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**NEGOTIATION SKILLS:  
Tips on How to Negotiate and Acquire Negotiation Skills**



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When asked to address the modest subject of “How to Negotiate and Acquire Negotiation Skills”, I am reminded of the narrator’s comment in *Moby Dick*:

“One often hears of writers that rise and swell with their subject, though it may seem just an ordinary one. How, then, with me, writing of this Leviathan? Unconsciously my chirography expands into placard capitals. Give me a condor’s quill! Give me Vesuvius’ crater for an inkstand. Friends, hold my arms! For in the mere act of penning my thoughts of this Leviathan, they weary me, and make me faint with their outstretching comprehensiveness of sweep, as if to include the whole circle of the sciences, and all the generations of whales, and men, and mastodons, past, present, and to come, with all the revolving panoramas of empire on earth, and throughout the whole universe, not excluding its suburbs. Such, and so magnifying, is the virtue of a large and liberal theme! We expand to its bulk. To produce a mighty book, you must

choose a mighty theme. No great and enduring volume can ever be written on the flea, though many there be who have tried it.”<sup>1</sup>

Hundreds of books have been written on this theme.<sup>2</sup> Moreover, all of us go through life negotiating in myriad circumstances. Thus all of us are experts in this area. What can one add that is meaningful for a 50 minute program?

What follows is an effort to capture key ideas and approaches that appear to have nearly universal applicability and to put them into a helpful, simplified framework. For starters, the simplest format follows and expands upon the advice of the Ancient Greeks: know yourself, know others, know the world. It then turns Taoist and adds a fourth component, recognizing that Negotiation is very much a process: the Way.

### *Nosce te ipsum (Know yourself).*

This phrase, inscribed above the entrance to the ancient temple of Apollo at Delphi, captures a core injunction for negotiators.

#### *Know Your Interests.*

In their well known negotiation model, Fisher and Ury – and the vast majority of proponents of joint, mutual gains, cooperative bargaining models – suggest that ideal negotiation involves the identification of the interests of each party, a search for options that will best satisfy those interests, and consideration of alternatives to any proposed deal in light of those interests. At the outset, in order to be effective, a good negotiator must be familiar with the interests that he represents – of himself, his group or his principals. Before starting any negotiation, it is useful to be clear on what one needs, and to give thought to how best one might satisfy those needs. “What do we need? What are we trying to accomplish?” should be expressly asked in advance. Are we trying to maintain a client base? Trying to avoid damage to good will or a reputation? In a labor context, are we trying to stay within budget in light of other material costs; increase productivity; cut down on health costs; improve our risk picture for experience rating by insurers; improve morale? Knowing the needs can direct the strategy and also can keep one alert to opportunities that might arise in the course of negotiations.

#### *Keep a Tab on Your Emotions & Inner Life.*

Beyond this, it is vital to be in touch with ones actual feelings, thoughts, and impulses at any point in time. In “Getting Past No,” Ury advises negotiators not to react to provocative actions or comments by one’s negotiation counterparty. Reactions can lead to escalation. They can also cloud chances to learn about the other. They can kill chances to demonstrate recognition of the needs and feelings of the other, which could

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<sup>1</sup> Melville, *Moby Dick*, Ch. 104.

<sup>2</sup> Some recommended reading includes: Fisher & Ury, *Getting to Yes*; Ury, *Getting Past No*; Mnookin, *Beyond Winning*; Shell, *Bargaining for Advantage*; ABA Section on Dispute Resolution, *The Negotiator’s Handbook*.

have enhanced the quality of communication and relationship, smoothing the bargaining, building trust, and capturing opportunities for mutual gain. The prerequisite for preventing undue reactions is sufficient self awareness to identify ones emotions and inner responses, including value judgments and the like, before they are given expression.

*Cultivate a Disciplined Self Consciousness.*<sup>3</sup>

For all of this, a disciplined self-consciousness is a negotiation treasure. Part of the discipline, in not reacting, is to know that there is a difference between having a feeling, thought, or even conviction, and acting on it. Knowing oneself is a first step in keeping the ego under control.

**SKILL ACQUISITION:**

*Try Mindfulness Meditation.*

How do we develop and increase this type of self knowledge? There are a range of activities and even exercises that enhance cultivation of self awareness and promote self knowledge. For nearly a decade, Professor Len Riskin<sup>4</sup> has been promoting mindfulness meditation as a way not only of reducing stress but also of increasing awareness of one's inner processes on the theory that this improves capacity as a negotiator or mediator. Sitting quietly, following the breath, being aware of bodily sensations, letting go particular emotions or thoughts – again, sensing the freedom of awareness without compulsive action – and, with bare attention, gaining a greater sense of presence and the richness of just being are all part of this type of exercise.

*Catalogue Interests.*

In addition, as mentioned above, reflective cataloguing of ones needs and interests in advance of a negotiation, and reconsidering needs and interests throughout the course of the negotiation, puts in the forefront of one's consciousness matters that should be addressed or that might enable one to seize opportunities for gain in the bargaining process.

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<sup>3</sup> The phrase “disciplined self consciousness,” coined by John Ross Carter, Professor of Philosophy and Religion; Robert Hung-Ngai Ho Professor of Asian Studies, Colgate University, for use in connection with the comparative study of religion, has wide applicability in the context of negotiation as well.

<sup>4</sup> See, e.g., Leonard Riskin (C.A. Leedy Professor of Law and Director of the Center for the Study of Dispute Resolution and the Initiative on Mindfulness in Law and Dispute Resolution at the University of Missouri-Columbia School of Law) “The Contemplative Lawyer: On the Potential Relevance of Mindfulness Meditation to Law Students, Lawyers, and their Clients,” Harvard Negotiation Law Review (May 2002). This was the centerpiece of a symposium entitled Mindfulness in Law and Dispute Resolution. Professor Riskin has provided training in mindfulness in law and dispute resolution at a wide range of venues including the Harvard Negotiation Insight Initiative, Harvard Law School, Straus Institute for Dispute Resolution, Pepperdine University School of Law, and Benjamin N. Cardozo School of Law.

*Observe the Mirror of Others.*

Beyond awareness of one's impulses, feelings, thoughts, judgments and interests, there is another type of self-understanding, all too often elusive, as expressed by the poet Robert Burns:

“O would some power the giftie gie us to see ourselves as others  
see us.”<sup>5</sup>

Particularly where one is engaged in negotiation, it is important to observe not only one's inner workings, sense of self, and recognition of one's own interests, but also the impact one is making on the other. How do they see us?

*Catch Cultural Differences.*

This becomes even more critical in negotiations between members of different cultures. Lecturers like our own Professor Hal Abramson, on cross cultural understanding in the mediation context, frequently identify such differences as expectations for eye contact. In certain South American cultures, *e.g.*, eye contact is seen as rude; yet for us, failure to make eye contact might be read as dishonesty, disrespect or a lack of self-confidence.

*Be Alert to Conflict Handling Styles.*

Even without major cross cultural differences, there can be a substantial discrepancy between the way one believes one is behaving and the way others perceive it. Classic examples are disconnects between people with different styles of handling conflict. These often are classified in five groups: competitors, compromisers, collaborators, accommodators, and avoiders. First, knowing one's own preferred mode of handling conflict can alert one to natural ways of reacting and can liberate one to try out different approaches. Understanding these modes leads to a better understanding of the negotiating counterparty, and also to an appreciation of how they might be perceiving us.

**SKILL ACQUISITION:**

*Test Drive the Thomas-Kilmann Conflict Mode Instrument.*

While we will not have time to administer this test during this 50 minute period, it can be instructive to test oneself using the Thomas-Kilmann Conflict Mode Instrument.<sup>6</sup>

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<sup>5</sup> (O would some power the gift to give us to see ourselves as others see us.) Robert Burns, Poem “To a Louse,” verse 8. In this poem, Burns, who was the Scottish national poet (1759 - 1796), paints a scene of a haughty beauty at Church, unaware of the louse on her bonnet and of others' awareness of same.

<sup>6</sup> Thomas-Kilmann Conflict Mode Instrument -- also known as the TKI (Mountain View, CA: CPP, Inc., 1974–2009), by Kenneth W. Thomas and Ralph H. Kilmann; *see*, <http://kilmann.com/conflict.html>.

This series of questions takes an inventory of one's preferred style of handling conflict. The basic premise is that people vary in the degree to which they seek to assert their own interests even at the expense of others (compete), or to cooperate and promote the interests of others (accommodate). Some prefer just to avoid conflict altogether, neither asserting their own interest in the particular dispute, nor satisfying the other's interest. Others seek a moderated satisfaction of their own interests and those of the other, through the shared sacrifice of compromise. Yet others maximize the promotion of both their own interests and those of the other – through collaboration. Despite the apparent preference of negotiation theorists for collaboration – as the way to reach the pareto optimum – the TKCMI advises that each of these modes of handling conflict has its own utility and drawbacks. It is a fascinating study, worth investigating.

For our purposes, in addition the knowledge of self and other gained through familiarity with the TKCMI and its principles, there is an added insight into the way people of different mode preferences interact and understand each other. A classic example is the competitor matched with an avoider. Competitors like to seal deals. Avoiders prefer to take time. The result can often be an odd mix where competitors offer up a series of increasing offers, just to be frustrated by further delays by hesitant avoiders. Judgments can be added to the mix, with competitors thinking avoiders are not trying or not appreciating their efforts and avoiders thinking competitors are pushy and self-interested.

#### *Try Being Proactive – Understand One's Impact*

Awareness of differences in styles and preferences can help with self understanding, as well. Beyond this, there are a host of behaviors and expressions that can have an impact on others and lead them to perceive us in manner different from the way we perceive ourselves. To the extent we are seeking to accomplish the goal of building an agreement that maximizes everyone's interests, we need to encourage the other to feel safe making disclosures about their interests, and to feel it is in their own interest to maximize ours.

#### ***Nosce Alius (Know the Other)***

The dance of negotiation by its nature involves partners. The advice given for self-knowledge above, applies across the board to ones counterparties as well. Both to prepare for negotiation and throughout the course of negotiations, it is helpful to be alert to what is going on for the party across the table. What are their interests? How are they feeling? What is important to them? What are their cultural assumptions? What is their conflict style? What is their context? What is their sense of self, their hopes, dreams, and aspirations?

Only by understanding the interests of the counterparty can a negotiator work to develop options that are going to meet everyone's needs. One can learn these interests indirectly, through the application of logic, and through direct communication. The best

way to learn of the other's interests is from what they say. The degree of disclosure by the other party will be influenced by the tone at the bargaining table.

#### SKILLS ACQUISITION:

*Set a Tone Conducive to Candid Disclosure; Be Effective as an Active Listener.*

Active listening is a buzz word in ADR circles, but for good reason. Targeted questioning calls for answers to questions we already have, to promote our pre-existing goals. Active listening, by contrast, is more open-ended. The other party can drive that conversation.

With active listening, we use open ended questions, show recognition of the other party's feelings, values and perspectives, and acknowledge their worth. A classic formulation is VECS: validate, empathize, clarify and summarize.

By this approach, the other party feels less alone and more willing to open up. This is the royal way to learning their interests. With that information, one can look for ways to create value in a deal – ways to satisfy the other party's interests and achieve satisfaction of one's own.

*Communication is Key.*

Even First Amendment case law recognizes that communication occurs not only with words and speech but also in nonverbal ways. The effective negotiator is alert to, and uses, all forms of communication to advantage. Body language – the handshake, eye contact, posture, tone of voice – all communicate messages or attitudes. It is fundamental to communicate in a manner that builds trust and rapport.

*Build Relationship & Trust.*

Understanding that it takes two to tango in deal making and that we must learn what will satisfy the other in order for the other to meet our own needs, nothing goes so far as a relationship of trust to foster disclosure. To enhance relationship, people from various cultures give gifts or serve food prior to commencing talks, to signal good will and create a common bond. Shell, in *Bargaining for Advantage*, tells of an executive who gave his counterparty a gold watch prior to initiating merger talks.<sup>7</sup> This signaled a valuing of the other and, to paraphrase Claude Rains at the end of *Casablanca*, “the beginning of a beautiful relationship.”

*Watch for Dynamics of Escalation and De-escalation.*

We have all seen it happen. An even toned conversation all of a sudden goes out of control. Tempers flare, people leave the room. Often these scenarios can be altered if the participants are aware of the factors escalating tensions as they arise. Points are made,

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<sup>7</sup> G. Richard Shell, *Bargaining for Advantage – Negotiation Strategies for Reasonable People*.

counterpoints asserted, one-upmanship takes place, voice tone changes, expressions change, the pace of speech accelerates. If one sees this happening, there is no loss in taking a break, changing tone, slowing things down. Much can be said for the pause that refreshes. Silence is a gift.

*Control the Spigot of Disclosure.*

At the heart of communications in negotiation is the flow of information. This can range from communicating one's own interests, eliciting and confirming the interest of the other, learning about context, developing principles for fair resolutions, exchanging offers, discussing alternatives, assessing and evaluating legal options and even possible litigation outcomes.

There is a balance in disclosure. Social scientists have observed that disclosure by one party encourages disclosure by the other; and the opposite is true as well. It pays to be clear in advance of what are one's confidential facts, interests, concerns and analyses, and also of what one would like to learn from the other. These views should be revisited throughout the negotiation.

*Disclosure Choices are Informed by Competitive or Cooperative Strategy and Behavior.*

In short, be artful in striking the delicate balance in disclosure. Share where possible, both to encourage sharing and also to enable one's counterparty to help think of options that might meet one's own needs. But be judicious as well, on disclosure of one's own weak points, points that give the other party leverage, feelings that might provoke, and arguments that might lead to escalation or corrective action shoring up the other party's position.

The fundamental difficulty entangled in the preceding consideration is the question of whether to engage in strategic behavior that is competitive or cooperative. Current negotiation theory has shown the greater advantages that can be gained by cooperative behavior. Only cooperation can enable both parties to learn and work together to meet the interests of all, and to maximize gain. A legitimate cause for hesitation in proceeding down the cooperative path is the view that one's counterparty is motivated by a purely competitive strategy or driven by ill will. The bind implicit in this assessment is that ill will or competitive approaches might change if one takes a risk and extends the olive branch. It takes courage and the ability to take a short term loss to make this long term advance.

There is no ultimate solution to this problem. In each instance one uses one's best judgment. But it pays to be aware of this set of choices and of the way the exercise by one party of choices to follow a competitive or cooperative strategy can itself be transformative for all parties.

*Maintain Credibility.*

Nothing can destroy trust and good will like the discovery that one has been lying or that one is operating with less than candor. Counterparties will clam up and be more inclined to resort to competitive approaches in self-defense if they perceive a negotiator to be dishonest or insincere. Crafty conduct can not only hurt one in the instant negotiation but also can wreak havoc on one's reputation in the long run.

*Assess Commitment Levels & Risk Tolerance.*

A classic image is the game of chicken. Imagine teenagers racing at each other in hot rods in some LA viaduct. Who will swerve out of the way? If I were driving, I know the answer. I tend to be highly risk averse. It is fascinating to watch commitment levels at play in negotiations. There is great strength in posing a credible threat. To the extent one is able to gage the counterparty's commitment to a certain course of action or deal element, one will understand whether a concession need be made. The capacity to understand the nature of one's own and the other's level of commitment, and also tendency to avoid risk in general and on the particular point at issue comes not only from understanding the person, but also from understanding their context. What happens to them if they give on a particular point? What interest is affected? What in the larger picture do they win or lose? This analysis should be applied for understanding of both self and others.

***Nosce Mundus (Know the World)***

None of us lives in isolation. As indicated above, to understand ourselves, we must understand our context. This is true for understanding the other as well. An effective negotiator is sensitive to the context in which every party is suspended, recognizing the impact of context and using it as a strength.

*Behold the Business Context.*

Litigators in particular can be reminded to think beyond the case. Why did this case originate? What is driving the parties?

If one is negotiating a real estate deal, it certainly pays to understand the current real estate market, and even the broader economic climate as that affects property and resale values, demand for space, capacity to build, the ability to obtain loans, interest rates, and related issues.

More specifically, knowing a market enables the negotiator to arrive at more compelling standards for use when setting values. The uses of mutually acceptable standards is routinely recommended by proponents of principled negotiation. Once recognized, they give direction to a negotiation and support fair and doable deals.

*Heed the Hierarchy.*

Wayne Outten, when thinking about strategies for negotiating on behalf of employees, considers where those employees stand within the framework of their employer. Do they have political allies, “Rabbis,” people willing to go to bat for them? Do they have “political capital,” credibility with certain supervisors or others in management? Have they earned loyalty; would harm to the employee engender a sense of guilt?

Conversely, knowing where the opposing negotiator fits can be helpful. Is he or she trying to cover for their own mistake? Is he responsible for the P&L that is affected by this deal or litigation? Who in the chain of authority must be brought in to achieve closure? Is the negotiator at a level where he or she is trying to impress a superior, or trying to prove a point to a subordinate?

*Assess Alternatives.*

Any post-modern piece sketching the contours of the Leviathan of Negotiation would have a gaping hole larger than that great beast’s blowhole if it omitted mention of the BATNA coined and popularized by Fisher and Ury. BATNA – the best alternative to a negotiated agreement – as well as its variants, all other alternatives, good, bad and ugly, can be used by negotiators to test whether a deal on the table is worth taking. If the likely, tangible alternative to that deal is superior, the rational negotiator keeps bargaining for something better or walks away.

The simplest example is of a currently employed party testing a proposal from a prospective new employer. If the job offer is for lower pay, at a shakier institution, doing less exciting work, with worse prospects for advancement, in a less convenient location, with nastier colleagues, and a less impressive title than one’s current employer, no rational worker will take that bait. When these and other similar factors begin to equal and exceed the appeal of those at the current job, then the new offer begins to seem worth taking. Of course, returning to self-knowledge, one still needs to be aware of one’s risk tolerance. Even if the offer is better than one’s BATNA, is one willing to move from the known to the unknown?

*Analyze Risk.*

Beyond the subjective condition of risk tolerance, in the context of pending or potential litigation, understanding alternatives to a deal requires an understanding of the probable consequence of litigation. This includes not only the like outcome after trial and appeal, but also the direct and indirect costs incurred along the way. These are often described as risk analysis and transaction cost analysis.<sup>8</sup> Careful counsel spend hours

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<sup>8</sup> For helpful articles on decision trees and risk analysis, *see*, Douglas C. Allen, *Analytical Tools and Techniques: Decision Analysis Using Decision Tree Modeling*; Marjorie Corman Aaron, *The Value of Decision Analysis in Mediation Practice*, 11 Neg. J. 123 (1995); Marc B. Victor, *The Proper Use of Decision Analysis to Assist Litigation Strategy*, 40 Bus. Law 617 (1984-1985); Jeffrey M. Senger, *Decision*

assessing the strengths and weaknesses of their case to guide clients in assessing the amount of payment that makes sense to put that matter to bed.

## SKILL ACQUISITION.

### *Man Learns from Machine – Try the TreeAge Decision Tree Program.*

As a general tool in decision making, it is helpful to identify areas of uncertainty and choice points that affect outcomes along the path of a predictable process. For example, in a case, there might be uncertainty on whether discovery will develop favorable or unfavorable information on a set of points; on whether the law characterizes a particular action or arrangement as legal or illegal; on whether one will win or lose on motions to dismiss and for summary judgment; on the range of damages that might be awarded under different standards at trial; and on likelihood of victory on appeal. Added to this mix, can be the litigation transaction costs – fees for attorneys and experts, transcripts, photocopying, preparation of exhibits and the like. These costs can be factored in along the way.

We all can rough out these factors and do our own math. If there is a 50/50 chance that we will win \$1,000,000 after trial, we can loosely give that case a \$500,000 value. Understanding it will cost the client \$250,000 in fees to get there, we might reduce that value to \$250,000 if that sum of cash were sitting on the barrelhead for the taking to end the suit.

When the factors get complex, we might explore a program that does the math on the factors of uncertainty and choices taken along the way – TreeAge. This software, available online at [treeage.com](http://treeage.com), helps develop and test outcome through complex decision tree analysis.

### *Gather Information.*

Across the board, information is the medium of negotiation. Information helps us identify our own and the other's interests. It is the basis of our understanding of the business, legal, or other risk context for assessing a deal. It is the *prima materia* with which we make any assessment of risk or value. Only with information can we discover and assess our leverage.

### *Assess Leverage; Engage in Logrolling.*

Much has been written on leverage. When one controls the counterparty's access to a means of satisfying that counterparty's need, or if one can impede the satisfaction of that need, one has bargaining power. It is important to be clear on what those levers are on both sides of the table. It is further helpful to see if there are alternative means of

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*Analysis in Negotiation*, 87 *Marquette Law Rev.* 723 (2004); David B. Hoffer, *Decision Analysis as a Mediator's Tool*, 1 *Harv. Neg. Law Rev.* 113 (1996).

satisfying, or jeopardizing, the need or interest in question; this liberates one from being hung up on a particular risk or issue.

There are a good number of times when it can cost one party little to satisfy a significant need of the other party. If each party can offer something of low value to the offeror and high value to the other party, this presents a wonderful opportunity for trading that will generate higher overall value in the deal. This type of trading, known as logrolling, can be a source of great satisfaction.

#### *Crunch Numbers.*

The risk analysis discussion above should already suggest that a good negotiator should not shy away from numbers. In deals there are often many moving parts, each with its potential economic value. It pays to try to price values, to calculate risks, to test principles and assumptions by working out their math.

#### *Develop Principles and Standards.*

At the heart of the Fisher-Ury model of negotiation – in addition to putting the parties into a cooperative frame of mind, focusing on the problem, identifying the issues, discovering underlying interests, and developing options to meet those interests, producing a deal that is superior to the BATNA – is the recognition that developing workable options and deals often depends upon arriving at principles which all parties can adopt. This fits into our “mundus” section, because they are an effort at transforming the subjective into the realm of objectivity. Whether it is fair, doable, wise, legal, efficient, considerate, reciprocal, due – whatever the standard, it pays consciously to work to develop standards that can be discussed with and adopted by one’s counterparty in order to address distributive issues or generally to work out a deal.

This can include finding an objective basis for assessments by turning to authorities in recognized texts – like the Kelley Blue Book for used car values – to experts, like appraisers or accountants, or to broader custom and usage in a particular industry or trade. The net result is bringing the discussion into an objective realm susceptible to shared, open analysis, and away from the subjective realm governed by the assertion of wills.

### **Opening to the Great Way**

Having embraced the chiliocosm, framing out content and approaches through the vast domains of self, other, and the world, a comprehensive presentation on Negotiation Skills must finally recognize that we are dealing with what is fundamentally a process.

We recognize that there is a wide range of styles and approaches in negotiation that can differ and yet be both effective and legitimate. Having said that, I still might make a few recommendations. Since we engage in negotiation in all areas of life, there is something to be said for being bigger than the topic. Sometimes living with dignity and

genuineness trumps a minor strategic gain. Moreover, with principled, joint mutual gains approaches, it is possible to hold one's own, and indeed improve the deal outcome, while still acting with decency and in a manner consistent with one's own values.

As we engage in this process, we can negotiate the process itself. If we find ourselves in a mode of interacting that seems inappropriate or unproductive, we can discuss our approaches with the counterparty. We are all too familiar with the frustration of negotiating the size and location of the table. Yet, while we do not wish to be hung up and frozen in our interactions, it can also be liberating – and good strategy – to be alert to process choices that might enhance relationships, information gathering, or the deal.

Negotiators should cultivate creativity, openness, and flexibility. We are participating in something greater than ourselves. Richer possibilities may emerge from a deal than we could have at first realistically have imagined. This attitude of openness makes us not only more humane and appreciative of others, it also opens us to reality and enables us to see and seize upon opportunities.

Along these lines, let a lively silence be your baseline. This helps in decision making on disclosure flow, preserves candor through eliminating impulsive misrepresentations, controls the expression of unhelpful emotional reactions, prevents reactive behavior overall, and encourages listening to others. It gives one a chance to consider before committing. Yet, this approach should not be at the expense of wholesome spontaneity and warm sharing.

Finally, negotiation, at its core, recognizes the freedom and dignity of all participants. We all can take it or leave it, talk or walk. For this reason, it is a beautiful way indeed.

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