
Kluwer Mediation Blog

The Electronic Curtain: Mediating Through Email

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The Problem

- You have become accustomed to communicating settlement offers through email;
- Your email efforts have been misunderstood by the other side;

In the fast-paced world in which we live, it is easy to get caught up in communicating through electronic channels such as the BlackBerry or the iPhone so that your message is received quickly. While this is particularly efficient when communicating with friends and family members, in the context of legal disputes there are some significant minefields. For example:

(1) *Your message might be misinterpreted* – Consider the difference between a face-to-face communication and receiving and interpreting messages through a BlackBerry. Visual and nonverbal cues that normally provide immediate feedback and facilitate communication are missed in online communications. Also, the general flow of information tends to be disrupted not only by time but also by the ability of the negotiator to create a momentum that normally occurs in face-to-face communications.

Since visual cues such as body language and facial expressions are absent in email, negotiators receive and transmit information differently than they would in person. Communication patterns in email tend to overlook preexisting knowledge or indirect signals and focus more on the explicit message conveyed. Straight logic and argument are the focal points of email negotiators, as opposed to emotional or personal appeals that occur in face-to-face communications. Research indicates that a negotiator would be more task-oriented and depersonalized as opposed to spending time building rapport with other adversaries.

In the context of litigated disputes, the type of cues that are normally available in face-to-face negotiations are inhibited. For example, the shared culture between claims personnel and plaintiff lawyers is dismissed because the indirect signals or code that occurs in face-to-face communications is eliminated.

In a face-to-face communication, participants develop a shared sense of understanding about the problem based on not only the factual information provided but the surroundings, body language, gestures, tone of voice, timing and sequencing of the information exchanged. These clues are overlooked in email negotiations, as the negotiators tend to condense multiple arguments and

issues into one email communication. This has an impact on the receiver's ability to process the overall objectives of the deliverer of the message.

(2) *Likelihood of miscommunication* – Communicating online often results in parties ignoring the consequences of their interactions due to the lack of social cues mentioned above. Negotiators tend to take a hard line. Using adversarial tactics, they can cloak their communication in an electronic curtain. Information exchanged tends to be analytical and contentious. This reduces the negotiator's ability to properly assess differential preferences and the potential for joint gains. Indeed, negotiating via email causes parties to accentuate competitive behavior.

The Solution

Use email to schedule meetings or transmit documents, but not to present offers or counteroffers unless absolutely necessary due to time constraints. When time is limited, a telephone call followed up by a confirming email has a more lasting impact.

Also, consider the possibility that email messages might be attached to declarations used against you in a court motion. This happens more frequently and can be the source of embarrassment and confusion.

When a mediator is involved, speak to the mediator by phone and present your position verbally so that it cannot be used against you in writing later. The mediator can then test the verbal and non-verbal cues with the other side that were absent from in your previous efforts at settlement.

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