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## CYBER E-MAIL NEGOTIATION VS. TRADITIONAL NEGOTIATION: WILL CYBER TECHNOLOGY SUPPLANT TRADITIONAL MEANS OF SETTLING LITIGATION?

Lynn A. Epstein\*

E-mail is on the way to becoming the foremost method of communication in the workplace.<sup>1</sup> In 1998, there were approximately 47,000,000 e-mail users in the United States with the estimated use at 105,000,000 by the year 2002.<sup>2</sup> Nine out of every ten employees have access to e-mail.<sup>3</sup> Despite the virtual communication explosion, attorneys lag far behind their business brethren. Although nearly two-thirds of American law firms maintain web sites, many lawyers are reluctant to incorporate virtual “e” technology into their practice arsenal.<sup>4</sup> If the historical growth trend bears out, lawyers must overcome their techno-phobia<sup>5</sup> in order to interface their practice methodologies with the business clientele’s virtual demands.

Attorneys who add virtual e-mail to their negotiation practice are one step closer to the positive incorporation of the virtual world, which helps to meet the client’s best interests in today’s fast-paced technological society. Though online mediation and negotiation business models recently surfaced in cyberspace,<sup>6</sup> little analysis has been dealt toward negotiation without intervention of a virtual third party mediator. This article, first, explores the advantages and disadvantages of e-mail negotiation versus traditional face-to-face negotiations. Next, the article will explore the ethical concerns inherent in e-mail negotiations. Finally, the article

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1. SAMUEL A. THUMMA & DARREL S. JACKSON, *The History of Electronic Mail in Litigation*, 16 *COMPUTER & HIGH TECH. L.J.* 2 (1999).

2. *Id.* (stating that estimates suggest the number of e-mail users doubles every two years).

3. See ANTHONY J. DREYER, Note, *When the Postman Rings Twice: The Admissibility of Electronic Mail Under the Business Records Exception of the Federal Rules of Evidence*, 64 *FORDHAM L. REV.* 2285, 2288 (1996) (based on 1996 estimates in companies with more than 1,000 employees).

4. CATHERINE J. LANCTOT, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 *DUKE L.J.* 147, 149 (1999) (stating that lawyers seem to “harbor latent nostalgia for the days of parchment and quill pens, or at least for mag cards and IBM Selectric typewriters”).

5. See IAN OLGEIRSON, *Internet, Schminternet! Cyberskeptics Speak Out*, *DENV. BUS. J.*, Oct. 4, 1996, at 25A, 29A (referring to the legal profession as “notoriously techno phobic”).

6. For example, [www.cybersettle.com](http://www.cybersettle.com) and [www.clicknsettle.com](http://www.clicknsettle.com) are two Internet services that will act as intermediaries and exchange offers for parties. However, these services have numerous limitations, mainly in that money must be the only issue and they simply navigate distribution of offers and expiration periods for these offers.

proposes guidelines for attorneys eager to engage in cyber e-mail negotiation.

## I. THE PROS AND CONS OF E-MAIL NEGOTIATION

Cyber e-mail negotiation offers numerous benefits and minimal detriments.<sup>7</sup> These include:

### A. *Time and distance*

Cyber e-mail negotiation constitutes practice at leisure. When sitting down to a traditional face-to-face negotiation, time is often of the essence. Attorneys generally have allocated a specific amount of time to negotiate. When negotiating telephonically, talks often break down due to the ease with which, often faceless, parties can reject proposals.<sup>8</sup> E-mail negotiation combines the luxury of negotiating as time permits in an attorney's schedule with the tools necessary to perform negotiation surgical strikes. Whether it's 6:00 a.m. or 6:00 p.m., the attorney can make an offer or respond to an offer. The virtual time factor allows participants to reflect and review their positions before articulating them.<sup>9</sup> They also have the luxury of taking a break without fanfare if emotions begin to run too high.<sup>10</sup> Furthermore, e-mail negotiations avoid the frustrations inherent in telephone tag gamesmanship or the worry over violating the prescribed time limit set by the parties, the mediator, or the court.<sup>11</sup>

Of course, one of the main benefits of online communications is that there are no distance barriers. You may negotiate by e-mail with an attorney one mile away or 1,000 miles away with the same force and effect. You may include or exclude as many parties as desirable. No more canceled flights, late arrivals, or car breakdowns. All parties are accessible and available.

The time and distance afforded by online negotiation may nonetheless pose certain disadvantages. Often time limits, whether actual or feigned, have a positive effect on negotiations. Parties who set a deadline for negotiations may find that demands and bluffing tactics tend to decrease as time pressure increases.<sup>12</sup> However, if negotiation time deadlines are not shared by the parties

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7. For purposes of this discussion, this article refers to negotiations by use of an e-mail systems provided by companies like America Online and Microsoft Outlook. This article does not contemplate other online possibilities, such as chat rooms. Chat rooms are defined as designated areas where a group of people can communicate simultaneously by typing messages to each other. See <http://www.truste.org/partners/usersglossary.html>.

8. HERB COHEN, YOU CAN NEGOTIATE ANYTHING 210-11(1980).

9. DAVID R. JOHNSON, *Screening the Future for Virtual ADR*, DISP. RESOL. J., Apr.-Sept. 1996, at 118-19.

10. ROGER FISHER & SCOTT BROWN, GETTING TOGETHER: BUILDING RELATIONSHIPS AS WE NEGOTIATE 53 (1988). Taking a break is an effective negotiating approach advocated by experts in face-to-face negotiations. This approach is often ignored, however, due to the awkwardness of the situation.

11. Court ordered mediation is now required in some form by a majority of courts. See PETER S. CHANTILIS, *Alternative Dispute Resolution Symposium: Mediation U.S.A.*, 26 U. MEM. L. REV. 1031, 1033 (1996). The attorneys typically split the cost of the mediator and often place time limits on the mediation session. See FLA. R. CIV. P. 1.700, 1.710, 1.720, 1.750 and FLA. R. JUV. P. 8.290.

12. THOMAS F. GUERNSEY, A PRACTICAL GUIDE TO NEGOTIATION 22 (1996).

or are used as a subtle threat, as in, “if you don’t accept our offer in the next hour, we will withdraw it,” the effect becomes destructive.<sup>13</sup> Time pressure threats place a party’s credibility at stake, often creating a hopeless negotiation crevice.<sup>14</sup> In cyber e-mail negotiations, the parties may impose time deadlines. The resultant effect of adopting cyber e-mail negotiation is that time restrictions typically followed under antiquated brick and mortar negotiation standards are suddenly viewed on a more flexible basis.

Notwithstanding time factor elements, the distance fostered by e-mail tests the parties’ abilities to develop a positive working relationship. A good negotiation can be dependent on the relationship among negotiators. Attorneys involved in face-to-face negotiation are encouraged to spend time “ice-breaking” before sitting down to the actual negotiation.<sup>15</sup> Spending a few moments in non-threatening small talk helps to produce a positive working relationship between otherwise opposing parties.<sup>16</sup> Like personal relationships, distance may hinder the ability to formulate a good working relationship.<sup>17</sup> If the parties plan for the negotiation and make an effort to meet in person, they may feel more dedicated to arrive at a resolution. They are also more likely to work to resolve the matter in one session<sup>18</sup> or at least to put forth the maximum attempt. Not so with e-mail negotiation. The parties may feel awkward spending time in “ice breaking”, and feel no obligation to continue with negotiations since there have been no “inconveniences” associated with meeting to negotiate. If the negotiator does not feel like continuing, he may simply type “that’s it for now” and turn off the computer. A “nothing ventured, nothing gained” attitude may be a more pervasive attitude in an e-mail negotiation.

### B. *E-mail communication is in writing*

The fact that cyber e-mail negotiation requires written as opposed to oral communication serves a positive and negative impact on the negotiation process. Typically, in face-to-face or telephone negotiations, there can often arise considerable disagreement by the parties as to what was actually said.<sup>19</sup> This is often the case since there is no memorialization of the negotiation. With cyber e-mail, there is always a record and one that cannot easily be destroyed.<sup>20</sup> Lawyers

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13. *Id.* at 115.

14. *Id.*

15. *Id.* at 43.

16. *Id.*

17. See NOAH D. KATZ, *Sidewalks in Cyberspace; See also Making Space for Public Forums in the Electronic Environment*, 12 HARV. J.L. & TECH. 149, 184-85 (1998).

18. See generally CHARLES THENSTED, *Litigation and Less: The Negotiation Alternative*, 59 TUL. L. REV. 76 (1984).

19. The disagreements generally show up when drafting the settlement agreement. A well-known saying about oral agreements is “they are not worth the paper they are written on.” See JAMES C. FREUND, *SMART NEGOTIATING* 220 (1993).

20. In fact, e-mail users are often under the mistaken belief that “delete” actually means it is gone. In actuality, delete only means you have to find it somewhere else. Contrary to popular belief, hitting the delete button does not destroy the computer records, nor is it the digital equivalent of throwing out or shredding a hard copy. Most often, deleting a file merely commands the computer to mark the

are less likely to lie in writing since they know the communication may last a lifetime.<sup>21</sup> Even though the communication would be protected from admission in court,<sup>22</sup> the fact that it is there may carry the imprimatur of it a more genuine communication.

A written communication avoids the psychological games lawyers often engage in during face-to-face negotiations. For example, tactics such as feigned or real anger or boredom are difficult to accomplish by e-mail.<sup>23</sup> While we've all been a witness to an attorney who storms out of the room and states, "You're wasting my time, I'll see you in court", it's difficult to have the same effect when leaving the virtual negotiating room. If you do not get a response from opposing counsel, it may be because opposing counsel is having a temper tantrum, attempting a stall tactic, or simply decided to go to the gym. Of course, it is possible to show anger by e-mail, often indicated by using all capital letters and exclamation marks, but such perversion in lawyer letter writing tends to not have the same effect as in person. Attorneys with an overly aggressive style may resort to excessive sarcasm in a face-to-face negotiation,<sup>24</sup> but they may be unable to translate that approach through e-mail. Attorneys also frequently resort to branding their client as unreasonable and thus blaming them for being unable to effectuate a settlement in traditional negotiations.<sup>25</sup> It is unlikely that an attorney would trash their client on e-mail since the client may very well be a part of the e-mail process, and even if not, the attorney would not risk the threat of the client reading that e-mail through later data recovery methodology.

Some tactics may still be effective in e-mail negotiation. For example, the tactic of starting a negotiation with an extreme demand<sup>26</sup> may play well in the e-mail arena. In fact, an attorney who does not care to be viewed as "weak" may feel inclined to start a point away from reason since the e-mail will be memorialized. Other tactics such as splitting the difference<sup>27</sup> and making successive concessions<sup>28</sup> may also be more effective by e-mail since they can be

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record for storage in the system's back-up or storage system, where it can be retained in the system. See CHRISTINE SGARLATA CHUNG & DAVID J. BYER, *The Electronic Paper Trail: Evidentiary Obstacles to Discovery and Admission of Electronic Evidence*, 4 B.U.J. SCI. & TECH. L. 5, 6 (1998); SUSAN E. DAVIS, *Elementary Discovery, My Dear Watson: Today's Evidence Comes in Bytes and Megabytes*, 16 CAL. LAW. 53, 53 (1996).

21. Numerous articles have been written on lawyers lying in negotiations. Often lawyers justify lying as conduct everyone does or that the conduct was not technically lying because it was not the requisite act or omission. GERALD B. WETLAUFER, *The Ethics of Lying in Negotiations*, 76 IOWA L. REV. 1219, 1237 (1990); see also MICHAEL H. RUBIN, *The Ethics of Negotiation: Are There Any*, 56 LA. L. REV. 447 (1995); THOMAS F. GUERNSEY, *Truthfulness in Negotiation*, 17 U. RICH. L. REV. 99 (1982); GEOFFREY M. PETERS, *The Use of Lies in Negotiation*, 48 OHIO ST. L.J. 1 (1987).

22. FED. R. EVID. 408.

23. CHARLES B. CARVER, *EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT* 200 (3d ed. 1997).

24. *Id.* at 200.

25. *Id.* at 206.

26. *Id.* at 186.

27. *Id.* at 221. This tactic involves splitting the remaining difference between the last offers from the parties.

28. *Id.* at 208. This tactic involves an attempt to show the other side that the attorney has made repeated concessions without reciprocal concessions from the other side. In reality, the concessions have been minimal and unjustified.

communicated in a simplified manner. While many of these tactics backfire and most are borderline unethical,<sup>29</sup> nonetheless, most negotiations still encompass these elements. An e-mail negotiation would likely eliminate some, if not most of the game playing. Arguably, the proponents of traditional negotiations would argue that attorneys are so accustomed to game playing that they may misinterpret or look for tactics employed through e-mail. However, with all the guessing it would take to interpret e-mail tactics, it seems logical attorneys would simply go for the obvious one - be straightforward.

Certainly attorneys will not be able to observe non-verbal cues through e-mail negotiation.<sup>30</sup> Many authorities believe non-verbal cues play an important role in a negotiation.<sup>31</sup> For example, facial expressions like taut lips may indicate anxiety.<sup>32</sup> A raised eyebrow suggests skepticism.<sup>33</sup> Slouching may connote defeat.<sup>34</sup> While non-verbal cues can be beneficial, some attorneys tend to overvalue their importance and misinterpret the signs.<sup>35</sup> Given the risk of misinterpretation, the absence of nonverbal cues would seem an unlikely deterrent to e-mail negotiation.<sup>36</sup>

There is also the added problem of converting spoken language to e-mail language. E-mail has been described as a combination of talking on the phone and writing a letter, with the benefit of the telephone's immediacy and a written letter's thoroughness.<sup>37</sup> However, the combination often creates a totally different form of communication.<sup>38</sup> Traditional grammar is frequently discarded and replaced by an informal language of its own creation replete with e-mail abbreviations,<sup>39</sup> slang,<sup>40</sup> and emoticons.<sup>41</sup> E-mail users have their own "netiquette."<sup>42</sup> While most e-mail language is geared toward the casual e-mail

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29. For example, Model Rule 4.1 states it is unethical for an attorney to make material misrepresentations of fact. Additionally, Model Rule 4.4 forbids harassing conduct and Model Rule 8.4 prohibits conduct prejudicial to the administration of justice. See MODEL RULES OF PROF'L CONDUCT R. 4.1, 4.4, 8.4 (1983).

30. Of course, PC cameras are on the cutting edge of technology and have the potential to become an integral part of the e-mail process.

31. GUERNSEY, *supra* note 12, at 82 (stating that some experts believe 60% of all important messages are passed nonverbally).

32. *Id.* at 38.

33. *Id.* at 39. See D. MORRIS, BODYTALK (1994).

34. GUERNSEY, *supra* note 12, at 84.

35. D. DRUCKMAN ET AL., NONVERBAL COMMUNICATION: SURVEY, THEORY AND RESEARCH (1982).

36. Race and gender bias will also disappear in an e-mail negotiation assuming the parties have not met prior to the negotiation. Race and gender issues often negatively impact negotiations in that people tend to be more cooperative when negotiating with opponents of the same race and gender. CARVER, *supra* note 24, at 281-92.

37. GENE BARTON, *Taking a Byte Out of Crime: E-mail Harassment and the Inefficacy of Existing Law*, 70 WASH. L. REV. 465, 466-67 (1995).

38. See <http://www.ehow.com> (a website that defines typical e-mail terms and e-mail slang).

39. *Id.* An example of an e-mail abbreviation is "LOL," referring to laughing out loud.

40. *Id.* An example of e-mail slang is "spam," referring to unsolicited mass e-mail.

41. *Id.* An example of an e-mail emoticon is "-P" defined as sticking out your tongue. Emoticons may one day help communicate some of the non-verbal cues missing from e-mail negotiations.

42. *Id.* Netiquette is defined as etiquette practiced on the Internet.

user, the time may come where the language and terms created by e-mail users will be the standard in all e-mail communications. E-mail negotiators may have difficulty making the transition to e-mail language, in that they may feel the need to formalize the discussion, much like a demand letter, yet they long for the informality of a face-to-face negotiation. E-mail language may not meet a requisite legalese<sup>43</sup> requirement many attorneys still feel is necessary to the practice of law. Yet with effort and repetition, the attorney may be able to strike the proper balance and appreciate the freedom from formal letter writing and appreciate the convenience and style of e-mail writing.

### C. *More planned negotiation*

Since each e-mail communication is in itself a conversational demand letter, the successful e-mail negotiator must have a negotiation plan.<sup>44</sup> The failure of many land-based negotiations is that attorneys go into them hoping to “wing” it.<sup>45</sup> Often attorneys fail to do their homework. They do not adequately counsel their client to ascertain the client’s needs,<sup>46</sup> and they do not adequately seek information from the other side to determine the other side’s needs.<sup>47</sup> “Winging it” by e-mail is a transparent act. To effectively communicate the client’s position, and to uncover the opposition’s position through e-mail, requires advanced planning, deductive reasoning, and applied strategic effort. The more strategic planning the attorney applies to e-mail negotiation, the more likely a successful negotiation process will occur absent lengthy, wasteful and needlessly repetitive e-mail exchanges.

Likewise, if an attorney proceeds without a plan and attempts cyber e-mail negotiation, the result can very often be disastrous resulting in a squandering of both the client’s financial resources and goodwill among the parties. A “seat-of-the-pants” cyber negotiation attempt will likely result in a tedious and fruitless exercise that will frustrate both parties and threaten to subvert the entire settlement negotiation process. Without adequate planning, it is likely that the negotiating would involve a multitude of miscued exchanges, where the attorneys chiefly react to the prior e-mail posting absent focus or direction. Just as in face-to-face negotiations, this effort will likely end in an exasperated exclamation of: “see you in court.”

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43. Lawyers’ uncomfotability in using legalese for e-mail communications may in fact prove to be an added benefit of e-mail negotiation. Legalese has been defined as “verbose technical, jargon and Latin phrases that obscure an otherwise straightforward text . . . a degenerate form of legal writing, where a document becomes distorted with formalities to the point that its message is no longer clear.” DOUGLAS LITOWITZ, *Legal Writing: Its Nature, Limits, and Dangers*, 49 MERCER L. REV. 709, 712-13 (1998).

44. CARVER, *supra* note 23, at 55.

45. *Id.*

46. *Id.* at 56. There are many planning theories for a negotiation. Perhaps the best known approach is called “BATNA,” which advises lawyers to discover their client’s best alternative to negotiated agreement. ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 100 (2d ed. 1991).

47. *Id.*

*D. The client is part of the negotiation process*<sup>48</sup>

Mediation has been successful, in part, due to the frequent requirement that the client attend the mediation session.<sup>49</sup> While some attorneys balk at having to perform in front of the client, the logical interpretation of statistical results is that a case is more likely to settle when a client is available and actively participating.<sup>50</sup> E-mail negotiation affords the opportunity for the client to monitor the ongoing negotiations without translation error and in virtual time. Since clients often complain their attorney fails to communicate and keep them informed about their case,<sup>51</sup> the cyber e-mail negotiation affords clients the opportunity to be “present” and take an active part in the case. Knowing the client is present will likely decrease the gamesmanship and puffery that accompanies clientless negotiations and increase the pre-negotiation counseling process so that an attorney may adequately express the client’s goals and objectives in the most effective manner to the opposing side.

*E. E-mail negotiation is cost effective*

An efficient cyber e-mail negotiation should result in a reduction in cost exposure to the client.<sup>52</sup> The time it takes to travel and conduct the negotiation is greatly reduced, or actually avoided, in cyber e-mail negotiation. When multiple parties are involved, cost avoidance or benefits are enhanced in an exponential degree. If the cyber e-mail negotiation process is effectively staged, the resultant billable time online should be effectively minimized. As client satisfaction is often equated with the economical management of legal expenses, client satisfaction is fostered by achieving this goal.

## II. ETHICAL CONCERNS WITH E-MAIL NEGOTIATIONS

Negotiations have always enjoyed a certain amount of protection from ethical constraints.<sup>53</sup> This protection is due to a longstanding tradition of allowing

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48. Not only is this a benefit of e-mail negotiations, it may in fact be a requirement under ethical codes. See STEPHEN G. BULLOCK & LINDA ROSE GALLAGHER, *Surveying the State of Mediative Art: A Guide to Institutionalizing Mediation in Louisiana*, 57 LA. L. REV. 885, 921 (1997).

49. See *id.* See also, CHRIS GUTHRIE & JAMES LEVIN, A “Part Satisfaction” Perspective on a Comprehensive Mediation Statute, 13 OHIO ST. J. ON DISP. RESOL. 885 (1998).

50. BULLOCK, *supra* note 48 (reporting that “parties experience both a high level of satisfaction with mediation and good compliance, with agreement rates in the range of 60-90%. Such results, together with low levels of relitigation, are the universal findings in mediation studies”).

51. See *e.g.*, MARTY M. SNYDER, *Disciplinary Complaints Reach All-Time High*, J. KAN. BAR ASSOC., Sept. 1997, at 4 (“The rules most commonly violated were lack of communication and lack of due diligence.”).

52. RICHARD S. GRANAT, *Creating an Environment for Disputes on the Internet*, at <http://www.law.vill.edu/ncair/disres/granat.htm>. But see JOEL B. EISEN, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305 (1998) (claiming the cost of Internet time as well as preparation by the parties may make online negotiation more expensive than traditional negotiation).

53. In fact, the main rule that addresses negotiations is the comments to Model Rule 4.1 and seemingly gives its blessing to misleading conduct in negotiations. Specifically, the rule permits certain misstatements of fact during a negotiation as long as the misrepresentation is not material. Examples of permitted misrepresentations include statements as to the authority the client has given to settle. MODEL RULES OF PROF'L CONDUCT R. 4.1 (1983).



parties to negotiate freely, and without restrictions that encompass other aspects of legal representation.<sup>54</sup> Historically, this freedom surrounded most negotiations in a shroud of secrecy. However, with cyber e-mail negotiation, the secret may be out.

In large measure, the drafters of the Model Rules of Professional Conduct<sup>55</sup> use restraint in regulating an attorney's conduct during negotiations. Following this trend, it remains doubtful that a proliferation in cyber e-mail negotiation will spawn a rapid growth in new ethical rules. Nevertheless, new ethical dilemmas may arise under the existing rules relating to: scope of representation,<sup>56</sup> communication,<sup>57</sup> and confidential information,<sup>58</sup> all of which may touch upon cyber e-mail negotiations.

The scope of representation rule is confronted when a client insists that an attorney must conduct settlement negotiations in a cyber e-mail format. Model Rule 1.2 provides that the client is in control of the objectives of the representation, and the attorney must consult with the client concerning the means to accomplish those objectives.<sup>59</sup> Although there is often debate as to what constitutes an objective or a mean, there is no doubt that e-mail negotiating constitutes a legitimate and logical means toward achieving a settlement. The comments to Rule 1.2 encourage lawyers to consult with clients about the means utilized to achieve settlement, however lawyers ultimately may exercise their discretion to adopt any means deemed appropriate to achieve settlement.<sup>60</sup> However, the comments also provide that lawyers assume responsibility for technical and legal tactical issues, while deferring to clients on issues involving expenses and concerns for third parties.<sup>61</sup>

E-mail negotiations undoubtedly concern a technical issue involving the approach to a negotiation. It may also be a tactical issue, for example, in cases where the relationship between the parties is especially acrimonious and face-to-face meetings are undesirable. One may posit that e-mail negotiations are cost effective, and thus the attorney should defer to the client's wishes. Additionally, if the opposing party requests negotiating by e-mail, failure to do so might adversely

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54. The Federal Rules of Evidence also protect negotiation discussions from admission into evidence. See FED. R. EVID. 408.

55. The Model Rules of Professional Conduct were enacted by the ABA in 1983. Most states follow the Model Rules in whole or in part. The rules govern attorney conduct and violation of the rules result in disciplinary action by the state bar.

56. MODEL RULES OF PROF'L CONDUCT R. 1.2 (1983).

57. MODEL RULES OF PROF'L CONDUCT R. 1.4 (1983).

58. MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983).

59. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1983).

60. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (1983). This comment has fueled much debate in the area of ADR as to whether an attorney must abide by a client's wishes to engage in ADR. Many advocate the rules should be amended to reflect a clients be given this right. Some states have responded by amending state rules to require client be given the choice to choose ADR. See ROBERT F. COCHRAN, JR., *ADR, the ABA and Client Control: A Proposal that the Model Rules Require Lawyers to Present ADR Options to Clients*, 41 S. TEX. L. REV. 183 (1999); MONICA L. WARMBROD, *Could an Attorney Face Disciplinary Action or Even Legal Malpractice Liability for Failure to Inform Clients of Alternative Dispute Resolution?* 27 CUMB. L. REV. 791 (1997).

61. MODEL RULES OF PROF'L CONDUCT R. 1.2 cmt. 1 (1983).

affect third persons, namely the other side.<sup>62</sup> However, even though the objective/means dichotomy is often unclear,<sup>63</sup> e-mail negotiations are certainly a means which require the attorney to consult with the client about its availability, but it is unlikely that an attorney is ethically bound to follow a client's demand to employ e-mail negotiation.

If e-mail negotiation is indeed employed, the next dilemma arises when an attorney must decide whether the client should be a part of the e-mail negotiation. Model Rule 1.4 mandates that attorneys keep clients informed and comply with requests for information.<sup>64</sup> Communications with the client before and during the negotiation process leads to more successful negotiations.<sup>65</sup> Nonetheless, it is difficult to determine whether Model Rule 1.4 specifically requires an attorney include the client in the actual e-mail negotiation process. The comments to Model Rule 1.4 seem to suggest that the more information a lawyer can transmit to the client, the better.<sup>66</sup> The comments specifically mandate that "a lawyer negotiating on behalf of a client should provide the client with facts relevant to the matter, inform the client of communications from another party and take other reasonable steps that permit the client to make a decision."<sup>67</sup> The comments also require a lawyer to explain proposals and review provisions resulting from negotiations.<sup>68</sup> Given the ease with which a client can be kept "informed" during an e-mail negotiation, it would appear that if requested, the client should be permitted to be a participant in an e-mail negotiation.<sup>69</sup> Though Model Rule 1.4 avoids mandating specific time reporting standards, the import is clear - a well-informed client in the virtual world is one who is provided information in near-real time. Even if the client does not want to be a part of the e-mail process, Model Rule 1.4 requires the attorney to inform the client of the discussions. In the case of an e-mail negotiation process, this may simply mean forwarding the communications to the client instead of copying the client as the discussions are ongoing.

Perhaps the greatest concern over adoption of cyber e-mail negotiation arises in the area of client confidences.<sup>70</sup> At first blush, it would appear that e-mail

62. See e.g., Mich. Comm. on Ethics and Professional Responsibility, Formal Op. RI-255 (1996) (requiring an attorney to inform the client if opposing counsel suggests ADR).

63. ROBERT F. COCHRAN, *supra* note 60, at 187.

64. MODEL RULE OF PROF'L CONDUCT R. 1.4 (1983).

65. CARVER, *supra* note 23, at 264-65.

66. MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 1 (1983).

67. *Id.*

68. *Id.*

69. The comment does allow the attorney to make decisions regarding strategy. See MODEL RULES OF PROF'L CONDUCT R. 1.4 cmt. 2 (1983). If the attorney could reasonably have a strategy to keep the client away from the negotiation, the rules seem to permit the lawyer to make this decision. However, this strategy would have to be in the client's best interest. *Id.* Further, given the requirement that most mediations require client attendance, there are probably not many strategic reasons to keep the client away.

70. Protection of client confidences involves two distinct rules. The attorney-client privilege, the evidentiary based rule that prohibits admission in court of confidential information and Model Rule 1.6, the ethical obligation owed by an attorney to a client to protect confidential information from disclosure. MODEL RULE OF PROF'L CONDUCT R. 1.6 cmt. 5 (1983). This article solely addresses

negotiations would not involve the exchange of client confidences since this is a communication from attorney to opposing counsel and not an exchange of information via e-mail from client to attorney. However, assuming the client is apprized of the e-mail negotiation, it may be beneficial for an attorney to discuss issues raised in an e-mail negotiation by e-mail to the client. If the client is monitoring the negotiation, the client may want to interject potential confidential information to his attorney. With the ease of forwarding e-mail or use of TCP/IP<sup>71</sup> instant messaging devices, the probability exists for a type of real time side bar communication between attorney and client. Model Rule 1.6 requires an attorney to take reasonable steps to protect client confidences.<sup>72</sup> If a lawyer uses a means of communication that carries a reasonable expectation of privacy, he has complied with the rule.<sup>73</sup> E-mail, however, raises privacy concerns in many regards. First, there is the threat of an unauthorized party intercepting the e-mail.<sup>74</sup> An e-mail message, once written, is stored on the sender's computer for an indefinite amount of time and susceptible of being intercepted by "hackers."<sup>75</sup> An e-mail message is also capable of interception on the Internet through network administrators and various programs that may intercept transmissions sent into the network.<sup>76</sup> Additionally, statistics prove that in ten (10) to twenty (20) percent of instances, e-mail messages are simply lost and thus capable of illegal and unwanted interception.<sup>77</sup> Finally, with numerous parties likely to be included in various stages of the e-mail negotiation process, there is the added threat that an attorney may send confidential information to one wrong party.

Model Rule 1.6 has been interpreted as including a negligence standard. Thus, if a lawyer uses a means of communication that carries a reasonable expectation of privacy, the lawyer complies with the client confidentiality requirements of Model Rule 1.6 even though another person might reveal the information inadvertently or through intentional interception.<sup>78</sup> Recognizing the

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Model Rule 1.6. However, since Model Rule 1.6 is considered to have a broader scope and application than the attorney-client privilege, the principles discussed should have application to this privilege.

71. TCP/IP is the standard set of protocols that allow computers to share resources across the Internet, see <http://oac3.hsc.uth.tmc.edu/staff/snewton/tcp-tutorial/secl.html>.

72. MODEL RULE OF PROF'L CONDUCT R. 1.6 (1983).

73. The Restatement of Law Governing Lawyers states that client information must be acquired, stored, retrieved, and transmitted under systems and controls that are reasonably designed and managed to maintain confidentiality. RESTATEMENT (THIRD) OF LAW GOVERNING LAWYERS at 112 cmt. d (Proposed Final Draft No. 1, 1996).

74. See ABA/BNA LAWYERS' MANUEL ON PROF'L CONDUCT, at 55:409. It should also be noted that interception of electronic communications is a felony under the Electronic Communications Privacy Act. Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848 (the "ECPA"). The ECPA provides that such intercepted electronic communication does not lose its privileged character. 18 U.S.C. § 2517(4) (1982) (amended 1994).

75. See generally MARILYN KEMPER LITTMAN, PROTECTING ELECTRONIC DATA: A LOSING BATTLE, IN SAFEGUARDING ELECTRONIC INFORMATION 20 (Jana Varlejs ed., 1996).

76. See AARON GROSSMAN, *Is Opposing Counsel Reading Your E-mail?*, MASS. LAW. WKLY., Nov. 18, 1996, at B4.

77. ALISON L. SPROUT, *Waiting to Download*, Fortune, Aug. 5, 1996 at 64. This phenomenon is traced to busy phone lines and the inaccessibility in some areas.

78. NATHAN M. CRYSTAL, PROFESSIONAL RESPONSIBILITY: PROBLEMS OF THE PRACTICE AND PROFESSION 262 (2000).

need to address e-mail communications specifically in relation to client confidentiality, the ABA issued a formal opinion stating that a lawyer's use of e-mail does not violate a client's confidences.<sup>79</sup> Despite the risk of interception, the committee concluded that attorneys need not take special measures to protect communications such as specialized encryption<sup>80</sup> or other encoding technology.<sup>81</sup> Many state bar ethic committees follow the ABA's lead,<sup>82</sup> though some have modified the conditions.<sup>83</sup> Notwithstanding the ABA's opinion, it is likely that e-mail interception will present privacy threats in the future,<sup>84</sup> where increased user sophistication and technological advancements often equate to a decline in cyber privacy. Encryption programs are also becoming more effective and easier to use.<sup>85</sup> In this constantly changing landscape, both the ABA and state bar associations must soon revisit the lax policy governing security practices over the distribution of confidential information by e-mail.<sup>86</sup>

### III. OVERCOMING ETHICAL PROBLEMS

Many of the aforementioned ethical concerns may be overcome by consultation with the client and setting parameters with opposing counsel before the e-mail negotiation process commences. For example, an attorney should discuss with the client the process of e-mail negotiation and receive the client's

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79. ABA COMM. ON ETHICS AND PROF'L RESPONSIBILITY, FORMAL OP. 413 (1999).

80. Encryption programs apply a mathematical function known as an algorithm to scramble e-mail messages. See DAVID HRICIK, *Lawyers Worry Too Much About Transmitting Client Confidences by Internet E-mail*, 11 GEO. J. LEGAL ETHICS 459, 493-96 (1998); see also DAVID P. VANDAGRIFF, *Who's Been Reading Your E-mail: Two Easy-to-Use Tools Can Protect Privacy, Integrity of Documents*, 81 A.B.A. J. 98 (May 1995).

81. See HRICIK, *supra* note 81 at 493.

82. For a thorough discussion of states following the Model Rules Formal Opinion see JOSHUA M. MASUR, *Safety in Numbers: Revisiting the Risks to Client Confidences and Attorney-Client Privilege Posed by Internet Electronic Mail*, 14 BERKELEY TECH. L.J. 1117, 1124-26 (1999). A few outdated state bar ethics opinions conclude that lawyers should not use e-mail to communicate client confidences unless the e-mail message is encrypted or the client has consented. IOWA ETHICS OP. 1 (1996) (amended by IOWA OP. 1 (1997); S.C. ETHICS OP. 27 (1994) (amended by S.C. ETHICS OP. 8 (1997) (removing the requirements)); TENN. ETHICS OP. A-650 (1998). Other states ethics opinions state that a lawyer should discuss confidentiality issues with the client when using e-mail to communicate client confidences. ALASKA ETHICS OP. 2 (1998).

83. MASUR, *supra* note 82, at 1124.

84. *Id.* at 1156.

85. *Id.* at 1159. The trend of opinions is to reject any general encryption requirement. STEPHEN MASCIOCCHI, *E-mail Confidentiality: Legal and Practical Considerations*, A.B.A. LAW PRACTICE MANAGEMENT at 45 (Oct. 1998); ILL. STATE BAR ASS'N COMM. ON PROF'L ETHICS, OP. 96-10 (1997); KENTUCKY OP. E-403 (1998); ALASKA OP. 2 (1998); N.D. OP. 9 (1997); S.C. ETHICS OP. 8 (1997) (amending S.C. ETHICS OP. 27 (1994)); VT. BAR ASS'N COMM. ON PROF'L RESPONSIBILITY, OP. 5 (1997); COMM. ON RULES OF PROF'L CONDUCT OF THE STATE BAR OF ARIZ. OP. 4 (1997).

86. It should be noted that even if an attorney manages to hurdle a disciplinary action, the attorney may still be subject to liability for malpractice. The Model Rules state that violation of the rules do not give rise to a cause of action that a legal duty has been breached. See MODEL RULES OF PROF'L CONDUCT Preamble 18 (1983). Thus, it follows that if a violation of the rules do not give rise to a malpractice claim, the converse is also true. Even if a rule has not been violated, a party may still be able to maintain a valid claim for malpractice. Additionally, despite the Preamble's directive, numerous courts will allow evidence of a violation of ethical rules as relevant to the duty of care. See generally GARY A. MUNNEKE & ANTHONY E. DAVIS, *The Standard of Care in Legal Malpractice: Do the Model Rules of Professional Conduct Define It?* 22 J. LEGAL PROF. 33 (1997-98).

approval for negotiation by e-mail before the process begins. In that discussion, the attorney should explain the procedure for conducting an e-mail negotiation, whether e-mail will be the sole means of negotiation or whether it will be utilized in a combination with face-to-face meetings. In order to address concerns with client confidentiality, the attorney should also explain the e-mail system being utilized and whether the transactions will be subject to encryption security measures. Additionally, the attorney should counsel with the client as to the information to be disclosed during the e-mail negotiations, and the potential for this information being discoverable. Finally, the attorney and client should agree upon the scope of client involvement in the e-mail negotiation process. For example, decisions as to whether the client will be copied on all e-mail negotiations, or simply provided a summary of the discussions,<sup>87</sup> or a verbal assessment following the negotiation by the attorney.

After consultation with the client, an attorney involved in cyber e-mail negotiation should set parameters before the process begins. If there is a time frame in which the negotiations should conclude, that should be decided before the process starts. Additionally, the attorneys should discuss the interface between their respective e-mail systems including details of security guards such as encryption programs, in order to decide upon a mutually acceptable procedure for continuing the proceedings in the event of a technological breakdown. The attorneys should also discuss whether their clients will be part of the online process.

Attorneys can also protect themselves from e-mail disasters by taking a few cautionary steps. First, it is paramount that an attorney reviews an e-mail before it is sent. Not only should the recipient's name and address be verified, but also the content and tone should be reviewed. Unless the negotiations are restricted to one ISP (such as AOL), typically once an e-mail is sent, it is irretrievable.<sup>88</sup> An attorney should also consider a disclaimer at the bottom of each e-mail, indicating the e-mail is confidential and is meant solely for the intended recipient.<sup>89</sup> While case law and ethics opinions are not clear as to whether the use of a disclaimer shields a lawyer from liability<sup>90</sup> a disclaimer undoubtedly alerts the recipient to the confidential nature of the transaction and shows the lawyer-sender's intent in keeping the message confidential.

Finally, the attorney must be diligent in retaining e-mail exchanges throughout the

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87. For many clients, it may be difficult to keep them away from being a part of the process.

88. Although some e-mail programs do have recall or cancel systems, most often the recipient has already read the e-mail before it has been canceled or the cancel feature still permits the recipient to read the e-mail.

89. An example of an e-mail disclaimer would be:

This e-mail contains confidential, privileged information intended only for the addressee. Do not read, copy, forward, or disseminate it unless you are the addressee. If you received this e-mail in error, call the sender at —, and ask to speak to the sender and/or first reply to this message and indicate it has been sent in error, and then delete it. Thank you for your help.

See AMY M. FULMER STEVENSON, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 375 n.159 (1997).

90. *Id.* at 376.

course of the negotiations. Separate filing systems, and the standby paper copies should be utilized. However, if the process becomes burdensome and tedious, the attorney should stop the madness. Many regrettable e-mails have been sent out of frustration and anger. If the process is not working, pick up the telephone or set up a face-to-face meeting to continue the negotiations.

#### IV. CONCLUSION

With the explosion in the use of e-mail, it is likely that attorneys will use this technology for negotiations. While some attorneys may resist the change from traditional face-to-face or telephone negotiations, many will find the benefits of this form of communication worth the effort. In fact, in the near future, attorneys may not have a choice. Clients or other attorneys and the sheer momentum of popular practice methodology may demand attorneys adopt e-mail in their negotiation tool arsenal. Nonetheless, the attorney using e-mail for negotiations must be mindful of ethical concerns and practical considerations when using this technology. Yet, once attorneys become proficient in negotiating in this forum, it may prove to be the preferred method of settling cases.

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