

Tips for Effective Electronic Communication Between Disputants

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Abstract

Parties to disputes often communicate poorly by electronic means, which can impact on their ability to effectively engage in mediation. This paper analyses the reasons for poor electronic communication by reference to general theories of communication, and the systems and structure of electronic communications. From this analysis, the paper suggests ten tips in which mediators can assist clients to communicate electronically more effectively.

Parties to mediation and disputes have many issues about which they must communicate. These include:

1. Substantive issues which will be the subject of any agreement they might reach.
2. Procedural issues about how they wish to resolve the substantive issues.
3. Relational and emotional issues. Parties to disputes often feel the need to express how they feel about each other. Weber *et al*² describes how individuals seek to understand their own lives and their relationship with others through a process of account-making. Account-making is the construction of story-like understandings of events. These accounts are first privately formulated and rehearsed, and then subsequently disclosed and negotiated with others.³ One or both parties may wish to express their account and narrative of the dispute and their relationship to the other and attempt (often unsuccessfully) to have the other agree.

Parties to disputes have a number of different ways they can choose to communicate. 'The medium through which a negotiation takes place affects outcomes by fundamentally affecting the parties' perceptions of one another and of the interaction in which they are participating'.⁴ Their choices of medium include:

1. Face to face (hereafter referred to as FtF). FtF discussions can be planned and agreed, or be spontaneously initiated by one party.

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2 Ann Weber, John Harvey and Terri Orbuch, 'Communicating Accounts of Relationship Conflict' in Margaret McLaughlin, Michael Read and Stephen Cody (eds), *Explaining One's Self to others: Reason-giving in a Social Context* (Lawrence Erlbaum Associates, 1992).

3 Ibid 261.

4 Kathleen McGinn and Rachel Croson, 'What Do Communication Media Mean for Negotiators? A Question of Social Awareness' (2005) 1 *Communication Media*.

2. Through third parties such as family, friends, business partners, employees, lawyers, mediators etc.
3. Telephone.
4. In physical writing via notes, formal letters etc.
5. Electronically. This can be directly to each other via email or text. This can also be indirect via postings on social media sites. This paper focuses on both direct and indirect electronic communications (hereafter referred to as electronic communications or EC).

Problems of Electronic Communications

The last twenty five years has seen the rise of the internet and email. Electronic communications have enabled the number and frequency of communications between disputants to multiply exponentially. Affidavit evidence tendered in court proceedings now often annex hundreds of pages of emails and text message records, as well as social media postings. Lawyers negotiating on behalf of disputants are cc'd in on countless email exchanges between disputants; and themselves engage in rapid fire email exchanges with opposing lawyers. Mediators can be included as a recipient of email exchanges between parties; and can struggle to maintain neutrality in joint emails sent to parties.

Relevance of the Problems of Electronic Communications to Mediators and Dispute Resolution Practitioners

Matters discussed in this paper will be of relevance to Dispute Resolution Practitioners in a number of ways including:

1. Impact on mediators working with clients
Practitioners may not necessarily hear or see the long history of negative ECs that ~~that~~ are silently remembered by parties and continue to impact on them in the mediation room. Alternatively, they may hear a great deal about earlier EC as the parties complain explicitly about them. In either event, it will impact on the ability of the parties to work together in the mediation room.
2. Electronic Communications as part of Dispute Resolution
This might be the use of EC to provide entirely online process, or email as adjunct to FtF mediation.
3. Practitioners own ECs with clients in handling initial enquiries, setting up mediations, housekeeping matters between pre meetings and joint sessions, follow ups after mediation etc.

Two Models of Communication

Early writers such as Shannon and Weaver⁵ conceptualised communication via a transmission model. They described communication as a process by which messages are encoded at a source (the sender) and transmitted along a channel (such as the mediums described above) to a destination (receiver) where

5 C Shannon and W Weaver, *The Mathematical Theory of Communication* (University of Minnesota Press, 1949); Robert Krauss, 'The Role of the Listener: Addressee Influences on Message Formulation' (1987) 6 *Journal of Language and Social Psychology* 81.

they are decoded. Problems in communicating can be attributed to mistakes in the coding or encoding of messages.

The need to explain miscommunications led to various elaborations on this encoding-decoding model.⁶ Shannon and Weaver added the notion of 'noise' in the communication channel which creates gaps in the message which the receiver attempts to fill in. The filling-in is often incorrect and negative – especially in the mistrustful atmosphere of conflict. Subsequent theorists introduced the notion of feedback by which the receiver communicates (perhaps via body language or gestures or (dis)confirming comments) causing the sender to modify their message as it is formulated and sent. Barlund⁷ introduced an additional step being a person's communication with him or herself which influences meaning and action. In the transmission model, the sender and receiver remain independent agents or autonomous information processors.

A contrasting model is the dialogic⁸ or constructionist approach.⁹ This model views communication as a joint activity. The meaning of the communication is in the relationship and the particular circumstances of the interaction.¹⁰ The perception of a message and its meaning develops over time. The parties to the dialogue develop hypotheses as to possible meanings, and test those hypotheses against available information. There is a tendency to seek out, or alternatively screen out, data to confirm a party's preliminary hypothesis. The data used is words, behaviours (gestures, tone, facial expressions), the situational context, the receiver's life experience and world knowledge. What people see or hear (or read in ECs) is a function, at least in part of what they expect to see.¹¹ The more ambiguous the message or stimulus, the more the receiver's expectancies guide the interpretation.

Krauss writes that 'the meaning of a message is more usefully thought of as something that is negotiated between sender and receiver'.¹² Each negotiation about substantive issues also contains a series of smaller sub-negotiations about process, meaning and communication.

The constructionist model presents communication as a dynamic process. The message the receiver hears is almost always composed of factors which are beyond the intention of the sender¹³ who does not have control over the meanings attributed by the other to their message. It is the receiver who adds the meaning to the message. Fundamental attribution theory suggests that the sender will attribute the receiver's different inferred meaning (compared to that intended by the sender) to the mala fides or stupidity of the receiver. False consensus bias theory suggests that we accept the accuracy of our views as being self-evident and the failure of another person to share our views is due to them being either 'mad or bad'. We tend to be overconfident about both our ability to correctly understand others, and

6 Joel Bowman and Andrew Targowski, 'Modelling the Communication Process. The Map is not the Territory' (1987) 24 *Journal of Business Communication* 21, 24.

7 Ibid 28.

8 Robert Krauss and Ezequiel Morsella, *The Handbook of Conflict Resolution* (Jossey-Bass, 2006) 146.

9 Krauss, above n 5, 83.

10 Krauss and Morsella, above n 8, 153.

11 Nicholas Epley and Justin Kruger, 'When what you type isn't what they read: The perseverance of stereotypes and expectancies over email' (2005) 41 *Journal of Experimental Social Psychology* 414-422.

12 Krauss, above n 5, 86.

13 Lee Thayer, *Communication and Communication Systems* (Homewood, IL, 1968).

also the ability of others to understand us. Neither party has total control over the meaning of their communications or negotiation but each adds to it for better or for worse. With each new message the sender and receiver (and their relationship) are changed. Each party effects and changes the other.

From a constructionist perspective, each utterance in a discourse expresses both an action on behalf of the speaker, and also evokes a reaction from the listener.¹⁴ Differently structured utterances will evoke different kinds of reactions. Questions will elicit different types of responses from the listener compared to demands. An open question will cause the listener to answer differently to a closed question. Disputants however typically lack insight into how their modes of dialogue effect the likely responses from the other. Similarly, they lack insight into how the dialogue of the other impacts on their own choices in responding. As discussed below, EC tends to encourage certain kinds of utterances and therefore elicit certain kinds of replies.

The constructionist approach therefore suggests that disputants who wish to communicate effectively need to focus on the other party (which is difficult where there is a lack of trust and respect) in two ways.¹⁵ Firstly, the sender must formulate their message taking into account the receiver's state of mind (which can be hard to assess in the midst of conflict). Secondly, the receiver must consider what the sender's intention was – rather than how the message affected them. In short, disputants need to try to take the other's perspective but may be unwilling to do (because it would validate the other) or may be cognitively or emotionally incapable of doing.

Special Characteristics of Electronic Communications

Email and text communications have distinctive features that affect how disputants communicate and negotiate.

These features include:

1. Isolation & anonymity:

Electronic negotiators are communicating in physical isolation from each other which creates a sense of anonymity. This has a number of consequences including:

- (a) This isolation reduces the ability for each person to check with the other that they have heard and understood. There is therefore greater opportunity to misunderstand and be misunderstood. Gaps or ambiguity in meaning will be filled in by the listener in accordance with their expectations – which in conflict are likely to be negative.
- (b) Lack of physical proximity and feedback reduces possibility of rapport and trust building.
- (c) Anonymity reduces inhibitions and parties tend to be less courteous and more easily angered. Raines¹⁶ suggests electronically communicating parties feel safer to express strong emotions.

14 Linda Putnam, 'Communication and Interaction Patterns' in Andrew Schneider and Christopher Honeyman (eds) *The Negotiators Fieldbook* (American Bar Association, Section of Dispute Resolution, 2005) 385-394.

15 Krauss and Morsella P 154.

16 Susan Raines, 'Mediating in Your Pajamas – The Benefits and Challenges for ODR Practitioners' (2006) 23 *Conflict Resolution Quarterly* 359.

THE ARBITRATOR & MEDIATOR SEPTEMBER 2015

In EC, they also lack the ability to use body language to modify the strength of their words. Parties use EC to state their own concerns rather than listening to the concerns of the other. Social and physical distance may encourage increased confrontational behaviour and a greater focus on self.¹⁷

- A
- (d) The sender has little control over when or in what location the other party receives ^{an} EC. Party B might receive the text or email at work, home, whilst driving, with children etc. By sending the EC, Party A is requesting Party B to consider and respond to the EC at a time when she might be poorly equipped to do so properly. When A reads the EC stuck in traffic late to collect children and replies sternly, ^B will attribute ~~Alex's~~ short and sharp response to her aggressive or irrational personality rather than to her circumstances. A will not consider how (according to the constructionist model) he has caused B to reply in the circumstances and way in which she did. Using the transmission model of communication, there is increased 'noise' in EC which must be filled in by the receiver. ^B
- (e) Isolated parties engage in reduced perspective taking. They are less likely to consider how, when and where their message may be received. Party A may send a series of ECs to B as each new concern or complaint occurs to him. This can lead to frequent ECs which may be interpreted by B as harassing or intimidating.
- (f) The lack of simultaneous feedback does not allow A to check B's reaction as she formulates and delivers her message and thus be able to modify it as she does.¹⁸
- (g) Party A is unlikely to know the mood of Party B when Party A sends a message, and even less of B's mood when B receives the message. A will therefore be unable to modify their message taking into account B's circumstances.
- (h) Some writers argue that the isolation and anonymity of EC has some benefits. In difficult relationships, physical isolation might avoid parties' acrimony for the other being triggered by their physical presence. Parties with greater status or social power may have more 'air time' in face to face negotiations and that this might be balanced by the remoteness of EC.¹⁹

2. Asynchronous:

- (a) ECs are not sent, read or replied to in real time or in any predictable time pattern. ECs do not provide a conversation but rather a series of intermittent one-directional comments.²⁰ Messages can potentially be sent extremely quickly or very slowly. This can helpfully provide time to carefully consider how to respond unlike FtF where an immediate reply is expected. However, a party's failure to respond within what the other thinks is a reasonable time can

17 Anita Bhappu and Zoe Barsness, 'Risks of Email' in Andrew Schneider and Christopher Honeyman (eds) *The Negotiators Fieldbook* (American Bar Association, Section of Dispute Resolution, 2005) 385-394.

18 Raymond Friedman and Steven Currall, 'Conflict Escalation: Dispute exacerbating elements of e-mail communication' (2003) 56 *Human Relations* 1331.

19 Lee Sproll and Sara Kiesler, 'Reducing Social Context Cues: Electronic Mail In Organisational Communication' (1986) 32 *Management Science* 1492. Also see Bhappu and Barsness, above n 17, 1492.

20 Friedman and Currall, above n 18, 1334.

cause negative attributions of disinterest, disrespect etc. Alternatively, very prompt or frequent responses may be perceived to be harassing.

- (b) The potential to send and receive messages at any time and without the consent of the other party (unlike a FtF meeting where both have to agree to meet) adds to the sense of the parties interdependence and lack of autonomy. The other party is ever present in the form of unsolicited ECs. It is harder to decompartmentalise negotiations which can overwhelm all other activities.
 - (c) An alternative view is that the lack of immediacy allows parties time to consider the message of the other and reflect on an appropriate response, rather than having to respond immediately to comply with conversational rules.
 - (d) Friedman refers to 'argument bundling' by which Party A sends a very long EC incorporating many points which attempt to cover all matters which have already been, or which might be, raised. It can be difficult for Party B to respond to all matters without sending a similarly long EC. A failure to address a point A perceived to be significant will cause A to attribute negative intentions to B such as a lack of interest. A very long EC may cause B to dismiss it as A ranting, and not consider responding. A will attribute rudeness or dismissal to B's failure to respond.
3. Mismatch of technology and skills:
- (a) Parties may have different technological resources. One may have the latest smart phone or tablet which allows easy typing, storage of messages and receiving of messages. The other may rely on a simpler, cheaper phone and only be able to log in occasionally to check emails. One party may have more highly developed typing skills and greater adeptness at written expression than the other. Variation of written language skills is probably not a greater problem than one party's greater spoken language skills in a FtF context.
4. EC is text based:
- (a) This has potential advantages and disadvantages. Some writers argue that email is a lean medium which reduces the social presence of communicators, increases the perceived social distance among negotiators, and causes parties to engage in more self interested behaviour. Bhappu et al refer to media richness in email as the capacity of a communication medium to transmit visual and verbal cues, to support a variety of languages (e.g. body language, tone and intonation of voice etc), and to provide feedback. ECs allow none of these. The transmission model of communication would suggest that there is insufficient data being transmitted. The constructionist model would suggest EC does not allow for the mutual testing of hypotheses of meaning.
 - (b) Other writers argue that the leanness of EC technology (and physical isolation) helpfully screens out the triggers caused by the physical presence of conflictual parties and allow them to focus on the message rather than the messenger.

- (c) EC technology does have the potential to allow for parties to exchange photos, schedules, spreadsheets, diagrams etc. This can help them explain their concerns and proposals and also to build trust and rapport through peace offerings of information, photos etc. Technology also allows for reviewing and editing of messages before they are sent – unlike a spoken communication (whether FtF or over the phone) which are spoken simultaneously whilst being mentally formulated. These potential benefits must however be utilised – ‘the ability to edit must interact with some desire or motivation to optimise one’s message’.²¹

5. Permanency and reviewability:

The ability to store and review messages has advantages and disadvantages. It allows excess attention to account-making about the parties, their relationship and the conflict.²² EC is permanent whilst spoken words are ephemeral. Once stated in text, it is harder for a party to step back from written statements and to attempt to do so creates face saving problems. The recipient of a written message is more likely to presume it was carefully considered and intended - compared to a throwaway comment made orally.

ECs are easily passed on to the parties’ ‘teams’ who provide reinforcement. Team members might include spouses, friends, family, lawyers, mediators etc. It can be unclear if these additional indirect recipients are being asked to reply or do anything, or if the creation of the broader audience is just intended to influence and elicit response from the direct recipient being the other party to the dispute.

EC leads to greater attention and rumination being given to individual messages. A party who expends a great deal of time considering and responding, will presume the other party devoted a similar amount of time. Parties are likely to become more invested and welded to a position taken in a carefully crafted response than to a brief spoken comment.

6. Difference between text and email:

Moore writes of texts as being akin to oral communication.²³ Texts tend to be shorter, and are written spontaneously and rarely proofread. Senders of texts conceptualise them as akin to phone conversations. They may be sent as a speech substitute but can be read as formal written document. This can lead to an increased disjunct between intent and effect.

7. Overconfidence and self-confirmatory biases:

The failure of Party B to correctly understand Party A’s EC (the meaning of which was so self-evident to A) will cause A to attribute B’s misunderstanding to B’s stupidity, negativity or aggression – rather than to the difficulties of effective EC. B’s misunderstanding will confirm A’s expectation of B which have been shaped by the history of their conflict.

21 Joseph Walther, ‘Selective self-presentation in computer-mediated communication: Hyperpersonal dimensions of technology, language and cognition’ (2007) 23 *Computers in Human Behavior* 2538-2557.

22 Weber, above n 2, 262.

23 Oren Soffer, ‘“Silent Orality”: Toward a Conceptualization of the Digital Oral Features in CMC & SMS Texts’ (2010) 20 *Communication Theory* 387, 390.

Tips for Effective Electronic Communication for Mediators

Mediation, and dispute resolution generally, depend on communication. Parties have choices of how to communicate and their choice of medium will impact on the quality of the mediated or negotiated outcome.

The meaning of a message lies more in the receiver's interpretation (and how they attribute meaning to it) than the intention of the sender (who ideally needs to assess the state of mind of the receiver). The higher the level of conflict between the parties, the lesser their ability to accurately assess each other's state of mind. EC only allows for the transfer of a narrow range of information and leaves many gaps to be filled in by the sender without the assistance of simultaneous feedback.

EC is therefore best used for procedural exchanges of information and short term issues. EC should be avoided for negotiating longer term substantive issues or relational and emotional issues

If a party chooses to use EC, they could be assisted by their dispute resolution practitioners discussing with them the following suggestions for dispute resolution practitioners to discuss with clients. Mediators can discuss these suggestions with individual clients at pre meetings or private sessions. They can be discussed with both parties together at joint mediations. Lawyers can raise these suggestions privately with their clients, or at joint settlement conferences or collaborative practice meetings with the other party and their lawyers. The discussion could start with how parties have found their electronic communication. The likely answer that 'it has been difficult' gives an opportunity to ask if the party would like to discuss how communications might work better. Alternatively, if a settlement option is likely to involve ongoing EC, the conversation could be around how the implementation of the agreement might work most effectively. Mediators can also utilise these tips in entirely on-line mediations, or in using EC to set up FtF mediation.

1. Before sending (or replying to) a text or email consider:
 - (a) Do you need to communicate or respond? You do not have to respond to their communications.
 - (b) What is the best medium? It is your choice as to what medium (FtF, phone, via third party, arranging mediation, electronically) to use to communicate. You do not have to reply to their communication using the same medium. You do not have to reply in the same emotional tone, or with the same frequency.
 - (c) What is your purpose? If it is to vent, criticise or complain – do not do it. Text and emails are bad ways to raise difficult issues or communicate feelings about the relational and emotional issues of the dispute. You have very limited ability to change the point of view and behaviour of the other party (and no ability to change their personality). You will not do it via ECs. Texts and emails are however great ways to confirm something previously discussed or provide straightforward factual information.
2. Do not presume you correctly understand the other person's thoughts and motivations.
 - (a) It is hard to understand the other person's intended meaning without the tone of voice, facial

THE ARBITRATOR & MEDIATOR SEPTEMBER 2015

gestures and body language when we are speaking directly with them. In particular, do not presume that if the other person's message made you feel bad that that was the intention of the other person. Without attacking or criticising, be curious and ask them.

- (b) In drafting a message, carefully consider whether you know how they will react. If in doubt, do not send it.
 - (c) The greater the conflict, the less accurately you will each be in assessing the other's mindset and intention.
3. Be careful with (and probably avoid) humour especially irony and sarcasm. Your joke might be interpreted as a criticism.
 4. Save ECs before sending them. Leave them for a few hours (or ideally overnight) and then review them before sending. If an immediate message is necessary restrict the message to the practical essentials (eg. time, place, amount, method of payment or delivery etc). Omit references to how the other party got it wrong and how 'it better not happen again'. How to avoid the difficulty occurring again is best left until after the immediate problem is resolved.
 5. Do not write texts or emails when angry or intoxicated.
 6. Emails and texts are not informal verbal conversations. Do not write quick throw-away or 'off the cuff' messages. Remember that your messages can be saved, reviewed, printed and forwarded. Do not send a text which you would be embarrassed for any other person to read. Treat your ECs with the other party at least as seriously as emails you send for work or business.
 7. Use ECs to make positive comments – do not just use them for problems. Ideally, the positive exchanges in your ECs should significantly outweigh the negative. If your ECs are dominated by acrimony, consider choosing new ways to communicate and negotiate. Use them to thank the other party when appropriate or to pass on useful information. Discuss with the other party an agreed protocol of ECs. This can include frequency, length, preferred phone numbers and email addresses, realistic reply times, and agreed subjects for ECs.
 8. If you each exchange more than three emails or texts on the same issue, you probably need to switch to a different medium of communication. This rule of thumb could be part of an agreed protocol.
 9. Social networking sites. Do not use them for dispute resolution!
 10. Also remember general rules for effective communication - irrespective of the medium. These include:
 - Do not criticise or belittle the other person. Instead explain how their actions make you feel. Use 'I statements'. These involve describing how your emotions arise out of their behaviour. The statement is therefore about you and the problem, rather than an attack on the other person.
 - Avoid absolute statements such as 'never' or 'always'. These invite the other person to find an exception and thus avoid the substance of your concern.

THE ARBITRATOR & MEDIATOR SEPTEMBER 2015

- Avoid offensive or inflammatory language.
- Express your proposals as a request or suggestion (not a demand) which the other person can choose to accept or reject. A proposal expressed as a demand is likely to be rejected because it is a demand (irrespective of its merits). If the other party makes a demand in EC to you, do not dismiss it immediately. Rather, say something like 'Well, that's one option for us to consider. Before making a decision, let's see what other options there might be'.