



The Art of Persuasion: The Written Word — Emailing and Texting

By Robert A. Creo

This is the 16th installment of The Effective Lawyer series. This column, second in a series of five, explores how lawyers can do better at utilizing electronic forms of communication. Briefs are up next, followed by position documents and reports. This five-part series will conclude with making effective presentations using a combination of written materials and technology.

client don't agree ... go file yourself!

Actual text message from one lawyer to another

Emails R US

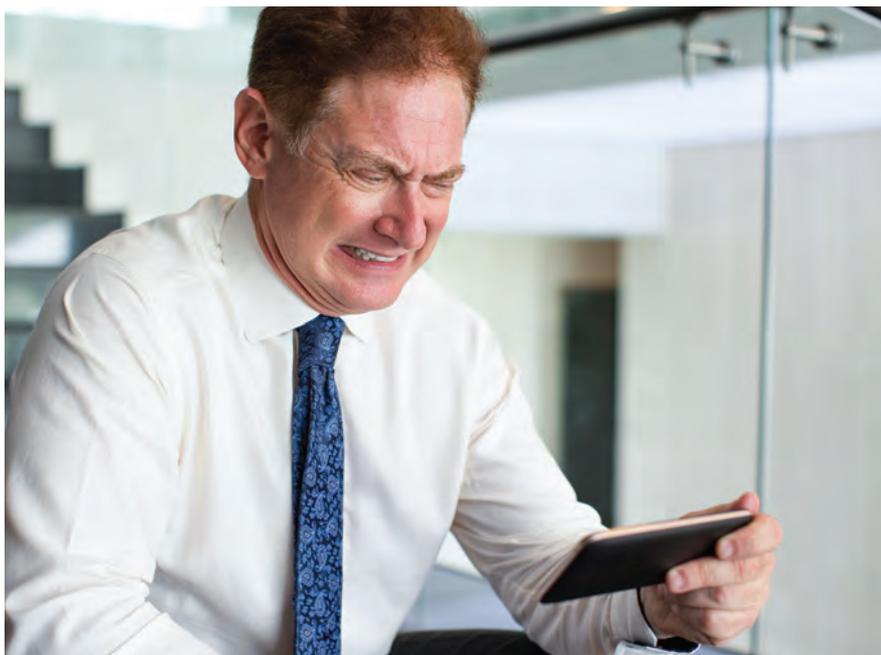
From my perspective, there is an inverse relationship between professionalism, civility and effectiveness and the use of electronic communications. The greater the reliance on email and texting for substantive communications, the more likely lawyers are to become mere technicians and surrogates directed by a win-in-any-way client culture. Technology has eroded the role of measured communication and the art of persuasive writing. The written word has increasingly become victimized as form dominates substance. The pressures of practice, especially billable hours and other man-

dates of efficiency, naturally mesh with the benefits of the speed of creating and delivering communications. Thoughts, whether good, bad, ugly or incomplete, are morphed into positions by a few clicks. It is way easier to communicate something negative from a distance rather than in a direct interaction by phone or in person. Polarization thrives on electronic communications.

Research

There is a vast amount of research on smartphone use, especially for texting and emailing. Although new results are published frequently with varying statistics, here are findings that are sufficiently reliable for you to consider:

- Overuse of smartphones hurts posture and may cause psychological harm.
- The smaller the smartphone, the greater the negative impact.
- Millennials receive on average 88 text messages per day compared to 17 phone calls.
- One in 4 people checks his or her phone every 30 minutes and 1 in 10 checks every 10 minutes.
- Using smartphones is habit forming. Sometimes we get an exciting email or are expecting a message but we don't know when, so we keep checking. This is known as variable-interval reinforcement.
- You check more often than you think. In one study, participants claimed that they only checked their email, on average, once an hour, but the study showed that they checked their email every five minutes on average. Notifications allow you to check it every time you receive a new message.
- Email takes up a quarter of your working day. According to one study, people spend an average of 23 percent of their workday on their email. Another study showed that the use of email at work was not just to communicate but also to track tasks. In this study, participants were managing an average of 65 tasks in 10 different fields at any one time.
- It only takes a few seconds for us to react to a new email, but it takes more than a minute to recover from an email. The problem occurs after we have finished reading our email and need to get back to our work. Studies show that it takes about



64 seconds for us to recover our train of thought after an email interruption.

- While we all have different ways of dealing with email, it can at times (or constantly, for some people) create stress.

- There is a lack of emotional communication. People overestimate their ability to communicate effectively with email. They usually don't realize that it is not a good way to communicate such things as sarcasm, which can be lost in an email and ultimately lead to a literal translation.

- People cooperate less in email than in face-to-face negotiations.

- People tend to be more negative in email.

- Email creates little to no rapport.

- It's easier to lie in an email. In a 2010 study, participants lied 50 percent more often in email negotiations than in pen-and-paper. People use less restraint in email. Emails are perceived as being less permanent and the use of email lowers personal connections.

This is only a fraction of the research on emailing and texting. More is added daily, and scholarly articles are published regularly as social scientists seek to understand the rapidly changing landscape.

Engagement Guidelines and Practice Tips

Devices

- Keep your head up, shoulders back and view your smartphone at eye level.

- Stretching and massaging muscle groups along the sides of the neck and between the shoulders reduces scarring and restores elasticity.

Email

- Unless the employer is the client, use your clients' personal email addresses and not their work email addresses since these are not private.

- Inform clients that they will be charged for your reading and sending email.



- Don't use email or texts to engage in personal attacks, humor or to be snarky about the opposing party or attorney, especially to your client. Do not add unsubstantiated information or speculation.

- Emails may become evidence and may result in waiver of attorney-client privilege if distributed or forwarded.

- Print important emails to proofread before you send them and to keep for your files.

- Although some providers confirm receipt of your email and the email having been opened, ask for confirmation of receipt and successful download of attachments.

- Don't overreact to content. Pause, and resist the urge to fire back. Your response can be as simple as: I am disappointed in the content of your email and disagree with it.

- Know your office's policy regarding emails before you delete them, but know that they never really disappear and can be reconstructed by computer experts.

- Use email primarily for procedural matters, such as scheduling and transmitting documents. If you include substantive content, such as a position, argument or demand, limit the number of topics. It is preferable to raise just one important sub-

ject for response per email and perhaps use multiple emails for related topics. Any more than three may get lost in the shuffle and receive only a partial or no response.

- Be concise and clear.

- Avoid self-serving commentary, summaries or long-winded confirmations. It is appropriate to follow up memorializing understandings reached in telephone calls or meetings in an email, but just stick to the facts without embellishments.

- Avoid threats or attempts to intimidate. They rarely work and may force you into a premature or unwise action.

- Invite a telephone communication or a meeting.

Texting

The sins of emailing are only graver in texting. Unless you are representing death row inmates seeking a stay, it can wait. To the extent that you feel compelled to text, the email guidelines usually apply.

Tweeting

Do not tweet.

There may be some limited value in tweeting as part of a PR campaign or crisis management effort if there is public interest in the subject or the case. I don't see

how a tweet is going to benefit your client in a court or transaction, and I believe it is more likely to backfire if the intent is to pressure or cast someone in a bad light.

Summary

Although I may be the proverbial lone voice in the technological nonwilderness, I believe we are, in fact, sufficiently intelligent, educated and able to control our impulses to wear the mantle of counselor and adviser without diminishing our individual and collective identities as learned professionals. Short bursts, zingers, memes and other darts intended as advocacy generally fall short on the persuasion continuum. The ability of these missives to be disseminated easily, and their eternal lifespan, should caution all of us to be more deliberative than reactive. As a law professor, attorney and arbitrator, I have been impressed by the talent and ability of lawyers to use written words on behalf of their clients. This skill set, which is at the core of practicing law, should be guarded from being sacrificed on the altar of communications technology. ☞

.



Pittsburgh attorney Robert A. Creo has mediated and arbitrated thousands of cases since 1979, including having served as a salary arbitrator for Major League Baseball, a grievance arbitrator for the National Football League and a hearing officer for the U.S. Senate Select Committee on Ethics Office of Fair

Employment Practices. Since 1996, he has been on the mediator roster for the Court of Arbitration for Sports in Lausanne, Switzerland. He is an adjunct professor at Duquesne University School of Law and served as an adjunct professor at the University of Pittsburgh School of Law for many years. He was recognized by *Best Lawyers in America* in both 2014 and 2017 as Pittsburgh Mediator of the Year. He is the principal of Happy! Effective Lawyer (www.happy.lawyer), an initiative focusing on lawyer contentment and peak performance. His website is www.robertcreo.com.

TAKEAWAYS

- Proofread, proofread and proofread!
- Deliberation and professionalism trump speed and efficiency.
- Use smartphones wisely.
- Be obvious in your ask or tell.
- Limit each email to one to three issues.
- Avoid or minimize using some forms of technology.

References and Additional Sources

- Maarten W. Bos and Amy J.C. Cuddy, iPosture: The Size of Electronic Consumer Devices Affects Our Behavior, *Harvard Business School Working Paper*, No. 13-097 (May 2013).
- Karen Renaud, Judith Ramsay and Mario Hair, “You’ve Got Mail!” ... Shall I Deal With It Now? Electronic Mail From the Recipient’s Perspective, 21(3) *International Journal of Human-Computer Interaction* (2006).
- Thomas Jackson, Ray Dawson and Darren Wilson, Case Study: Evaluating the Effect of Email Interruption Within the Workplace, Conference on Empirical Assessment in Software Engineering, Keele University, *EASE 2002*, Keele, UK, pp. 3-7 (April 2002).
- Mary Czerwinski, Eric Horvitz and Susan Wilhite, A Diary Study of Task Switching and Interruptions, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, pp. 175-182 (2004).
- Victor M. Gonzalez and Gloria Mark, “Constant, Constant, Multi-tasking Crazyiness”: Managing Multiple Working Spheres, Proceedings of the SIGCHI Conference on Human Factors in Computing Systems, pp. 113-120 (2004).
- Mario Hair, Karen Renaud and Judith Ramsay, The Influence of Self-esteem and Locus of Control on Perceived Email-related Stress, 23(6) *Computers in Human Behavior*, pp. 2791-2803 (Nov 2007).
- Justin Kruger et al., Egocentrism Over E-mail: Can We Communicate as Well as We Think? 89(6) *Journal of Personality and Social Psychology*, pp. 925-936 (Dec 2005).
- Michael Morris et al., Schmooze or Lose: Social Friction and Lubrication in E-mail Negotiations, 6(1) *Group Dynamics: Theory, Research, and Practice*, pp. 89-100 (March 2002).
- Charles E. Naquin, Terri R. Kurtzberg and Liuba Y. Belkin, E-Mail Communication and Group Cooperation in Mixed Motive Contexts, 21(4) *Social Justice Research*, pp. 470-489 (Dec 2008).
- Charles E. Naquin, Terri R. Kurtzberg and Liuba Y. Belkin, The Finer Points of Lying Online: E-mail Versus Pen and Paper, 95(2) *Journal of Applied Psychology*, pp. 387-394 (March 2010).
- Karen Thalacker, *The New Lawyer’s Handbook: 101 Things They Don’t Teach You in Law School*, Sphinx Pub., (2009).