

CHAPTER 8

Telephone and Cyber Negotiation

Effective negotiators use multiple forms of information gathering as the basis for formulating strategy and shaping responsive communication. All of our senses are put to use in determining the needs, feelings, resolve, strengths, and vulnerabilities of our negotiation counterparts. We also convey messages by nonverbal means, such as gestures and body language, to construct a desired context, shape perceptions and build rapport. Therefore, face-to-face negotiation is the gold standard to get and give information and pursue agreement. Meeting in person provides an opportunity to establish a relationship before jumping into negotiation details. Social psychologists and communication theorists refer to face-to-face discussions as a "rich medium," providing synchronous or "real-time" communication.

Our schedules, time restraints, distance, limited resources, and changing norms may require that we use telephone communications, e-mails, and text messages to initiate, conduct, or conclude negotiations. These methods of communication limit nonverbal cues and other information. They are more "lean" forms of communicating than face-to-face negotiation. Thus, we must employ a different skill set and approach to achieve effective negotiation results and avoid the potential traps of relying only on telephone and cybercommunication.

A. Negotiating by Telephone and Video Communication

Before the ubiquitous use of e-mail and text messages (discussed in section B), telephones were the efficient substitute for face-to-face negotiations and still serve an important role. Like in-person communications, the telephone allows for real-time conversation. The use of voice messaging adds to the efficiency factor by allowing sequential messages, or "asynchronicity," when it is not practical for negotiating counterparts to be on the phone at the same time. Negotiation communication by telephone, rather than face-to-face meetings, may be a necessity when geographical distance or busy schedules prevent meeting in person. Teleconferencing or videoconferencing in multiple-party negotiations offers exponential economies and convenience compared to getting several lawyers physically in the same room together.

Although negotiating by telephone strips us of visual cues, some audible cues beyond the words chosen can provide a richer medium of negotiation than the

written word. Tone of voice, inflection, pitch, pace, volume, pauses, breathing, and sighs provide audible cues. These audible cues may be more pronounced with the elimination of visual distractions in face-to-face discussions. We also feel we can “read” meanings like friendliness, hostility, fear, and other emotions based on what we hear from others over the telephone. Telephonic communication may be less personal than face-to-face negotiation, but the use of the telephone is generally more personal than the written word alone. It is more common to engage in “small talk” and other ice-breaking or rapport-building communication by telephone than in e-mails. We previously studied the role of trust in successful negotiations (see Chapter 5). Trust is fostered by getting to know a negotiating counterpart through conversation and identifying common interests before “getting down to business.”

Telephone negotiations may be advantageous in some situations. It may be helpful to have your notes, concession points, and other reminders in front of you when negotiating by telephone. The use of outlines and prompts cannot so easily be relied upon in face-to-face talks. If your client is present with you when you are negotiating by telephone, you can visually communicate together in private in a way that cannot be done in face-to-face meetings with the other side. If you need to take time to gather your thoughts prior to making an offer or deciding what to do next, it is easier to interrupt the telephone conversation and offer to call back than it is to excuse yourself from a face-to-face negotiation.

Telephoning a negotiation opponent offers the caller a degree of control beyond that provided by scheduling a negotiation meeting. Calling when you are prepared and ready may provide some advantage over the person who answers the call when she is not as focused as you are on the topic. (Courtesy and custom, however, may require scheduling the telephone conversation in advance.) In a significant negotiation, it may be easier to say no or be more insistent on favorable terms when negotiating by telephone than when facing a forceful opponent in person. It is also easier to strategically conclude a telephone negotiation that is not going well than to leave a negotiation meeting, particularly if it is in your office. Of course, an opposing lawyer might do the same or more easily use deceptive and strategic tactics on the telephone, including hanging up. Every advantage can be a double-edged sword.

Telephone follow-up to an in-person negotiation is common and presents fewer of the disadvantages and dangers noted above. If rapport and trust are established in face-to-face negotiations, communicating by telephone or videoconferencing to conclude the deal or settlement can be a cost-saving convenience.

Video technology is further transforming how we communicate and negotiate. Virtual meetings and teleconferencing through immersive telepresence, possibly even in 3D and with holographic technology, is becoming more of a reality to replace long-distance travel and scheduling of in-person negotiations. Tablet devices and smart phones with two-way cameras are becoming so ubiquitous that electronic video communication is an expanding alternative to in-person negotiation. Skype, FaceTime, Tango, Zoom, and other visual-plus-voice forms of cybercommunication may become the negotiation media of choice, just as e-mailing and texting became more convenient and popular than telephone conversation. All of these technologies, present challenges that person-to-person negotiations behind closed doors do not. (See Ebner and Thompson 2014.)

Take the Deal!

Sports agents and others who negotiate for a living spend a lot of time on the telephone negotiating deals. Leigh Steinberg is a legendary lawyer-agent, who, in his book, *Winning with Integrity*, discusses his use of telephone follow-up and other electronic aids to negotiation. Steinberg states that he could easily make a hundred telephone calls in a day. He cautions about the need to protect against invasions of privacy and eavesdropping. An interesting example provided is a contract he negotiated for Troy Aikman to become the star quarterback for the Dallas Cowboys. The negotiations began in a face-to-face meeting in Texas of Steinberg, Aikman, Cowboys owner Jerry Jones, the head coach, and others.

This was a get to know you meeting. A lot of the conversation was about hunting and fishing. Everyone in that room, with the exception of me, was from Arkansas, Texas, or Oklahoma. I soon felt that I was the one with a heavy accent. . . . When I finally left Dallas that day and flew back home, we were far from finished. But the groundwork had been laid. . . . [W]e were on the phone constantly. . . . I had a particularly intense car phone conversation with Jerry Jones. I was stuck in the infamous Los Angeles rush-hour traffic on the San Diego Freeway, and Jerry was stuck at his offer of 10 million.

"Jerry," I told him, "we've got to have eleven and a half."

"Son," he said, "that dog won't hunt."

"Jerry," I said, "this is fair."

"Son," he answered, "we passed *fair* about eight million dollars ago." Back and forth it went, until suddenly a third voice came on the line, a stranger who had crossed cell phone signals with us.

"Listen, buddy," the voice said, addressing me with a Texas drawl, "if you don't want the 10 million, I do. Take the deal."

This deal was finally closed through a two-way telecommunications link-up between Los Angeles and Dallas as the parties sat in their offices watching one another on widescreen television.

B. E-Mail and Text Message Negotiation

E-mail is commonly used for purposes of conducting all types of negotiation or following up negotiations started through in-person or telephone discussions. We explore below some of the issues raised by e-mail negotiation.

This discussion of e-mail negotiation should be placed in generational perspective. For many law students, e-mail, text messaging, and the use of social media might serve as your primary mode of communication. However, some older attorneys and clients may not be as comfortable or knowledgeable about cybercommunication. The law relating to negotiation and the enforcement of negotiated agreements is, by nature, slow to catch up to technological advancement, as are some older lawyers.

As you know from your own experience, the ease and informality of e-mail and texting can be both a blessing and a curse. Experienced users of e-mail

and text messaging develop shortcuts and abbreviations that among friends may be understood as acceptable conventions but can appear to others to be curt, abrupt, and sloppy. An informal choice of words may create misunderstandings and further disputes. Although e-mails and texts used in negotiation can and should be composed with care, it is easy to lapse into “cybermode.” As a “lean” form of communication, electronic words are not readily put in context by facial expressions, like a smile, and by posture or body language, like a shrug or a nod. The speed, convenience, and economy of electronic communication must be balanced against the risk of misinterpretation and the bareness of the medium.

The following reading is based on the assumption that digital negotiation is now mainstream and will continue to expand. It presents eight major challenges of negotiating online and offers practical advice about how to capture its advantages and avoid its pitfalls.

❖ *Noam Ebner, NEGOTIATION VIA (THE NEW) EMAIL*

Negotiation Excellence: Successful Deal Making
(M. Benoliel ed. 407-436, 2014)

With the explosive increase in internet usage and online communication, and the surge in e-commerce, online negotiation can be expected to continue to gain traction as one of the most widespread methods of interaction. As the world goes increasingly mobile, we find ourselves with a range of communication devices scattered about our persons, vying for our attention and rendering us susceptible to interaction at unexpected moments. Negotiating in this environment presents many challenges. However, as opposed to several years ago, when students and clients would regularly inform me that they would *never* negotiate anything important by email, today this statement is rarely voiced—and with good reason. . . .

Negotiating Online is Unavoidable—and Unavoidably Different

The proliferation of e-communication media has presented us with a world of opportunity for negotiation interactions. So many of our interactions are now conducted online, that isolating negotiation activity as something to *avoid* online might seem unnatural to people. . . . However, the ease with which so many people have transferred so many of their interactions online conceals a hidden, yet crucial, truth: online negotiation is significantly different from face-to-face negotiation. While many people intuitively recognize this, the differences are either ignored and dismissed as inconsequential; alternatively, they are seen as insurmountable, a cause to avoid negotiating any significant matter online at all. However, in today’s world, we can neither bury our heads in the sand, nor can we avoid online negotiation—we need to understand it, and learn how to conduct it well. . . .

Using Email: A Moving Target

Hailed as the fastest spreading technology in human history, the introduction of the smartphone has caused substantial upheaval in our communication habits. This tool has affected society in many ways, but for the purposes of this

[article], I will stress one in particular: A major feature of the smartphone, as opposed to a regular mobile phone, is its capacity for accessing web and client-based email while on the move, via cellular or wireless connections, rather than requiring a physical connection to a static modem. In turn, this capacity has significantly affected our negotiation habits. . . .

Communicating via email no longer conjures a more-or-less uniform picture of a person seated at her desk or in her home office, typing on her computer, or even of her ordering a cappuccino and summoning up sufficient attention to work on her laptop at a café. Emails are read and written on buses and trains; while watching the kids at the playground or in-between turns of playing a game with them; during classes, rock concerts and movies; and even—even though most of us would never admit to this—while driving. The smartphone has introduced new elements of accessibility, distraction, environment, timing and technical limitations to email communication. . . .

Negotiating via email: Eight major challenges

Building on this understanding of media effects on communication, and awareness of the potential effects of communication media's constant shifts, we can now examine specific media effects affecting negotiation dynamics. We will focus on eight major elements:

1. *Increased contentiousness*
2. *Diminished information sharing*
3. *Diminished inter-party process cooperation*
4. *Diminished privacy*
5. *Diminished trust*
6. *Increased effects of negative attribution*
7. *Diminished party commitment and investment*
8. *Diminished focus*

1. Increased contentiousness

Communication at a distance is more susceptible to disruption than face-to-face dialogue. Parties communicating via telephone have been found more prone to distrust, competition, and contentious behavior than those in comparable face-to-face interactions. These findings are intensified in e-communication, which tends to be less inhibited than face-to-face communication due to physical distance, reduced social presence, reduced accountability and a sense of anonymity. The lack of social cues in e-communication causes people to act more contentiously than they do in face-to-face encounters, resulting in more frequent occurrences of swearing, name calling, insults, and hostile behavior.

Early research on negotiation showed the same tendency for parties-at-a-distance (such as parties negotiating over the phone) to act tough and choose contentious tactics. Examinations of e-negotiation brought to light the effects of further-diminished media richness: the social presence of others is reduced and the perceived social distance among negotiators increases. This might explain why e-negotiators seem less bound by appropriate, normative behavior than face-to-face negotiators. This translates into an increased tendency to threaten and issue ultimata; to adopt contentious, "squeaky wheel" behavior; to lie or

deceive; to confront each other negatively, and to engage in flaming. In short: email negotiation is a rough playing field!

Getting practical:

1) Unmask yourself: The mutual invisibility inherent in email negotiation facilitates adversarial, contentious behavior. It is easier to cause damage to a faceless other—particularly when one feels protected by a shield of anonymity and physical distance. This can cause people to assume that they can get away with this behavior, and lower moral inhibitions they might have against doing so. By adopting a proactive agenda of unmasking ourselves—making ourselves human, present, and real in the other's eyes—we can protect ourselves from these dynamics. This unmasking process can include sharing personal information, building rapport, and reducing the perception of distance through shared language, or shared geographical or cultural references.

2) In the unmasking process, decide carefully what to share about yourself, taking advantage of the masking effect to avoid any anticipated bias.

3) Unmask the other: Remember, there is a person behind the other screen as well, whether they have had the foresight to engage in unmasking themselves or not. They are not computers or inboxes—they will respond to your messages on emotional, cognitive and behavioral levels which you will then have to deal with.

4) Use email's potential for asynchronicity in order to think and work proactively: Read a received message twice instead of banging out an angry reply. When you do write a response—delay sending it, and read it again before clicking send. Be extra careful on this front while communicating via smartphone; the fact that you can now answer instantly in more cases than ever before doesn't mean that you should!

2. Diminished inter-party process cooperation

As we've noted, information exchanged in email negotiations is likely to be constrained, analytical, and contentious. This might explain why email negotiators suffer from reduced accuracy in judging the other party's interests. Such reduced accuracy would reduce negotiators' ability to accurately assess differential preferences and identify potential joint gains—and therefore, one might posit, their desire to engage in this type of cooperative activity in the first place. Reduced social awareness in lean media causes parties to engage more heavily in self-interested behavior when negotiating by email. Focused inwardly, negotiators may simply ignore or fail to elicit important information regarding the other party's interests and priorities. The use of email may, therefore, accentuate competitive behavior in negotiations. Email communication is conducive not only to parties acting uncooperatively, but to parties feeling *justified* for choosing this pattern of behavior. Combine this with increased contentiousness, and with the comparative ease of walking away from the process (see below), and we are faced with a recipe for diminished process cooperation.

Getting practical:

1) Use interest-related language intentionally, and often, when discussing your own position and inquiring about theirs. Use process-cooperative language

overtly, and try and set the tone for others to do so. This might give process-cooperation a much-needed boost.

2) Take the stage: You have the opportunity to speak your mind, state what you want and explain why you should get it. No one can shout or shut you down. Utilize this clear stage.

3) In a multi-party interaction, if one party is dominating the conversation and others are quiet, you might invite them in, either in a "Let's hear what some others have to think" email to the group, or in a private, behind-the-scenes message to reticent parties.

4) Use bundling intentionally, highlighting connections between the issues, and perhaps using language you feel might trigger similar thinking in your negotiation opposite.

5) A familiar source of confusion in email negotiation occurs when your opposite party relates to some of the issues you raised in a letter, but not to other issues raised. This might not be a deliberate, contentious omission—it may simply be information overload. Consider whether you want to call their attention to this as an oversight, before assuming there is some underlying meaning in the omission.

6) Some people may find writing long, well thought-out messages on the small screen and keyboard or touchpad provided by a smartphone to be a daunting task; cooperative, information sharing messages may sometimes fall into this category. Rather than discard such opportunities, you might give more careful thought to the question of which machine you would best type your message on.

3. Reduction in integrative outcomes

The potential for email negotiation to result in lower rates of integrative outcome is partially connected to the previous challenge of reduced process cooperation. Indeed, many experiments measuring these two indicators illustrate significant challenges: First, that e-negotiation entails lower rates of process cooperation, and lower rates of integrative outcomes, when compared to face-to-face negotiation. Second, that the potential for impasse appears to be greater than in face-to-face negotiation.

These findings don't clearly explain *why* email negotiation results may be less integrative. Is it an outcome of reduced process cooperation? Of increased contentiousness? Of the difficulty of establishing rapport in email? Of reduced inter-party trust? Or, perhaps of a combination of some or all of these elements? . . .

Getting practical:

Most of the suggestions made above (regarding process cooperation) apply here as well. In addition:

1) Consider using the multimedia potentialities used in e-mail in order to portray integrative offers or ideas. Charts, graphs, presentations—all easily attached to an email—are powerful tools for overcoming the challenges of lean media.

2) Frame: In email negotiation, every message is an opportunity to set a new frame around the interaction, much more so than rapid-fire statements and

reactions in face-to-face processes. Intentional and repeated integrative framing might have an effect on the outcome.

4. Diminished privacy

Maintaining a negotiation process' privacy is never an easy task. In face-to-face negotiation, in the absence of a confidentiality agreement (and too often, in practice, even when one exists!) parties can, and do, share information about the negotiation with their friends, families and colleagues, and occasionally with wider circles. However, you can meet in a private setting, physically shut out the rest of the world, or relate something confidentially in a lowered voice. Anything shared with external parties will always be subjective, after-the-fact, secondhand (and in legal terms, hearsay). In email negotiation, by contrast, you never know who is "in the room" with you. Is your opposite showing your letter to their boss, to their colleagues or to your competition? The messages you transmit are recorded, and forever archived somewhere beyond your control; they can be adjusted or tampered with, altering what you wrote. Personal or proprietary information you send might be exposed to wider circles than intended, whether due to the other's bad intentions or their technical shortcomings. Who among us has never clicked "reply all" instead of "reply", thereby sending a personal message into a public domain?

Getting practical:

- 1) Consider each address field carefully. To whom should a message be sent? Should anyone appear in the "cc" field? Do you want anyone invisibly lurking on the conversation, from the "bcc" field?
- 2) Use the lack of privacy to your advantage: Record the interactions, return to them when things get unclear, and relate to them when it seems the other party is being inconsistent. Share messages with anybody you feel you need to share them with, and consult—often—about the process.
- 3) Increasingly, individuals' online activities are becoming public, widespread, sought out by future opponents and admissible in court. Be cautious of what you write in an email, particularly before trust is established. A good rule of thumb might be: Don't write anything in an email that you wouldn't want shown on the news.

5. Diminished degree of inter-party trust

Diminished privacy is but one factor that affects the much wider issue of inter-party trust. Trust has been identified as playing a key role in enabling cooperation, problem solving, achieving integrative solutions, effectiveness and resolving disputes.

Communicating via email, negotiators must cope with threats to trust that are inherent in the medium and in its employ. Email negotiators trust their counterparts less than negotiators in similar face-to-face interactions—at all stages of the process. Before the process' inception, e-negotiators report a comparatively low level of trust in their opposite. This low trust-level persists throughout the course of the negotiation, resulting in diminished process cooperation and information sharing. Even after reaching deals with their opposites,

e-negotiators trust their opposites less than participants in face-to-face negotiations, manifesting in lower degrees of desire for future interaction with them. Why do people distrust each other online — or, more to the point, what is it they are worried about? It may be that they are specifically concerned about intentional deception.

Getting practical:

The following practices are helpful for building trust in email interactions:

1) Build rapport: Try to “bond”, building an instant relationship with your opposite.

2) Apply social lubrication: Take the time, at the beginning of a negotiation and throughout its course, for light conversation. While this does not come as naturally by email as it does face-to-face, email doesn't make icebreaking or small talk superfluous — the contrary is true. Even minimal pre-negotiation, socially-oriented contact, such as preliminary email introductory messages, can build trust, improve mutual impressions, and facilitate integrative outcomes.

3) Mix media, when possible: Holding a preliminary face-to-face meeting can assist in setting the stage for a trust-filled e-negotiation. Meeting face-to-face in the middle of the process can also be beneficial. Remember that the smartphone you are reading the email on can also be used to call the other person for a conversation through a media that is at once more synchronous and rich, injecting cue multiplicity into the interaction.

4) Show e-empathy: Showing empathy performs multiple roles in negotiation, including trust building. E-negotiators who show empathy are trusted by their negotiation opposites more than those who do not. This cannot be neglected just because the medium seems to be “cold” and impersonal. Utilize email's characteristics which allow considered, careful language to intentionally show e-empathy.

6. Increased attribution, increased misinterpretation

Communicating through lean media increases the tendency toward the fundamental attribution error: parties perceive negative actions or statements on their opposite's part, and interpret these as outgrowth of the other's negative intentions and character — rather than as unintended results of circumstance. Reduced social presence and few contextual cues lend a sense of distance and vagueness to the interaction. The media richness element of interactivity compounds this: E-negotiators ask fewer clarifying questions than face-to-face negotiators — leaving more room for assumptions to form and take root. Attribution dynamics will cause these assumptions to tend toward the negative. Analysis of failed email negotiations shows that they tend to include unclear messages, irrelevant points, and long general statements, each of which provides ample breeding ground for attribution.

Getting practical:

1) Increase your social presence: constantly remind the other of the real person opposite them.

2) Write clearly, taking into account negative interpretations. Clarify much more than you do face-to-face. Here are several rules of thumb for enhancing email clarity:

- a) Avoid unnecessary length—don't overload your opposite.
- b) Use "In summary" sentences to highlight your main points.
- c) Use the subject field intentionally. This introduces your letter (preparing your opposite for the content), provides a frame through which it will be read (diminishing negative interpretation), allows your opposite to find it when they want to review it for clarity before responding, and helps organize messages bundling multiple issues.
- d) Avoid use of emoticons—particularly in early message exchanges.
- e) If you are writing your message on a smartphone, be aware to the changes this causes in your writing style. If it causes you to respond in short messages, or constrains the way your email is laid out, consider how that might look through the eyes of your negotiation opposite. You might hold off and respond on a different machine, or you might simply let them know that you are responding to them via smartphone, which will explain issues of style and stave off negative attribution.

3) Waiting and perceived delay cause anxiety, which is conducive to negative attribution. Manage both sides of this cycle: Don't expect immediate answers to your own letters, and do your best to provide prompt responses to your opposites. Consider how use and expectations of smartphones—your own, or your counterpart's—may have affected your expectations on this issue. Knowing you read mail on your smartphone, certain opposites might get uptight if you don't respond within a few minutes! Conversely, accustomed to a couple of days typically passing before hearing from your opposite, you might be surprised to get a near-instant response from her—and read meaning into that haste. In reality, she may have just happened to have her smartphone in her hand when your message arrived and responded on the spot. Remember that you and your opposite might use multiple machines for email, each with its own nature with regards to message reading, message writing and other timing issues.

4) Be very careful when using humor: While humor has been shown to be a valuable tool in online negotiation, leading to increased trust and satisfaction levels, higher joint gains and higher individual gains for the party who initiated the humorous event, humor is often misunderstood, misinterpreted and misattributed—and can easily backfire.

5) If you are concerned that all this mindfulness and caution might not suffice, don't leave it to email: Recognize situations in which you need to pick up the phone and call, or meet in person with your negotiation opposite.

7. Diminished party commitment and investment

Parties to e-mail negotiation might be less motivated than face-to-face negotiators. They have not displayed the minimum commitment of getting up, getting dressed and coming to the table; indeed, there might not be any sunk costs at all. Smartphones have compounded this issue by reducing even the value of the time invested in writing the email, given that they allow people to do so during what might be "garbage time" to them—commuting, waiting for someone to show up, etc. Email may be the easiest medium there is for making "shot in the

dark” approaches (perhaps best exemplified by the 62 trillion spam e-mails sent yearly, most of which are “shot in the dark” scamming or marketing efforts). This might provide partial explanation for reports of higher rates of impasse in email negotiation (see above), and for the familiar phenomena of email negotiations simply evaporating, with one party simply dropping out of the conversation, either disappearing in a whiff of smoke or dissolving into a cloud of “I’ll get back to you”.

Getting practical:

- 1) Stay on top of things: Provide regular contact, keeping your counterpart engaged—without getting pushy.
- 2) Bridge time gaps: Try to create the illusion or experience of an uninterrupted conversation. For example, write “As I wrote you . . .,” and then copy and paste a quote from your previous letter.
- 3) It could happen to you: The implications of this section are not only about roping in and maintaining contact with your opposite. You yourself might be prone to underinvestment and a low level of commitment. Email negotiation tends to confuse us in this regard; keep a constant eye on your motivation level, and make sure it matches your commitment and the resources you invest.

8. Diminished party focus

E-negotiators, even if they are committed and invested at the same level one might encounter in face-to-face negotiation, are likely to suffer media-related effects including confusion, low cognitive retention of previous messages, and diminished concentration. This is due to several factors, including time passage between information exchanges, the tendency to answer emails in spurts and sections rather than finding the time to write full messages, and the tendency to answer emails in less-than-optimal surroundings and circumstances. In addition, email is often not something we train our full attention on, but rather something we do as part of our media multitasking. We check our email as we surf the web, and we surf the web as we read or reply to our email—perhaps holding in-person or phone conversations at the same time. Recent research addressing this issue indicates that we are not as good at multitasking as we like to think we are. Heavy multitaskers suffer a range of shortcomings as opposed to “focusers”, many of which are pertinent to negotiation: They are not good at filtering out irrelevant information, and are easily distracted. They tend to have low detail recall, and despite their tendency to switch between tasks rapidly—they are not skilled at this, as their brain is always somewhat focused on the task they are *not* doing. Negotiators suffering from any of these, due to their multitasking tendency, work surroundings, or email-management habits, might be confused and unfocused. Similar adjectives might be suitable for negotiators communicating via smartphone in noisy or crowded environments, without taking care to consider the effects their surroundings may have on their capacity to focus.

Getting practical:

- 1) Stay focused: The greater the importance of the negotiation to you, the more it pays to concentrate on it. Read and write messages in an environment

that allows you to concentrate. One simple rule of thumb to follow would be to close your Internet web browser while reading and writing email.

2) Be very aware of the costs of distraction. Negotiating via email on your smartphone might seem like a good way to make the most of your train ride into the office in the morning—but you may be setting yourself up for poor negotiation performance.

3) Go mobile—intentionally: Conversely, being able to take your negotiation to a place in which you feel comfortable, empowered, and competent might enable you to do your best. If you feel this is the case, grab your smartphone or tablet and go! The key is in making the choice to go mobile consciously and intentionally.

Conclusion:

Already a challenging medium to negotiate through, email has recently developed into a semi-synchronous communication channel and continues to evolve rapidly. Communicating by email, negotiators face a rougher playing field, a more contentious opposite, and numerous process-challenges. The good news is, that armed with some knowledge and a healthy dose of awareness, negotiators can navigate these challenges and even turn the use of the media to their advantage. Given the anticipated increase in e-negotiation processes, and the increasing sophistication and variation of the tools for engaging in it, the sooner negotiators get started on improving their skills and awareness in this area, the better.

Questions

1. Do you believe that negotiating by e-mail or text message is significantly different in terms of necessary preparation, strategic considerations, or ethical issues than face-to-face or telephone negotiations? How so?
2. Is it necessary to get client approval for negotiating by e-mail before the process begins?
3. Should clients be copied on all negotiation e-mails?
4. Need you check with clients about system compatibility, encryption programs, and metadata scrubbing mechanisms?
5. In the course of a negotiation, you receive an e-mail from opposing counsel with an attachment containing a proposed settlement amount. Can you ethically send the electronic proposal to your IT department with the request that the electronic file be mined for embedded metadata that might reveal hidden information, like other amounts they had considered offering and erased? Are you aware of the practice of mining electronic documents for metadata? (See *ABA Formal Opinion 06-442*, 2006.)

1. Talk First

When lawyers know one another, either socially or from past dealings, the use of text messaging may have fewer disadvantages than when they do not

have a relationship. Research indicates that the existence of a prior relationship between opposing counsel favorably affects the likelihood that they will settle a lawsuit. In a study of thousands of cases filed in federal courts, it was discovered that attorneys were less likely to go to trial and could settle cases more quickly when they had faced each other in the past than when they had not. (See Johnston and Waldfogel 2002.) One explanation of this tendency is that those who know one another, even as opponents, are better able to communicate and know what to expect based on past interactions. They are able to put their communications in context more easily based on past experience together.

How can lawyers who do not know one another tap the advantages of e-mail for negotiation while minimizing the risks inherent in the "lean" nature of digital communication and the absence of social cues? This question is answered by the empirical research described in the next reading. As explained by Professor Nadler, law students were assigned to negotiate a commercial transaction with counterparts at a different law school using e-mail as the mode of communication. Negotiators who spoke together in an introductory telephone call established a relationship that tended to create rapport and trust, which aided them in reaching agreement in the subsequent e-mail negotiation and created positive feelings about one another. By contrast, those who began e-mail negotiation without first engaging in telephone "small talk" were over four times as likely to reach impasse and tended to end up feeling resentful and angry about the negotiation. Professor Nadler concludes by discussing implications of this experiment for lawyers who use e-mail to negotiate.

❖ Janice Nadler, *RAPPORT IN LEGAL NEGOTIATION: HOW SMALL TALK CAN FACILITATE E-MAIL DEALMAKING*

Harv. Negot. L. Rev. 223 (2004)

A. Procedure

The negotiation exercise used in the experiment involved the purchase of a new car. Participants consisted of 146 law students, half of whom were students at Northwestern University School of Law and half of whom were students at Duke Law School. The students participated as part of a class assignment in a Negotiation course. Thirty-five randomly selected Northwestern students were paired with thirty-five randomly selected Duke students and were assigned to the "Small Talk" condition. The remaining thirty-seven Northwestern students were randomly paired with the remaining thirty-seven Duke students and were assigned to the "No Small Talk" control condition.

Participants were given confidential role instructions which specified that they were to conduct a two-party negotiation exclusively via electronic mail. Each student received a packet of materials that contained a page of general confidential instructions and guidelines, an e-mail address for their counterpart, and pre- and post-negotiation questionnaires. Participants were given one

week to complete the negotiation and questionnaires, and were specifically instructed to not discuss the negotiation or procedures with their classmates.

Unbeknownst to participants in the "No Small Talk" control condition, the participants in the "Small Talk" condition received an additional special instruction: they were to have an initial "getting to know you" telephone conversation lasting five to ten minutes with their partner before they began negotiating. Directions specified that participants should not talk about business (i.e., the negotiation) in this initial conversation, ensuring that it was a strictly social conversation. The goal was to have negotiators "break the ice." Regardless of group assignment, all negotiations took place exclusively via e-mail.

The negotiation itself involved the purchase of a new company car by a manager at a software company. The negotiation contained both distributive and integrative elements. Whereas both parties were motivated to claim as much value for themselves as possible, parties had different priorities; hence concessions by Party A on a given issue could be traded for gains on another issue which Party A values more but Party B values less. This type of logrolling increases the joint value of the agreement, creating more profit that can be allocated between the two parties. . . .

B. Results

"Small Talk" negotiators who had a brief "getting-to-know-you" telephone conversation prior to negotiating via e-mail reached superior economic outcomes and markedly better social outcomes than negotiators who did not talk on the phone. Differences between the "Small Talk" and "No Small Talk" conditions in economic and social outcomes are described below.

1. Economic Outcomes—Small Talk Led to More Negotiated Agreements

"Small Talk" negotiators were over four times as likely to reach an agreement as "No Small Talk" negotiators. Only three out of thirty-five "Small Talk" pairs (less than 9%) failed to reach an agreement, whereas fourteen out of thirty-seven "No Small Talk" pairs (nearly 40%) failed to reach agreement. The high percentage of "No Small Talk" pairs that were unable to reach agreement is especially noteworthy in light of the fact that a positive bargaining zone existed, making it economically desirable for each party to reach a negotiated agreement. Interestingly, the value of the outcome (measured both in terms of joint outcome and individual outcome) for the pairs that did reach agreement appears to be unaffected by small talk. . . .

An examination of precisely what occurred between negotiators who reached impasse is revealing. Because parties negotiated via e-mail, the transcripts of unsuccessful negotiations indicate the last offer on the table prior to the point at which impasse was declared. For all three "Small Talk" negotiators that failed to reach agreement, the last offer on the table had a value below the reservation price of one of the parties. In other words, none (0%) of the "Small Talk" pairs walked away from an offer that was more profitable than their outside option. For all three pairs, given the value of the last offer, it is understandable that one of the parties would refuse to agree to it. But the story for the "No Small Talk" pairs was quite different: the value of the last offer on the table exceeded both

parties' reservation price for nine out of the fourteen pairs (64%). Thus, these eighteen negotiators (none of whom engaged in small talk) failed to reach agreement despite the fact that the last available offer would have made all of them better off than impasse. . . .

2. Social Outcomes

What accounts for the huge differences between the "Small Talk" and "No Small Talk" negotiators in their propensity to reach a mutually beneficial agreement? Prior to negotiating (but after the phone call, if there was one) negotiators indicated on a scale from one to seven (1 Not at all; 7 Quite a bit) how "competitive" they were feeling toward their counterpart as they entered into the negotiation. They also indicated how "cooperative" they were feeling toward their counterpart. Negotiators who did not engage in small talk with their counterpart prior to negotiating reported feeling more competitive and less cooperative toward their counterpart than negotiators who did engage in small talk.

3. Negotiation Processes

Why would negotiators who adopt more cooperative, less competitive attitudes toward the negotiation achieve greater success economically than negotiators who adopt the opposite attitudes? After all, one might expect a negotiator who is too nice and unwilling to be tough to do poorly in a negotiation. By contrast, in this simulation, the cooperative attitude adopted by negotiators who engaged in small talk led them to come away from the negotiation in a position that was substantially more favorable economically than those who did not engage in small talk.

a) Small Talk Negotiators Shared More Information

. . . Consistent with their cooperative mental model of the negotiation process, negotiators who engaged in telephone small talk prior to negotiating exchanged significantly more information relating to their relative priorities on multiple issues compared to negotiators who did not engage in small talk. Thus, negotiators who established initial rapport with a brief telephone chat felt more cooperative in the negotiation and trusted the other negotiator enough to share the kind of information necessary to reach an efficient solution.

b) Small Talk Negotiators Engaged in More Reciprocity

In addition to offering more freely their own information about relative priorities, information sharing was reciprocated more often for negotiators in the "Small Talk" condition than for negotiators in the "No Small Talk" condition. That is, compared to negotiators who did not engage in small talk, negotiators who chatted with their counterpart prior to negotiating were more likely to receive multiple issue priority information from their counterpart immediately following their own provision of such information. Negotiators who engaged in small talk expected more strongly to cooperate, did cooperate by sharing more relevant multiple-issue information, and received more cooperation in return from their counterpart. This pattern of multiple-issue information sharing is necessary for negotiators to avoid impasse by recognizing numerous, mutually

beneficial solutions in the negotiation. In this mixed motive negotiation, failing to exchange information resulted in negotiators failing to integrate their interests, leaving little or no joint surplus to share.

c) Small Talk Negotiators Made Fewer Threats

The negotiation transcripts were also analyzed to examine whether negotiators provided information that related to one's own alternative, because such a reference can be akin to a threat to walk away from the table (e.g., "I can buy a similarly equipped car much more cheaply at another dealership"). Compared to negotiators whose initial contact was strictly business-like, negotiators who engaged in small talk before negotiating were less likely to reference their own alternative. Thus, in the absence of an initial getting-to-know-you telephone conversation, negotiators assumed a competitive mental model and behaved competitively during the negotiation by making subtle (or not so subtle) threats to walk away from the table. . . .

d) Small Talk Negotiators Developed More Respect and Trust

Negotiators who did not chat beforehand ended the negotiation with a substantially different attitude toward both the process and their counterpart than the negotiators who did chat initially. . . . Negotiators who did not chat found the process of e-mail communication more difficult. They ended up feeling significantly more angry, annoyed, and cold toward their opponent, as well as less friendly and pleasant, compared to negotiators who had the opportunity to chat with their opponent. These feelings are consistent with the competitive mindset and inferior economic outcomes of negotiators in the "No Small Talk" condition. The increased cooperation and trust that the telephone chat engendered led to smoother interactions and a friendlier attitude toward the opponent after the negotiation concluded. This attitude was also associated with respect—negotiators who engaged in small talk formed an impression of their counterpart as significantly more accomplished, skilled, effective, and perceptive than the impression formed by negotiators who did not engage in small talk. . . . Finally, this experiment also measured the extent to which negotiators came away trusting their counterparts. One of the many ways to define trust is the expectation that the other person will cooperate with you when you are in a vulnerable position. In legal communities, lawyers who face each other in one negotiation often can expect to cross paths again in the future. If trust is eroded during negotiation in one matter, this is likely to affect the way the lawyers approach the negotiation in the next matter when they meet again. To explore the question of whether engaging in small talk prior to negotiating would increase trust, negotiators in this experiment answered two questions relating to trust. First, they were asked to suppose that they and their counterparts were in the position of working together on a future project and to rate how smoothly such a project would go. . . . Second, negotiators were asked to imagine that sometime in the future, they were in a vulnerable position in a dispute with their counterpart's firm. Would they prefer to negotiate with the same counterpart, or some other unknown attorney. . . . Negotiators who had an initial chat with their opponents left the negotiation with significantly more trust in their counterparts than did negotiators who did not chat initially.

C. Discussion

In the negotiation simulation involved in this experiment, a seemingly trivial intervention—a preliminary, brief, and informal chat on the telephone—increased the likelihood that the e-mail negotiations that followed would be characterized by cooperation, information exchange, reciprocity, liking, trust, and ultimately, agreement. These negotiators had the opportunity to establish common ground with the other negotiator through small talk, even if the basis for common ground was exceedingly trivial (e.g., “The weather is nice here in Chicago.” “Yes, it is nice here, too.”). Engaging in small talk enabled negotiators who were strangers to get to know one another and to connect in a fashion that did not spontaneously occur during the process of e-mail exchange. The seemingly inert act of small talk encouraged negotiators to adopt a cooperative mental model in the negotiation, leading to the sharing of crucial information with the other party. Negotiators who engaged in small talk were more willing to take the chance that the other negotiator would reciprocate and share their own private information, which is precisely what happened. This resulted in favorable impressions of the counterpart after the negotiation. Negotiators who engaged in small talk placed their trust in the ability of their counterpart to recognize the mutual benefit of information exchange. When the counterpart successfully recognized these benefits and shared crucial information, their abilities and skills were respected, and they were generally held in high regard.

By contrast, negotiators who did not have an opportunity to chat with their counterpart prior to e-mail negotiation approached the negotiation with a competitive mental model, and either failed to exchange the kind of information that would lead to identification of mutually beneficial solutions, or failed to recognize as beneficial the solutions which arose, leading to greater likelihood of impasse. In the absence of the phone call, the two negotiation counterparts were complete strangers, never having seen one another or heard one another’s voice. Because the other person was, in this sense, an unknown quantity, negotiators could not be sure of the other person’s motives. These circumstances were associated with negative impressions of the other person, as evidenced by negotiators’ ratings of their opponents as less accomplished, skilled, effective, and perceptive than negotiators who engaged in small talk. In short, negotiators in the “No Small Talk” condition were less likely to reach agreement, which made them angry and annoyed and for which they blamed the other negotiator. . . . The failure to reach an economically advantageous outcome is even more remarkable when one considers the circumstances under which this occurred—a substantial portion of the “No Small Talk” negotiators who reached an impasse did so despite an offer on the table that would have made both negotiators better off than impasse.

One reason that a cooperative mental model served negotiators well in this simulation (while an overly competitive mental model served negotiators poorly) is that cooperation helped participants solve the “negotiator’s dilemma.” This getting-to-know-you telephone call made e-mail interaction proceed more smoothly by creating rapport before the negotiation began. This rapport helped negotiators approach the negotiation with a more cooperative mental model, thereby trusting in each others’ good intentions. This mental model, in turn, led to a successful negotiation that concluded with a contract and engendered

positive feelings about one another. The negotiators who engaged in small talk solved the “negotiator’s dilemma” by agreeing (albeit tacitly) to share enough information to determine what kind of agreement would satisfy their needs simultaneously.

Sharing information was crucial in the negotiation simulation used in this experiment because of the mixed motive nature of the exercise. While some issues were purely distributive, others could be profitably logrolled in a manner that inured to the benefit of both parties simultaneously. To successfully expand the pie of available resources (as opposed to simply compromising and “splitting the difference”), it was crucial for negotiators in this experiment to exchange enough information to allow them to determine, for example, that both parties preferred all airbags and yellow color, that financing was an especially important issue for the seller, but warranty was especially important for the buyer, etc. Without communicating this information in some form, negotiators were unable to maximize the joint value of the agreement. Adopting an attitude that was more cooperative than competitive allowed negotiators to trust the other party enough to share with them relevant private information, and to expect the other party to reciprocate by sharing their own relevant private information, which in turn resulted in identification of and agreement to efficient solutions. Because lawyers are repeat players within a legal community, and often expect to interact with each other again in the future, it is important to observe here that one deal that sours because of misunderstandings in the course of e-mail negotiations can affect the tenor of future negotiations—whether conducted via e-mail or more traditional means. . . .

This study documents the importance for lawyers of establishing rapport when negotiating with another lawyer who is an “unknown quantity.” When face-to-face contact between negotiators is not possible, it is important to find an alternative method of building rapport. This study demonstrates that a social, personalizing communication via telephone is one way to restore some rapport that may be missing from electronically mediated negotiations. . . .

Questions

6. Nadler’s study appears to confirm the often repeated traveler’s story of being invited to sit down for a cup of tea by a Turkish rug dealer before talking business or being asked by a Balinese beach peddler, how do you like Bali, and where are you from? What is the purpose of these benign gestures, and how do they relate to the previously described experiment?
7. If “schmoozing” is the social grease that makes deals happen, are there ways other than a preliminary telephone conversation to schmooze or create rapport and promote cooperation before engaging in e-mail negotiations? In her article, Professor Nadler suggests the following:

[A]n initial, non-business, getting-to-know-you chat over e-mail prior to beginning e-mail negotiations has been shown to increase the likelihood of reaching a mutually beneficial agreement. Moreover, outside of the negotiation context, social psychologists have shown that using flattery (even when

people suspect the flatterer has ulterior motives) and humor, and mentioning points of similarity, can facilitate good feelings and relationship building, thereby engendering the kind of cooperation and trust that leads to discovery of mutually profitable negotiated solutions. (Nadler 2004, 11 n.250.)

8. How might the increasing affordability and use of digital video cameras and voice technology change the way we negotiate? Will the use of these technologies equate digital means of negotiation with in-person negotiation, or will differences remain? What might such differences be?

2. *Avoiding Costly E-Mail Mistakes*

No doubt you have either experienced or heard e-mail horror stories. Knee-jerk reactions or damaging, unfiltered thoughts hastily entered via the computer keyboard and sent instantly through cyberspace without the benefit of delay or having to write them down longhand can cause long-lasting mischief. Hitting the “reply to all” button when sensitive information was intended only for the original sender can cause embarrassment and resentment. Misaddressing an e-mail that contains confidential or revealing information creates breaches of confidentiality, and the leaked information cannot be erased. Having an important message go unread because the subject line did not accurately indicate the content may result in a missed deal, or at least misunderstanding. The recipient taking offense because an abbreviated term was misinterpreted or an attempt at humor was misunderstood or coolly read out of context may be hard to turn around. These mistakes can be costly if committed in the course of e-mail negotiations. Why do people communicate differently in digital mode, and how can mistakes be avoided?

First, be aware of the false anonymity shield, or what has been referred to as “online disinhibition effect.” We tend to believe that we are more anonymous in cyberspace and that we will not be held accountable in the same way as in face-to-face exchanges. Many people state in e-mails what they would not say face-to-face. When you are stuck in a room with a negotiation opponent, you see her reactions and the consequences of your comments. With e-mail, you can, in effect, hit and run without staying around to see emotional reactions. Responses can only come later in digital form, so we tend to be bolder and less inhibited. However, if your name or e-mail address is on the message, you are not anonymous; you are accountable and can be held legally liable for what you send. E-mails also satisfy the writing requirement for a binding contract under the Statute of Frauds, because the Uniform Electronic Transactions Act provides that a “record or signature may not be denied legal effect or enforceability solely because it is in electronic form.” See, e.g., *International Casings Group, Inc. v. Premium Standard Farms, Inc.*, 358 F. Supp. 2d 863 (W.D. Mo. 2005).

Second, e-mail communication can be highly “flammable.” That is, without the schmoozing and face-to-face social lubrication that can soften spoken words, e-mail messages can be read with the most harsh and inflammatory interpretation. Devoid of eye contact, facial expressions, voice inflection, and body language, e-mail offers a “narrow bandwidth” or undressed mode to convey

meaning. The flammable potential of naked e-mail, combined with the "hit-and-run" factor, is reason for caution and restraint in negotiating by e-mail.

Third, when representing clients, lawyers tend to write more formally and precisely because we understand the legal consequences of words and the downside of ambiguity. As agents of clients, we have a responsibility when negotiating not to be careless or sloppy in the words and phrases we use. If the medium is the message, as Marshall McLuhan said, then e-mails may not be an easy medium for lawyers to use in negotiating. The common style and "netiquette" of e-mail is informal and highly abbreviated. Although conventions of abbreviation and new definitions may be emerging, e-mail syntax remains idiosyncratic and rapidly evolving, particularly with the advent of handheld digital devices. Lawyers can use the speed and economy of the digital world to negotiate with composed and clear messages and more formally drafted attachments. Combining e-mail with other forms of communication, as we saw in the pre-negotiation telephone schmoozing experiment described above, allows for the best use of different media. The use of e-mail to negotiate need not be all or nothing.

The following checklist will help you avoid common e-mail and texting traps when negotiating, as well as when using digital communication generally. (See Jay Sullivan, "Lawyers and Technology: A Crash course in Writing Effective E-Mails," 229 N.Y. L.J. 5, Feb. 2003.)

- ✓ **Use proper grammar, spelling, and punctuation.** Never send a message with an incomplete sentence, a misspelled word, or referring to yourself as "I" because besides deleting them, people often forward or print e-mails.
- ✓ **Never send negative feedback or criticism through e-mail.** Criticism sent through an e-mail can come across like a slap in the face. It is always received more harshly than intended. At the very least, the recipient will feel as if you should have picked up the phone to deliver your message, and you will appear to be "hiding behind your e-mail."
- ✓ **Refrain from humor and sarcasm.** The nuances of face-to-face or spoken communication are lost with the written word. It is very hard to be funny in an e-mail. People who are humorous in person cannot necessarily write humor well. It requires a different discipline. Sarcasm, in particular, does not translate well through e-mail, and it is often taken literally, with potentially disastrous consequences.
- ✓ **Think before sending an e-mail.** This requires more than proofreading: It requires giving your brain a break between drafting and sending. Very few e-mails require an immediate response, so you can build in a delay to improve the quality of your communication.
- ✓ **Put substance in the "subject" line.** It is always easier to hit "reply" than to start a new message, but consider changing the subject to better reflect your reply. Also, do not start your message in the subject line and continue it within the body. It is disconcerting to the reader and almost always requires that the recipient read the sentence twice.
- ✓ **Use a salutation.** E-mail is generally an abrupt way of communicating, but by starting a message with the recipient's name, the tone is softened. It is especially important to use a salutation when copying someone on a message.

- ✓ **Get to the verb.** Use short sentences and direct language in the body of the message. Avoid the passive voice. Do not begin a professional e-mail with “How was your weekend?” or the recipient may think the message is more personal and never get to the meat of the message. This does not mean you should eliminate all niceties. Just keep them short.
- ✓ **Make it clear how you want the recipient to respond.** People tend to respond to a particular communication in the same form they receive it. If we get a voicemail, we tend to reply by phone. When someone gets your e-mail, the instinct is to hit the “reply” button. However, if you are inaccessible for the next few hours or days, make that known and indicate the best way for the reply to be delivered. For example, “Please respond by phone. I will not be able to check my e-mail for a few hours.”
- ✓ **Review your “cc:” list.** Who is on it and why? Is there a legitimate reason for including each individual? Do not include someone just to keep him or her “in the loop” unless it is appropriate and you have first asked that person if they want to be included. The courtesy will be appreciated.
- ✓ **Be careful.** Do not gossip, make off-color jokes or comments—they will come back to haunt you.
- ✓ **Remember, e-mail does not get deleted, only subpoenaed.** Deleting it from the hard drive does not “destroy” it. The message is still floating around somewhere in your device or in cyberspace.
- ✓ **Apply the Golden Rule.** Only send e-mails you would like to receive.

Questions

9. Can you add any cautionary or advisory items to this checklist?
10. Are the potential mistakes noted previously and those in the checklist equally applicable to all forms of negotiation communications? What is truly unique about e-mail communications?
11. Have you negotiated electronically? Looking back on that experience, would you have done anything differently?
12. Given the “lean” nature of e-mail communication and that the digitally transmitted word need not reveal the sender’s gender, race, or ethnicity, does negotiation only via e-mail eliminate any influence of these factors? Why or why not?
13. Can you think of ways in which e-mail communication might exacerbate cultural differences and create obstacles to successful negotiation?
14. Can you think of any worse e-mail blunder than the one below, attributed to a Harvard summer associate at Skadden Arps by the *New Yorker* on June 30, 2003? First, he made the mistake of sending the message to everyone in the law firm rather than just to the friend he intended as the sole recipient, and then it was posted worldwide:

“I’m busy doing jack shit. Went to a nice 2hr sushi lunch today at Sushi Zen. Nice place. Spent the rest of the day typing e-mails and bullshitting with people.” He signed off, “So yeah, Corporate Love hasn’t worn off yet. . . . But just give me time.”

A helpful guide to business and legal use of e-mail is David Shipley and Will Schwalbe, *Send: The Essential Guide to Email for Office and Home* (2007).

C. Computer-Based Negotiation Help and Online Dispute Resolution

Today's negotiation software programs are not your parents' calculator, spreadsheets, and word processors. The power of the computer to process information is now combined with the Web-based power of the Internet and computer networks to transmit information. The ever-improving resources of cyberspace, initially used to assist traditional, face-to-face negotiation processes, have evolved to offer alternative ways of negotiating to reach a settlement online. So now an attorney can tap into the Internet to take advantage of sophisticated, programs and databanks to prepare, strategize, and improve their negotiation effectiveness, or use online dispute resolution platforms (ODR) to resolve money claims, as well as more complex issues in cases involving multiple parties.

Two of the software programs to aid in planning and preparing for negotiations were described in Chapter 5 (*ExpertNegotiator.com* and *NegotiatorPro.com/negpro50coms.html*). There is also a smartphone app to help you assess your negotiation style and determine after a negotiation how you can improve from the experience and what you can do better next time. (See *Negotiation 360*.) Another intriguing program available as software or as a tablet app is designed to help lawyers plan a specific negotiation strategy, including how much to demand or offer at the beginning of a negotiation and at each successive round to reach a target amount. *PictureItSettled.com* uses predictive analytics based on statistical studies of thousands of negotiated settlement histories by case categories and other distinguishing inputs to predict the behavior of opposing negotiators. This information is analyzed to graph the probable monetary moves necessary to reach an optimum settlement. It was initially designed to help in-house lawyers plan a negotiation strategy calculated to induce cooperative behavior and to reach settlements at favorable numbers.

The above programs are designed to help negotiators on one side optimize their outcomes. Another category of Web-based computer programs exists to provide all sides with an alternate way to reach a mutually satisfactory outcome online. There are cybernegotiation sites that conduct monetary negotiations using sophisticated algorithms to match demands and offers in a double-blind bidding process. (See *Cybersettle.com* and *Fairoutcomes.com*.) Although initially created to be used to settle insurance claims, these blind bidding platforms can be used in any negotiation involving a single variable, like the amount to be paid in settlement of a contested medical bill, which now appears to be the primary use of *Cybersettle*.

Lawyer Negotiation Meets High Tech

The story of how *Cybersettle.com* was created to resolve insurance claims by computer blind bidding is an interesting tale combining lawyer negotiation, tech start-up, and maybe a little urban legend. In 1995 two seasoned New York City trial attorneys, Charles Brofman and James Burchetta, were representing opposing sides in an insurance claim and met in the courthouse in an attempt to settle their case. They were tens of thousands of dollars apart, but they each felt they knew roughly the amount for which the case would eventually settle; they just didn't want to show their hand to the other side and risk paying more than necessary or leaving money on the table.

The lawyers agreed to write down their bottom-line numbers on a piece of paper and hand them to a clerk, who was instructed to indicate if the numbers were within \$1,000. If they weren't, the clerk would destroy the papers and neither side would know what had been written. If they were within the range, they would split the difference. The numbers were in range and the case settled in minutes. The paper process used by those New York attorneys is now automated through a double-blind computer bidding program, which preserves the secrecy of the demands and offers. Brofman and Burchetta obtained a patent for the process, created *Cybersettle* and later sold the company for millions of dollars, before engaging in litigation with the off-shore purchaser.

Cybersettle became a go-to resource for the Association of Trial lawyers of America, the New York State Trial Lawyers Association, and the American Arbitration Association. It has counted among its clients Wal-Mart, General Electric, and Zürich Insurance, along with the city of New York's Office of the Comptroller. When a claim is filed against a *Cybersettle* client, the client receives an electronic request to settle the matter online. Both parties log in to the system and submit three different amounts of money for their demands or offers. Neither side knows what dollar amounts were submitted during the online process. Whenever the competing numbers come within a certain range, as determined by the *Cybersettle* program, both sides are alerted and a live person steps in to finalize the amount to be paid. That payment is made online through the *Cybersettle* site. Although mostly used for smaller cases, the company has reported online settlements as high as \$12.5 million. (See Douglas S. Malan, "A Numbers Game," 36 Conn. L. Trib. No. 4 (2010).)

There are secure, Web-based platforms to facilitate communication between negotiators that go beyond quantitative monetary claims to resolve qualitative issues based on prioritizing interests (see *Smartsettle.com*). *Smartsettle* offers an unattended, automated process for simple cases, and a facilitated process for more complex ones, including multi-party matters. The platform moves disputants through several stages that clarify the issues in dispute, gauge how strongly the parties feel about these issues, and prioritize acceptable outcomes. Parties are asked to place values on their different interests and demands. In this process, *Smartsettle* provides a structure to clarify and assess issues that, by itself, can help parties reach consensus. *Smartsettle* works to combine interests and issues

into packages so that the parties can see the impact of various decisions, enabling them to reach an agreement that meets their needs. A successful end result will involve trade-offs by each party. A novel feature offered by Smartsettle, is that it can take a tentative agreement and, based on information obtained, suggest other possibilities that may give each party a more favorable, or optimal, outcome.

ODR has had its greatest success in resolving disputes arising from e-commerce and online marketplaces, which generate a tremendous number of long-distance conflicts that can best be settled online using cloud-based programs to automate the dispute resolution process between sellers and buyers. In 1999, eBay decided that having a dispute resolution process might strengthen trust between buyers and sellers. eBay selected an Internet startup, SquareTrade, to be its dispute resolution provider. Before providing a human mediator, SquareTrade used the Web, rather than e-mail, as the means for communicating and working with disputants. SquareTrade recognized that almost all eBay disputes fell into eight to ten categories, allowing it to create forms that clarify and highlight both the parties' disagreements and a choice of solutions. If Web-based negotiation failed, SquareTrade provided a human mediator for a modest fee. The negotiation was then individually facilitated by the mediator using the Web interface so they did not all need to participate at the same time. SquareTrade resolved millions of eBay disputes and put ODR on the global map. More advanced electronic platforms now offer automated cyberresolution of all types of claims that arise from e-commerce. (See *Modria.com*.) These computerized settlement functions for consumer online disputes reduce the need for customer care personnel or call center involvement, as well as the assistance of lawyers.

Professor Ethan Katsh, a leading authority on ODR has stated, "ODR will grow in importance as offline activities migrate to the Web. The growth of ODR is partly a recognition that disputing is a kind of growth industry on the Internet. ODR is also, however, a sign or indicator that cyberspace is maturing. Many of the same tools that built such online venues as auctions, stores, and casinos can contribute to building online civic institutions such as courts and dispute resolution systems." (Katsh, Online Dispute Resolution, in *The Handbook of Dispute Resolution* 425 (Moffitt and Bordone eds., 2005).)

Problem

Assume you are consulted by a business client who purchased a computer server system from an out-of-state supplier in a private transaction for \$80,000. The system is dysfunctional, and the client believes that the seller defrauded him by not revealing that the system would function only with customized software, which would require an additional \$17,000 to create. Even with this software, the client says, the system probably will not handle the volume of data that he has to process, contrary to assurances given during the sales process. He wishes to revoke the transaction. He has heard about the Cybersettle system and wonders if it would make sense to use it. What would you advise your client and why?