

Negotiating via Email

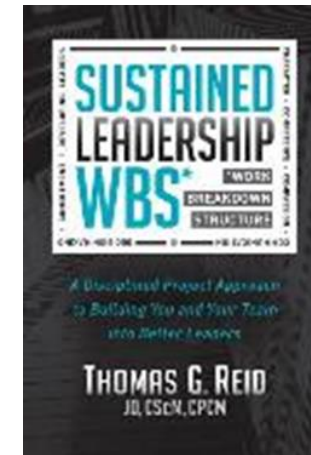
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Tuesday, April 4, from 1:30pm-3:30pm ET

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Based in part on the book Getting to Yes
by Roger Fisher and William Ury, (1981).

Communication

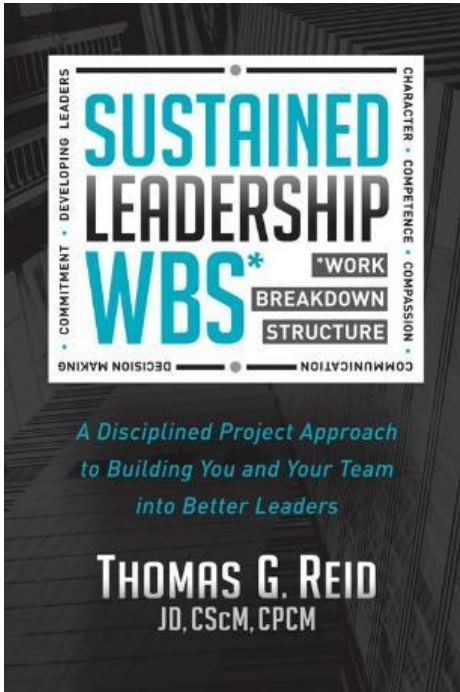
**Without Communication,
there is no negotiation.**

Who am I?

Thomas Reid, JD, MPA, CPCM

- Chief Problem Solver, CCS
- Over 40 years in government contracting
- Have served in government, large businesses, small businesses, 8(a), and start-up
- Speaker, author, trainer, attorney, expert witness, and contract manager

Latest Publication



- Defines a new approach to leadership development
- Uses project management tools to help you build yourself into a sustained leader
- Provides a lexicon of leadership by defining 229 elements
- Covers the Professional Competencies defined by DAU and the NCMA CMBOK

***Stop calling non-leaders “leaders” because of the position they hold.
Demand more!***

Start using leadership development that actually works.

Opening Thoughts

Negotiation has never been confined to a single mode of communication

Face-to-face has often not been possible

New communication techniques were adopted

- *Telegram*
- *Telephone*
- *Fax*
- *Email*
- *Video conferencing*
- *Each mode has its own unique rules and protocols*

Negotiation Aspects

What exactly are you negotiating?

In Every Negotiation, You Must Focus on:

1. The *Substance*
2. The *Relationship*
3. The *Process*

Every communication should consider each of these three aspects

Agenda

- **Part 1** will review classic negotiations from the Win-Win perspective
- Part 2** will introduce material on building (and impediments to) the relationship
- Part 3** will delve more deeply into specific email negotiations strategies and tactics to include ethics and clear communication tips.

Win-Win Negotiation Strategies

Section 1

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Negotiation Environment

- It is a process, not an event
- It is a series of actions – from planning to negotiation to final documentation – that results in an agreement
- It is essentially a communication process

Win-Win Negotiations

Benefits of using win-win

- ◆ Resulting agreements satisfy the needs of both parties
- ◆ The value of the agreement is increased
- ◆ A supportive environment is developed

Benefits of developing long term business relationships

- ◆ An understanding of both parties' needs is increased
- ◆ Collaborative solutions to problems are developed
- ◆ The parties can project future needs and create innovative ways to achieve them together

Principled Negotiations

People: Separate the people from the problem

Interests: Focus on interests, not positions.

Options: Generate many possibilities before settling on one

Criteria: Insist that the result be based on objective standards

Separate the People from the Problem

- Negotiators are people first
- Every negotiator is interested in the substance and the relationship
- Separate the relationship from the problem
- Perception
- Emotion
- Communication
- Prevention works best

Don't Bargain Over Position

- Arguing over position produces unwise agreements
- Arguing over positions is inefficient
- Arguing over positions endangers an ongoing relationship
- When there are many parties, positional bargaining is even worse
- Being nice is no answer
- There is an alternative

Generating Options

- Make the pie bigger
- Expand your thinking beyond boxes
- Consider value, not cost

Insist on Using Objective Criteria

- Deciding on the basis of will is costly
- The case for using objective criteria
- Developing objective criteria
- Negotiating with objective criteria
- “It’s company policy”

Win/Win Negotiations

- Win/Win negotiation works in all situations
- Issues are decided on their merits rather than through a haggling process
- Hard on merits, soft on people
- Employs no tricks and no posturing
- Enables you to be fair while protecting you against those who would take advantage of your fairness

Polling Question #1

One good reason to insist on objective criteria is to:

- A) Insure that you will get your way
- B) Know when the contract is over
- C) Support your professional organization

Negotiators are People

Section 2

Basic Human Needs

- Most powerful interest
 - Security
 - Economic well-being
 - Recognition
 - Control over one's life
- Main interest is not always money

Negotiators are People

- Emotional
- Deeply held Values
- Different Backgrounds
- Different Viewpoints
- Unpredictable (but often predictably so!)
- So are you!

Perception vs. Reality

- Personal Viewpoints Yield Perceptions
- Perceptions ARE Reality
- Misinterpretation
- Misunderstanding
- Prejudice Cycle
 - Scoring points
 - Apportioning Blame

Practice Note

Never forget:

“Short-term strategies and tactics designed to give you the upper hand are inconsistent with a good relationship. They may work once in a while because they are unexpected; however, they do lasting damage to the relationship.”

*From Skopec, Eric Wm. And Laree S. Kiely. Everything's Negotiable ...
When You Know How To Play The Game. (AMACOM, New York) 1994
p.140.*

Perceptions

- Walk a mile in their shoes
- Understanding a point of view is not the same as agreeing with it
- Don't deduce their intentions from your fears
- Don't blame them for your problems
- Discuss each other's perceptions

Personal Note

Remember: Your perceptions can be as inaccurate as you perceive their perceptions to be.

I know you think you understood what you thought I said, but what you don't understand is that what you heard was not what I meant to say!

Lessons From Salesmen

- Agree with Everything
- Feel, Felt, Found
- Move from Principle to Conclusion
- Do **NOT** move from Conclusion to Rationalization
- Meet One-on-one with Decision-maker
- Silence is Golden

Build a Working Relationship

- Strangers are friends you haven't met yet
 - The “other side” is diabolical
 - Your “friend” just doesn't understand
- Familiar communication lines
- The art of “small talk”

Face the Problem

- Everything isn't personal
- Defensiveness is not productive
- Do not ignore legitimate interests
- Treat identified problems as speedbumps, not roadblocks
 - Shared problem
 - Sailors in lifeboat

Dealing with Difficult People

- Go to the Balcony
- Step to Their Side
- Don't Reject – Reframe
- Build Them a Golden Bridge
- Bring Them to Their Senses, Not Their Knees

From Ury, William. Getting Past No (Bantam Books, New York) 1991.

Polling Question #2

What a person believes they perceive is their reality whether it is factually correct or not.

True

False

Communication Techniques

Section 3

Questions

Ambiguous
Controversial
Direct
Explanatory

Factual
Leading
Redirected
Relay

Recommended resource: Dorothy Leeds, *The 7 Powers of Questions*.

Practice Tips

- Questions should always be worded clearly, concisely, and courteously
- Avoid using deliberately ambiguous, controversial, or leading questions
- Be careful of your tone and the words you use
- Factual and explanatory questions should predominate

Interests vs. Positions

Your position is something you have decided upon.

Your interests are what caused you to so decide.

Identifying Interests

- Interests are often stated as goals
 - Positions are usually conclusory in nature
- Interests have reasons behind them that can be articulated
 - Positions are often stated confrontationally

Identifying Interests

- Too often we simply fail to ask “why?”
- We make assumptions about a person’s motivation
- Ask for understanding, not justification
- Seek an understanding of needs, hopes, fears, or desires

Identifying Interests

- Ask “Why Not?”
- If you need to change their minds, you need to know where their minds are now
- Asking such questions often helps them figure out what they are thinking
- Clear thinking is not necessarily a natural activity

Clear Thinking

- Thinking is not usually done with mathematical precision
- Precision in concepts is very rare
- Few decision makers actually write down and weigh pros and cons
- Positions are a function of human choice, not weighted guideline scoring

**“Fuzzy writing reflects fuzzy thinking.
Communicating clearly and effectively is always a
skill of the sustained leader.”**

From *Sustained Leadership WBS*

The Magic of “What if...?”

- Use to explore options
 - Increase quantity
 - Change delivery schedule
 - Eliminate/add “optional” items
- With multiple issues, a change in one aspect can have a “ripple effect”
- Need not be totally practical or realistic

Be Concrete But Flexible

- How do interests translate into specific options?
- If they agree, what specifically do I want them to agree with?
- Think in terms of multiple options that address your interest
- An open mind is not an empty one

Hard on Problems; Soft on People

- Separate people from problem
- Attack problem, not people
- Be personally supportive
 - Listen with respect
 - Show courtesy
 - Express appreciation for time and effort
 - Emphasize your concern with meeting their needs

Cognitive Dissonance

- Psychological term
- People dislike dissonance and will work to reconcile it
- Attacking problem while giving personal support creates the dissonance
- Temptation is to dissociate from problem and seek to solve it

Using Communication to Develop the Relationship

- Attacking the problem becomes a mutual goal
- Supporting the person improves the relationship
- Combination improves likelihood of reaching agreement
- Either alone will be less successful

Importance of Flexibility

- Be willing to admit mistakes
- Perfection in human behavior is a direction, not a result
- Adapt actions to reality
- Deal with each situation as new
- Be open to other points of view

From Walters, J. Donald. The Art of Leadership MJF Books, New York. (1987) p. 99

Inventing Options - Some Basic Principles

- Do not negotiate on a single issue or dimension
- No issue is (or should be) “black or white”
- Add things to the mix
- Guard against false assumptions

“Skill at inventing options is one of the most useful assets a negotiator can have.”

Getting to Yes, p.56

Invent Options for Mutual Gain

Prescription

- ◆ Separate inventing from deciding
- ◆ Broaden your options
- ◆ Look for mutual gain
- ◆ Make the decision easy

Insist on Using Objective Criteria

- Deciding on the basis of will is costly
- The case for using objective criteria
- Developing objective criteria
- Negotiating with objective criteria

Using “Will” is Self-Destructive

- Take it or leave it
- Be my friend
- Ignores long term relationship
- Based on selfish wants
- Seek a standard other than who has the strongest will.

Nature of Objective Criteria

- Fairness
- Efficiency
- Scientific merit
- Experience
- Precedent
- Community practice
- Best practices

Sources of Objective Criteria

- ISO Standards
- ANSI Standards
- UL Standards
- Independent Laboratories
- Best practices
- Industry trade groups
- Building codes
- Academics
- Benchmarks
- Professional standards
- Professional organizations
- Certifications

Negotiation Power

Section 4

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What is Power?

- The capacity or ability to get things done...to exercise control over people, events, situations, oneself.
- It isn't good or bad. It isn't moral or immoral. It isn't ethical or unethical. It's neutral.

Cohen, Herb, You can Negotiate Anything (New York: Bantam Books, 1980, 1982) p. 51.

Common Forms of Power

- Reward
- Coercive/Control/ Punishment
- Referent
- Charismatic
- Risk Tolerance – Courage & Common Sense
- Expertise – Trappings of power

Other Forms of Power

- Identity
- Morality
- Precedent
- Persistence
- Persuasive capacity
- Investment
- Competition
- Attitude
- Time
- Information
- Situational
- Commitment
- Knowledge of “needs”

Know Your BATNA

Best Alternative to a Negotiated Agreement

What COULD you do if no agreement is reached?

Sometimes “no deal” is better than a bad deal

Goal of BATNA

To protect you against making an agreement you should reject
To help you make the most of the assets you do have

So that any agreement you reach will satisfy your interests as well as possible.

Attitude is Everything

- Our attitude determines our approach to life
- Our attitude determines our relationships with people
- Often our attitude is the only difference between success and failure
- Our attitude at the beginning of a task will affect its outcome more than anything else

Attitude

- Our attitude can turn our problems into blessings
- Our attitude can give us an uncommonly positive perspective
- Your attitude is not automatically good because you are a religious person

Maxwell, John C. Attitude 101 (Nashville, TN: Maxwell Motivation, Inc., 2003) pp. 15-25.

Practice Note

Studies of negotiations consistently show a strong correlation between aspiration and result

REMEMBER: It pays to think positively!

Character and Dirty Tricks

- People of character are more successful negotiators
- Dirty tricks will come back to haunt you
- Develop a strong sense of ethics
- Avoid focusing on either party's breach

“Character is how you act when there is no one else around”

The Dynamics of Negotiation via Email

Section 5

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Verbal Skills vs Written Skills

- Effective communication is a skill that can (must) be learned.
- It must be studied and practiced
- Both verbal and written
- It has VERY practical applications
- KISS applies

What do we Lose on Email?

- The three initial elements of identity and assessment are:
 - Physical attractiveness
 - Social attractiveness
 - Task attractiveness

The first disappears; the second is weakened, but can be strengthened over time. Different communication methods carry different task attractiveness on an individual level.

Active Listening

- What does it mean to practice active listening when email is involved?
 - Read it ALL
 - Read attachments
 - Confirm receipt
 - Acknowledge receipt
- Note disagreements quickly
- Seek clarification quickly
- Ask probing questions
 - Principle
 - Rationale
- Look for the equivalent of um's, er's, and uh-huh's in email text
- Are emoji's ever appropriate in business communications?

Negotiating from a Distance

- 1. Pay attention to your mindset.**
- 2. Pick the right medium for your negotiations.**
- 3. Create an “in-person feel” with video conferencing.**
- 4. Add a buffer by negotiating via email.**

Harvard Law School Program on Negotiation. The Sunday Minute
4/12/20

Negotiating from a Distance

Social norms – including body language, manners, and physical appearance – can't guide you

Lack of a common environment hinders understanding

The speaker's intensity, speed, and inflection on the phone can provide useful social information.

Face-to-face and telephone interactions generate greater social awareness and greater stability and cooperation.

When the only cues available are words typed on a screen, you'll have trouble reciprocating the other side's style.

Difficult to get to know/understand each other

Negotiating with Candor

People tend to be more honest when communicating in person.

People who negotiate online tend to hold back private information.

“Negotiation research studies have shown that information exchanged over electronic media such as e-mail is less likely to be true, less likely to be relevant and clear, and therefore less informative and useful than similar information exchanged face to face.”

Bluffs and threats also increase in email, a tendency that can culminate in “flaming” – shooting off vitriolic messages without pausing to think about the consequences.

Executives often receive more than 100 emails each day.

https://www.pon.harvard.edu/daily/negotiation-skills-daily/how-to-negotiate-successfully-online-the-challenges-of-virtual-negotiation/?utm_source=WhatCountsEmail&utm_medium=daily&utm_date=2020-04-30-13-30-00&mqsc=E4112873

Negotiating Online

- Social media has probably made us all a little better at building online relationships.
- Many social media groups have arranged in-person meetings.
- Research shows that negotiators who meet in person reach better deals than those who negotiate online.

General Tips

- Start small
- A mix of communication media can help
- ALWAYS give the benefit of the doubt
- Kindness rules – you have no idea what battles the other party is waging
- Strive for greater value creation

https://www.pon.harvard.edu/uncategorized/online-negotiation-in-a-time-of-social-distance/?utm_source=WhatCountsEmail&utm_medium=daily&utm_date=2020-03-26-13-30-00&mqsc=E4111033

Industry Motivations

“Industry” is not a monolith

- It is made up of people of diverse backgrounds and interests
- Some are motivated by the wrong things
- Some are motivated by different things
- Others are motivated by the same things as you

Three Primary Areas

Business Stability and Continuation

Cash Flow/Financial Stability/ ROI

Ease of Doing Business

- Non-negotiable
- Negotiable



Business Stability and Continuation

An underlying assumption for any entrepreneur or business owner/operator is that they want their business to continue.

- Continuing business; reducing competition
- Stable competent workforce
- High barriers to entry/ market share/ new markets



Stable Workforce

Ability to attract and keep best talent

- Challenging and rewarding work
- Education and experience
- For the fun of it
- Being part of history
- “Being Green”
- Civic responsibility
- Charity/altruism
- Pride in professional standards
- Pride in “Supporting America”
- Creating a legacy
- Professional awards
- Ability to work near home

Threats to Business Continuity

Protection of owned IP

Developing IP they can keep and commercialize

Security of persons and property

Access to Government Furnished Property

Inability to keep the pipeline full

Cash Flow/ Financial Stability/ ROI

Cash flow

- prompt payment
- prompt negotiation of changes
- cost-type contracts

Ability to cover overhead

- Allow audit as a “going concern”
- Effective use of equipment

Proper Risk Management

- Contract type
- Insurance
- Best efforts
- Reasonable profit commensurate with risk



Ease of Doing Business with the Government

Non-negotiable

Negotiable



Non-Negotiable Items

Rules on competition

Legal work

Ethical work

Best value

procurements (if SSO
is trusted)

Procurement integrity

- inadvertent technical
transfusion
- unsolicited proposals

Certifications

Buy American

Terminations for
Convenience

Criminalization of
business judgment

Christian Doctrine

Doctrine of
Apparent Authority

TINA

Increasingly
complex regulatory
environment

Socio-economic
programs

Ethics compliance

Political Support

Negotiable Items

Clarity of requirements and direction

- Minimal ambiguity or assumptions
- Documented assumptions

Excessive push for “faster, better, cheaper”

Coping with change; managing expectations

Simplified procedures

Openness; good communication



Explore Motivations

The impulse is to say that contractors are motivated only by money

Money can be a major motivator

In reality, however, money is not the ends

Money is simply the means to address a large array of real interests

The successful negotiator will explore those real interests

Many can be met without direct infusions of cash

Learning about People Online

- Absent in-person contact, how do you explore and develop an understanding of their motivations?
 - Explore interests
 - Ask around, mutual friends, others who have negotiated with them
 - Online searches
 - Social media
 - Web search
 - Online small talk
 - Casual conversations
 - Clues from email

The Importance of Wise Choices

Acting unethically is a choice

In any situation we can choose to act ethically or not

Sometimes we can trust our “gut”

Other times we can't

Why Is This a Dilemma?

We make unethical decisions for one of these reasons:

We do what is most convenient (thoughtless)

We do what we must to win (need)

We rationalize our choices with relativism.

We don't know any better or practice
ignorance of convenience

• We are fearful (actual or perceived threat)

Five Advanced Techniques for Relationship Building

- 1. Reframe anxiety as excitement.**
- 2. Anchor the discussion with a draft agreement.**
- 3. Draw on the power of silence.**
- 4. Ask for advice.**
- 5. Put a fair offer to the test with final-offer arbitration.**

https://www.pon.harvard.edu/daily/negotiation-skills-daily/5-good-negotiation-techniques/?utm_source=WhatCountsEmail&utm_medium=daily&utm_date=2020-04-30-13-30-00&mqsc=E4112873

Polling Question #3

It is difficult to determine what motivates people, but you can always persuade anyone with enough money.

True

False

Email Negotiation Hazards & Helps

Section 6

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General Email Principles

- Build the trust relationship
 - Never go over their heads
 - No response; send email and copy the boss (rare)
- Be targeted
 - Not a game of 20 questions;
 - Most people do not manage their email well
- Have a bias for action
 - Gets buried quickly
 - Set a tickler among your “to do” lists

Some content offered by J. Etherton

Good Writing Counts

- Punctuation and Word Choice
- No, But, and However (Marshall Goldsmith)
 - Just as in writing – remove these words from your communication.
 - Clarify your thinking; it clarifies your communication
- Clear thinking leads to clear writing; clear writing reflects clear thinking
 - Persuasive power is increased
 - Less confusion, explanation, re-work required

Email Greetings

Appropriate greetings

Seasonal

Time of Crisis – “Hope you are well” during virus crisis.

Formulaic

***Courtesy never goes
out of style!***

Content Stylings

- Weather
- Holidays
- Regional/national days of recognition
- Use of emoji's
- Use of excessive signature blocks/ quotes
- Disclaimers
- Lack of vocal cues
- How to engage in active listening

Written communications are ***perceived*** as being more concrete and well thought out. Both parties will make this same false assumption

Email Closings

- Appropriate closing
 - Better response obtained for “thanks”
 - Others: “Best,” “Sincerely,” “Yours truly,” “Here’s to your best day yet”
- Quotes
- Misdirect notices/ disclaimers

Importance of the PS

- Marketing copywriters will tell you that of all the things in an email that get read, the “PS” is number one.
- Can be used for emphasizing important points
 - Deadlines
 - Next appointment
 - Approvals made or pending

The Non-response

- Things you say vs things you don't say; phrasing, questions, tone.
- Is a slow response a comment on the last email content or a lack of attention on this negotiation at this time?
- Did your email go to their spam folder?

There is no punctuation mark for sarcasm!

What Happens to Small Talk?

- Dealing with small talk:
The personal message or personal opening;
empathy balanced with assertiveness
- Interest in the person is good – build the relationship.
- Machiavellian use: “I know that you have some illness in your family right now, so let’s see if we can wrap this up and get it off your desk so you can give your family the attention they need.”

Legal Implications

- Two emails do not make an agreement
- UCC considerations
 - Mirror Image Rule
 - Battle of the forms
- PAROL EVIDENCE RULE: ***NOTHING*** in an email becomes part of the contract UNLESS AND UNTIL you actually put it in the contract.
(Unless the emails become the agreement!)

Empirical Studies on Negotiation

Section 7

Empirical Studies

“People tend to reveal information honestly when communicating in person, and the receiver usually believes and acts on that information. By contrast, people who negotiate online tend to hold back private information. When they do open up, the receiver is often leery about responding in kind.

“Negotiation research studies have shown that information exchanged over electronic media such as e-mail is less likely to be true, less likely to be relevant and clear, and therefore less informative and useful than similar information exchanged face to face.”

Empirical Studies

“Negotiation thrives on physical presence. Handshakes, eye contact, shared meals, and long meetings in stuffy conference rooms are everyday tools of the trade, and with good reason: Negotiators who meet in person reach better deals than those who negotiate online, [research shows](#). Face-to-face meetings offer invaluable nonverbal and verbal cues, such as eye contact, body language, and tone of voice, that facilitate understanding and build lasting bonds.”

Empirical Studies

In a study reported in Harvard's Program on Negotiation:

“Whether they negotiated via video or text, pairs who used computers achieved better combined outcomes than those using phones, the results showed. Moreover, those who negotiated via video did better than those who conducted text negotiations. And pairs who negotiated via video on a computer achieved the highest outcomes.”

“Research has shown that face-to-face interaction and, likely, video work better for ‘storytellers’—people who express themselves emotionally, through stories and anecdotes,” he says. “Text-based communication, such as email, may be more comfortable for so-called engineers—people who communicate more through data and logic.”

Empirical Studies

In a study reported in Harvard's Program on Negotiation:

“In addition, because cues of status, such as a fancy office, are absent from text-based communications, emails and texting can be a smart choice in online negotiations when you are interacting with those who have considerably more power or status than you. Communicating via such formats may serve to level the playing field between negotiators of different rank. Text negotiations can also be beneficial when you're feeling nervous and need time to craft what you want to say.”

Empirical Studies

In a study reported in Harvard’s Program on Negotiation:

Even video negotiations have their limits, however. As Ebner writes in a chapter in *The Negotiator’s Desk Reference*, online negotiations conducted via video provide us with only a partial view of our counterpart(s)—their head and shoulders, typically—and little sense of their environment.

He also notes that privacy is a special concern in video negotiations. Online negotiations could be recorded without your knowledge, or others could be listening in and even advising your counterpart without your knowledge.

Thus, when you don’t know your counterpart well and security is a concern, you may want to make an extra effort to negotiate in person. If that isn’t feasible, be sure to make time at the start of a video negotiation to engage in small talk, which could help you [build trust in negotiations](#).

“Emails and texts tend to be ‘impoverished’ forms of communication because they lack nonverbal and visual cues, though emojis can help.”

HLS_PON_FR14_OnlineNegSpecReport_102021_ed5

Empirical Studies

“Negotiations conducted via email tend to result in less creative, less satisfying agreements than those that take place in person, several studies have found. Emails can also lead to misunderstandings and conflict, and foster a sense of “mutual invisibility” that can lead us to be less courteous and considerate than we would be in person.”

“One study found that computer-mediated negotiation minimized power differences between parties, probably because social cues and the outward trappings of power tend to be absent from electronic communications.”

HLS_PON_FR14_OnlineNegSpecReport_102021_ed5

Ethics of Email Negotiation

Section 8

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Business Ethics

“There’s no such thing as business ethics – there’s only ethics. People try to use one set of ethics for their professional life, another for their spiritual life, and still another at home with their family. That gets them into trouble. Ethics is ethics. If you desire to be ethical, you live it by one standard across the board.”

Maxwell, John C. There’s No Such Thing as “Business” Ethics, p.v.

Polling Question #4

What is your view of Negotiation Ethics?

A. I agree with Maxwell; Ethical conduct is a constant

B. I believe ethical standards are more fluid and situational

C. Ethics shmethics

The Fallacy of Relying on the Law

As a western society we set
our legal standard well
below our ethical standard

Not always true in other
societies

The Rule of Law

“I’ve lived my life in a society where there was no rule of law. And that’s a terrible existence. But a society where the rule of law is the only standard of ethical behavior is equally bad.”

- Aleksandr Solzhenitsyn

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Compliance versus Commitment

Compliance can be measured

Commitment comes from within and is based on character.

Which is More Important?

Compliance

- Federal Sentencing Guidelines
- Sarbanes Oxley
- HIPAA

Commitment

- Morals
- Values
- Mission
- Character

Which is More Important?

Commitment is grounded in authentic behavior supported by an ethical framework which integrates our intellectual, emotional, spiritual, and physical selves.

Commitment shifts expenditures from compliance, damage control, and penalties to a quality working environment and greater productivity.

Compliance is the bottom rung of the ethical ladder.

Ethics Lessons from Lawyers

- Rules applied to lawyers do not apply to everyone. The REASON for these rules, however, apply to any confidential or business proprietary communications. Negotiations clearly fit within that framework.

Lawyers must comply with the Rules of Professional Conduct (RPC) which now covers electronic communications. A lapse, even in such things as cloud providers, can result in professional disasters and bad outcomes for clients and their lawyers

The same can be said about contract negotiators, even without the formal ethical rules.

- Use of email risks the breach of confidentiality, inadvertent transmission to third parties, and exposing confidential business information to hackers. AND – the relationship!

Like Lawyers, as with Contract Negotiators

As is the case with contracting professionals:

- Changes in laws

- Variations among the states

- Benefits and risks of technology

 - Third parties

 - Suspect hardware

 - Intentional hackers

 - DNS

 - Fraudsters pirating domains/ email addresses

Use of Disclaimers

The purpose is to alert persons who receive an errant communication that it might be privileged or confidential

Depending on state and local laws, liability can vest against the sender OR the receiver.

Sample 1:

This electronic transmission and any attachments are for the individual or entity intended to receive it and may contain information which is legally protected by privilege or trade secret. If you are not the intended recipient, please do not review, transmit, convert to hard copy, copy, use, disclose, or disseminate this message.

Sample 2:

This email is ONLY for the person(s) named in the message header. Unless otherwise indicated, it contains information that is confidential, privileged, or exempt from disclosure under applicable law. If you have received it in error, please notify the sender of the error and delete the message.

Mobile Devices

- Cell phones
 - Easy to lose
 - Password protected
 - Search for it app
 - Remotely disable ability
 - Method to destroy the data
 - Not keeping loaded links available to any user
- Disclosure often not included on cell phone email
- Email and unsecured WiFi networks subject to hacking

Use of Metadata

Metadata is the “hidden” information that travels with a document revealing who created it, who made changes, the substance of deleted text, when the changes were made, and comments reviewers may have made.

Beware of information that might be contained in, but hidden, in electronic files!

Metadata - ABA View

The Model Rules say that you need only notify the other party that you have received “inadvertent” information.

There is no restriction on its use.

Implication is that it is sending person’s responsibility to remove the data.

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Metadata – State Views

New York = prohibits the use of “surreptitiously obtain[ed] privileged or otherwise confidential information” of an opposing party.

Florida = prohibits looking at metadata on a document inadvertently sent

Maryland = OK to view metadata

ABA Opinion on Negotiations

“It is not unusual...to make a statement that is less than entirely forthcoming.”

“A party ... might exaggerate ...emphasize strengths, and minimize ... the weaknesses.”

ABA Standing Committee on Ethics and Professional Responsibility, Formal Opinion 06-439, April 12, 2006.

ABA Opinion

“Such remarks, often characterized as ‘posturing’ or ‘puffing’ are statements upon which parties to a negotiation ordinarily would not be expected justifiably to rely, and must be distinguished from *false statements of material fact.*”
(emphasis added)

ABA Opinion

“Rule 4.1(a) applies only to statements of material fact that the lawyer knows to be false, and thus does not cover false statements that are made unknowingly, that concern immaterial matters, or that relate to neither fact or law.”

ABA Opinion

Items deemed NOT material facts:

- Downplay willingness to compromise
- A bargaining position without disclosing the “bottom line”
- Overstatements or understatements re: Strengths or weaknesses
- Opinions as to the value or worth of the subject matter

ABA Conclusion

“Under Model Rule 4.1 in...a negotiation...a lawyer representing a party may not make a false statement of material fact to a third person [S]tatements regarding a party’s negotiating goals or its willingness to compromise, as well as statements that can fairly be characterized as negotiation ‘puffing,’ are ordinarily not considered ‘false statements of material fact’ within the meaning of the Model Rules.”

The Golden Rule

Appropriate use of this rule is an integrity guideline for any situation.

Maxwell, John C., *Ethics 101*, p.16

If men were angels, no government would be necessary.

James Madison (1751 - 1836)

How Do You Want To Be Treated?

I want to be valued.

I want to be appreciated.

I want to be trusted.

I want to be respected.

I want to be understood.

I do not want others to take advantage of me.

Invest in the Covey Bank Account

Treat people better than they treat you

Walk the second mile

Help people who can't help you

Do right when it is natural to do wrong

Keep your promises even when it hurts

***You teach people how to treat you by
what you allow, what you stop, and
what you reinforce.***

What to Do?

Adopt the golden rule in all of your dealings

Learn to make good choices that firm up your integrity, not harden your conscience.

The solution lies in the consistent application of good choices

Each action you take, good or bad, affects the world we live in.

Personal Responsibility

Old Standards:

- Is this Legal?
- Is this specifically against company policy?
- Can I sleep at night?

New Standard

- Is this how I would want someone I trusted to act on my behalf?

Why Ethics in Negotiations?

Why do societies have a common language, a standardized form of money, and universal electric outlets? The unifying answer – it reduces the cost of dealing with each other – is obvious. And so it is with ethical norms.

Brauer, Jurgen, “Business Ethics: Scandals and Standards,” *Phi Kappa Phi Forum* (Vol 87, No. 1) pp.28,33.

Your Moral Compass

“In the final analysis, it is your moral compass that counts far more than any bank balance, any resume, and yes, any diploma”

Elizabeth Dole

Duke University Commencement
2000

“The truth of the matter is that you always know the right thing to do. The hard part is doing it.”

– Norman Schwarzkopf, US Army general

“No amount of business school training or work experience can teach what is ultimately a matter of personal character.”

– Truett Cathy, Chick-fil-A Inc. founder

Polling Question #5

The proper perspective of the Golden Rule is:

- A) Do unto others before they do unto you.
- B) Treat others as you would want them to treat you
- C) He who has the gold makes the rules
- D) He who dies with the most toys wins.

Summary

- Negotiations are the same regardless of the mode of communication
 - Subject matter
 - Relationship
 - Process
- Email negotiations are merely ONE OF MANY processes for negotiating
- Email tends to be less formal than negotiations sometimes require
- Develop good communication skills
 - Asking questions
 - Being a clear thinker
 - Keep communications simple and direct
- Building the relationship is *STILL* critical to successful negotiations; online will be no different.
- Above all else, keep an ethical focus; be aware of the new issues online communications present.

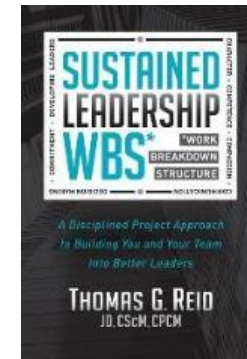
PCI Instructor, Tom Reid

www.certifiedksolutions.com

www.Ask-Tom-Reid.com

www.sustainedleadershipwbs.com

<https://TalkingHeadAcademy.thinkific.com>



“The first responsibility of a leader is to define reality. The last is to say thank you.”

Max DePree

Author & Business Executive