

The Consummate Dealmaker

Best practices in negotiation for lawyers, courtesy of Henry Kissinger.

BY TALMAGE BOSTON

Among the most important tools in a successful lawyer's toolkit is the capacity to negotiate a favorable agreement for his or her client. When the parties finally sign off, it's usually with the belief that its terms will make their future better than the present.

No one has ever mastered the act of negotiation better than Henry Kissinger. Although not a lawyer, Kissinger demonstrated his legendary prowess at the table on a global scale while serving as national security adviser and secretary of state under President Richard Nixon and again as secretary of state under President Gerald Ford, for which he received the Nobel Peace Prize in 1973 and the Presidential Medal of Freedom in 1977. Among his better known negotiations are his key negotiating roles in the opening to China after decades of reciprocal hostility; in detente and the first nuclear arms control treaty with the Soviets at the height of the Cold War; in the Paris Peace Accords with North Vietnam after years of bitter conflict (though the deal collapsed after two years); and in Egyptian and Syrian disengagement deals with Israel following their 1973 war—that remain in place today. Exactly how he did what he did during his historic diplomatic run is worthy of emulation by attorneys who negotiate on a frequent basis.

Though there have been many fine biographies of him written in the past 15 years, the acclaimed book *Kissinger the Negotiator: Lessons from Dealmaking at the Highest Level* (Harper 2018), authored by James K. Sebenius (professor, Harvard Business School), R. Nicholas Burns (professor, Harvard Kennedy School), and Robert H. Mnookin (professor, Harvard Law School), according to Kissinger in his foreword, is the “first to delve deeply into my philosophy and method of negotiation” and provides “a superb and practical analysis of how to forge worthwhile agreements in complex situations.” Their book is relied upon in this essay for the accounts of this great American statesman.

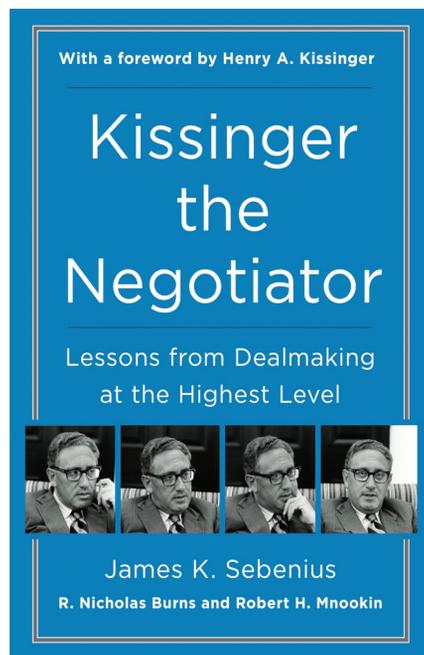
Henry Kissinger began every negotiation he undertook away from the table by first identifying his ultimate contractual goal and then working backward to determine what had to be in place and in sequence for the deal to make. Once he gained clarity on the goal and the steps necessary to achieve it, if Kissinger knew at the outset that his negotiating posture was weak, then well before starting any dialogue with the other

side, he found ways to add cards to the hand he was dealt by identifying new incentives he could offer and penalties he could threaten that would potentially motivate his counterpart to accept his terms instead of refusing them and holding fast to the status quo.

As an example of improving his hand after a goal had been set, when Kissinger became charged by Nixon in 1969 to negotiate a peace treaty with North Vietnam that would end America's involvement in Southeast Asia, he knew at the outset that his bargaining power was weak because the enemy was stubbornly persistent, massive U.S. forces had not produced victory on the battlefield, Nixon had publicly committed to a rapid drawdown of U.S. troops in Vietnam, and an increasing number of Americans opposed our further participation in the war. Because of those readily apparent facts, the North Vietnamese leaders saw no reason to change their favorable position, and Kissinger knew that continuing to negotiate with them one-on-one (which President Lyndon B. Johnson had begun in 1968) would remain a futile exercise until such time as the U.S. brought new cards to the table.

After reaching that conclusion, Kissinger brainstormed with Nixon on how to grow their negotiation ammunition, and they agreed upon and then executed a triangular negotiation strategy involving the U.S., what was then “Red” China, and the Soviet Union, by which America played the two largest communist countries against each other and widened their Sino-Soviet split. This led both communist nations to agree to reduce their support of the North Vietnamese military in hopes of improving their relations with the U.S., and, when combined with a major U.S.-South Vietnamese battlefield victory, sufficiently altered the war's balance of power to motivate North Vietnam to finally start negotiating toward a solution acceptable to both sides. (Although a deal was reached in 1973, Nixon soon resigned as a result of Watergate, the U.S. effectively ended its military support for South Vietnam, and the North conquered the South two years later.)

Once Kissinger added new cards to his hand, he had to assess the best strategic sequence for playing them. For this diplomatic exercise, he used the knowledge gained from his meticulous preparation, which allowed him to fully understand his counterpart's position well in advance of their negotiations.



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After absorbing the complete context of his peer's position, Kissinger then determined which of his negotiation cards, standing alone, would likely have the greatest impact on his counterpart and which would have importance only if played in tandem with another card before it could move the desired deal toward consummation.

As an example of strategic sequencing, Kissinger negotiated with several southern African countries in 1976 seeking to prevent them from becoming a new front in the Cold War, after Angola fell under Soviet and Cuban influence and Mozambique had a new Marxist government. He determined that the best strategy for stopping the growth of communism in that region entailed ending white-minority rule in Rhodesia (now Zimbabwe). If America supported the black majority there, the countries in the region such as Tanzania and Zambia would agree to keep out all foreign troops.

To motivate the white Rhodesian Prime Minister Ian Smith to move off his stated position that his country would never—"not in a thousand years"—open itself to free elections (which would surely result in a victory for its black citizens since they outnumbered whites there 22 to 1), Kissinger was aware that the strongest country in the region, South Africa (then under apartheid), which shared a border with Rhodesia, was potentially in the most influential position to move the needle toward having the white leadership of its adjacent neighbor surrender its control.

In his negotiation with South Africa's Prime Minister John Vorster, attempting to persuade him to resist supporting Smith's regime, Kissinger began their conversation with "a philosophical discussion of what the U.S. was trying to achieve." From there, he built rapport with Vorster by alternating genuine empathy with gentle wit and gaining trust with his sincerity and command of the pertinent facts involved in the situation.

Kissinger then calmly explained why it was in South Africa's interest to reduce its political and military support for Rhodesia. If Vorster decided to lock arms with Smith, a race war next door would likely ensue and spread, "violence would increase; radicals would gain control of the armed struggle, aided probably by foreign [communist] forces, at which point South Africa would face the dilemma of either holding still while the [white] European population of Rhodesia was expelled or else joining in the conflict."

Knowing neither option had any appeal, Kissinger ultimately recommended to Vorster that South Africa's best strategy was to remove itself from the looming black-white conflict in Rhodesia, which would provide it with the best opportunity to stay out of the fray and thereby "achieve a certain breathing space in which his country might solve its problems peacefully." Moreover, by acting promptly, South Africa could enhance the chances of "moderate" black leadership in Rhodesia. Kissinger explained his approach in dealing with South Africa as follows:

"We were not out to punish them for their fathers' sins [i.e., apartheid] or even their own—as were so many of their critics in the West. Rather, our goal was to bring them face-to-face with their realities and lead them as gently as possible to the acceptance of the fact that these [realities] dictated change both on moral and on political

grounds. As such, I presented these views more in sorrow than in anger, not as a debate over South Africa's past so much as an option for its future."

Convinced that this was the best course, Vorster accepted Kissinger's advice and withdrew much of South Africa's support of Rhodesia, thereby leaving Ian Smith alone to fend for himself against the 22 to 1 odds.

Because of the strategic sequencing of Kissinger's diplomatic moves in southern Africa, Smith was put in a position of having no choice except to accept the principle of free elections (and, thus, black majority rule) within the next two years, thereby preventing southern



Kissinger the Negotiator lead author James K. Sebenius

PHOTO COURTESY OF JAMES K. SEBENIUS

Africa from becoming a new front in the Cold War, Kissinger's primary aim with this diplomacy. (At the time, this largely forgotten episode was widely regarded as a triumph of negotiation. After the election, Rhodesia changed its name to Zimbabwe and ended up choosing Prime Minister Robert Mugabe, who later led his country to economic disaster—underscoring that a negotiating success achieved one year may in time turn sour.)

This type of up-front "wide-angle lens" analysis—strategic sequencing of subsidiary objectives prior to the final negotiation, and direct but empathetic conversations with counterparts Vorster and then Smith—accomplished Kissinger's goal without the U.S. having to supply any foreign aid or military forces in southern Africa.

Authors Sebenius, Burns, and Mnookin's research and analysis of Kissinger's diplomatic feats that made him arguably the most influential person in the world during his eight-year run from 1969 to 1977, and the "actionable insights" they derived from his strategies and execution that can be used by lawyers to up their game at the negotiating table, are summarized as follows:

- Start by understanding the client's desired final result while being fully mindful of his or her ongoing interests and current position.
- Fully research the person across the table: his or her personality, method of doing business, full context of current position (and how he or she got there); his or her track record for credibility; and his or her probable expectations and goals for the transaction to be negotiated.
- As Talleyrand said, "foresee the inevitable and expedite its occurrence," and, therefore, start from the client's desired deal, and compare that to what his or her position is now, and then formulate an efficient, imaginative, and realistic plan that connects those two points.
- To be in a position to fulfill the plan, brainstorm with the client and any engaged co-counsel and explore all meaningful available commercial and legal options that

might be added to the existing stack of bargaining chips.

- Upon doing what it takes to make the desired negotiation options materialize into bona fide incentives and penalties capable of influencing one's counterpart at the table, determine how to play one's hand in the most impactful sequence, which requires understanding the linkage among the factors in play.
- Upon arriving at the table with one's counterpart, recognize that to move a negotiation toward one's goal is more likely to occur if there's genuine rapport between the parties, and the best means of building rapport with another is to be empathetic; display a warmhearted sense of humor; generally avoid lecturing or arrogance; listen attentively and respectfully; communicate potential options and offers calmly and with precision; minimize tension; and convey strength and flexibility as circumstances dictate.
- If new facts or options arise or the counterpart takes an unexpected position while negotiations are taking place, which make adherence to one's original plan impossible, go with the new flow and see if a different but still acceptable resolution of the transaction can be achieved. As the authors summarize this best practice: "Think strategically but act opportunistically."
- With each exchange of offers and counteroffers, a pertinent consideration for the client should always be: "If

we make a deal based on these terms, will I be in a better position than if I make no deal at all?" i.e., "How does the value of this deal as it now stands compare to the cost of impasse?"

- When a meeting of the minds on both sides finally occurs, draft a tight agreement that accurately reflects the deal that's been struck, though recognize that there are instances where, in order to achieve closure, it's necessary to include a term that contains "carefully crafted ambiguities" with which the parties can live in order to avoid impasse, and can allow a party to save face and sometimes even declare victory when reporting back to constituencies.

Upon grasping Kissinger's methods of diplomacy set forth in this highly readable and useful book, when confronting any aspect of complex negotiations, the operative question for the lawyer to ask and answer so he or she can engage in best practices and achieve best results is simply: "What would Henry do?" **TBJ**



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