

## **Take No Prisoners**

*How the FBI, human psychology, and (a little) ethics can help you negotiate your clients out from behind bars.*



Take No Prisoners: How the FBI, human psychology, and ethics can help us negotiate our clients out from behind bars.

Taking no



Lessons:

- (1) Art of persuasion vs. science of persuasion.
- (2) Realized I want to sell people. I'm a public defender, if I don't have a client to sell, I need to get a new job.
- (3) Good news for you, but some bad news first...



Believe it or not, this is what we do. This is *who* we are!

Who the f#\$ck are



Who the f#\$ck are



Who the f#\$ck are



Who the f#\$ck are



Who the f#\$ck are



What are the  
**Ethics of Negotiation?**

Can we employ the science of persuasion?

Should (must) we employ the science of persuasion?

What are the  
**Ethics of Negotiation?**

*As negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealings with others.*

*Preamble: A Lawyer's Responsibilities*

## Dealing with the **Prosecutor**

Cannot make a false statement  
of a material fact.

SCR R 20:4.1.

ABA Comment: Statements of Fact (“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact.”)

Material facts:

- (1) things the other side would base a decision on
- (2) Does not include intentions or belief in the intentions of the defendant

## What is the role of the **Client?**

*A lawyer shall abide by a client's decision whether to settle a matter. In a criminal case or any proceeding that could result in deprivation of liberty, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered.*

SCR R 20:1.2

Whether a client wants to settle is often the result of the agreement you can obtain.

## Duty to Negotiate

Your failure to negotiate  
constitutes a lack of diligence.

SCR R 20.1.3; Matter of Disc. Proceedings Against  
Des Jardins (1992) 172 Wis.2d 178.

This doesn't say, your failure to negotiate well, constitutes a lac of diligence. But...

Duty to negotiate  
**Well**

Competence includes "skill"  
that is "reasonably necessary  
for the representation."

SCR 20:1.1

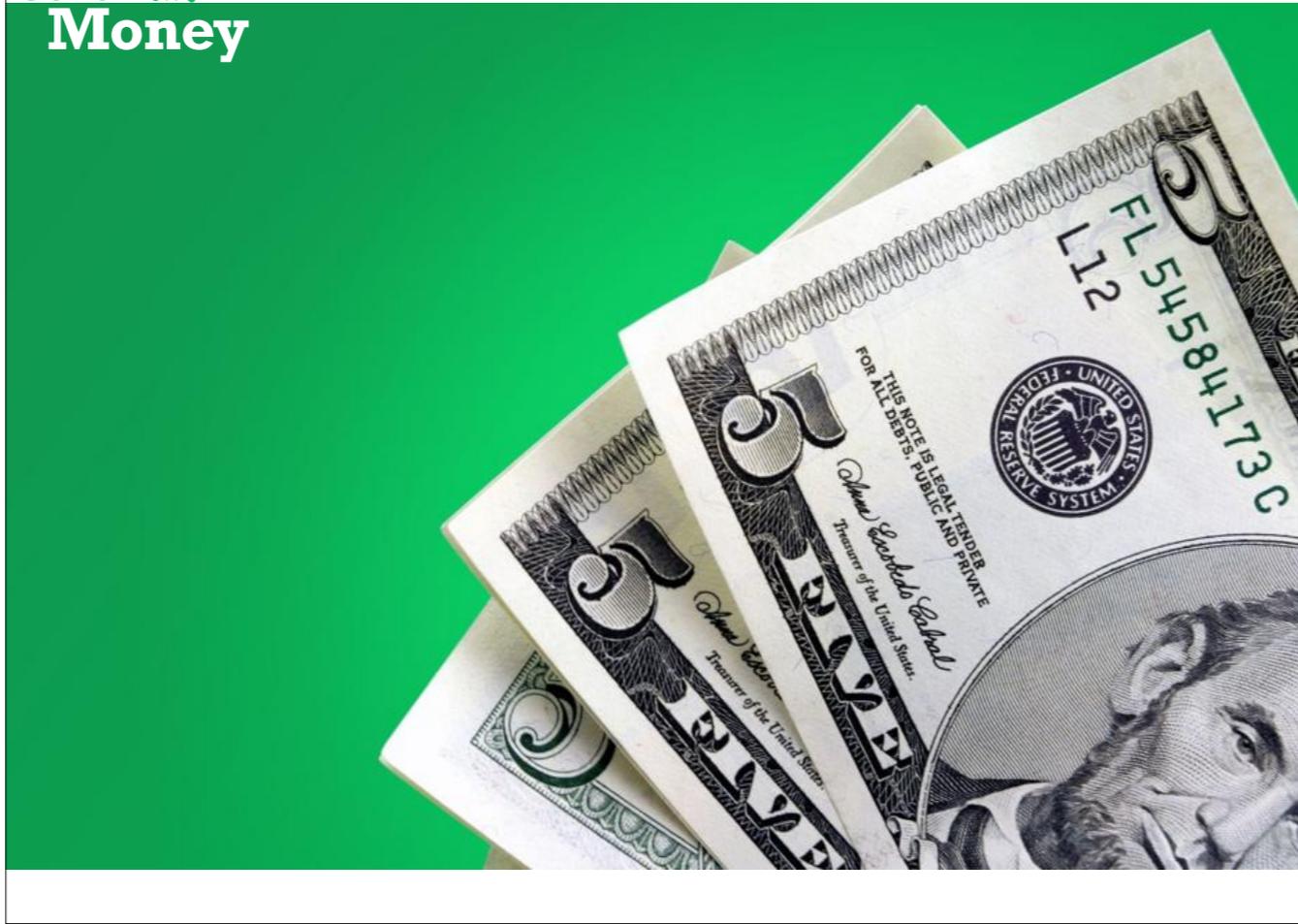
If you don't control the psychologically, the psychology will control you.

Duty to negotiate  
**Well**

*If you don't control the psychology,  
the psychology will control you.*

We have a duty to master the psychology (our's and the prosecutor's) of negotiation.

## Let's talk Money



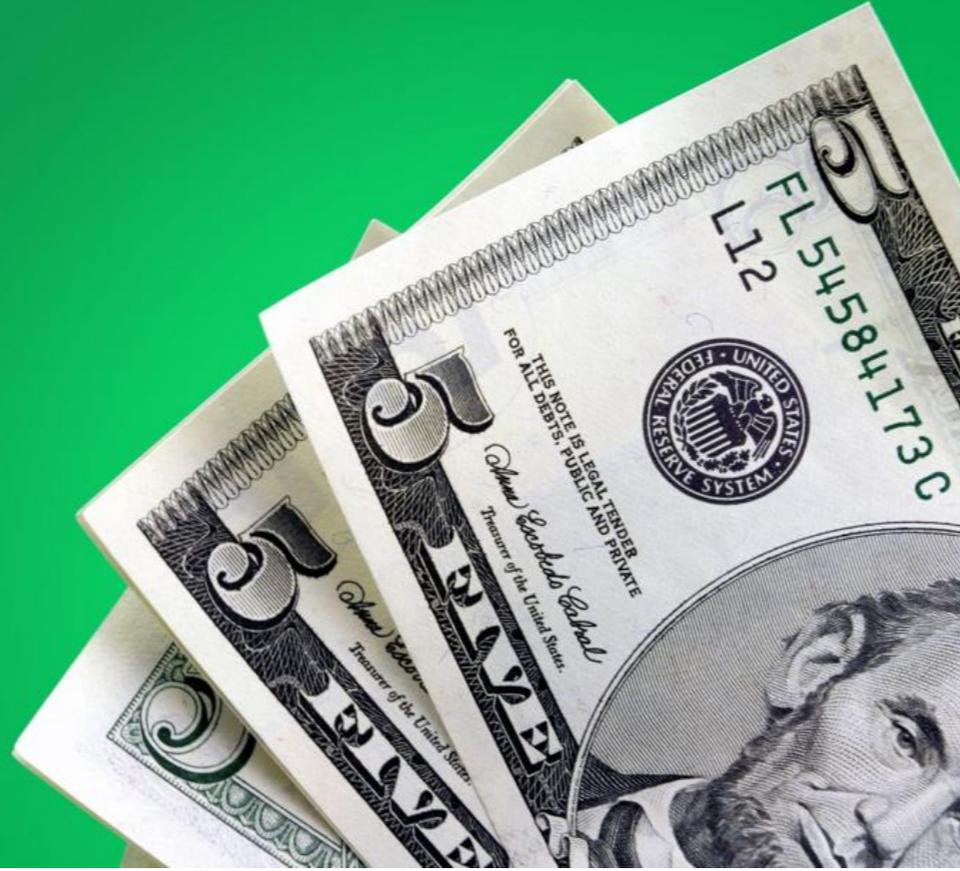
### Lesson:

- (1) We are not driven by pure logic/reason
- (2) We are driven by underlying psychological motivators
- (3) If you don't control the psychology, the psychology will control you

Let's talk  
Money



Let's talk  
Money





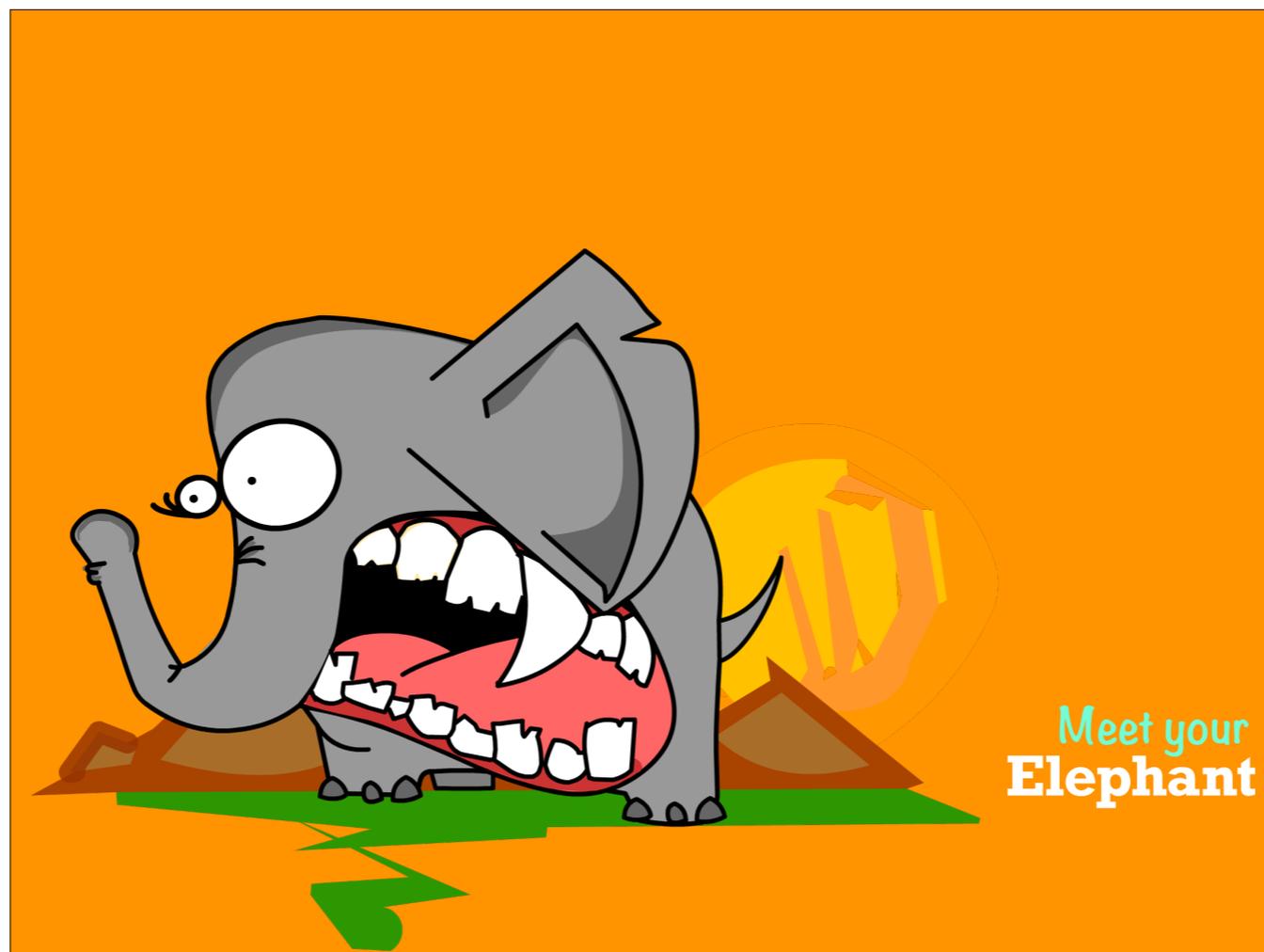
Spotting  
Bad Negotiation

Just like in cold war, to win, you need to be the United States.  
Have to use another technique



Brain processing is separated into two parts:

- (1) The rider (reason/conscious processes)
- (2) The elephant (emotional/subconscious processes)



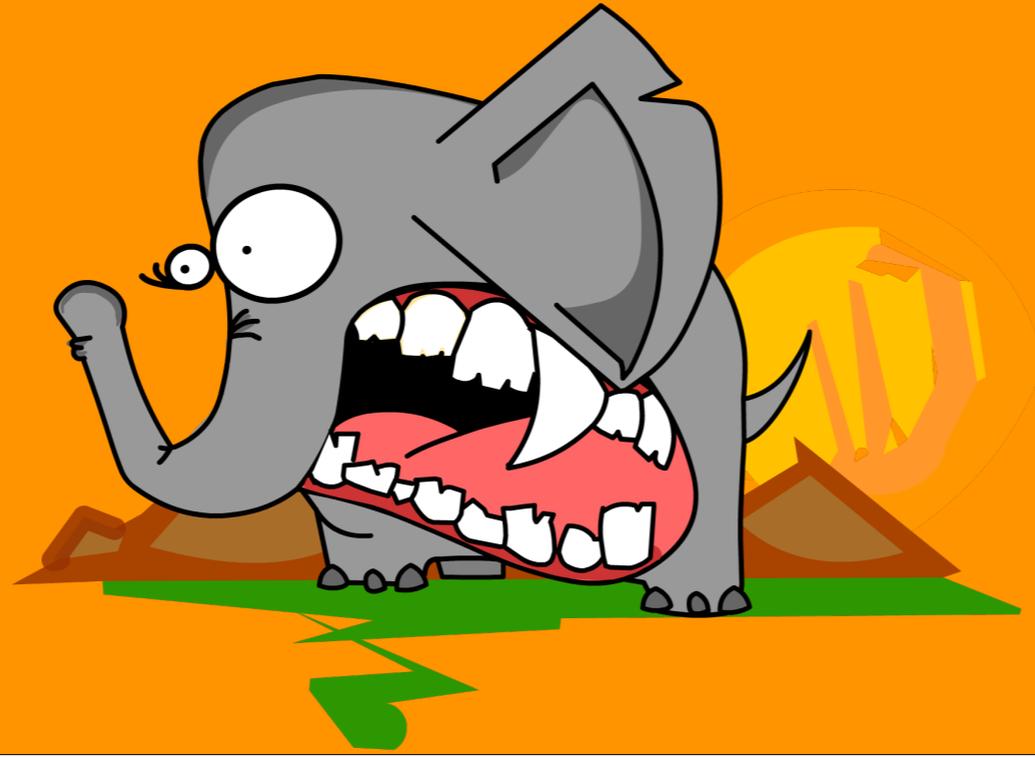
- Risk-reward stored in the amygdala
- Information processed subconsciously first within 1/5 of a second
- Our social brains have mapped onto our primal brains
- Threat = decreased resources to the prefrontal cortex
- Amygdala tuned to feel threats more than rewards = hair trigger.

Risk

Reward

Approach

Avoid



Meet your  
**Elephant**

Consequences of  
**Threat-avoidance**



Threat/amygdala activated: “the tendency is to **generalize** more, which increases the likelihood of accidental connections. There is a tendency to **err on the safe side, shrinking from opportunities**, as they are **perceived to be more dangerous**. People become more likely to **react defensively** to stimuli. . . . suddenly a **whole meeting can appear threatening** and the tendency can be to **avoid taking risks**.”

Prosecutor will **generalize** client to all thieves, burglars, etc. in their head. You and your client will be **perceived to be more dangerous. Whole meeting** or negotiation can **appear threatening**. They are more likely to **react defensively, avoid taking risks, err on the safe side** with more probation, jail, or prison, and **shrink from opportunities** to accept your individualized, creative agreement.

## Consequences of Reward-approach



“An approach response is synonymous with the idea of engagement. Engagement is a state of being willing to do difficult things, to take risks, to think deeply about issues and develop new solutions. An approach state is also closely linked to positive emotions. Interest, happiness, joy and desire are approach emotions. This state is one of increased dopamine levels, important for interest and learning. There is a large and growing body of research which indicates that people experiencing positive emotions perceive more options when trying to solve problems (Frederickson, 2001), solve more non-linear problems that require insight (Jung-Beeman, 2007), collaborate better and generally perform better overall.”

Approach response is synonymous with engagement, state of being **willing to do difficult things**, take risks, **think deeply** about issues and **develop new solutions**. Associated with positive emotions, which are associated with the perception that there are **more options when trying to solve problems**.

Controlling the elephant with a  
**S.C.A.R.F.**

**S**tatus

**C**ertainty

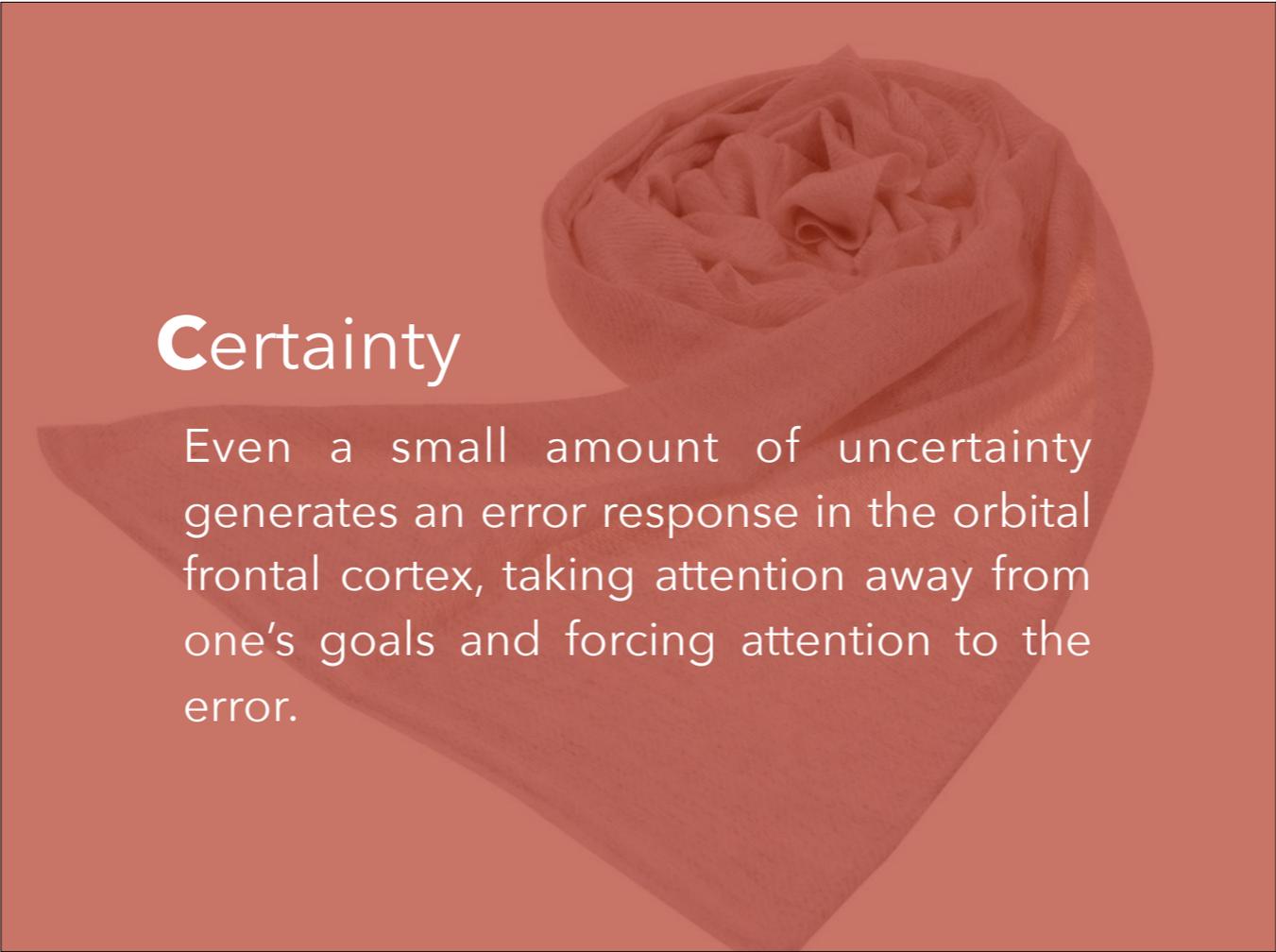
**A**utonomy

**R**elatedness

**F**airness

## Status

The perception of a potential or real reduction in status can generate a strong threat response. A status threat can occur through giving advice or instructions, or simply suggesting someone is slightly ineffective at a task



## Certainty

Even a small amount of uncertainty generates an error response in the orbital frontal cortex, taking attention away from one's goals and forcing attention to the error.

What you're asking for and why

What will happen if they give you what you're asking for

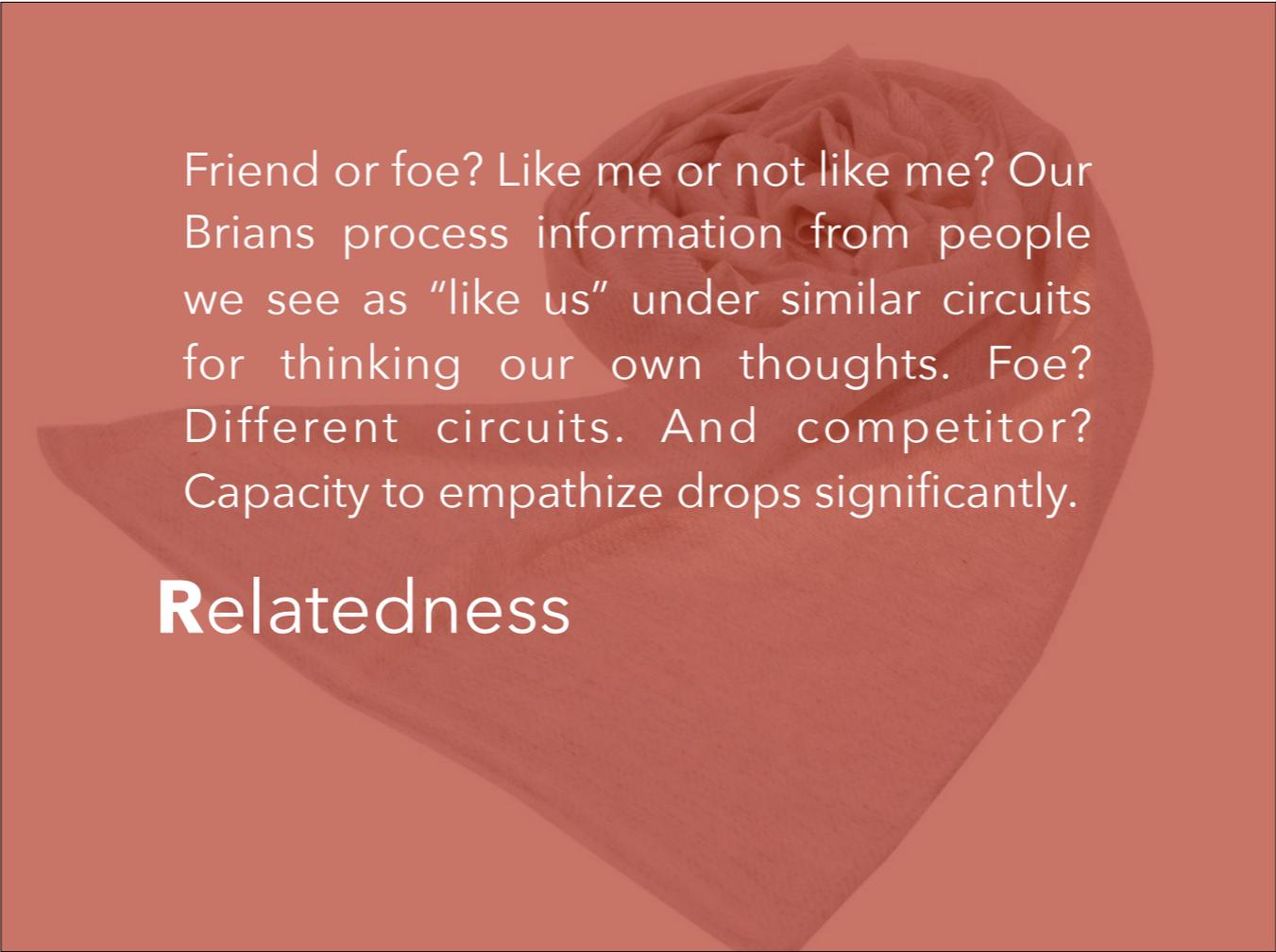
Likely why they are starting from a "safe" position



## Autonomy

Ability to control your environment. Essentially, to control stress. Stress you can control (escapable) versus stress you cannot control (inescapable) was literally a matter of life and death for rodents.

(1) Control is in the eye of the beholder

A red rose is placed on a folded red napkin. The entire scene is set against a solid red background. The text is overlaid on the upper part of the image.

Friend or foe? Like me or not like me? Our  
Brains process information from people  
we see as “like us” under similar circuits  
for thinking our own thoughts. Foe?  
Different circuits. And competitor?  
Capacity to empathize drops significantly.

## Relatedness

- (1) Part of active listening is about giving them the impression you “hear” them
- (2) You can relate
- (3) You are likable

A red rose is centered in the upper half of a solid red rectangular area. Below the rose, white text is centered. At the bottom left of the red area, the word 'Fairness' is written in a large, white, sans-serif font.

Unfair exchange generates strong threat response. Can activate the insular part of the brain involved in intense emotion—e.g. disgust. Perceiving another as unfair shuts off empathy for their pain, and feel reward when unfair others are punished.

## Fairness

- (1) Careful not to get caught up in “fair” numbers
- (2) Fairness in opportunity to be heard
- (3) Information gathering will help you find out what’s fair to them and why

### 3 Principles to effective negotiations

Control is in the eye of the beholder

- (1) Instinct is to want to be in control
- (2) Autonomy, Status, Fairness, Certainty relaxed when you let them think they're in control
- (3) Real control is the not the issue; perceived control is what matters

### 3 Principles to effective negotiations

Understand  
Before you seek to be understood

- (1) Our first goal in effective negotiation is to investigate
- (2) The more we know, the better we become.
- (3) And by understanding first, you create a feeling of reciprocity or fairness. They will want to reciprocate. That's when they open the door. And that's when we deliver the message.

### 3 Principles to effective negotiations

Negotiation is a self-fulfilling prophecy

- (1) Parking spot analogy
- (2) Belief in what you're saying
- (3) Belief that you have "good news."



(1) The overall structure is based on FBI's stairway model

(2)

## The FBI's behavior change



# Understanding Negotiation Types

Analytical Person  
Assertive Person  
Appeaser (“I try to be fair”)

# Understanding Negotiation Types



# Understanding Negotiation Types



# Understanding Negotiation Types



# Understanding Negotiation Types

## Understanding Negotiation Types

### Analyst

Realistic, prepared, smart

Perceived as cold and  
standoffish

Care most about their thought  
process

Validate the analysis

Analytical Person  
Aggressive Person  
Appeaser ("I try to be fair")

## Understanding Negotiation Types

*Assertive*

Direct

Perceived as aggressive and harsh

Want to be heard and respected

Let them think they are king

Analytical Person

Aggressive Person

Appeaser ("I try to be fair")

## Understanding Negotiation Types

### *Accommodator*

Relationship focused

Friendly, talkative

Preserve the relationship

Care most what you think of them, or (danger) what co-workers will think.

Let them solve the problem with



Lesson:

- (1) Why is an accusation
- (2) What / How tell you what's possible
- (3) A directed question will cause them to solve the problem

What led you to believe prison was appropriate?

What was the key factor in getting to that amount of jail?

How can we assure no one else is harmed, while helping this person to regain their life?

How do we avoid ruining two lives?

How can Mr. Wilder take responsibility without losing his [insert concern]?

What do you hope to accomplish?

What issues do you see with the case that make resolution possible?

# Let them solve the problem with Open or Directed Questions

How + What

Lesson:

- (1) “Why” is an accusation
- (2) What / How tell you what’s possible
- (3) A directed question will cause them to solve the problem

What led you to believe prison was appropriate?

What was the key factor in getting to that amount of jail?

How can we assure no one else is harmed, while helping this person to regain their life?

How do we avoid ruining two lives?

How can Mr. Wilder take responsibility without losing his [insert concern]?

What do you hope to accomplish?

What issues to you see with the case that make resolution possible?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

What led you to prison?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

What led you to prison?

What was the key factor in that amount of jail?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

What led you to prison?

What was the key factor in that amount of jail?

How did you rule out probation?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

What led you to prison?

What was the key factor in that amount of jail?

How did you rule out probation?

What are your goals with the resolution you proposed?

Let them solve the problem with  
**Open or Directed Questions**

How + What

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

How do we do X without causing Y?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

How do we do X without causing Y?

How is Mr. X supposed to accept responsibility given X?

Let them solve the problem with  
**Open or Directed Questions**

How + What - Why

How do we do X without causing Y?

How is Mr. X supposed to accept responsibility given X?

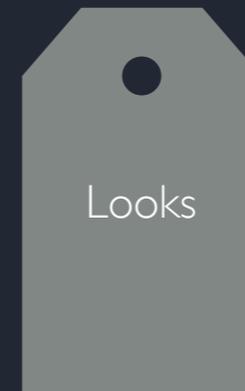
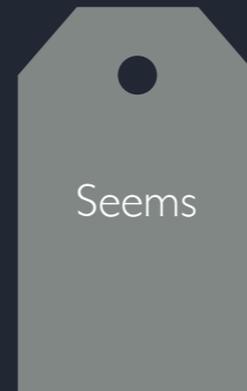
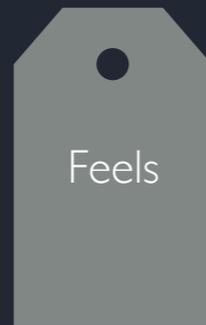
What's would you need to see in order to [change]?



Examples:

- (1) Is it a bad time to talk about a case?
- (2) Would it be inconvenient to get your thoughts about...?
- (3) Is it unreasonable to ask you to consider an ordinance?
- (4) Will I offend you if I ask you for probation?
- (5) Is it impossible for this case to close to probation?
- (6) Am I insane want an ordinance?
- (7) Will you stop talking to me if I ask you to dismiss this case?

## Using Labels



- (1) Form of active listening that will trigger information sharing
- (2) We always want to talk about ourselves, explain ourselves.
- (3) Can label or *mislabeled*



#### Lesson:

- (1) We normally try to diminish, set the bar higher than what will come out
- (2) Plays on our desires contradict or challenge
- (3) Taking the sting out of our biggest fears

#### Examples

(A) Worried about what you're asking for

You're going to think I'm crazy...

You're going to laugh at me...

You're going to think I don't have sympathy for...

You're going to think I'm insensitive...

I'm going to say something that appalls you...

I'm going to ask for something you will want to ignore...

(B) Addressing general fears

I'm worried you're going to only see his priors

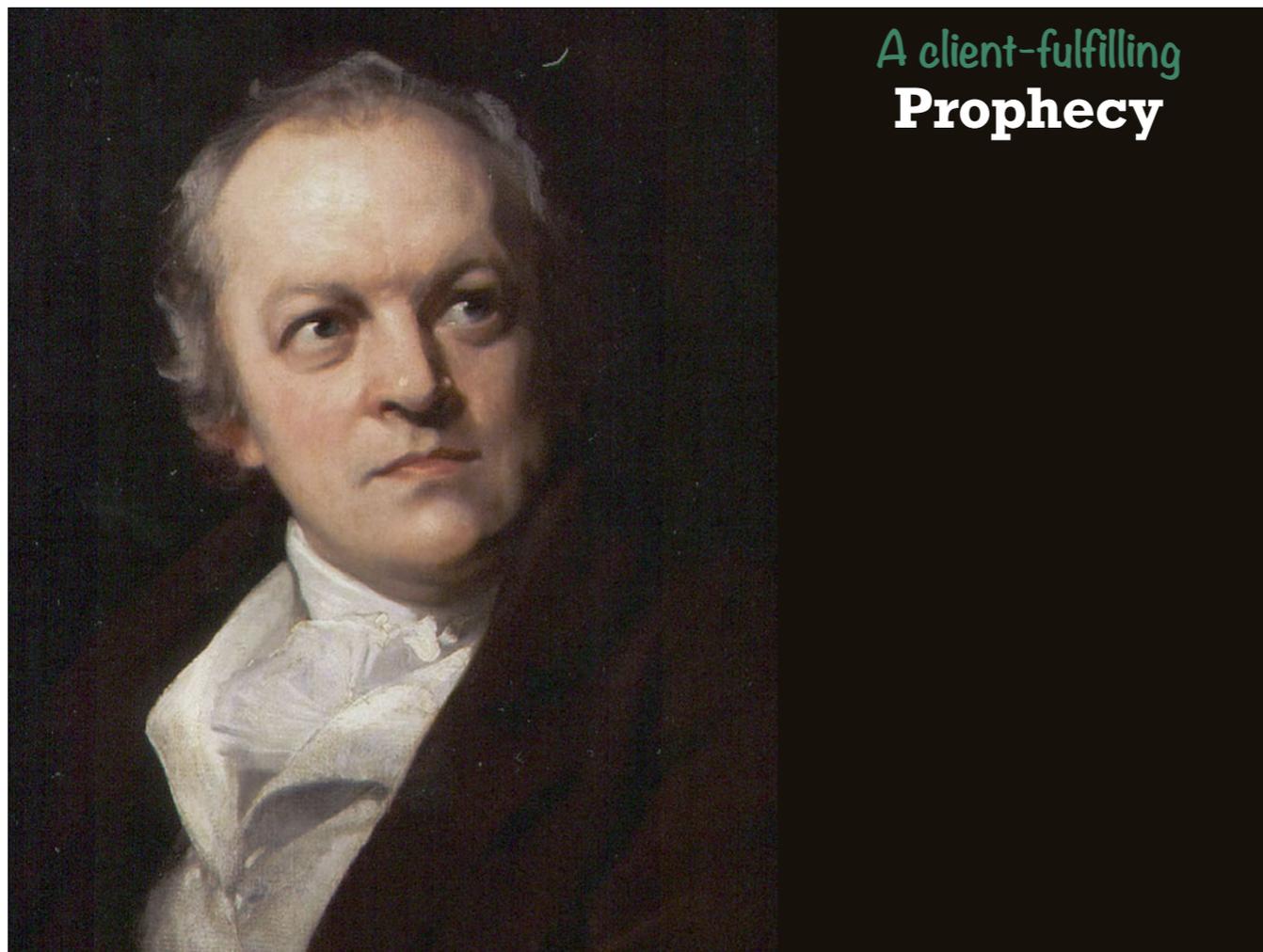
I'm concerned you will ignore the girlfriend's role

You will accuse me of victim blaming

Getting to  
That's right

A man with dark skin and short hair, wearing a blue suit jacket over a light-colored shirt, is shown from the chest up. He has a surprised or excited expression on his face, with wide eyes and an open mouth. He is standing in front of a wall with a green grid pattern. The background is a textured, light-colored wall.

Oh my God, that's right!



William Blake

- (1) Favorite poet, favorite poem: imagination is sublime.
- (2) the magic happens when you see someone incredible, a possibility, others can't see.
- (3) Believe you can.

Conclusion

- (1) Going back to the good news message: you have to find good news.
- (2) It can some times feel hard to find good news (set your goals high)
- (3) You're a defender you got to have some good news.



*A client-fulfilling*  
**Prophecy**

To see a World in a  
Grain of Sand

And a Heaven in a  
Wild Flower

Hold Infinity in the  
palm of your hand

And Eternity in an  
hour



*A client-fulfilling*  
**Prophecy**

To see a World in a  
Grain of Sand

And a Heaven in a  
Wild Flower

Hold Infinity in the  
palm of your hand

And Eternity in an  
hour