

E-mail Communication Can Be Dangerous During Litigation

By Victoria Pynchon

This story occurs in the spring of 2001, a year I'd dreamed of since elementary school. But the technological changes predicted in the science fiction of my childhood and adolescence are nothing like the "hi-tech" I'm living with now. There are no one-man jets cruising the skies; no robots running my errands or cooking my dinner; no tele-transportation; and, on the political scene, no Big Brother.

My personal 2001 "future" is primarily marked by instantaneous access to information and "real time" communication with that late 20th century "killer app" — e-mail. E-mail — telegraphic, spontaneous, unannounced — is about to cause a great deal of trouble in my own life.

There's an associate in Los Angeles, you see, the quality of whose work and the strength of whose dedication to our mutual client is in alarming decline. More troubling, his enthusiasm and work ethic is deteriorating at the same time I'm taking old-fashioned passenger jets to cities in every Canadian province for the purpose of depositing those still-living witnesses who can tell me how 500-plus toxic waste sites got that way in the first place.

It's 3 a.m. in Toronto. My associate failed to fax me the outline I need for tomorrow's deposition. The "hard copy" exhibits that were supposed to be waiting for me when I arrived at the hotel have gone missing. I'm tired. I'm hungry. I'm lonely. And I'm angry.

Worst of all, I'm composing an

e-mail to my associate about my considerable disappointment in his recent performance. There is a moment, a split second, in which my finger hovers over the "send" button while a rational voice in my head says "no." Then I push "send."

It's becoming far more common in my mediation practice for opposing counsel to be meeting — and sometimes speaking — to one another for the first time on the morning of the settlement conference. When they have met previously, it's usually been only in court ("good morning, counsel") or in depositions (eyes averted; objections made). Increasingly, by far the largest percentage of their communications take place by way of e-mail.

And that's a problem. There's no question that litigation escalates whatever conflict existed when our client first walked in our door. We don't, after all, make requests. We issue demands. We don't seek concessions. We insist upon them. We don't make inquiries. We require responses. And we're not such great listeners, impatiently tapping our feet or clicking a pen while waiting for counsel to finish his argument so that we can press our case.

Are these bad things? Not necessarily. If we understand what we're doing to escalate the conflict and can forecast its likely results, the intensity of the dispute is not necessarily worse than maintaining a steady state or even deescalating the conflict at hand.

The problem for most of us is that we don't know what we're doing and

we don't understand the breadth and depth of the likely repercussions.

In "Conflict Escalation: Dispute Escalating Elements of E-Mail Communication," Raymond A. Friedman of the Owen Graduate School of Management at Vanderbilt University quotes conflict specialists Rubin, Pruitt and Kim on the difficulties caused by escalation tactics and strategy. According to Rubin, et al., escalation is "an increase in the intensity of a conflict as a whole." Escalation is important ... because when conflict escalates it is intensified in ways that are sometimes exceedingly difficult to undo. One reason why escalated conflicts are so hard to undo is that when more aggressive tactics are used by one side they are often mirrored by the other side, producing a vicious cycle.

E-mail, Friedman argues, unnecessarily, and often drastically, escalates conflict in ways none of us fully appreciate. Unlike conversation — in person or by telephone — we are not "physically present with others, can't see their faces or hear their voices, and can't give or get immediate responses. The lack of contextual clues ... impose high 'understanding costs' on participants in e-mail interactions, making it harder to successfully ground the interaction. [T]he inability to carefully time actions and reactions ... makes communication less precise."

Sitting in my Toronto hotel room at 3 a.m., reviewing on-line documents for tomorrow's deposition and "penn[ing]" an e-mail to my errant associate, I am not simply making communication more difficult. I have become "profoundly social." "E-mails," writes Friedman, "are typically received and written while the writer is in isolation, staring at a computer screen — perhaps for hours at a time, so that awareness of the humanness of the counterpart may be diminished."

As evidence, Friedman cites research in which subjects played the "prisoner's dilemma" game against a computer. Not only did the gamers act socially in this context, "many continued to act socially even when told that they were now playing with people (through the computer)."

Here, then, are the difficulties Friedman says we cause ourselves by attempting to resolve conflicts using e-mail.

Use of aggressive tactics: Because e-mail encourages the use of aggressive tactics, or makes a counterpart's tactics appear more aggressive, the conflict will be escalated.

Changes in view of other: Because e-mail escalated conflict, it also tends to influence our perceptions of and attitudes toward the opposition, such as seeing our opponent's position or offers of settlement as inherently unfair, lessening our empathy toward both opposing counsel and their client, and, characterizing our opponent as malicious, spiteful, immoral or downright evil.

Weakened interpersonal bonds: Because e-mail tends to weaken social bonds, the chances that the conflict will escalate in duration or



intensity increases due to reduced inhibitions for aggression.

Problems are difficult to resolve: As frustrated counsel and parties move from mild to more aggressive strategies to achieve their goals, the problems between them multiply and rising animosity makes collaborative problem solving more difficult.

You know this story was not going to have a happy ending. What a cranky, tired, stressed partner means to communicate by way of e-mail at 3 a.m. and what a fully awake associate understands while reading that communication over his morning coffee: the following

day are, as Friedman stresses, two quite different things. And though I've rarely had a face-to-face disagreement with a colleague that could not be mended by further communication, apologies, explanations and the like, this particular communication caused a rift that I was never able to fully mend.

My personal and professional experience, coupled with academic literature on the topic, makes me want to advise, exhort, plead, beseech, entreat and pray that you commence every litigation with a telephone call rather than a "demand" letter. And that you continue to communicate with opposing

counsel by telephone or, more radically, in person over a meal, throughout the litigation to make sure channels of communication are as open and clear as possible.

This change in practice, as awkward as it may first be, will be nothing compared with the personal and professional benefits to be gained by pulling your hands away from the keyboard, picking up the telephone and asking opposing counsel how *his* day is going.

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Letter to the Editor

California Should Keep Protecting the Insured

After reading with interest the Focus item of June 25, 2008, entitled "Crash Intentions," I found it ironic that that very day the Court of Appeal published an opinion reaffirming California law that accidental consequences of an intentional act are potentially covered under CGL insurance policies. *State Farm Fire and Cas. Co. v. Superior Court (Wright)*, 2008 DJDAR 9798 (June 25, 2008).

For almost 50 years, this state's courts have "recognized that an act which under the traditional terminology of the law of torts is designated 'intentional' or 'willful' does not necessarily fall outside insurance coverage." See *Gray v. Zurich Ins. Co.*, 65 Cal.2d 263 (1966), citing *Fires, Inc. v. Farmers' Prod. Ins. Co.*, 175 Cal.App.2d 524 (1959). But two cases now before the Califor-

nia Supreme Court may alter that decades old authority. The court is reworking *Delgado v. Interinsurer Brokers*, 152 Cal.App.4th 671 (2007), and *Jafari v. EMC Insurance Co.*, 155 Cal.App.4th 885 (2007), to answer the question, "when a liability policy covers injury arising from an 'occurrence,' which is defined as an 'accident,' does the insurer have a duty to defend an action for assault if the complaint alleges the insured was acting under an unreasonable and negligent belief that he was acting in self-defense?"

In *Wright*, considering the personal injury claim of someone the insured threw into a swimming pool in a malicious act without intent to injure, the 2nd District rejected the insurer's argument that the potential for coverage should apply only to acts that are

fortuitous, without reference to the injury. "Under *State Farm's* analysis," the court observed, "all accident-based automobile insurance policies would be illusory." Courts that have found for the insurer agree with courts that have found for the insured: An accident exists when any aspect in the causal series of events leading to the injury or damage was unintended by the insured and a matter of fortuity. That includes, in the view of the *Jafari* court, the fortuitous attack of a third party provoking the insured to defend himself.

It would be too bad if California's insureds lost the protection this state has so long afforded them.

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