ARTICLES

HOW TO CONDUCT EFFECTIVE TELEPHONE AND E-MAIL NEGOTIATIONS

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I. INTRODUCTION

Lawyers negotiate regularly, even when they do not appreciate the fact they are negotiating. They interact with colleagues within their own firms, and with prospective clients and current clients. They also negotiate on behalf of their clients with external parties. Transactional attorneys work to structure diverse business arrangements, while litigators endeavor to resolve disputes. In the vast majority of situations, the business deals are achieved and the lawsuits are resolved—all through the bargaining process.

Few negotiations are conducted entirely in person, with the participants working together at the same location. Most include portions carried out through telephone and e-mail communications. Even if they begin primarily with personal interactions and continue to include some personal sessions, they tend to include important communications carried out by phone or e-mail messages. It is simply too time consuming and cumbersome for lawyers to limit all of their interactions to in-person sessions, even if they practice in the same location. They regularly telephone or e-mail their counterparts to ask questions, convey new positions, or comment upon questions or proposals received from the persons on the other side. It is thus critical for attorneys to appreciate the critical differences between in-person, telephonic, and e-mail interactions. This article will explore these issues.

Before individuals negotiate with others, they need to be thoroughly prepared, because well-prepared bargainers almost always obtain better results than their less prepared cohorts.¹ They must carefully explore the relevant factual, legal, economic, business, and other issues. When in doubt, it is preferable to obtain more

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pertinent information rather than less, because knowledge is power when people negotiate.

Once negotiators have gathered the relevant information affecting their own side, they must endeavor to place themselves in the shoes of the persons on the other side.2 What do these parties hope to achieve from this interaction? How much do they need to obtain what this side can provide? What are their likely non-settlement alternatives? Many attorneys make the mistake of focusing entirely on the factors affecting their own side when they prepare for bargaining interactions, and they fail to appreciate the factors influencing their counterparts. When they carefully consider the interests of their counterparts, they begin to understand the degree to which those persons need to achieve agreements.

Once individuals believe they have obtained the relevant information regarding their own side and the factors influencing their counterparts, they must ask themselves three crucial questions. First, what happens to their own side if they fail to achieve an agreement with the persons on the other side?3 This is what Roger Fisher and William Ury call your BATNA: Best Alternative to a Negotiated Agreement.4 It is important for bargainers to understand when they would be better off with no agreement, rather than with what their counterparts are suggesting. They must appreciate the fact that no accord is preferable to a bad one.

Once they have determined their bottom line, attorneys must then establish aspirations for the relevant items to be addressed.5 What do they hope to obtain with respect to each item to be addressed? It is critical for them to contemplate elevated, but realistic goals because there is a direct correlation between negotiator goals and negotiation results—persons who expect better terms generally do better than others with lower expectations.6

The final thing negotiators must address on their own side as they prepare for bargaining interactions concerns their planned opening offers.7 Some academics seem to believe that if persons articulate highly reasonable opening offers, their counterparts will respond in kind, and the parties will engage in mutually beneficial

2 See id. at 279–80.
3 See id. at 277–80.
5 See Craver, supra note 1, at 281–82.
& ECON. REV. 162 (2009); Russell Korobkin, Aspirations and Settlement, 88 CORNELL L. REV. 1
(2002).
7 See Craver, supra note 1, at 282–84.
win-win interactions. Although this is a lovely theoretical concept, it is incorrect due to the impact of “anchoring.” When one side opens with a reasonable offer, the persons on the other side actually move away from them psychologically, due to the fact they begin to think they will be able to obtain more favorable terms than they initially imagined. On the other hand, when persons begin with less generous opening offers, counterparts begin to think they will not be able to do as well as they initially hoped, and they begin to lower their expectations. It is thus important for bargain- ers to develop opening positions that favor their own sides, but which they can rationally explain. This enables them to anchor the discussions in a manner their counterparts are likely to find persuasive.

Negotiators should also endeavor to frame their planned opening positions in a manner that makes them appear to be gains, rather than losses, in the minds of their counterparts due to the impact of gain-loss framing. When individuals have to choose between sure gains and the possibilities of greater gains or no gains, they tend to be risk averse and accept the certain gains. On the other hand, when they must choose between sure losses and the possibility of greater losses or no losses, they tend to be risk takers in an effort to avoid any losses.

Transactional bargainers usually benefit from this phenomenon whether they are exploring possible buy-sell deals, joint ventures, licensing arrangements, or similar deals, because such transactions usually seem to provide gains for the parties on both sides. As a result, the negotiators on both sides tend to be risk averse to enable them to generate sure gains, which enhances the likelihood the parties will be able to achieve mutual accords. Litigators, however, often face gain-loss dichotomies. While the possible settlements appear to be gains in the eyes of the claimants, they usually seem like losses in the eyes of the defendants. This factor tends to make defendants more risk taking in an effort to enable them to avoid all losses through the trial process. To counteract this factor, claimants should try to frame their opening position statements in a manner that makes them seem like gains in the eyes of their counterparts. Instead of simply demanding compensation for any losses sustained by their clients, they should indicate

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9 See id. at 334–36.
that for this amount of money the defendants’ difficulties will be resolved. If this approach can induce such defendants to view these offers as gains, rather than losses, it would cause them to become more risk averse and more amenable to amicable resolutions.

Once they have determined their own bottom lines, aspirations for each term, and planned opening positions, individuals must plan their negotiation strategies. How do they hope to accomplish their overall objectives? Do they envision a few large position changes or a series of smaller ones? What bargaining techniques to they plan to employ? Do they think it would be preferable to conduct their interactions primarily in person, or by telephone and e-mail? If they plan to meet in person, should they conduct the sessions at their own offices, the offices of their counterparts, or at neutral locations?

Before they begin to interact with their counterparts, they should endeavor to ascertain from others who know those persons whether they tend to be cooperative/problem-solver or competitive/adversarial negotiators. Cooperative/problem-solvers tend to move psychologically toward the other side, try to maximize the joint returns achieved, seek reasonable and fair results, are open, trusting, and work to satisfy counterpart interests, while competitive/adversarial persons tend to move psychologically against the other side, endeavor to maximize their own returns, seek terms favoring their own side, are less open, less trusting, and work to defeat their counterparts. If they know they will be interacting with cooperative/problem-solvers, they can plan to be more forthcoming and less competitive. On the other hand, if they have to deal with competitive/adversarial persons, they should be less open, more suspicious of counterpart motives, and more cautious regarding their own behavior to avoid exploitation. If they are too open and cooperative when they deal with such competitive adversaries, they would be likely to obtain less beneficial terms for their own side due to the manipulative tactics employed by such bargainers to advance their own interests. If they initially think their counterparts are cooperative/problem-solvers, they should try to determine whether they are actually competitive/problem-solvers

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13 See id. at 1–3.
who appear to be open and cooperative but who employ somewhat manipulative tactics to enable them to obtain more for their own side than they provide to their counterparts.\textsuperscript{14} They should be as cautious with such negotiators as they would be with competitive/adversarial negotiators to avoid giving up more than they should.

When they initially contact their counterparts, they must appreciate the fact they have entered the Preliminary Stage during which they should strive to establish rapport with the persons on the other side and establish the tone for their interactions.\textsuperscript{15} Americans tend to be impatient, and do not enjoy the small talk usually associated with the Preliminary Stage. As a result, they often move too quickly into the Information Stage. This can be a significant mistake. If bargainers take the time to establish—or reestablish—good relationships with the persons on the other side, they enhance the likelihood the participants will behave cooperatively and courteously. They should use small talk regarding areas of mutual interest to generate rapport. They should simultaneously seek to create positive bargaining environments, because this will help to generate cooperative behavior, and increase the probability the parties will achieve agreements and generate mutually efficient final terms.\textsuperscript{16}

In this article, we will explore the ways in which negotiators use telephone and e-mail exchanges to consummate deals. Which factors should they consider when they talk on the telephone? What issues do cell phones raise that are not associated with traditional landlines? How do e-mail interactions differ from in-person and telephonic dealings? What can individuals do to optimize their use of these bargaining channels?

II. TELEPHONE INTERACTIONS

Many legal negotiations are conducted primarily through telephone discussions due to the relative efficiency of such exchanges.\textsuperscript{17} Telephone negotiations involve the same stages as in-

\textsuperscript{14} See id. at 10–16.
\textsuperscript{15} See supra note 2, at 286–92.
\textsuperscript{17} See JAMES BORG, PERSUASION: THE ART OF INFLUENCING PEOPLE 131–59 (2004).
person interactions. When the participants first interact, they enter the Preliminary Stage where they should use small talk to create rapport and establish positive bargaining environments.\[^{18}\] They should talk about such things as where they went to school, the music or sports they enjoy, and the weather. Most persons are somewhat anxious when they commence bargaining interactions, and the Preliminary Stage should be employed to diminish such concerns.

Once the parties begin to feel comfortable conversing with each other, they enter the Information Stage, which involves “value creation.”\[^{19}\] They are endeavoring to determine the issues to be addressed and the relative value of those terms to the different sides. They are trying to create a surplus they can share with each other in the subsequent stages. The optimal way to elicit information from counterparts is initially to ask broad, open-ended questions that will induce those persons to talk.\[^{20}\] The more they speak, the more information they divulge. As the participants get further into the discussions, they usually employ “what” and “why” inquiries. The “what” questions are designed to determine the specific issues valued by their counterparts, while the “why” questions are designed to ascertain the underlying interests associated with those terms. One side may not be willing or even able to provide their counterparts with some specific items those persons are seeking, but once they comprehend the interests underlying those terms, they may be able to suggest alternatives that may satisfy those interests in a manner acceptable to this side.

Most legal negotiators like to induce their counterparts to articulate the first offer.\[^{21}\] This enables them to accomplish two objectives. It initially allows them to see precisely where the persons on the other side begin the discussions. If they are more generous to this side than they expected, they can reconsider their own preliminary assessments and plan opening offers favoring their own side. On the other hand, if those offers are less beneficial than contemplated, they can plan to begin with less generous offers of their own to avoid placing themselves in situations where they have to induce their counterparts to make much larger concessions than they make. It also enables them to use “bracketing.”\[^{22}\] Once they

\[^{18}\] See Craver, supra note 1, at 286–92.
\[^{19}\] See id. at 292–02.
\[^{20}\] See id. at 292–94.
\[^{21}\] See id. at 294–96.
\[^{22}\] See id. at 295.
know where their counterparts begin, they can articulate their own offers at a level that places their ultimate goals in the middle. Bargainers tend to move together from their opening positions toward the center, and this tactic can significantly enhance their likelihood of ending up where they hope to be.

Impatient negotiators frequently disclose their important information relatively quickly to get the process moving forward. As a result, much of what they disclose is ignored by their counterparts due to “reactive devaluation.”23 Their counterparts listen less carefully to what they are saying, and assume that most of it is manipulative and self-serving. As a result, they accord it minimal respect. On the other hand, if negotiators disclose these pieces of information more slowly in response to counterpart inquiries, those persons listen more intently to what is being said. In addition, they attribute those disclosures to their questioning capabilities and accord greater respect to what they hear.

Once the parties appreciate the issues to be addressed and the diverse interests underlying those terms, they enter the Distributive Stage, which is “value claiming.”24 They should begin this part of their interaction with a carefully planned concession pattern designed to generate the final terms they hope to obtain. They should be able to explain carefully why they are making particular position changes to enable them to let their counterparts know why they are not making larger concessions. They should also be patient and refrain from expeditious movement, in recognition of the fact it takes time for people to lower their sights.25 I have observed this phenomenon frequently when I mediate employment controversies. When I ask about possible resolutions at the initial mediation session, both sides make it clear those terms are entirely unacceptable. As the mediation process unfolds, however, the parties begin to reduce their expectations and often end up exactly where they initially said they would not go.

Silence is a powerful bargaining tactic, especially when individuals are negotiating on the telephone.26 When someone articulates a position change, if their counterpart says nothing, they may be induced to announce another concession. When they seem to have finished an answer to a particular question regarding their

23 See id. at 298.
24 See Craver, supra note 1, at 302–18.
25 See id. at 316.
26 See id. at 315–16.
interests or objectives, a prolonged silence may cause them to speak further and to disclose more information.

Near the end of the Distributive Stage, the parties begin to see an agreement on the horizon, and they enter the Closing Stage. They have closed most of the gap between themselves, and have become psychologically committed to a mutual accord. As a result, both sides become more malleable as they move toward the center of their current positions. If they get this far, they almost always reach an agreement. They do not want to see their prior efforts result in failure. Nonetheless, they should still be careful not to move too quickly, and be sure not to bid against themselves by making consecutive position changes that are not reciprocated by their counterparts.

When individuals complete the Closing Stage, many think they are done, and they cease bargaining. They fail to appreciate the importance of the Cooperative Stage, during which their goal should be “value maximizing.” They may have achieved a mutual accord, but their current division of the relevant items may not be mutually efficient. During the prior portions of their interaction, both sides may have under or over stated the degree to which they desire the particular items being exchanged for strategic purposes, and certain terms may have ended up on the wrong side of the bargaining table. As a result, items Side A values more than Side B may have ended up on Side B’s side of the table; while items valued more by Side B may have been claimed by Side A. At this point, they should engage in integrative bargaining to see if they can expand their overall pie and simultaneously improve their respective results. They should offer to exchange terms they think may have ended up on the wrong side for items they believe their counterparts value less than they do. This process should enable them to achieve results that are mutually efficient.

When individuals negotiate in person, they usually meet for relatively long periods of time, during which they cover many relevant issues. Telephone interactions generally consist of a series of

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27 See id. at 318–20.
28 See id. at 320–26.
29 Such puffing and embellishment regarding party values is considered to be nonmaterial information within the meaning of Model Rule 4.1, which prohibits any knowing misrepresentations by lawyers regarding material fact, due to the relatively unique nature of bargaining interactions. Model Rules of Prof'L Conduct R. 4.1 cmt. 1. See Charles B. Craver, Negotiation Ethics for Real World Interactions, 25 Ohio St. J. on Disp. Resol. 299, 306–07 (2010).
shorter exchanges during which they focus on narrower considerations. Telephonic discussions also preclude visual contact, except where videophones are being used. Nonetheless, negotiators who make the mistake of treating these electronic exchanges less seriously than face-to-face interactions place themselves at a distinct disadvantage.

Cell phone interactions raise unique issues not associated with most landline discussions. When individuals contact their counterparts on landlines, they know exactly where those persons are, and it would be most unlikely for the call recipients to be surrounded by complete strangers. When they call their counterparts’ cell phone numbers, they have no idea where they might be. The call recipients might be at athletic events, cocktail parties, airports or train stations, or walking down the street. As a result, the call recipients might be significantly distracted by what is going on around them. The callers should initially ask if this is a good time to talk. If the call recipients are distracted by their surroundings, they should say so and promise to return the calls when they get to locations where they can concentrate on what is being communicated. Cell phone recipients frequently try to keep any calls short to enable them to continue to do what they were already doing, and this may severely limit the degree to which meaningful talks may occur. In addition, if call recipients are impatient, they may carelessly disclose more information than they should, and even make position changes on an expedited basis.

Cell phone negotiators must also be concerned about the possibility that strangers might overhear confidential client information. When people talk on landlines, they can hear their voices in the earpieces, and they tend to speak relatively quietly. When they talk on cell phones, however, they do not hear their own voices in the earpieces. As a result, they tend to speak more loudly than they do on landlines. I am amazed how much I can hear at airports, train stations, restaurants, and even on the street when strangers are speaking on their cell phones. On many occasions, I have heard lawyers and businesspersons discussing confidential topics where I can recognize the names of the firms involved and even the specific issues being discussed. Model Rule 1.6 requires lawyers to prevent the disclosure of information relating to the representation of their clients. When attorneys decide to conduct negotiations on cell phones, they should be certain to move to areas in which they

would be unlikely to be overheard by others. This would enable them to avoid the inadvertent disclosure of confidential client information, and allow them to focus completely on the critical discussions taking place.

It is important for lawyers to appreciate the fact that telephone exchanges, whether conducted on landlines or cell phones, are less personal than face-to-face interactions. This factor makes it easier for participants to employ more overtly competitive or deliberately deceptive tactics than they would be likely to use during in-person discussions. It also makes it easier for participants to reject proposals being suggested by their counterparts. In addition, since telephone discussions tend to be more abbreviated than in-person encounters, it is more difficult for them to create psychological commitments to agreements through only one or two telephone exchanges.

Negotiators who find it difficult to conduct in-person discussions, often due to the distance between the relevant participants, but who desire more personal interactions than are available through conventional telephone calls, should not hesitate to take advantage of video conferencing. They could use Skype or a similar means to make their talks visible. Even though such videoconferences may not be as intimate as in-person meetings, they can still be conducted in a far more personal manner than traditional telephone interactions.

A. Nonverbal Signals and Verbal Leaks

Many attorneys naively think that telephone conversations are less revealing than in-person talks, because they do not involve visual interactions. They act as if their counterparts cannot perceive nonverbal signals during these transactions. This presumption is incorrect. Some psychologists have suggested to me that many individuals are more adept at reading nonverbal messages during telephone exchanges than they are during in-person interactions. I have found support for this assertion from blind students who have taken my Negotiations course and have exhibited an uncanny ability to read nonverbal signals being emitted by others they cannot

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see. This phenomenon is attributable to the fact that in-person interac-
tions involve a myriad of simultaneous nonverbal stimuli that are often too numerous to be proficiently discerned and interpreted. When persons speak on the telephone, however, they are not as likely to be overwhelmed by the various nonverbal cues emanating from the other party. They need only concentrate on the audible messages being received to ascertain the content of the nonverbal messages being communicated. Because blind people tend to have more discerning audio sensibilities to offset their lack of vision, they tend to hear much more in the voices of others than persons with no such limitations.

A substantial number of nonverbal clues are discernible during telephone interactions.\textsuperscript{35} Careful listeners can hear changes in the pitch, pace, tone, inflection, rhythm, and volume of speaker voices.\textsuperscript{36} A pregnant pause may indicate that a particular offer is being seriously considered by a recipient who did not hesitate before rejecting previous proposals. If they were interacting in person, the offer recipient might play with her glasses or look at her notes while contemplating a reply, but on the telephone, even a short pause seems like a long time due to the absence of such visible distractions. The initial pause before the most recent position statement was verbally renounced would suggest that the proposal has entered the other party’s zone of acceptability, as they take a few seconds to decide exactly how to articulate their current rejection statement. A sigh in response to a new proposal would similarly indicate that the recipient is becoming confident that some agreement is likely to be achieved.

Voice inflection may be similarly informative. Individuals who respond to communicated offers with perceptibly increased levels of excitement may nonverbally indicate that they are more pleased with these proposals than their verbal responses might otherwise indicate. Because most negotiators tend to begin the serious discussions with either some of their most important or their least important subjects, the topic sequence presented by parties may inadvertently reveal the items they value most.

In his seminal book on deception, Professor Paul Ekman noted that individuals who engage in prevarication tend to speak more deliberately and to utter their misrepresentations with higher


\textsuperscript{36} See Jay Folberg & Dwight Golann, Lawyer Negotiation Theory, Practice, and Law 164 (2d ed. 2011).
pitched voices. They speak more slowly to be sure their counterparts hear their false statements, and their elevated voice pitches indicate the stress people often experience when they are being deceptive. They may also utter “to be candid” or “to be truthful” before they make their dishonest statements, to peak the interest of their listeners.

Persons engaged in telephone negotiations should also listen carefully for verbal leaks being uttered by their counterparts. Someone might indicate that they are “not inclined” or “do not want” to go higher. The inclusion of such modifiers as “inclined” or “want” would normally indicate that they are actually willing to go higher. They often employ such terms to avoid the outright dishonesty that would be present if they said that they could not go higher even when they could. They might similarly disclose their item preferences by indicating that they have to have Item 1, “really want” Item 2, and “would like to get” Item 3. Item 1 is critical, since they have to have it. Item 2 is important—they really want it, but do not have to get it. Item 3 is desirable—they would like to get it, but would presumably trade it for anything they value more. Near the end of bargaining interactions, people may make “final offers,” and then say that is “about as far as they can go” or indicate that they “do not have much more room”—both of which clearly suggest they possess more discretion in this regard. Individuals negotiating in person might not hear such verbal leaks, due to the fact they may be distracted by nonverbal signals emanating from their counterparts, and from other visual distractions affecting them. On the telephone, however, they would be more likely to discern the leaks due to the fact they are focusing entirely on the voices they are hearing.

B. Dynamics of Who Calls Whom

It is usually more advantageous to be the telephone caller rather than the recipient of the call, due to the fact the caller has had the opportunity to prepare for the exchange. Negotiators who plan to phone counterparts to discuss particular matters

38 Legal negotiators may ethically misrepresent client settlement intentions due to the fact such statements do not pertain to “material fact” under Model Rule 4.1 under the exception for such statements set forth in Comment 2. See Craver, supra note 29, at 306–07.
should prepare for those encounters as thoroughly as they would for in-person exchanges. Such efforts are almost always rewarded. Since they have the opportunity to surprise unsuspecting counterparts with their calls, they may subtly gain the upper hand.\textsuperscript{40} The other participants may not have expected their calls, and may be unprepared for the conversations that are about to occur. This phenomenon allows the phone call initiators to advance more persuasive arguments and to elicit less planned counteroffers than would have likely occurred during formally scheduled interactions.

Individuals who receive unexpected telephone calls from counterparts should internally assess their degree of preparedness. If they are not fully conversant regarding the pertinent factual circumstances, operative legal doctrines, and prior bargaining discussions, they should not make the mistake of plunging ignorantly into uncharted waters. They should not hesitate to indicate that they are occupied with other matters and are unable to talk. They can thereafter peruse the relevant file, review the pertinent information, and then telephone the other party once they are thoroughly prepared. When they reach the original caller, they should simply say that they are returning that person’s call as if they have no idea why they were contacted. Their subsequent silence can adroitly return the focus of the interaction to the other party and force her to initiate the substantive discussions.

Most bargaining techniques that could be employed during in-person interactions may be used with equal efficacy during telephone negotiations. Although it is difficult to walk out during telephone calls when participants want to graphically demonstrate their displeasure regarding bargaining progress, persons who are inclined toward such histrionics may accomplish the same result by hanging up on their intransigent counterparts. It must be realized, however, that this tactic may be considered less acceptable than a cessation of in-person talks effectuated by way of a walkout due to the more contemptuous and discourteous nature of this approach. People who decide to terminate current telephone interactions should at least inform their counterparts why they are doing so to avoid unnecessary future difficulties.

Negotiators occasionally become frustrated or confused during telephone discussions and want to discontinue the exchanges without evidencing a total disregard for the other participants. Instead of simply hanging up while the other persons are talking,

\textsuperscript{40} See Bob Wolf, \textit{Friendly Persuasion} 161 (1990).
they can abruptly terminate the conversation while they are speaking! Since no one expects individuals to hang up on themselves, the targets of this maneuver will reasonably assume that the participants have been inadvertently disconnected, particularly if they are on cell phones. This gives the moving parties time to regain control over their emotions. If they do not wish to continue their interactions immediately, they can have their assistants explain to their counterparts when they call back that they are busy with other calls.

Many negotiators prefer in-person interactions to telephone discussions, particularly when significant issues are involved. They like the psychological atmosphere they can establish more effectively during face-to-face encounters than during telephone talks. They also prefer several longer in-person interactions to numerous telephone exchanges. These people should not hesitate to insist on in-person sessions when serious transactions are involved, and they think this approach will provide them with a bargaining advantage.

Once telephone negotiators think they have achieved final agreements, they should take the time to review the operative terms to be certain they have covered everything. Near the end of complex interactions, participants often make changes expeditiously, and one side may not appreciate the precise changes their counterparts actually made with respect to particular terms. If they discover such misunderstandings now, they are likely to resolve them amicably. On the other hand, if such misunderstandings are not ascertained until someone has drafted a written agreement, claims of dishonesty may arise. After the parties have confirmed the operative terms, one might wish to verify those provisions through an e-mail message concisely describing everything agreed upon.

When older individuals must interact with younger persons, they must appreciate the fact that such younger participants may be hesitant to interact in person. Even when they are next to each other, many young people prefer to text each other instead of conducting personal conversations. I have noticed this phenomenon in recent years from my Negotiations class students. While most students in the past conducted their course exercises in person,

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42 See generally Sherry Turkle, Alone Together: Why We Expect More From Technology And Less From Each Other (2011).
many contemporary students prefer to conduct most of their interactions by cell phone or text messaging. It may be more difficult to induce such persons to meet in person, but others should not give up on this desire. By scheduling in-person sessions, people may be able to gain an advantage, by requiring electronically-minded individuals to have to work on a person-to-person basis.43

III. E-MAIL INTERACTIONS

A growing number of individuals like to conduct their negotiations primarily—or even entirely—through electronic transmissions, especially younger persons who have grown up using e-mail, text-messaging, or similar electronic means of interacting with others.44 They do not merely transmit written versions of terms orally discussed during earlier in-person or telephonic interactions. They limit most, if not all, of their transactions to text-based communications. Most people who endeavor to restrict their bargaining exchanges to e-mail communications and text-messaging are not comfortable with the traditional negotiation process. They do not like the seemingly amorphous nature of that process, and do not enjoy the split-second tactical decision-making that must occur during in-person interactions. They seem to forget the fact that bargaining involves uniquely personal encounters that are not easily conducted entirely through written communications.45

Persons contemplating bargaining interactions that will be primarily conducted through e-mail transmissions should appreciate how difficult it is to establish rapport with counterparts through such lean written mediums that lack facial expressions and body

43 When individuals agree to conduct such in-person sessions, they should also turn off their electronic devices. Studies have shown that persons who interrupt in-person discussions to check their electronic devices are perceived by others as being less professional and less trustworthy than people who refrain from such behavior. See Apama Krishnan et. al., The Curse of the Smartphone: Electronic Multitasking in Negotiations, 30 NEGOT. J. 191, 200–04 (2014).


language signals. It would thus be beneficial for participants to initially telephone their counterparts to exchange some personal information and to establish minimal rapport. Individuals who first create mutual relations through such oral exchanges are likely to find their subsequent negotiations more pleasant and more efficient. Professors Thompson and Nadler scheduled business students to conduct bargaining interactions entirely through e-mail exchanges, but one half of the participants were allowed to conduct five-minute schmoozing phone calls during which they were not permitted to discuss their impending e-mail negotiations. The students who conducted the five-minute phone calls behaved more cooperatively, reached more agreements, and achieved more mutually efficient agreements than their cohorts who had no preliminary phone conversations. This is due to the fact they can use such preliminary telephone calls to establish more trusting relationships and to generate more cooperative behavior that should generate fewer impasses. On those rare occasions when it might be difficult to use telephone exchanges to conduct the Preliminary Stage, it would be helpful during the preliminary e-mail exchanges to disclose some personal information designed to increase the rapport between the participants.

The use of e-mail transmissions to conduct bargaining interactions is a cumbersome and inefficient process. Every communication has to be carefully drafted and thoroughly edited before it is sent to the persons on the other side. The recipients must then read and digest all of the written passages, and formulate their own detailed replies. Due to the definitive nature of written documents, written position statements seem to be more intractable than those expressed vocally, over the telephone, or in person. When persons articulate their proposals orally, their voice inflections and nonverbal signals may indicate a willingness to be flexible with respect to certain items. Written communications, however,

46 See Noam Ebner et al., You’ve Got Agreement: Negotiating via Email, in Rethinking Negotiation Teaching 89, 91 (Christopher Honeyman, James Coben & Giuseppe De Palo eds. 2009); Todd Kashdan, Curious? 142 (2009).
50 See Thompson & Nadler, supra note 45, at 112.
rarely convey such critical information. In addition, written encounters tend to generate less efficient outcomes than in-person exchanges, because of the lack of effective cooperative bargaining. People also tend to be less polite and more confrontational when communicating through e-mail. They are similarly inclined to employ more deceptive tactics.

E-mail exchanges are frequently misinterpreted due to the “attribution bias.” As the recipients of such communications review and evaluate the positions set forth by their counterparts, they may read more or less into the stated terms than was actually intended, due to their assumption that the senders are being disingenuous and manipulative. As a result, they may interpret seemingly innocuous language as deliberately inflammatory. As they reread the pertinent passages, they tend to reinforce their preliminary impressions and to exacerbate the situations. Their misinterpretations may be compounded by the escalated responses they send in response to the terms they erroneously think their counterparts intended to convey. When the original senders receive these negative replies, they may not comprehend the senders’ uncompromising and negative tone, and may further exacerbate the circumstances with antagonistic responses of their own. This is why e-mail negotiations tend to be less cooperative than in-person interactions.

When individuals send substantive proposals through e-mail transmissions, they should telephone the recipients of such messages a day or two after they are sent to obtain some feedback. They should ask if the recipients have any questions or comments with respect to the proposals they received. They may raise some minor issues that can be resolved fairly easily. For example, they might not like the precise language used by the sender, but be entirely open to other language that contains the same basic meaning.

51 See Ebner et al., supra note 46, at 94–95; Laura Klaming et. al., I Want the Opposite of What You Want: Reducing Fixed-Pie Perceptions in Online Negotiations, 2009 J. DISP. RESOL. 139, 156–57 (2009); Janice Nadler & Donna Shestowsky, Negotiation, Information Technology, and the Problem of the Faceless Other, in NEGOT. THEORY AND RES. 145, 156–57 (Leigh Thompson, ed. 2006).


53 See Ebner et al., supra note 46, at 95; McGinn & Croson, supra note 52, at 342–43.

54 See Ebner, et al., supra note 46, at 94–95.

55 See Thompson & Nadler, supra note 45, at 119; Nadler, supra note 47, at 337–38.

56 See McGinn & Croson, supra note 52, at 341.
If they raise some significant issues, the participants can orally discuss those matters more effectively than if they limited their exchanges to written statements. This is why it can be quite inefficient for persons to negotiate entirely through e-mail exchanges.

If participants become especially frustrated by unpleasant e-mail exchanges, they may decide to write particularly negative replies. When this occurs, they should take the time to write especially nasty messages, but always remember to click on “cancel,” rather than “send,” when they are done. They may also wish to delete the sender’s e-mail address before they prepare such flaming responses, just in case they make the mistake of hitting the “send” button instead of the “cancel” key. They should then take the time to calm down, before they prepare rational replies. When doing this, they must endeavor to be as logical and professional as possible.

When individuals negotiate in person or on the telephone, they can immediately hear the way in which their counterparts perceive their articulated positions. Those persons may quickly ask questions to clarify seemingly ambiguous proposals that could be interpreted in different ways. If the original speakers realize that their true intentions are being misunderstood, they can expeditiously correct the misperceptions. They can thus minimize the problems created by miscommunication. The participants can also indicate through their verbal leaks or nonverbal messages their willingness to modify stated proposals their counterparts might find entirely unacceptable, and this flexibility can help the process move continually toward a successful conclusion.

Negotiations pertaining to disputes frequently involve emotional components. Business partners may have to deal with a strong disagreement with respect to prior actions or their future dealings, spouses may be contemplating an end to their relationships, or insurance representatives may be focusing on injuries caused by possible medical malpractice or driving errors. In such instances, the injured parties may strongly desire admissions of responsibility by the persons on the other side, and even personal apologies where appropriate. When such persons interact in person, it is quite easy for the responsible persons or their representatives to show real sympathy and to offer sincere apologies. On the other hand, if the communications are being conveyed entirely through e-mail exchanges, it may be more difficult for the responsible parties to appreciate the emotional feelings of the persons on
the other side, and it may be hard for them to convey apologies in a manner that will be perceived as sincere.

When parties negotiate through e-mail transmissions, they regularly attach Word documents containing important client information and terms they want their counterparts to consider. As a result, they may inadvertently include critical information that is not obvious on the face of these documents, and which they do not intend to share with the document recipients. Once Word files are created, every single keystroke, deletion, and addition is recorded in the electronic metadata associated with the files in question. People preparing bargaining position statements may initially articulate one theory, but later decide to delete that theory in favor of an entirely different one. Someone may have initially included a monetary offer or demand of one figure, and subsequently decided to increase or decrease that number. In addition, proposed changes and comments received from reviewing clients or supervising partners may similarly be recorded. When attorneys attach such Word files to e-mail messages, many naively think the recipients will only be able to see the words visible on their computer screens when they finally saved those words in the files.

Individuals who receive attached Word files can set their computer programs to enable them to “mine the metadata” included in those files for hidden information that will allow them to determine exactly how the documents were prepared and edited, and even to uncover editorial comments by the people who reviewed earlier drafts. In *ABA Formal Opinion 06-442* (2006), the American Bar Association indicated that attorneys who receive such Word files may ethically mine the metadata attached to them under the naïve presumption that all of the senders were aware of such information when they sent the files. It should have been obvious to the ABA Committee that the senders would never have included such critical electronic information had they been aware of the fact it was included in the Word files.

In *ABA Formal Opinion 92-368* (1992), the Bar Association had previously indicated that attorneys who receive confidential or privileged information from opposing counsel that appear to have been sent to them inadvertently should refrain from examining those materials. They were instructed to notify the opposing counsel of the circumstances and to abide by the instructions provided by those persons. They might be told to destroy the materials without reading them further, or to return them immediately to the senders. The ABA thereafter modified Model Rule 4.4(b) to deal
with such situations. The modified rule continues to require lawyers who obtain such confidential or privileged information that seems to have been inadvertently sent to notify the senders. Nonetheless, they are no longer obliged to refrain from further examining those documents, nor must they abide by any instructions they might receive from the sending attorneys. This helps to explain why the ABA’s 2006 opinion did not forbid attorneys from mining the metadata contained in Word files sent to them by opposing counsel.

The New York Bar,57 the Alabama Bar,58 and the Maine Bar59 have indicated that such mining of metadata contained in electronic files contravenes Model Rule 8.4, which states that it constitutes “professional misconduct” for a lawyer to “engage in conduct involving dishonesty, fraud, deceit, or misrepresentation [or] . . . that is prejudicial to the administration of justice.” The Alabama Bar acknowledged that the “mining of metadata constitutes a knowing and deliberate attempt by the recipient attorney to acquire confidential and privileged information in order to obtain an unfair advantage against an opposing party.”60

I agree with the New York, Alabama, and Maine Bar Associations. Attorneys who receive electronic files should only be permitted to open those files to see what the sending lawyers intended them to see. It should thus be unethical for them to mine the metadata they know the senders did not realize they had included in their electronic files. The recipients should not have to notify the senders of their inadvertent inclusion of these metadata, because they should not be looking for these metadata when they open the files.

The New York Bar,61 the Alabama Bar,62 and the Maine Bar63 have indicated that attorneys have an ethical obligation under Model Rule 1.6 to use “reasonable care” when transmitting electronic documents to prevent the inclusion of metadata containing confidential or privileged client information. There are several ways in which they can preclude the unintended transmission of such metadata. They can use one of several scrubbing software programs designed to eliminate such metadata before the files are

61 Id.
sent to others. The more recent versions of Word contain such scrubbing software, which simply has to be activated. Computer experts have informed me that they may alternatively create brand new Word files and then insert the existing files into the newly created files. This action eliminates the metadata that are not associated with the existing files being saved. They may finally publish the files to PDF and send those files to their counterparts.

IV. CONCLUSION

Lawyers negotiate regularly through telephone discussions and e-mail communications. Before they conduct their bargaining interactions, they must be thoroughly prepared, carefully establishing their bottom lines, aspirations, and planned opening positions. They must also place themselves in the shoes of their counterparts to enable them to appreciate the factors influencing those persons. They should use the Preliminary Stage to establish rapport with their counterparts and to create positive bargaining environments. During the Information Stage they must work to create value by determining what the participants have to share with each other. The Distributive Stage involves value claiming, as the participants work to obtain beneficial terms, while the Closing Stage helps them achieve definitive terms. They should finally use the Cooperative Stage to be certain they have generated efficient agreements that maximize their joint returns.

Telephone negotiations tend to involve shorter interactions than in-person dealings. It is frequently advantageous to be the caller, rather than the call recipient, due to the fact the caller is generally more prepared than the person being called. Even though telephone callers cannot see their counterparts, they can discern nonverbal signals emanating from the pitch, pace, tone, volume, inflections, rhythm, and pauses involved.

Individuals calling the cell phone numbers of others must appreciate the fact they may reach those persons at poor times to negotiate. They should ask if this is a good time to talk, and have them return their calls if they are being distracted by what is going on around them. People conducting bargaining interactions on cell phones must be careful not to allow strangers to overhear confidential client information.

Many individuals now conduct negotiations to a substantial degree through e-mail transmissions. These involve very imper-
sonal interactions, which make it easier for participants to behave competitively and to reject counterpart offers. If persons take the time to conduct Preliminary Stages through short telephone calls to enable them to establish rapport and positive environments, the participants are likely to behave more cooperatively, reach more agreements, and achieve more efficient accords. When they send counterparts written proposals, they should telephone those persons a day or two later to hear their responses.

When individuals create Word files, every keystroke is recorded in the electronic metadata. Recipients can set their software to enable them to mine the metadata and see all of the changes made by the file senders. To avoid such unintended disclosures of confidential information, file senders should either eliminate the excess metadata or send PDF files.