation Checklist

### PRE-BARGAINING

#### Rule 1: Be alert.

- 1.1 Know when you are negotiating.
- 1.2 Understand that litigation and negotiation are inseparable.
- 1.3 Be alert to the fact that (almost) everything is negotiable all of the time.
- 1.4 Be alert to your state of mind.
- 1.5 Be aware that compromise is always in the air.

#### Rule 2: Build rapport.

- 2.1 Lines of communication are critical.
- 2.2 Understand what influences people.
- 2.3 Highlight similarities.
- 2.4 When to establish rapport.
- 2.5 Rapport leads to trust, and trust is built on reciprocity.
- 2.6 Masters persist at rapport building.
- 2.7 Do not limit rapport building to your counterparts.
- 2.8 Be proactive not reactive.
- 2.9 Understand that the “how” is usually more important than the “what.”
- 2.10 Understand priming.
- 2.11 Be humble.

#### Rule 3: Evaluate.

- 3.1 Describe the problem.
- 3.2 Framing.
- 3.3 Outline the issues.
- 3.4 Fractioning.
- 3.5 Evaluating with limited resources.
- 3.6 Leverage.
- 3.7 BATNAs.
- 3.8 PIOC (people, interests, options, and criteria).
- 3.9 People problems.

- 3.10 Interests.
- 3.11 Options and viable solutions.
- 3.12 Experts.
- 3.13 Evaluate the game: cooperative or competitive?
- 3.14 Where is the middle ground.

Rule 4: Plan for bargaining.

- 4.1 Negotiation plans.
- 4.2 Themes and mantras.
- 4.3 Anchoring and first offers.
- 4.4 Make the first offer simple: the power of cognitive ease
- 4.5 State the problem before the solution.
- 4.6 Understand that goals are more important than bottom lines.
- 4.7 The power of concessions.
- 4.8 Never lose sight of the forest.
- 4.9 Understand when and how to mediate.

## BARGAINING

Rule 5: Work the people.

- 5.1 Use your rapport.
- 5.2 Know what you want before you engage in bargaining.
- 5.3 Push your theme.
- 5.4 Be detached.
- 5.5 Stay humble.
- 5.6 Be mindful.
- 5.7 Be empathetic.
- 5.8 Be cooperative, but don't let your guard down.
- 5.9 Listen - actively.
- 5.10 Listen - for CEM (content, emotions, and movement).
- 5.11 Stay vigilant about evaluating a dynamic situation.
- 5.12 Learn and use tactics when you need them.
- 5.13 Size up and pare down large groups.
- 5.14 Be alert for the "consistency principle."
- 5.15 Understand and look for cognitive biases.

- 5.16 Exposure anxiety.
- 5.17 Name the game.
- 5.18 Understand personality disorders.
- 5.19 Know how to counter anger.
- 5.20 Manage expectations.
- 5.21 Wisdom is a powerful tactic.

Rule 6: Work the deal.

- 6.1 Attack the problem.
- 6.2 Technology pays.
- 6.3 Use litigation if it improves your BATNA.
- 6.4 Crunch the numbers.
- 6.5 Manage the clock.

## CLOSURE

Rule 7: Close mindfully.

- 7.1 Don't blow the end game.
- 7.2 Have a closing strategy.
- 7.3 Understand that "fair" is a range.
- 7.4 Strive for a "wise agreement."
- 7.5 Pay attention to details, but don't sweat the small stuff.
- 7.6 Don't neglect emotional closure.
- 7.7 Understand that no one wins them all.
- 7.8 Settlement Agreements.
- 7.9 MSAs in family law cases.
- 7.10 Use Zipf's Principle.

## IMPROVING YOUR SKILLS

Rule 8: Sharpen thy saw.

- 8.1 Negotiation is a multi-disciplinary field.
- 8.2 Go back to basics, and then go back to basics.
- 8.3 Study great historical negotiations.
- 8.4 Study hostage negotiations.
- 8.5 Negotiation Study Groups