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# Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating

Robert M. Bastress

Joseph D. Harbaugh

# TAKING THE LAWYER'S CRAFT INTO VIRTUAL SPACE: COMPUTER-MEDIATED INTERVIEWING, COUNSELING, AND NEGOTIATING

ROBERT M. BASTRESS* & JOSEPH D. HARBAUGH**

*Bellow's and Moulton's* The Lawyering Process *emphasized the need for law students and lawyers to draw on other disciplines for effective skills development, to make self-analysis of their professional skills and principles a career-long practice, and to remain ever vigilant of emerging ethical issues. This article attempts to honor those lessons by applying them to lawyers' use of computer mediated communication (CMC) in interacting with clients and in negotiating for clients. The article examines the social science research on CMC, applies that research to the lawyer's context, and makes some tentative assessments about the skills involved in lawyers' use of CMC. Ethical issues that have arisen with the expanding use by attorneys of CMC are also addressed.*

> "This is a book about the experience of being a lawyer. . . . [It] asks that lawyers make lawyering a subject of inquiry."[1]

On this premise, Gary Bellow and Bea Moulton built a text that profoundly influenced a generation of law teachers, law students, and lawyers. In the thousand or so pages that followed, Gary and Bea "suggested models and analytic frameworks . . . designed to encourage [clinical professors,] students [and lawyers] to compare and contrast their own experience with what has been said and felt by a variety of observers and commentators."[2] And the variety and number of observers and commentators they presented to their readers were extraordinary.[3] Many of their sources were law-related, but almost as

* John W. Fisher, II Professor of Law, West Virginia University College of Law.

** Dean and Professor of Law, Nova Southeastern University, Shepard Broad Law Center.

[1] GARY BELLOW & BEA MOULTON, THE LAWYERING PROCESS: MATERIALS FOR CLINICAL INSTRUCTION IN ADVOCACY xix (1978) (hereinafter "*The Lawyering Process*"). The authors characterized the cluster of skills used by an attorney as "The Lawyers' Craft." *Id.*

[2] *Id.* at xxiii.

[3] In a dozen pages of copyright permissions, the authors listed more than 150 sources from almost a score of disciplines, including law, ethics, medicine, psychiatry, psychology, sociology, economics, journalism, literature, poetry, rhetoric, political science, history, and more. *Id.* at xxviii-xl. Although Gary's and Bea's efforts provided us with a wealth of

many were drawn from other disciplines.[4] Gary and Bea cautioned their readers about possible distortions in their "treatment of the literature from social psychology and sociology" and other fields:

> We have borrowed and edited unmercifully, losing many of the continuities and nuances in this rich material in our attempt to find what was relevant to the lawyer's world. . . . Few of the selections can simply be "applied" to law practice. Nor are all of the readings relevant to lawyer work. They are included to stimulate discussion of similarities and differences in the expectation they will be reworked by student and teacher to make better sense of what lawyering and law are actually about.[5]

As was true of most clinicians at the time *The Lawyering Process* was published, our thinking and teaching were forever shaped by Gary's and Bea's use of knowledge and research from other disciplines to illuminate, understand, and explain the lawyering process. To be sure, others had built theories about critical aspects of lawyering on foundations laid in other fields,[6] but none had drawn on such a wide range of sources or applied them by analogy to so many phases of legal practice. We followed Gary's and Bea's model when we wrote our text on lawyer interviewing, counseling, and negotiating,[7] as so many others have in writing other textbooks and articles. Although our references were neither as broad nor as numerous as those presented in *The Lawyering Process*,[8] the example of that work enhanced our appreciation for the usefulness of materials from related disciplines in developing those three interactive, interpersonal lawyering skills.

What is remarkable about *The Lawyering Process* twenty-five years later is that so much of those diverse materials remains relevant

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materials, the permission fees they paid out to do so unfortunately ensured that those efforts would not provide material wealth for either Gary or Bea. *See* Bea Moulton, *Looking Back at* The Lawyering Process, 10 CLIN. L. REV. 33, 66 (2003).

[4] By our calculation, more than 40 percent of references in *The Lawyering Process* are outside – many well outside – the field of law. In their article in this symposium, Neumann and Krieger also emphasize the diversity of the materials in *The Lawyering Process* and build on Gary's and Bea's groundbreaking use of empirical studies to teach lessons about law practice. Richard K. Neumann, Jr. & Stefan H. Krieger, *Empirical Inquiry Twenty-Five Years After The Lawyering Process*, 10 CLIN. L. REV. 349, 350-52 (2003).

[5] BELLOW & MOULTON, *supra* note 1, at at xxv, xxiii.

[6] *See, e.g.*, DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING (1977); WILLIAM R. BISCHEN & CHRISTOPHER D. STONE, LAW LANGUAGE, AND ETHICS (1972); ANDREW S. WATSON, THE LAWYER IN THE INTERVIEWING AND COUNSELING PROCESS (1976).

[7] ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING, AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION (1990).

[8] In comparison to the extensive list of sources in *The Lawyering Process* (*see supra* note 3), our copyright permissions numbered only 27; more than 40 percent of them, however, were outside the domain of law.

today and that what Gary and Bea said at the time continues to be so useful for lawyers and law students of the current generation. There has, however, been at least one dramatic change since the publication of *The Lawyering Process* that has created a new dimension for the lawyer's craft that Gary and Bea analyzed and developed. That change is the transformation of communications in the computer age, which has brought with it the capability to communicate over great distances (privately, with multiple persons, or to the whole world) and to do so efficiently, effectively, and cheaply. This transformation inevitably affects lawyering since so much of what lawyers do involves the art and science of communicating.

The convening of this symposium provides us with an opportunity to address the implications of this change for at least some of the subjects that Gary and Bea discussed, specifically interviewing, counseling, and negotiating.[9] We do so by using Gary and Bea's format of first presenting "Preliminary Perspectives," which will provide some necessary background on the nature and extent of the communication transformation, and then developing both "The Skill Dimension" and "The Ethical Dimension."[10]

*The Lawyering Process* taught students – and the lawyers they would become – the means by which they could analyze and evaluate their lawyering skills (to deconstruct them, in current parlance), and those means would, in turn, enable the students-turned-lawyers to continue to learn and improve throughout their careers.[11] As our ac-

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[9] These were three of the skills that Gary and Bea included in their consideration of "the lawyer's craft." BELLOW & MOULTON, supra note 1, at 124-1122. Other skills that they included in *The Lawyering Process* were "Constructing the Case: Preparation and Investigation," *id.* at 273-429, "Witness Examination: The Case Reconstructed," *id.* at 607-825, and "Argument: The Turn to Authority," *id.* at 826-965. For some consideration of how technological advances have affected the craft of advocacy since publication of *The Lawyering Process*, *see* Marilyn J. Berger, Ronald H. Clark & John B. Mitchell, *Letters and Postcards We Wished We Had Sent to Gary Bellow and Bea Moulton*, 10 CLIN. L. REV. 157, 186 (2003).

[10] BELLOW & MOULTON, *supra* note 1, at 124-1122 ("Part Two. The Lawyer's Craft: Tasks and Relationships of Practice").

[11] As Randy Hertz explained at our colloquium: "[Gary and Bea] creat[ed] a book which students could refer to later when they were in practice and continue the learning process. That's another lesson that Gary and Bea and Gary in his other works taught us, that learning lawyering is a lifetime profession." Transcript, Colloquium: Critical Moments in the Conceptualization of Lawyering: Reflections Upon the Quarter Century Since Publication of Bellow's and Moulton's "The Lawyering Process" (American University, Washington College of Law Feb. 21, 2003), *available at* http://www.wcl.american.edu/clinical/lawyeringprocesstranscript.cfm; *see also id.* (remarks of Ronald Clark): "[In] the intro, [Gary and Bea] tell all of us that they are heading out to teach you how to be a lawyer and then they say . . . they will provide a convenient starting point for talking about the subjects that are rarely made the subject of inquiry. But [their] primary interest lies not in persuading you of the usefulness of the particular models but encouraging you to clarify and make explicit your own images of what good lawyering seems to be about." For proof that Gary

knowledgment of the lessons Gary and Bea taught so well a quarter century ago, we thus apply their approach to examine the use of "computer-mediated communication" ("CMC")[12] in lawyer interviewing, counseling and negotiating. In doing so, we follow Gary's and Bea's lead by drawing on traditional legal resources and emerging research in other fields. The scholarship we will examine comes from several disciplines collected under the academic umbrella known as "communication theory."[13]

## I. PRELIMINARY PERSPECTIVES: CMC AND THE TRANSFORMATION OF THE ART OF LAWYERING

### A. *The Twentieth Century Paradigm*

Although they never explicitly said so,[14] Gary and Bea understandably assumed that lawyer-client and lawyer-lawyer communication would be, for the most part, in a face-to-face (FTF) setting.[15] The

succeeded in teaching his students the lessons of ongoing professional self-critiquing, *see* Leah Wortham, The Lawyering Process: *My Thanks for the Book and the Movie*, 10 CLIN. L. REV. 399 (2003).

[12] CMC covers many communication models, including asynchronous e-mail, computer conferencing, bulletin boards, electronic databases, facsimile, teletex, videotex, voice messaging, synchronous chatrooms, Mud Object Oriented (MOOs), and Multi-User-Dungeons (MUDs). Yuliang Liu, *What does research say about the nature of computer-mediated communication: task-oriented or social-emotional-oriented?*, 6 ELECTRONIC J. SOCIOLOGY (2002), *available at* http://www.sociology.org/content/vol006.001/liu.html (last visited August 17, 2003). Our focus here is on computer-mediated text-based communication models, including both those that are asynchronous (*e.g.*, email) and synchronous (*e.g.*, chatrooms).

[13] Communication theory is an interdisciplinary field that borrows from anthropology, linguistics, psychology, sociology, and social psychology, FLORA DAVIS, INSIDE INTUITION (1971), along with a smattering of economics and political science. The goal is to understand human communication processes and to develop a set of concepts that describe, explain, evaluate, and predict communication events. *See* Kumiko Aoki, Theory and Process of Communication: Introduction to Communication Theory (course outline and lecture notes)., *available at* http://www.bu.edu/people/kaoki/cm380/ (last visited August 17, 2003).

We emphasize the *preliminary* nature of our appraisal. The limited nature of this symposium, the volume and growth of CMC research, and our concern about reaching premature conclusions dictate that we proceed cautiously. The issues that we tentatively address here will need further consideration.

[14] In their analysis of negotiation, Gary and Bea identify "the available modes of communication" as one of seven elements to be considered by lawyers. BELLOW & MOULTON, *supra* note 1, at 446. As we shall see, however, virtually all sections of *The Lawyering Process* dealing with lawyer communication presume that the parties are in the same place at the same time.

[15] To be sure, this was not an inappropriate assumption in 1978. We suspect few had sufficient knowledge of information technology's potential for transforming communication to address CMC in any meaningful way. We have located, however, several studies and reports from the era that explore mediated communication questions. *See* S. R. Hiltz, Communications and Group Decision-making: Experimental Evidence on the Potential Impact of Computer Conferencing; A Selective Review of Small Group Communications Experiments (Research Report 2) (New Jersey Institute of Technology 1975); S.R. Hiltz, *The Computer Conference*, 28:3 J. COMMUNICATION 157 (1978); S.R. HILTZ. & M. TURN-

most expansive discussion of communication in *The Lawyering Process* is in the Skill Dimension section of the chapter dealing with interviewing.[16] There, Gary and Bea present excerpts from several observers from other disciplines that were designed "to stimulate discussion of similarities and differences" between the writers' settings and the client interview. Notice how the excerpts presuppose an FTF environment:

> We may *hear* [in an interview] only what we expect to *hear*, basing our expectations on all sorts of cues – the speaker's *voice* or *diction* or *mannerisms* or *dress*, or something he said at another time. . . .[17]
>
> When we turn to *how* the interviewer communicates his expectations, we must clearly distinguish between *asking* for cooperation and *expecting* it. The former is mainly a *verbal* communication while the latter is mainly *non-verbal*. . . . [T]here must be harmony between what one *says* and what one *feels* if the interviewer is to be "dependably real" to the respondent. The inexperienced interviewer who lacks confidence, or who fails to see the importance of his task, will often only ask *verbally* for the information. He dutifully poses the question, while his whole *non-verbal manner* communicates his doubt that he has any right to expect an answer.[18]
>
> The lawyer interviews a client with much less sophistication concerning the accuracy of *verbal* responses than he shows when examining witnesses in the courtroom. . . . [I]n . . . *office interviews of his. . . client*, the lawyer tends to presume more readily that his client is a rational being . . . capable of communicating objectively. . . .[19]

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OFF, THE NETWORK NATION: HUMAN COMMUNICATION VIA THE COMPUTER (1978); S.R. Hiltz, K. Johnson, K. & G. Agle, Replicating Bales' Problem Solving Experiments on Computerized Conference: A Pilot Study (Research Report 8) (New Jersey Institute of Technology 1975); R. Johansen, R. DeGrasse & T. Wilson, Group Communication Through Computers: 5 Effects on Working Patterns (Institute for the Future 1978); J. Valee, R. Johansen, H, Lipinski, K. Spanger, T. Wilson & A. Hardy, 8 Group Communication Through Computers: Pragmatic and Dynamics (Institute for the Future 1978); E. Williams, A Summary of the Present State of Knowledge Regarding the Effectiveness of Substitution of Face-to-Face Meeting by Telecommunication Meeting (Technical Report Studies Group, London 1974); E. Williams, *Experimental Comparisons of Face-to-Face and Mediated Communication: A Review*, 84 PSYCH. BULLETIN. 963 (1977). Our research revealed only a few commentators apparently operating in a limited number of research centers involved in CMC studies at the time *The Lawyering Process* was published.

[16] BELLOW & MOULTON, *supra* note 1, at 156 *et seq*.

[17] *Id*. at 157 (quoting R. KAHN & C. CANNELL, THE DYNAMICS OF INTERVIEWING (1957) (emphasis added)).

[18] *Id*. at 167-68 (quoting GORDON, INTERVIEWING: STRATEGY, TECHNIQUES AND TACTICS (1969) (initial three emphasized items in the original; remaining emphasis added).

[19] *Id*. at 170 (quoting Baernstein, *Functional Relations Between Law and Psychiatry: A Study of Characteristics Inherent in Professional Interaction*, 23 J. LEGAL EDUC. 399 (1971) (emphasis added)). See also the commentary dealing with the office "setting," "proxemics" and the "countless other 'external features' of the [interview] situation." *Id*. at 173-

These are but a few of many examples from the interviewing chapter of *The Lawyering Process* that reflect an unstated premise of FTF lawyer-client interaction. The later sections of the book on counseling and negotiating tend to refer back to the interviewing section rather than specifically identifying a scenario, but the nature of the discussion in these later sections again reflects an assumption of an FTF context for lawyer-client and lawyer-lawyer communications.[20]

A dozen years later, when we made our modest contribution to the clinical legal education literature by publishing our book on interviewing, counseling and negotiating, one might have expected that we would have discussed the then quite substantial body of research on CMC.[21] Alas, we did not do so. Indeed, from the opening "Scene from a Law Office"[22] to our "Coming Full Circle" afterword,[23] our presentation falls into the same pattern of presuming an FTF setting for communications by lawyers with their clients or other lawyers.[24] By way of explanation (some might say apology), CMC in 1990 was not an issue of significance to lawyers, a profession that had yet to enthusiastically embrace the proliferating information technologies.[25]

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[20] For example, in the counseling section, after referring the reader back to the interviewing material, Gary and Bea note that the technique of reflection, just then being introduced, "is concerned with the *feelings* underlying the client's *verbal* statements." *Id.* at 1041 (latter emphasis added). Again, in the section addressing negotiation, they write: "[I]t is often possible to learn as much from the *way* . . . questions are answered as from the answers themselves. Did the opponent *hesitate* before answering or *seem surprised* by the question? Did the opposing party *look* at counsel for guidance before responding?" *Id.* at 515 (initial emphasized item in the original; remaining emphases added).

[21] By 1990 there were dozens of articles, studies and books that addressed aspects of CMC. *See, e.g.*, J. Asteroff, Paralanguage in Electronic Mail: Role of User Experience and Expertise (Columbia Univ. Teacher College 1987); J.W. Cheseboro, *Computer-Mediated Communication*, *in* 1 INFORMATION AND BEHAVIOR (B.D. Ruben ed., 1985); C.E. Grantham & J.J. Vaske, *Predicting the Usage of Advanced Communication Technology*, 4 BEHAVIOR AND INFORMATION TECHNOLOGY 327 (1985); S.R. Hiltz & K. Johnson, *Measuring Acceptance of Computer Mediated Communication Systems*, 40 J. AM. SOC. INFORMATION SCIENCES 386 (1989); E.B. Kerr & S.R. Hiltz, COMPUTER-MEDIATED COMMUNICATION SYSTEMS: STATUS AND EVALUATION (1982); S. Kiesler, D. Zubrow, A.M. Moses & V. Geller, *Affect in Computer-Mediated Communication*, 1 HUMAN INTERACTION 77 (1985); K. Matheson, *Persuasion as a Function of Self-awareness in Computer-Mediated Communication*, 4 SOCIAL BEHAVIOR 99 (1989); R.E. Rice & G. Love, *Electronic Emotion: Psychoemotional Content in a Computer-Mediated Communication Network*, 14 COMMUNICATION RESEARCH 85 (1987).

[22] BASTRESS & HARBAUGH, *supra* note 7, at 3.

[23] *Id.* at 523 *et seq.*

[24] Indeed, in the section dealing with paralinguistic communicators (pace, pitch, tone and volume), we also failed to mention that these are the only non-verbal indicators available in another non-FTF communication setting – over the telephone.

[25] A personal anecdote may be illustrative of this point. In 1990, the same year we published our treatise, one of us was called on to make a "pitch" to the AT&T Education Fund in his capacity as dean of the University of Richmond School of Law. AT&T had

In the absence of widespread use by lawyers of the technology that would make CMC possible and in light of a well-justified preference for FTF communication, it is regrettable but perhaps not surprising that we missed the opportunity to reflect on this new form of communication.

These reasons no longer can excuse the legal profession's and academy's failure to consider the impact of CMC on lawyer interviewing, counseling, and negotiating. Lawyers are now high-end users of technology. Moreover, communicating with others via email and other forms of CMC are at the top of the list of tasks performed by lawyers who use computer technology.

### *B. Lawyering in the Twenty-First Century*

The publishers of *The Internet Lawyer,*[26] in partnership with Microsoft Corporation, conducted what is perhaps the broadest survey of lawyers' use of technology.[27] With more than 1,500 respondents, representing all 50 states plus the District of Columbia and Puerto Rico, this is the largest random sampling of the legal profes-

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designated the University as a likely recipient of a significant grant and invited each of the University's schools and colleges to present a proposal. The Law School's proposal was the creation of an Intranet that would link the faculty (using desktops) and students (each of whom would have a laptop and their own "office," a designated wired carrel in the then under-construction new Library). The proposal was premised on the dean's assertion that lawyers were "information managers" who acquire information from clients and others, synthesize that information along with relevant law, analyze the collected information and present it to clients, who then make choices and authorize their lawyers to act on their behalf. Lawyers, it was claimed, would be one of the professional groups who would benefit most from the "computer revolution" because technology was the most powerful tool available to collect and organize information. One of the AT&T reviewers inquired about the conclusion, pointing to unquestionable evidence that lawyers then ranked at or near the bottom of professions and other occupational groups in the use of computers. The response of the Law School was that lawyers are a conservative group who move slowly but who eventually realize the value of technology in law practice and would become high-end users. The response apparently satisfied the reviewers: The Law School received a $430,000 grant, enabling it to become one of the first in legal education to install a network linking faculty, students, and staff and with access to the Internet.

[26] The print and online service known as The Internet Lawyer (http://www.internetlawyer.com) was first published in 1995 by Josh Blackman and Andy Adkins at a time "when the Internet (as we know it today) was still in its infancy," "because [they] knew with the power of the Internet and the ever-growing thirst for information by the legal profession, lawyers would migrate to the Internet at a rapid pace to take advantage of this free information." INTERNET AND ONLINE USER TRENDS IN THE LEGAL PROFESSION 7 (1997).

[27] The survey "was conducted to determine how the legal profession uses and views the Internet and online services in the context of day-to-day legal practice." *Id.* at 1. It "examined how legal professionals access the Internet, use trends in the area of email communication, online legal research, and law firm marketing, and how the legal profession uses the Net to purchase products and services." *Id.* at 8. One of the key questions specifically addressed in the survey was "*What do lawyers use online services for?* Is online primarily a communications, research or marketing tool?" *Id.* at 3.

sion and technology we have located. While describing lawyers as "typically slow adopters of new technology," the survey found:

> [L]arge numbers of legal professionals are using the Internet. Over 720,000 (71%) American legal professionals now use the Internet, including some 520,000 lawyers who access the computer network from their law offices and homes. . . .[28]

The "most anticipated study results" dealt with the use of the Internet for legal research.[29] For our purposes in this article, however, the findings relating to CMC in the form of email are most illuminating. According to *The Internet Lawyer*-Microsoft study, the most commonly used Internet application by legal professionals is email. Almost three-quarters of those surveyed (73%) use email to communicate with others. The study concluded:

> Given that 72% of lawyers are using the Net, and the ubiquity of email addresses. . ., it appears that email is fast becoming as important to legal professionals as the fax machine.[30]

Moreover, the wide use of email as a form of communication cuts almost evenly across the survey's categories of practice lines (private, corporate and government) and firm size.[31]

The responses to two questions on the survey are particularly relevant to our analysis of the impact of CMC on lawyer interviewing, counseling, and negotiating. The first asked respondents to identify

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[28] *Id.* at 8. The numerical disparity between "legal professionals" and "lawyers" is due to the fact that the survey included others who operate in the "legal industry," specifically law librarians, legal administrators and paralegals. *Id.* at 3.

[29] *Id.* at 10. A remarkable finding in this regard was that "Many of the legal pros who use the Net for research are not looking for traditional legal materials like court opinions and state codes, but rather, are in search for other information. They use the Net to find missing people, to investigate trademark infringement or to conduct medical research." *Id.* Although beyond the scope of this article, this conclusion suggests that those of us who teach fact investigation in our clinical programs should consider specifically addressing Internet research strategies. In our experience, law library professionals are adept in developing such online information research plans. Perhaps we need to consider how to integrate presentations by librarians into our clinical curriculum.

[30] *Id.* at 11. Noting that email is a speedy and efficient method of transmitting documents, the study authors seemed puzzled that legal professionals were not using email as their primary means of document transmission. The survey found that although one-third of legal professionals use emails for "zipping memos and briefs around electronically . . . respondents reported that most email . . . contains no documents." *Id.*

[31] The study found that 65 percent of those in private, 70 percent in corporate, and 63 percent in government practice used email. Eighty-five percent of respondents fell into these three categories; the remaining 15 percent were divided among academics, those not in practice and others. Slightly more than two-thirds were in private practice. *Id.* at 19, 120. The survey also established that almost all legal professionals personally used a computer at work without regard to the type of practice (in excess of 96 percent of the three practice types) or the size of the firm (at least 96 percent of those in small, medium or large practice settings). *Id.* at 30-31.

those to whom lawyers send, and from whom they receive, email.[32] Outside of communication with family members, legal professionals list clients at the top of the list of those with whom they communicate by email. The second largest category consists of colleagues within one's own firm and co-counsel. CMC with opposing counsel trails other professional correspondents but exceeds courts. The following chart sets out key findings from the study:

TO WHOM DO LEGAL PROFESSIONALS SEND AND RECEIVE EMAIL?[33]

| To/From Whom | Percentage Using Email |
|---|---|
| Clients - Send | 40 |
| Clients - Receive | 38 |
| Colleagues in firm - Send | 37 |
| Colleagues in firm - Receive | 35 |
| Co-counsel - Send | 18 |
| Co-counsel - Receive | 17 |
| Opposing Counsel - Send | 9 |
| Opposing Counsel - Receive | 8 |

The second critical CMC question addressed in the survey involved the type of information that is transmitted by lawyers via email.[34] Twenty-two percent of the respondents reported sending and receiving information involving the status of cases while eight percent identified other client information (including billing) as the focus of email correspondence. The total of these client-related categories, then, almost equaled the one-third of those surveyed who used email to transmit memos and briefs.[35]

Later surveys of computer use by lawyers, although neither as broad nor as deep as *The Internet Lawyer*-Microsoft study, confirmed many of these findings. The Florida Bar, the third largest unified bar in the United States, conducts a biannual random survey of its now more than 60,000 members.[36] For the past several iterations, The Florida Bar survey has included questions related to the growth and

[32] *Id.* (Question 45). For the results, *see id.* at 121.

[33] *Id.* (percentages rounded). Other categories of correspondents were: Prospects, Government Agencies, Outside Counsel, Courts, Family and Other.

[34] Question 47 of the survey instrument, the results of which are reported on *id.* at 122.

[35] *Id.* (percentages rounded). Other categories of information were: Marketing Information, Court Filings, Service of Papers, None and Other.

[36] The Florida Bar Economics and Law Office Management Survey was last conducted in April 2002. *See* Mark D. Killian, *Salaries for Florida Lawyers Are on the Rise: Use of Technology Continues to Grow; Support "Dignity in Law" on the Annual Bar Fee Statement*, FLORIDA BAR NEWS, July 1, 2002, at 1.

use of computer technology by Florida attorneys.[37] Of interest to our understanding of CMC and how it affects the professional communications of lawyers are findings about the high access to and use of the Internet in law practice as well as the reasons for using the technology. Almost all Florida lawyers have access to the Internet from their offices and the growth in access was significant in a recent four-year period.[38] Personal use of the Internet also has climbed significantly in recent years. In 1996, only 30 percent of Florida lawyers went on the Internet in the three months preceding the survey; in 2002, access within three months climbed to 95 percent.[39] Even more impressive is the number of lawyers who go online several times a day. The most recent survey reports almost three-quarters of Florida's lawyers access the Internet on multiple occasions during the workday, up from less than one-quarter who did so in 1998.[40]

The 2002 survey of the Florida Bar confirmed the finding of *The Internet Lawyer*-Microsoft study that more than 70 percent of legal professionals use email in their work.[41] The primary reason cited by Florida lawyers for using the Internet was to send or receive email. Over two-fifths of the attorneys (42 percent) listed email as their principal use of the Internet, several percentage points ahead of legal education and research (35 percent) and well above the third ranked reason, personal education and research (19 percent).[42] Quite interesting is the finding that Florida lawyers use CMC to reach those outside their law offices more than they employ email to communicate with those inside the law firm.[43] Unlike *The Internet Lawyer-*

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[37] In 2002, more than a dozen questions and sub-questions dealt with these issues while several others addressed use of the Florida Bar's home page. *See* Florida Bar Economics and Law Office Management Survey 56-76 (2002).

[38] Ninety-nine percent of Florida lawyers had office access to the Internet in 2002, up from 76 percent in 1998. *Id.* at 60.

[39] *Id.* at 61.

[40] Seventy-one percent were multiple daily users of the Internet in 2002; only 22 percent were users in 1998. *Id.* at 65.

[41] Although the questions in the two studies were framed differently, the Florida Bar survey found that at least 84 percent of lawyers used email on a weekly basis, 71 percent on a daily basis. Actual use may be higher because the Florida report gathered data about in-firm email and email sent to those outside the firm. *Id.* at 56. As an interesting contrast, 80 percent of Florida lawyers have not in the past two years used video conferencing, the closest technology replicate of FTF communication. Government lawyers use video conferencing more often than those in private practice: Only one-percent of private practitioners have used video conferencing over ten times in the preceding two years while ten percent of government lawyers have used the technology that often in the same period.

[42] *Id.* at 64. Email use by women lawyers was slightly greater than by men (85 versus 83 percent), higher among younger attorneys (under 50 years old) than lawyers over 50 (87 versus 79 percent), and directed outside rather than inside the firm (79 versus 70 percent). *Id.* at 56-57.

[43] Ninety percent use email to send messages to those beyond the firm but only 74

Microsoft study, the Florida Bar survey did not probe for data about specific recipients of email messages or the content of those messages. It is reasonable to assume, however, that many of the emails sent by Florida lawyers to persons outside their law offices were directed to clients, co-counsel and opposing attorneys and contained client and case-related information.[44]

Thus there is abundant evidence that lawyers are using email to communicate professionally with others, both within and beyond their offices, and some data are available on their use of CMC for lawyer-client and lawyer-lawyer communications. No specific information is available, however, on how much, if any, lawyer interviewing, counseling, or negotiating is taking place in an electronic environment. We have personal experiences in using CMC to obtain information from clients and others (interviewing), to advise clients about the feasibility, risks and rewards of certain actions (counseling), and to negotiate settlements of disputes or transactional agreements with opposing counsel or parties.[45] We also have "anecdotal evidence" gleaned from practitioners who are using technology for these purposes and from clinical colleagues who report some use of CMC by students in their professional interactions with clients and lawyers.[46] Even without

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percent use email for internal communications. *Id.* at 56.

[44] *See supra* notes 33-34 for data reported in *The Internet Lawyer*-Microsoft study on these two subjects.

[45] One of us, acting as a negotiation consultant in both transactional and dispute matters over the past ten years, has used CMC extensively in professional interviewing, counseling and negotiating settings. Factors such as time (often information had to be acquired quickly or action had to be taken promptly), distance (clients, parties and other counsel were scattered across the country, as well as in Europe and Asia), and complexity (most of the matters involved complicated intellectual property transfers or disputes that arose in technology related contexts) made it impossible or impractical to accomplish the desired goals in FTF sessions or by teleconference. All of the matters, however, involved at least some FTF or telephonic contact with clients and counsel. Nonetheless, on occasion the non-CMC interaction was minimal. For example, in the resolution of a dispute involving a personal services contract between the client and a technology company, most of the information gathering and counseling and all of the negotiation with opposing counsel (except for one dinner meeting and a single telephone exchange) was accomplished by email and limited fax communication.

The other of us handled a litigation involving clients who lived and worked at a substantial distance from the lawyer and whose case involved an equally distant employer and a remote counsel. The lawyer and his clients quickly discovered that email was the easiest and best medium for most of the fact-gathering and decision-making. The substance of the case concerned an employment policy, which ultimately was negotiated to mutual satisfaction through counsels' email exchanges of proposed drafts and amendments.

[46] Informal inquiries of the NSU Law Board of Governors, all of whom are legal professionals, lead us to the tentative conclusion that increasingly more professional information exchanges and persuasion interactions are taking place via CMC. Time pressures and the convenience of communication were the reasons given most often for the use of email in lieu of FTF or telephone exchanges. An informal survey of 15 NSU Law faculty who taught in our seven clinics over the past five years reveals that many of our clinical students

hard data, we are confident that lawyers are using CMC as a tool for interviewing, counseling and negotiating and that this practice will continue to grow.

Indeed, the advantages of the CMC media virtually (so to speak) guarantee that lawyers will increasingly use them for the gamut of their professional relations. Email, for example, although a variation on age-old letter-writing, nevertheless offers benefits that are not available through regular mail or even by fax. These include: ease of use; ease of access; instant transmission and receipt; multiple party participation; the capability to transmit lengthy documents easily; the capacity to contact people wherever they are (regardless if one knows where that is) from wherever one is; the ability to leave messages of whatever length one wishes; and (aside from the initial hardware investment) extremely low costs. Many of these advantages of electronic communication are heightened when lawyer and client, or lawyer and opposing counsel, are separated by significant distances. Moreover, the very existence of such media facilitates long-distance representation and thus creates opportunities and needs for even greater use of CMC.

With the foregoing advantages, however, come new (or at least different) issues for the lawyer-communicator. This leads us to our examination of the communication differences between FTF and CMC and a (preliminary) explanation of how those differences affect the interpersonal communication tasks of lawyers.

## II. The Skill Dimension

### A. *Introduction*

In the skill dimension sections of *The Lawyering Process*, Gary and Bea featured material "borrowed" from other disciplines and "edited unmercifully." They expected clinical teachers to "rework" the material to uncover "similarities and differences" useful in understanding and explaining the work of lawyers.[47] Because the article format of this symposium precludes us from including lengthy excerpts from communication theory, we will try to parallel Gary's and Bea's approach by "unmercifully" summarizing and simplifying the extensive research on CMC. Our hope is that clinicians will be drawn

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are using email to obtain information, advise clients on case status and available options, and engage other lawyers in settlement or transactional discussions.

[47] Bellow & Moulton, *supra* note 1, at xxiii, xxv. As examples of materials "borrowed and edited unmercifully," *see id.* at 197-207 (*reprinting* Kahn & Cannell, *supra* note 17, at 107-13, 116-25, 131-39), and at 537-43 (*reprinting* Pruitt, *Indirect Communications and the Search for Agreement in Negotiation*, 1 J. App. Soc. Psych. 205, 205-11, 233-37 (1971)).

to sources that will help them understand and explain to law students how CMC affects lawyer interviewing, counseling and negotiating.

Another pattern of the Skill Dimension sections of *The Lawyering Process* is the inclusion of Notes – subsets where Gary and Bea set out observations, questions and problems to tease readers and encourage them to apply the "borrowed" material to the lawyer's craft.[48] Modestly mimicking our mentors, we begin with ten hypothetical situations to tease our readers and encourage them to speculate whether the CMC research we summarize suggests that distance communication media may be adequate (or superior) substitutes for FTF interviewing, counseling or negotiating by lawyers. These hypothetical cases should be kept in mind as you wend your way through our later summary of the findings from other disciplines.

1. The lawyer represents a group of named class action plaintiffs who have similar but not identical goals (as opposed to coinciding legal interests) and who reside within a 150 mile radius of the lawyer's office, and the parties need to sort through a range of options before the litigation can move forward.
2. The same situation as in the preceding paragraph except that the class clients are within the immediate geographical area, group conversations about the case have previously taken place, and the lawyer has found during these group conversations that some clients dominate while others are reticent to speak.
3. The lawyer's client has left a telephone message raising a number of questions about her case. Most of the client's inquiries are straightforward and factual (*e.g.*, what documents she must produce, how long an upcoming deposition will last), but several are anxious queries about matters that counsel views as emotional time bombs (*e.g.*, the client's fear and anger that opposing counsel will ask her embarrassing questions of a personal nature). The lawyer is in the midst of trial in another matter and will be unable to schedule an FTF meeting for a week or more.
4. The lawyer represents several clients from three generations of a family in an estate planning context where the distribution of real, personal, and inchoate property is at issue. The clients are scattered across the U.S. and Canada. The lawyer has detected a hint of animosity and a touch of jealousy among the parties.

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[48] *Id.* For example, see *id.* at 207-09 (Question Formulation and the Problem of Rapport); *id.* at 545-48 (Using Concessions: Problems and Possibilities).

5. The client in a family law matter became distraught and was unable to continue in several interview sessions after raising the issue of his spouse's alleged infidelity. The client's difficulties in getting beyond this emotionally charged aspect of the case has impeded reflective discussion of such crucial subjects as joint custody, child support and the disposition of jointly held property.
6. The lawyer in a joint venture (JV) matter is on the West Coast of the U.S., the client is on the East Coast, the attorney representing the other side is in Tokyo, and the financial institution they hope will fund the new business enterprise and its attorney are in London. The lawyer and counsel for the JV partner are negotiating the specifics of the representations and warranties section of the agreement, matters that are crucial to both sides but particularly important to the attorney's client. Counsel for the London bank must be "kept in the negotiation loop" and has informed the parties that volatility in interest rates means that "time is of the essence."
7. The parties are engaged in negotiating a Non-Disclosure Agreement involving the testing of a new technology, and there is disagreement over the effect of the wording of three clauses in the current draft of the document. Time is of the essence and the lawyers have offices at either end of a large city.
8. The parties to a contract have vastly different views of their responsibilities under an existing contract, and each accuses the other of engaging in conduct contrary to business and ethical norms. At an earlier FTF meeting, their lawyers were unable to prioritize the issues or to make any headway in reaching agreements on the relevant facts.
9. The lawyer is counsel in three cases recently set for trial in several districts within the same state. The trial judge in each case has instructed counsel to engage in good faith settlement negotiations and to report progress to the court in the coming week. The lawyer believes two of the cases are likely to settle if she can maintain productive contact with opposing counsel. The lawyer is convinced the third case will go to trial and that she therefore must prepare for trial in that matter, but the judges' orders require that she nonetheless pursue a settlement in that matter in addition to the other two.
10. The lawyer and opposing counsel have successfully negoti-

ated several transactions on behalf of clients in the past. In a pending deal, in which each lawyer represents a client other than those who have been involved in their prior dealings, the lawyers have spoken briefly on the telephone but are having difficulty scheduling an FTF meeting.

As you read the following summary of CMC research, consider whether (and, if so, how) the findings should inform and perhaps influence the lawyers in these hypothetical situations who are considering whether to interview, counsel or negotiate online.

### *B. CMC Research: An Overview*[49]

Several strains of CMC research have emerged. Most of the early studies focused on the task-oriented nature of computer-mediated communication and found CMC to be a "lean" medium in contrast to the "rich" communication observed in FTF encounters.[50] This research led to a view of CMC as businesslike, depersonalized and lacking the emotional content of FTF communication. In the '90s, researchers approached CMC from a different perspective, focusing on the social and emotional nature of CMC communication. These later studies suggest CMC participants convey socially revealing information and engage in relational behavior that is not qualitatively different from FTF communicators.[51] The sharply divergent major findings of these two research paradigms – the task-oriented model and the social-emotional-oriented model – are the product of differences in their theoretical foundations and in key aspects of the employed research methodology (particularly in terms of the form of CMC used and the duration of the communication studies).[52]

Quite recently, a research team has constructed studies that focus

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[49] In conducting our research within the primary field of communication theory and its subset of CMC, we "found no end, in wand'ring mazes lost." JOHN MILTON, PARADISE LOST, Book II, l. 561 (1667). These are exploding disciplines marked by a steady stream of published studies through which we slowly waded. Luckily, we stumbled upon a recent summary of research in these companion fields that allowed us to focus our thinking and extract meaning. Liu, *supra* note 12. The organization of this section follows Professor Liu's. We have examined primary sources where needed, however, to try to ensure that we are not straining to reach our preliminary and tentative conclusions.

[50] L. Trevino, R. Lengel & R. Daft, *Media Symbolism, Media Richness, and Media Choice in Organizations: A Symbolic Interactionist Perspective*, 14 COMMUNICATION RESEARCH 553 (1987).

[51] Much of the research referenced in the sections that follow, particularly the work conducted early in the cycle, arose in the context of business organizations because efficient and effective communication is a central theme in the business world. Researchers appear to have expanded the settings in more recent studies.

[52] Liu, *supra* note 12. Professor Liu observes, however, that the two schools have certain similarities, including several common research strategies as well as comparable characteristics among study participants and their assigned tasks.

specifically on CMC negotiation. These scholars come from disciplines outside the field of communications and have not relied heavily on CMC research. The researchers have, however, developed several theories about how CMC affects the bargaining process.

### *1. Task-Oriented Model*

Three related but somewhat different theories support the task-oriented model: Social Presence, Media Richness and Social Context Cues.[53] All three theories are premised on the view that FTF communication incorporates an abundance of social information (including verbal and non-verbal cues) while CMC contains far less information of a social nature because it is limited to text-based cues. As a result, theorists conclude, CMC is inherently task-oriented and virtually devoid of emotional content.

The major findings of the task-oriented studies about CMC involve five issues: (1) equal participation; (2) uninhibited behavior; (3) increased quality of decision-making; (4) increased time to reach a decision; and (5) depersonalization.[54] Task-oriented researchers found that status and expertise inequalities are strikingly reduced in CMC

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[53] Although each task-oriented theory exhibits its own twist, all three appear to reinforce Marshall McLuhan's famous aphorism, "The *medium* is the message." MARSHALL MCLUHAN, UNDERSTANDING MEDIA (1964) (emphasis added). *Social Presence Theory* attempts to articulate the level of "psychological presence" that can be attained in a communications medium. The fewer the communicative channels, the lower is the degree of social presence and the more impersonal will be the communication. FTF communication is high in social presence because all verbal and non-verbal channels are present. CMC, on the other hand, is low in social presence because all of the visual and aural non-verbal channels are missing, leaving only the text message. *Media Richness Theory* concentrates on the communication goal of resolving ambiguity and reducing uncertainty. Advocates of this model assert that communication media can be positioned along a rich-lean continuum based on the medium's capacity for processing equivocal information. Media richness, according to these theorists, depends upon the mixture of several criteria including: (1) the availability of instant feedback making it possible for communicators to converge quickly upon a common interpretation or understanding; (2) the capacity of the medium to transmit multiple cues, such as body language and voice tone, to convey interpretations; and (3) the personal focus of the medium to convey feelings and emotions that infuse the communication. Media rich theorists concluded that FTF communications are "rich" and suited for occasions when messages are ambiguous; CMC (*e.g.*, e-mail), on the other hand, is "leaner" and more appropriate when the communication is unambiguous. *Social Context Cues Theory* compares communication media on the basis of the amount of information that can be exchanged by the transmission of "social context cues." People perceive others through both static and dynamic social context cues. Static cues come from the individual's appearance. Dynamic cues come from the individual's behavior, such as frowning with unhappiness and nodding approval. According to social context cues theory, CMC environments have the fewest and FTF settings have the greatest social context communication cues. For the sake of space and readability, we have omitted references to the extensive research we reviewed in developing this summary of the three task-oriented theories. We would be happy to provide references on request.

[54] *Id.*

discussions and that both high and low-status members tend to participate equally in CMC discussions. These researchers also found that group members exhibit more uninhibited behavior and are more willing to express themselves in strong and even inflammatory ways in CMC environments than in similar FTF encounters.[55] Task-oriented researchers concluded that the group support systems in CMC environments improve brainstorming and positively influence the quality of decision-making.[56] Another conclusion that emerged from this school of research is that participants are less likely to reach an agreement in CMC environments, with consensus occurring less often and requiring a longer period of time than in FTF groups. Finally, task-oriented scholars found that there is little or no emotional arousal in CMC settings, which has led these scholars to characterize CMC as an impersonal environment.

### 2. *Social-Emotional-Oriented Model*

The three task-oriented theories have been characterized as presenting a "cues-filtered-out" perspective on CMC.[57] Maintaining that nonverbal cues shape social interaction by producing information that is extremely helpful in forming personal impressions, comprehending and replying to messages, and assessing the truthfulness of communications, the task-oriented theorists assert that CMC's filtering out of nonverbal cues limits participants' ability to perceive others and form impressions, and reduces their awareness of the social context of communication. Accordingly, these theorists view all CMC environments as less personal and less socially emotional than FTF interactions.[58]

The social-emotional-oriented researchers questioned these conclusions of the task-oriented scholars about the *capabilities* of the various modes of communication and how they *affect* the communicators. The social-emotional-oriented research model of CMC environments,

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[55] "Flaming" was influenced by participant anonymity. More uninhibited remarks were made in anonymous CMC environments than in non-anonymous CMC settings.

[56] One study found that mixed-status group made poorer decisions and referred less to critical information than equal-status groups in both CMC and FTF environments. A.B. Hollingshead, *Information Suppression and Status Persistence in Group Decision Making: The Effects of Communication Media*, 23 HUMAN COMMUNICATION RESEARCH 193 (1996). Another study concluded that larger groups generated significantly more and higher quality ideas than small groups. J. Valacich, A. Dennis & J. Nunamaker, *Group Size and Anonymity Effects on Computer-Mediated Idea Generation*, 23 SMALL GROUP RESEARCH 49 (1992).

[57] M. Culnan & M. Markus, *Information Technologies*, *in* HANDBOOK OF ORGANIZATIONAL COMMUNICATION: AN INTERDISCIPLINARY PERSPECTIVE 420-43 (F. Jablin, L. Putnam, K. Roberts & L. Porter eds., 1987).

[58] Liu, *supra* note 12.

based on principles grounded in social cognition and interpersonal relationship development from the field of social psychology,[59] addresses the manner in which communicators *process* relational and social identity cues by using various media. The social-emotional theorists begin with the proposition that those who use any communication medium experience similar needs for affinity and uncertainty reduction. To meet such needs, CMC participants are forced to adapt their textual and linguistic behaviors to the medium and to adjust the manner in which they present and solicit socially revealing and relational information. However, CMC's limited cues limit the speed with which task-related and social-emotional-related information can be conveyed. Therefore, these theorists hypothesize, the key difference between FTF and CMC environments is not a matter of medium *capability*, but a matter of the *rate* at which the medium can transmit the needed information.[60]

This hypothesis led the social-emotional-oriented theorists to alter the research model. Most of the task-oriented CMC communication research involved synchronous technology over a short period of experimental duration, generally less than one hour.[61] In contrast, most of the social-emotional-oriented studies extended over several weeks, using asynchronous technology.[62] These differences in conducting the research led to several remarkably different conclusions about CMC.[63]

The task-oriented researchers[64] and the social-emotional-oriented studies diverged sharply with regard to each of the following subjects: (1) social and relational development; (2) individuation; (3) impression development; (4) humor; and (5) trust.[65] The social-emotional-oriented researchers found that, over time, CMC groups exhibit

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[59] *See* J.B. Walther, *Interpersonal Effects in Computer-Mediated Interaction: A Relational Perspective*, 19 COMMUNICATION RESEARCH 52 (1992). Earlier researchers did, however, suggest that "CMC systems can support socioemotional communication and the communication reflects the inherent communication traits of the users." R. Rice & G. Love, *Electronic Emotion: Socioemotional Content in a Computer-Mediated Network*, 14 COMMUNICATION RESEARCH 85 (1987) (quoted in J. Michael Jaffe, Young-Eum Lee, Li-Ning Huang, and Hayg Oshagan, Gender, Pseudonyms, and CMC: Masking Identities and Baring Souls, *available at* http://weblaw.haifa.ac.il/~jmjaffe/genderpseudocmc/intercmc.html (last visited August 18, 2002).

[60] Liu, *supra* note 12.

[61] *Id.*

[62] *Id.*

[63] Liu identifies other differences in the two research models, including the types of participants, group size and structure, and task characteristics. In our preliminary assessment of the impact of CMC on lawyer interviewing, counseling, and negotiating, we have concluded that the time and technology differences are most important.

[64] *See supra* notes 53-54 and accompanying text.

[65] *See supra* note 12.

*greater* intimacy and social-orientation than FTF groups, achieving *higher* levels on several dimensions of interpersonal communication.[66] These studies also report that CMC participants have higher levels of private self-awareness and lower levels of public self-awareness ("individuation"). As a result, the social pressure to conform to majority judgments seems to be reduced in CMC environments, and CMC participants tend to be more critical of and more willing to assess the information they receive.[67] In addition, CMC users formed clear impressions of others gradually over the multi-week studies, developing images of one another based on the verbal and *non*-verbal[68] cues available in their textual online communications. An interesting finding of social-emotional-oriented researchers is the presence of humor in CMC conversations. According to one researcher, humor – which "depends on group norms, knowledge, problems, and practices" – "provides a different way for CMC participants to solve problems within the group, to produce unique identities and individuality, and to create group solidarity and identity in CMC environments," and therefore " can be a particularly important locus of social information in CMC environments."[69] This same researcher's survey of CMC research asserts that email and FTF communication foster the development of similar levels of trust and cooperation among communicants.

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[66] *Id.* According to Liu, "[t]his surprising phenomenon is called 'hyperpersonal communication' in CMC environments." *Id.* (citing K. Vergoth, *Let's Get Hyperpersonal*, 28 PSYCHOLOGY TODAY 21 (July/August, 1995), and J. Walther, *Computer-Mediated Communication: Impersonal, Interpersonal, and Hyperpersonal Interaction*, 23 COMMUNICATION RESEARCH 3 (1996)). Certain CMC studies conclude that social-emotional levels are "very close to those of FTF groups" while others indicate that the level of affect and social-emotion in CMC environments parallels FTF interaction.

[67] *Id.*

[68] *Id.* It is difficult to understand the reference to *non*-verbal cues in the asynchronous text environment (*e.g.*, e-mail). Liu cites a study that refers to "cognitive models and conceptual categories" individuals possess as part of their communication life experiences. *Id.* (citing David Jacobson, *Impression Formation in Cyberspace: Online Expectations and Offline Experiences in Text-based Virtual Communities*, 5 J. COMPUTER-MEDIATED COMMUNICATION [online 1999]). We interpret this statement as this researcher's formulation of the ways in which a CMC user can send and receive non-verbal information. Another source sets out a more expansive – and to us, more comprehensible – explanation of "the types of cues that exist in CMC. . . . First of all, there are the same types of variables commonly employed by linguists in content analysis of transcribed conversation (i.e., the semantic and discursive cues imbedded in the text: deictic expressions, politeness behavior, reference). Additionally, it is possible to quantify non-content text variables, such as length or relative amount of utterances. Then there are cues unique to online communication, such as deliberate use of punctuation symbols, ellipses and capital letters to convey specific information . . . [and] affect through the manipulation of common grammatical symbols." J. Riseberg et al., Action and Reaction: Computer-Mediated Dialogues As a Model for Natural Interfaces 1 (paper presented at the 2nd International Conference on Cognitive Technology, Aizu, Japan, August 1997), *available at* http://citeseer.nj.nec.com/update/262234 (last visited August 18, 2003).

[69] *Id.*

We believe, however, that this last conclusion is problematic.[70]

### 3. *Summing Up the General CMC Research Evidence*

CMC technology prompted communication theorists to reexamine some of the fundamental principles about how ideas and information are exchanged. As these theorists revisited the interrelationships between verbal and non-verbal communication, the research models treated FTF interactions as "the benchmark for assessing CMC."[71] FTF was regarded as "provid[ing] individuals with a full array of verbal and nonverbal cues that create social presence and visceral immersion in the interaction, supply important social and contextual information, permit nuanced and coordinated interaction, and add redundancy."[72] CMC initially was perceived as an "impoverished communication environment [that] . . . eliminate[s] social presence, degrade[s] the quality of the communication, impair[s] working relationships, and undermine task[s] performance," and it was believed that CMC communicators are unable to "compensate for such losses."[73]

As social-emotional-oriented researchers explored CMC media more deeply, however, these perceptions were tested, with the result that the CMC environment was found to be far richer than had been assumed, perhaps as rich as FTF communications. Now, after more than two decades of research into how CMC technologies affect communication, we are left with conflicting conclusions and mixed advice. As researchers have observed, the empirical evidence to date does not support the view that "FTF interaction is . . . a superior mode of communication" and the more reasonable view appears to be that "FTF is

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[70] Liu cites a single study for this proposition: M. Dana, The Effects of Computer-Mediated Communication on Trust Relationships Between Middle Managers and Their Subordinates (Doctoral Dissertation, University of La Verne, 1999). Our research turned up two studies that seem to contradict this finding: N. Bos et al., Effects of Four Computer-Mediated Communication Channels on Trust Development, *available at* http://www.2.cs.cmu.edu/~dgergle/pdf/BosOlsonGergleOlsonWright_RichMediaTrust_CHI02.pdf and C. Jensen et al., The Effect of Communication Modality on Cooperation in Online Environments, *available at* ftp://ftp.research.microsoft.com/pub/tr/tr-99-75.pdf (both last visited on August 18, 2003). Although the latter two studies compared different media (*e.g.*, one included FTF interaction while the other's "richest" medium was voice), and had certain limitations (*e.g.*, relatively brief interactions), they reached the same essential conclusion. In the words of one study: "Groups using text chat . . . [had] the most difficulty establishing high trust based cooperation." Bos et al., *supra*.

[71] J. Burgoon et al., *Testing the Interactivity Principle: Effects of Mediation, Propinquity, and Verbal and Nonverbal Modalities in Interpersonal Interaction*, J. COMMUNICATIONS 657, 658 (September 2002), *available at* http://www.talkbank.org/data/JOC/PDF/9-Burgoon%20et%20al. .pdf (last visited August 21, 2003). Many clinical teachers, certainly including the two of us, endorsed this proposition and never questioned it.

[72] *Id.*

[73] *Id.*

not the inevitable preferred venue for decision making" and that "communicators can effectively compensate for [CMC's] structural shortfalls if given adequate time and motivation"; in other words, "[i]t is the property of [the] communication itself rather than [the] medium. . ." that counts.[74]

### *4. Negotiating via CMC: Results from Early Studies*

We did not find any reports of CMC research that concentrated on the specific skills of interviewing and counseling. We did, however, find two studies comparing negotiating in FTF and CMC environments.[75] The principal investigators in these studies, who come from the disciplines of business and law, ignored (or did not cite)[76] the extensive research findings of the communications theorists. They drew instead upon more traditional work in the areas of negotiation and dispute resolution, where most of the experiments were conducted in FTF settings. Despite potential research shortcomings,[77] the following findings are instructive to lawyers who are considering the use of

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[74] *Id.* at 659.

[75] Leigh Thompson & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 J. SOCIAL ISSUES 109 (2002); Michael Morris, Janice Nadler, Terri Kurtzberg & Leigh Thompson, *Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations*, 6 GROUP DYNAMICS 89 (2002). The authors of these two articles are part of a group conducting a five-year investigation of the dynamics of online negotiating. They plan to issue additional reports, which are referenced in the two cited articles as unpublished manuscripts. The authors mention five other research reports on CMC negotiation but we have examined only one of those publications. (Several are unpublished papers delivered at conferences and not available online.).

[76] Questionable analysis flows from ignoring the CMC data. For example, the researchers report a "striking pattern" in one of their studies that we do not find remarkable given the research to which we refer *supra* notes 54-74 and accompanying text. The researchers found that CMC negotiators exchanged only one-third of the non-task-relevant information of the FTF negotiators but the two groups shared the same amount of task (negotiation) relevant data. Morris et al., *supra* note 75, at 91. The researchers also report that CMC negotiators are far more inhibited in asking questions of their opponents than are their FTF counterparts. However, the significant disparity involved non-task topics. *Id.* These outcomes seem to us to be clearly consistent with the CMC research on the task-specific nature of CMC and the medium's deficiencies in fostering social-emotional communication during short-term encounters. Interestingly, the authors of the study discount a peer reviewer's observation that less significant disparities between the two negotiator types on task topics were due to CMC being "so clear and ample that no questions need be asked." *Id.* at 91 n.3. We find the peer reviewer's comment in sync with the implications of the summarized CMC research findings.

[77] In addition to our observations in note 76, *supra*, we believe that certain aspects of the research design may have influenced the findings. For example, although the CMC medium in the studies was asynchronous e-mail (as used in the social-emotional research), the CMC negotiation periods (three days to one week) were closer to the shorter time frames of the task-oriented studies. As we noted earlier, the time allowed for the CMC communication is a key factor in distinguishing competing CMC research findings. *See supra* notes 70-71 and accompanying text.

CMC technologies for negotiation.

*Negotiating via CMC: Key Findings*
*Effects of Rapport and Social Identity on Outcomes*[78]

| | Social Outcomes | Economic Outcomes |
|---|---|---|
| **Interpersonal Factors** | As compared to FTF negotiation, CMC reduces rapport building[79] | As compared to FTF negotiation, CMC increases multi-issue offers[80] |
| | Brief telephone call prior to CMC negotiation results in greater cooperation and better working relationship[81] | Brief telephone call prior to CMC negotiation improves outcomes |
| | CMC negotiators who attempt to build rapport engender more positive emotion and trust than do those who attempt to dominate | Brief personal disclosure via CMC reduces likelihood of impasse |
| **Group and Social Identity Factors** | Out-group CMC negotiators express more negative affect and develop less rapport compared to in-group CMC negotiators[82] | CMC negotiators concerned about their group's reputation use more aggressive strategies, leading to lower outcomes than negotiators concerned about their personal reputation |
| | Male/male CMC negotiators develop less cooperative working relationships than male/female negotiators | Out-group CMC negotiations result in more impasses than do in-group CMC negotiations |

[78] Thompson & Nadler, *supra* note 75, at 116.

[79] According to the researchers, "there are three components to rapport: (1) mutual-attentiveness (*i.e.*, my attention is focused on you and your attention is focused on me); (2) positivity (*i.e.*, we are friendly to each other); and (3) coordination (*i.e.*, we are in sync, so that we each react spontaneously to each other).... [R]apport was a powerful determinant of whether people developed the trust necessary to reach integrative agreements." *Id.* at 111. Moreover, "rapport building between negotiators leads to trust and optimism about the future that motivates people to form long-lasting relationships and maintain contact in the future." *Id.* at 116.

[80] The researchers found that the greater amount of non-task-relevant conversation in FTF negotiations resulted in less efficient discussions. *Id.* at 112.

[81] In one of the two reported studies, the researchers compared a group of participants whose only contact was by CMC e-mail with a group who added a brief five-minute "getting to know you" telephone call. The researchers have dubbed the latter variable "social lubrication" or "schmoozing." Morris et al., *supra* note 75, at 94. CMC "negotiators who 'schmoozed' . . . developed more realistic goals, resulting in a larger range of outcomes, and were less likely to impasse compared to nonschmoozers.... [E]ven though both schmoozers and nonschmoozers conducted all of the business aspects of the deal via e-mail, there were dramatic differences in the negotiators' strategies and in the result of the negotiation." Thompson & Nadler, *supra* note 75, at 115.

[82] One study matched graduate students who were enrolled in the same classes at a

Based on these findings, the researchers identified several "cognitive-motivational" biases in CMC negotiations,[83] two of which may be of particular interest to lawyer e-negotiators. In what has been termed the *Temporal Synchrony Bias*, email negotiators tend to behave as if they are in a synchronous environment in which they can control the rate of message exchange, even though self-evidently this is not the case. According to the researchers, "most negotiators have a 'tennis game' mental model of negotiations . . . and they expect the other party to 'volley back' offers [and respond to other statements] much faster than is actually possible using asynchronous media."[84] Alteration of the "turn-taking" behavior that is typical of FTF encounters has implications for email negotiators. Conversational turn-taking facilitates the development of trust and rapport, social-emotional factors that positively correlate with enhanced negotiation outcomes. On an informational level, turn taking allows FTF negotiators to "engage in a process of rapid correction of information," reducing the formation of inaccurate assumptions that lead to leaner outcomes.[85] Asynchronous email cannot match the smoothness or speed of the mutual clarification procedure that turn taking permits in FTF encounters.

Building on an earlier study, the researchers suggest the existence of a *Sinister Attribution Bias* in CMC negotiation. Online negotiators are more likely than those interacting in FTF contexts to suspect the other party of lying or other forms of deception. Given the finding that e-negotiators are no more likely than their FTF counterparts to actually engage in deceptive behavior, the authors attribute this mistrust to conditions extant in the CMC medium. They go on, however,

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university (*i.e.*, in-group) while the other study matched graduate students at two universities against each other (*i.e.*, out-group). Out-group negotiators "consistently underperformed on the relevant measures of negotiation performance" (information exchange, persuasion tactics, offers and what the researchers dubbed "metalevel statements") in comparison with in-group negotiators. Thompson & Nadler, *supra* note 75, at 116 (relying on criteria and data reported in Morris et al., *supra* note 75).

[83] *Id.* at 117-20. Two others, the Burned Bridge and the Squeaky Wheel Biases, appear to be related to each other and to conclusions reached by earlier CMC researchers. Consistent with the observations of task-oriented researchers, the e-negotiation studies showed a tendency on the part of participants, dubbed the Burned Bridge Bias, "to engage in risky interpersonal behaviors in an impoverished medium that they would not engage in when interacting face-to-face." *Id.* at 118. For example, online negotiators may "test" an opponent as follows: "If I don't hear from you in 1 hr, then I'm going to assume that you don't want to reach an agreement and I will refuse to send any more offers." *Id.* at 118. CMC negotiators suffering from the Squeaky Wheel Bias are inclined to adopt a negative (as opposed to positive or rational) emotional style to achieve their goals. The social and physical distance and the relative anonymity of CMC afford negotiators a greater opportunity to act slightly irrationally, to be rude, and to use intimidation techniques. The study authors relate this bias to "flaming." *Id.* at 118-19.

[84] *Id.* at 117.

[85] *Id.*

to note that "perceived ingroup status of the e-negotiation opponent can reverse the sinister attribution effect."[86] Indeed, when a CMC negotiator perceives an opponent as an in-group member, normative behavior is fostered, information exchange is increased and impasse is reduced to nearly zero.

### 5. *Lawyer Interviewing, Counseling and Negotiating via CMC*

We assume that the vast majority of lawyer representation of clients will continue to include at least an initial FTF interview and that critical counseling sessions will normally find the lawyer and the client together in time and space. We make these assumptions because we believe most attorneys will view these aspects of the lawyer-client relationship as requiring an FTF setting and that most clients will feel frustrated or slighted if their lawyers do not meet with them in person for important stages of their relationship.[87] We also believe lawyers will continue to prefer FTF negotiations because the contextual cues only available in that medium enhance understanding and enrich persuasion.

Our review of the evolving CMC research leads us to preliminary observations about substitution of a CMC alternative for an FTF client interview or counseling session or an in-person negotiation with counsel for another party.[88] Before proceeding to specifics, we emphasize an obvious but crucial point: In deciding when and how to use CMC to interview, counsel or negotiate, the lawyer should be familiar with those complex skills in the FTF environment. To be proficient in computer-mediated interpersonal skills, the attorney must have learned the lessons of *The Lawyering Process* and other sources that address the theories and techniques of FTF interviewing, counseling, and negotiating.[89] Many of the concepts of FTF encounters are di-

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[86] *Id.* at 120.

[87] We do not say "all" representations because "e-Lawyering" is a reality. *See, e.g.*, http://www.elawyering.org/ (last visited August 22, 2003). The ABA sponsored "e-Lawyering" website leads with the question: "How can I practice law over the Internet?" *See also infra* notes 134-41 and accompanying text and the discussion of online legal advice-giving and the lawyer-client relationship frequently created (if only of limited scope and duration).

[88] Given the preliminary nature of our observations, we are excluding fact gathering from non-clients (*e.g.*, witnesses and experts, friendly or otherwise). Although the information goals of client and non-client interviewing are similar (*see* BASTRESS & HARBAUGH, *supra* note 7, at 197 ("[I]nterviewing witnesses or other nonclients involves application of the principles learned in the preceding chapters.")), there are CMC nuances we are not yet comfortable addressing.

[89] We adhere to this view despite the cautionary admonition of CMC negotiation researchers that there likely will be "different classes of skills, currently not under standard social psychological investigation, that may prove to be important for helping people to be competent . . ." in a CMC world. Thompson & Nadler, *supra* note 75, at 120. They go on

rectly applicable to the CMC environment.[90] Other skill principles appropriate in FTF settings need to be evaluated to decide if and how they can be employed online.[91]

Use of a CMC format for interviewing, counseling and negotiating has the obvious advantages of overcoming time and distance obstacles and the costs associated with them. Several of the hypothetical situations set out earlier illustrate these virtues of CMC lawyer-client and lawyer-lawyer encounters. CMC offers a solution for lawyers who are completely occupied with their responsibilities for one client but should not put off responding to another client's pressing questions and need for reassurance (the earlier-presented Hypothetical 3) and to lawyers who are trying to juggle multiple negotiations within a tight time frame (Hypothetical 9). An attorney representing multiple clients who are at a great distance from each other (Hypothetical 1) or negotiating with counterparts on two other continents (Hypothetical 6) should consider communicating by email. The costs to client and counsel of bringing parties together in FTF sessions (Hypotheticals 1, 4 and 6) are also relevant when considering the utility of CMC.

The CMC research findings also suggest there are other factors that might militate for the use of CMC rather than an FTF meeting. The business-like nature of asynchronous CMC may make it the preferred medium when the client is having difficulty overcoming an emotional issue and concentrating on essential fact-based matters (Hypothetical 5). The finding that CMC allows an otherwise inhibited person to "speak up" suggests that it may be desirable to use asynchronous email or synchronous on-line chats when dealing with multiple clients, some of whom dominate counseling conversations (Hypothetical 2). Because CMC records text and limits distortion of language, it may be the favored mode of communication when a lawyer needs to communicate precise language and the rationale behind the selection of those words (Hypotheticals 6 and 7). When lawyers are having difficulty in getting past the confusion generated by client feelings and sorting out the underlying issues (Hypothetical 8), CMC may offer a solution, given the research findings that CMC reduces the transference of emotion and enhances the communication of facts.

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to suggest that "the challenge for the investigation of e-negotiation, and e-interactions in general, will be to develop concepts and theories that are unique to the medium, rather than merely borrowing from established disciplines." *Id.* at 121.

90 For example, the principles supporting use of the funnel or inverted funnel sequence to obtain information during a FTF interview are applicable to a CMC fact-gathering encounter. *See* BASTRESS & HARBAUGH, *supra* note 7, at 170-73.

91 Consider, for example, the principles we suggest that adversarial and problem solving negotiators should consider concerning the initial offer. *Id.* at 493-96. Should those concepts be modified when a lawyer is involved in a CMC negotiation?

Finally, because previous FTF contact tends to "lubricate" a relationship, lawyers who have dealt with each other successfully in the past and who now are having difficulty scheduling an FTF meeting (Hypothetical 10) could profitably turn to CMC.

This is not to say, of course, that CMC's use in such situations is risk-free. The CMC context pretermits a range of nonverbal signals present in FTF communications, including eye contact and facial expressions, body movement and gestures, speech patterns (pace, pitch, tone, and volume of speech), and appearance. The significance of nonverbal communication has been well addressed,[92] and has previously received our attention.[93] The absence of the FTF nonverbal information complicates the task of identifying emotive content, establishing rapport, and communicating emotions (or the lack of them). Words on a screen are more likely to be misunderstood than words conveyed in ordinary FTF speech with accompanying intonations, emphases, and body movement. The impersonal quality of the medium also emboldens some people to act more aggressively than they would in most FTF contexts,[94] a phenomenon that can have a significant impact on on-line negotiations. The challenge, then, is to mitigate the disadvantages created by the absence of nonverbal cues.[95]

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[92] The classics include RAY BIRDWHISTELL, KINESICS AND CONTEXT: ESSAYS ON BODY MOTION COMMUNICATION (1972) and ALBERT MEHRABIAN, SILENT MESSAGES (1971). One of many online bibliographies on non-verbal communication can be found at http://web.stcloudstate.edu/tme/categories/bodylanguage.html.

[93] BASTRESS & HARBAUGH, *supra* note 7, at 131-44.

[94] *E.g.*, John Suler, *The Online Disinhibition Effect*, PSYCHOLOGY OF CYBERSPACE (June 2003), *available at* http://www.rider.edu/~suler/psycyber/disinhibit.html. (The PSYCHOLOGY OF CYBERSPACE is a comprehensive, on-line book that is *available at* http://www.rider.edu/~suler/psycyber/psycyber.html and, using its title, through common search engines.) That impersonal quality, however, has the positive aspect of facilitating a greater degree of intimacy in disclosures from shy persons, which should enhance interviewing and counseling. Sarah A. Birnie & Peter Horvath, *Psychological Predictors of Internet Social Communication*, 7 J.C.M.C. No. 4 (2002), *available at* http://www.ascusc.org/jcmc/vol7/issue4/horvath.html. *See also* Annette N. Markham, Sketch of Research on Computer-Mediated Communication: Tool, Place, Way of Organizing (App. to Doctoral Thesis) (1997) (copy on file with the authors). Birnie and Horvath also found that the frequency of Internet contacts corresponded to the users' normal contact frequency and normal socializing frequency. That is, the Internet helped shy persons to make intimate disclosures but not to make more contacts or engage in more interaction.

[95] One expert, however, has projected that the difficulties created by the loss of nonverbal communication can be overcome by technology:

> Virtual environments and computer-mediated communication offer possibilities that we do not ordinarily have in person-to-person communication. Potentially, communication through virtual environments could provide new channels for affect – perhaps, as one idea, via sensors that detect physiological information and relay its significant information. In this way, computer-mediated communication might potentially have *higher* affective bandwidth than traditional "in person" communication.

ROSALIND W. PICARD, AFFECTIVE COMPUTING 57 (1997) (emphasis in the original). Pic-

In CMC interviewing and counseling, the lawyer's ability to empathically reflect emotive content becomes paramount to ensure that the lawyer is, in fact, understanding the client. CMC allows the attorney more time to formulate an appropriate response, at least in asynchronous interaction,[96] thus offering the opportunity for more accurate and sensitive reactions.[97] Reflecting on emotions should encourage clients to describe with words or symbols their emotive meaning, which would in turn enhance their self-awareness. Moreover, online communicants have developed a language of their own to convey the information that visual cues supply in FTF conversations. This language has been variously tagged as "Text Talk"[98] or the "paralanguage of the Internet."[99] As experts on the subject have

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ard acknowledges that "the use of such communication would not be desirable all the time." *Id.*

[96] In synchronous interaction, if one party takes a long time to respond, the person on the other end is waiting and looking at a blank screen, which obviously can create considerable impatience.

[97] There is no accounting, though, for insensitivity, which can be exacerbated by the absence of FTF cues. One researcher illustrated the point, reporting on a chat room conversation:

> Dan: Helen, you sound depressed
> Helen: I am forever depressed
> LostBoy: If you traveled back in time and killed yourself, you wouldn't be alive now so you could go back in time to kill yourself. A paradox!
> Diamond: I was like that alot. . . . now I am doing better thanks to prosac
> Dan: Helen, why are you depressed?
> Helen: my heart hasn't healed from life yet
> Diamond: I have a family of depressed people
> Yabada: hi folks!!!
> Diamond: and . . like I said. . . am doing better . . .
> LostBoy: Helen, I have almost no self confidence. . .but I never let it get me down.
> Yabada: I pale to see myself typing this. . .but how old are you Helen?
> LostBoy: Yabada, are you hitting on poor Helen?
> Dan: Helen, did you just break up?
> Helen: no he's being very nice
> LostBoy: I have never officially had a girlfriend before.
> Diamond: I am in therapy now
> Helen: I have a psychiatrist
> LostBoy: Never been on a date. Never done the hunka chunka
> Helen: actually a good listner [sic] is all I need right now

John Suler, *Psychological Dynamics of Online Synchronous Conversations in Text-Driven Chat Environments*, PSYCHOLOGY OF CYBERSPACE 6-7 (Oct. 1997), *available at* http://www.rider.edu/~suler/psycyber/texttalk.html. Given the absence of visual clues, Yabada can be excused for not realizing that she had entered into a conversation in which two of the participants were quite serious and two others were clueless. At least "LostBoy" appears to have given himself an appropriate name.

[98] Suler, *supra* note 97.

[99] Mark Dery, *Flame Wars*, 92 SOUTHERN ATLANTIC QUARTERLY 559-68 (1993); Lee-Ellen Marvin, *Spoof, Spam, Lurk and Lag: The Aesthetics of Text-based Virtual Realities*, 1 J. COMP. MEDIATED COMMUNIC. No. 2 (1995), *available at* http://www.ascusc.org/jcmc/vol1/issue2/SSLL-link.html. *See generally* MARK DERY, THE DISCOURSE OF CYBERCUL-

explained:

> Experienced e-mail users have developed a variety of keyboard techniques to overcome some of the limitations of typed text — techniques that almost lend a vocal and kinesthetic quality to the message. They attempt to make e-mail conversations less like postal letters and more like a face-to-face encounter. Some of these strategies include the use of emoticons, parenthetical expressions that convey body language or "sub vocal" thoughts and feelings (sigh), voice accentuation via the use of CAPS and *asterisks*, and trailers . . . . to indicate a transition in thought or speech. Use of "smileys" and other commonly used symbols can convey not only facial expression but also a variety of emotional nuances. Color and font can be used both for impact and to separate one writer's words from the other's.[100]

As with all things, practice makes perfect, and so people will tend to fine-tune and enhance their text expressiveness over time. As a text relationship develops, the partners will become more sensitive to the nuances of each other's typed expressions and may develop a private language and style of communication that contains many rich subtleties not readily apparent to an outsider.[101]

To be effective in CMC, lawyers must be sensitive to the risk that the messages they write are also prone to minscontruction because of the absence of attending visual cues. Statements may be read literally when humor or irony was intended; ambiguities may be read the wrong way; and the like. The risk of misunderstandings is compounded by the informality of the CMC medium, which has led many to engage in hasty drafting and perfunctory proofreading when communicating online. Naturally, lawyers using CMC for professional work should avoid, or at least temper, those tendencies.

Establishing rapport and building trust are as important in CMC interviewing and counseling as in FTF interactions, and the means for accomplishing those ends are not that different in the two contexts. Informal CMC "chat" (the online version of "small talk") has been found to promote good working relationships, just as it does in FTF relations.[102] Accurate, empathic reflection helps dramatically, too.[103]

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TURE (1995).

[100] Michael Fenichel, John Suler, Azy Barak, Elizabeth Zelvin, Gill Jones, Kali Munro Vagdevi Meunier & Willadene Walker-Schmucker, *Myths and Realities of Online Clinical Work*, PSYCHOLOGY OF CYBERSPACE (June 2002), *available at* http://www.rider.edu/~suler/psycyber/myths.html. The authors are a group of psychologists and related professionals reporting on the work of the Online Clinical Case Study Group, which was created by the International Society for Mental Health Online to study psychotherapy cases and professional clinical encounters that involve the Internet.

[101] *Id.*

[102] *See* note 81 *supra*. We discussed the value of small talk in FTF interviewing and

Respecting the client, which in CMC has to be manifested verbally, remains critical.[104] Explicit statements of commitment and support promote trust.[105] Of particular importance in maintaining electronic relationships with clients is the need to respond in a reasonably prompt manner. Doing so communicates (nonverbally!) that the client is important and that the lawyer cares. A failure to respond or a substantial delay in responding communicates the opposite, of course.

Effective CMC negotiators must take into account the research findings suggesting that people are less inhibited, more likely to become strident, and less willing to share information on line than they are in FTF negotiations.[106] As one expert observed:

> With e-mail, negotiations are considerably more likely to degenerate into an unpleasant exchange. In face-to-face encounters, if the conversation gets a little nasty, someone will back down. . . . When the interaction is purely electronic, people are more willing to escalate conflict – to get downright rude, even. There's a reason that flaming has become so common on the Internet.[107]

Lawyers using CMC must be sensitive to these tendencies and avoid responding in a similarly erratic fashion.[108] One expert in the field has suggested, for example, that CMC communicators should wait 24 hours before responding to an email that is perceived as offensive: A response can be typed immediately upon receiving the apparently offensive message but should not be sent until 24 hours have elapsed and the initial message has been reread calmly and carefully with an eye towards alternative possible meanings and the virtues of a

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counseling in BASTRESS & HARBAUGH, *supra* note 7, at 85-92.

[103] This is not new. Sympathy cards, congratulatory notes, and similar written expressions conveying thoughtfulness and understanding have long been appreciated and contributed to relation-building.

[104] BASTRESS & HARBAUGH, *supra* note 7, at 66-67.

[105] Sirkka L. Jarvenpaa & Dorothy E. Leidner, *Communication and Trust in Global Virtual Teams*, 3 J. C.M.C. No. 4 (1998), *available at* http://www.ascusc.org/ jcmc/vol3/issue4/ jarvenpaa.html.

[106] Suler, *supra* note 94, at 1; Kathleen Valley, *The Electronic Negotiator*, HARV. BUS. REV. 16, 16-17 (Jan.-Feb. 2000).

[107] Valley, *supra* note 106, at 17. "Flaming" is netspeak for inappropriately aggressive, confrontative, or insulting messages. *See generally* DERY, *supra*, note 99. Flaming is considered bad "netiquette." A recent study comparing FTF, telephone, and CMC negotiations found that the most frequent outcome in FTF negotiations was a mutually beneficial agreement; for telephone negotiations, the most frequent outcome was an agreement that favored one side; and for CMC it was impasse. Valley, *supra* note 106, at 17.

[108] Others in the legal academic literature have addressed this and similar issues in the context of online mediation. *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 B.Y.U. L. REV. 1305; Llewellyn J. Gibbons, Robin M. Kennedy & Jon M. Gibbs, *Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27 (2002). *See also* Alejandro E. Almaguer & Roland W. Baggot III, Note, *Shaping New Legal Frontiers: Dispute Resolution for the Internet*, 13 OHIO ST. J. DISP. RES. 711 (1998).

more measured response.[109]

Although we indicated earlier our assumption that lawyers and clients will initiate their relationship with at least one FTF encounter, that will not always be the case with lawyers who find themselves in CMC negotiations. As a practical matter, it seems likely that negotiating lawyers will have had FTF or telephone contact before they begin serious bargaining to resolve a dispute or conclude a transaction, but one can imagine a scenario in which the first contact is online. Negotiating online requires that lawyers consider a range of communication issues that differ from those confronting the CMC interviewer and counselor,[110] and one of these is certainly the complications of communicating with an individual one has never met in person.

These then are our tentative conclusions concerning the skill dimension of online interviewing, counseling and negotiating. We set them out with some hesitation, knowing we must experiment with the medium, reflect on our CMC lawyering efforts, and continue to study and attempt to apply the research developed in related disciplines.[111] We are confident, however, that, in doing so, we follow the practice that Gary and Bea modeled when they wrote *The Lawyering Process*.

## III. The Ethical Dimension

As Gary and Bea persuasively demonstrated, there is an "ethical dimension" to all of the basic lawyering skills.[112] Attorneys engaged in CMC-based representation encounter an array of ethical issues similar to those that arise in the traditional FTF context but CMC creates new concerns and exacerbates some old ones. We will address several of the issues that have proven to be particularly troublesome or important for those engaged in CMC lawyering.

### *A. Extra- and Multijurisdictional Representation*

A threshold problem, which is not new but which CMC will most certainly magnify, is the extent to which a lawyer can represent clients

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[109] John Suler, *E-Mail Communication and Relationships*, *in* Psychology of Cyberspace 2-3 (June 2003), *available at* http://www.rider.edu/suler/psycyber/emailrel.html.

[110] Some of those issues have been the subjects of recent study. *See* Thompson & Nadler, *supra* note 75; Morris et al., *supra* note 75.

[111] Indeed, given the likelihood that lawyers will increasingly use CMC to interview, counsel and negotiate, our need as clinical educators to prepare our students for these professional encounters will increase proportionally. We clinical educators have an opportunity to assume roles as principal investigators in this ongoing research. *See* Neumann & Krieger, *supra* note 4. Our simulation courses and client clinics are ideal laboratories for such research.

[112] Each of the six chapters devoted to a particular skill in *The Lawyering Process* contains a section entitled "The Ethical Dimension."

who reside or are based in states in which the lawyer is not licensed. As noted above, one of CMC's prime advantages is that it facilitates long-distance relationships and undertakings because any number of parties can participate with ease from wherever they are. But the virtual world's central advantage of lack of geography clashes with traditional notions of boundaries that have governed the real world. Laws regulating the profession have not kept pace with technology in this respect. In our now-global economy, many individuals and entities have holdings and interests in multiple jurisdictions, and many of these individuals and entities want representation from a single lawyer or firm. Must these lawyers be licensed in each state from which their clients seek advice?[113] To date, few states have addressed these issues. According to one pair of observers,

> [I]n the present and foreseeable future, jurisdictional barriers to practice undermine clients' access to counsel of their choice. Arguably anyone with interests in more than one state must retain separate counsel to advise them with respect to every jurisdiction where advice must be rendered.[114]

The inconvenience, inefficiencies, and costs of that prospect are obvious.

The specter of that situation was raised by the California Supreme Court in *Birbrower, Montalbano, Condon & Frank v. The Supreior Court of Santa Clara County*.[115] A California software company, ESQ, had engaged the Birbrower law firm, which was located in New York City, to represent the company in a dispute it was having with another software company, Tandem. Birbrower dispatched two of its lawyers to California, where they interviewed ESQ personnel, provided advice to them, developed strategy, negotiated with officials from Tandem, and eventually filed a petition for arbitration. Neither of the Birbrower lawyers were members of the California bar. ESQ and Tandem ultimately settled their differences, but a disagreement developed between the Birbrower firm and ESQ. The latter filed a malpractice claim against the firm, which then counterclaimed to recover its unpaid fee. Eventually, the litigation landed in the state Supreme Court, which held that Birbrower could not recover under its contract claim with ESQ for the services rendered in California be-

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[113] Admittedly, this question can be avoided to some extent in the many large law firms that now have offices scattered around the country and throughout the world and that have lawyers in each of them with multiple bar admissions. Even these firms, however, cannot cover every jurisdiction in which their clients might operate or have holdings, and not every person or entity with multi-state interests wants to hire a mega-firm.

[114] Ann L. MacNaughton & Gary A. Munneke, *Practicing Law Across Geographic and Professional Borders: What Does the Future Hold?*, 47 LOY. L. REV. 665, 683 (2001).

[115] 17 Cal. 4th 119, 949 P.2d 1, 70 Cal. Rptr. 2d 304 (1998).

cause those services violated a statute prohibiting law practice within the state by anyone who is not licensed by California. The firm could press for compensation, however, for the services that its lawyers had performed in New York that did not involve the practice of law in California.[116]

The case poses for us the question of whether the New York lawyers could have recovered for their time spent interviewing and counseling ESQ and negotiating with Tandem if they had done so while in New York by means of CMC. The California court's answer to that question (although the facts did not present it) was resoundingly, "No!" The court's definition of "practicing law in California" did not turn on the unlicensed lawyer's physical presence in the State. Rather, as the court stated:

> Physical presence here is one factor we may consider in deciding whether the unlicensed lawyer has violated [the statute], but it is by no means exclusive. For example, one may practice law in the state in violation of [the statute] although not physically present here by advising a California client on California law in connection with a California legal dispute by telephone, fax, computer, or other modern technological means. Conversely, although we decline to provide a comprehensive list of what activities constitute sufficient contact with the state, we do reject the notion that a person *automatically* practices law "in California" whenever that person practices California law anywhere, or "virtually" enters the state by telephone, fax, e-mail, or satellite. . . . We must decide each case on its individual facts.[117]

Although the California legislature subsequently overrode the decision and permitted out-of-state lawyers to work within the state on mediation matters,[118] the case nevertheless stands as authority that could seriously limit interstate CMC-based representation.[119]

Some counterweights have appeared. Following *Birbrower*, the American Bar Association held a conference on multijurisdictional practice and created a new Commission on Multijurisdictional Practice to conduct a comprehensive study of the issues such practice

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[116] *Id.* at 138, 949 P.2d at 11, 70 Cal. Rptr. 2d at 314-15. The services performed in New York apparently included fee negotiations and some corporate case research. *Id.*

[117] *Id.* at 128-29, 949 P.2d at 5-6, 70 Cal. Rptr. 2d at 309 (emphasis in the original). The court remanded the case, however, for further proceedings on Birbrower's *quantum meruit* claim for the reasonable value of services rendered. That claim had not been resolved by the lower courts.

[118] CAL. CIV. PROC. CODE § 1282.4(b) (2001). *See* Mark Pruner, *The Clash of 20th Century Regulation with 21st Century Technology*, 16 ST. JOHN'S J. LEGAL COMMENT. 587, 594 (2002).

[119] MacNaughton & Munneke, *supra* note 114, at 684; Pruner, *supra* note 118, at 594. Other cases have reached similar results. *See* MacNaughton & Munneke, *supra* note 114, at 684. *See, e.g.*, Ranta v. McCarney, 391 N.W.2d 161 (N.D. 1986).

evokes and to prepare a report with recommendations. That Commission's work led to a 2002 amendment to the Model Rules of Professional Conduct that endorsed somewhat liberalized standards for multistate practice. Subsection (c) would authorize a lawyer who is not admitted in the state but is licensed elsewhere to perform legal services in the forum if those services are "reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice."[120] According to the comments, a lawyer violates the rule against practicing without a license by maintaining a "systematic and continuous presence" in the state, which can occur "even if the lawyer is not physically present."[121] Out-of-state lawyers "may provide legal services on a temporary basis in this jurisdiction," says another comment, "under circumstances that do not create an unreasonable risk to the interest of their clients."[122] The comments expressly reject the use

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[120] The Rule reads, in its entirety:

RULE 5.5: UNAUTHORIZED PRACTICE OF LAW; MULTIJURISDICTIONAL PRACTICE OF LAW

(a) A lawyer shall not practice law in a jurisdiction in violation of the regulation of the legal profession in that jurisdiction, or assist another in doing so.

(b) A lawyer who is not admitted to practice in this jurisdiction shall not:

(1) except as authorized by these Rules or other law, establish an office or other systematic and continuous presence in this jurisdiction for the practice of law; or

(2) hold out to the public or otherwise represent that the lawyer is admitted to practice law in this jurisdiction.

(c) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services on a temporary basis in this jurisdiction that:

(1) are undertaken in association with a lawyer who is admitted to practice in this jurisdiction and who actively participates in the matter;

(2) are in or reasonably related to a pending or potential proceeding before a tribunal in this or another jurisdiction, if the lawyer, or a person the lawyer is assisting, is authorized by law or order to appear in such proceeding or reasonably expects to be so authorized;

(3) are in or reasonably related to a pending or potential arbitration, mediation, or other alternative dispute resolution proceeding in this or another jurisdiction, if the services arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice and are not services for which the forum requires pro hac vice admission; or

(4) are not within paragraphs (c)(2) or (c)(3) and arise out of or are reasonably related to the lawyer's practice in a jurisdiction in which the lawyer is admitted to practice.

(d) A lawyer admitted in another United States jurisdiction, and not disbarred or suspended from practice in any jurisdiction, may provide legal services in this jurisdiction that:

(1) are provided to the lawyer's employer or its organizational affiliates and are not services for which the forum requires *pro hac vice* admission; or

(2) are services that the lawyer is authorized to provide by federal or other law of this jurisdiction.

ABA MODEL RULES OF PROFESSIONAL CONDUCT (2002).

[121] *Id.*, Comment 4 to Rule 5.5

[122] *Id.*, Comment 5 to Rule 5.5.

of a single test to determine whether provided services are "temporary." "Services may be 'temporary' even though the lawyer provides services in this jurisdiction on a recurring basis, or for an extended period of time, as when the lawyer is representing a client in a single lengthy negotiation or litigation."[123] Another factor is whether the lawyer's services are sought because of his or her expertise in the body of law applicable to the client's concern.[124] Subsection (d) of the Rule recognizes that lawyers providing legal services for an employer, such as a corporation or government agency, do not threaten the usual state interests regarding the unlicensed practice of law and therefore should be permitted even when performed by lawyers admitted to practice in another jurisdiction. All authorizations in the rule for representation by attorneys not licensed in the state are subject to local rules requiring *pro hac vice* admission for particular services. It remains to be seen how the states respond to the new model rule.

### *B. Virtual Attorney-Client Relationships*

The proliferation of online advice sites – from chat rooms to websites to emails – has led to concerns about whether legal advice offered in such contexts constitutes the practice of law and creates an attorney-client relationship.[125] The resolution of these issues can have

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[123] *Id.*, Comment 6 to Rule 5.5.

[124] *Id.*, Comment 15 to Rule 5.5; Kristine M. Moriarty, *Law Practice and the Internet: The Ethical Implications that Arise from Multijurisdictional Online Legal Service*, 39 IDAHO L. REV. 431, 444-45 (2003).

[125] The leading article on the subject, Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise*, 49 DUKE L.J. 147, 151-55 (1999), canvassed the various contexts:

> . . . One way for laypeople to seek legal advice is through online newsgroups, which are discussion forums online, categorized by subject, in which people post and read messages at the newsgroup site. . . . In another type of discussion group, called a "listserv" or mailing list, messages are sent to a central e-mail address and then redistributed to the list's subscribers; some such lists may also feature requests for legal advice. A different version of these groups is the "chat room," in which two or more individuals may communicate in "real time," receiving responses on the screen as soon as they are typed in. Lawyers occasionally answer these questions, often while simultaneously disclaiming any intent to form an attorney-client relationship.
>
> Specific websites have also been established to facilitate requests for legal advice. . . . These sites encourage laypeople to post legal questions, identifying their state of residence, and suggest that lawyers who are licensed to practice in those states post responses. The questions and the answers are publicly available to anyone who accesses the websites. . . . [The legal advice typically found on these websites] is specific, tailored to the facts furnished by the questioner, and given as if it were definitive. Another way for laypeople to seek legal advice online is to go to the websites of individual attorneys or law firms and to send questions directly to the attorneys by e-mail. [On these sites,] neither the questions nor the answers are visible to the public. . . . [S]ome lawyers have begun using the Internet to offer answers to legal questions for a fee.

implications not only for a jurisdiction's enforcement of the rules concerning unauthorized practice of law but also a number of other ethical provisions (most notably confidentiality) and malpractice laws.[126] At stake are not only the interests of those who are already making use of such forms of online legal advice but the millions of other individuals with unserved legal needs who could benefit from the practice.[127]

This subject has also recently received the attention of an ABA task force. The Task Force on the Model Definition of the Practice of Law presented its recommendations to the ABA House of Delegates at the 2003 annual meeting, and the House adopted the proposal that each state's definition of legal practice "should include the basic premise that the practice of law is the application of legal principles and judgment to the circumstances or objectives of another person or entity."[128] The task force purposefully crafted a broad definition to allow for comprehensive protection of the public from unethical and incompetent lawyers.[129] The American Law Institute took the same expansive approach in defining the scope of the attorney-client relationship in the *Restatement (Third) of the Law Governing Lawyers*. Section 14 of the Restatement provides that such a relationship exists when:

> (1) a person manifests to a lawyer the person's intent that the lawyer provide legal services for the person; and either
>  (a) the lawyer manifests to the person consent to do so; or
>  (b) the lawyer fails to manifest lack of consent to do so, and the lawyer knows or reasonably should know that the person reasonably relies on the lawyer to provide the services; or
> (2) a tribunal with power to do so appoints the lawyer to provide the services.

In applying these concepts to online consultations, a key factor (in addition to express commitments) is the specificity of the advice that is rendered. The more specific the advice, the more information

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The latter sites, according to Professor Lanctot, typically acknowledge the formation of an attorney-client relationship but expressly terminate it upon emailing the responsive advice. *Id.* at 155.

[126] *See, e.g.*, Brad Hunt, *Lawyers in Cyberspace: Legal Malpractice on Computer Bulletin Boards*, 1996 U. CHI. LEG. FORUM 553 (1996); Natacha D. Steimer, *Cyberlaw: Legal Malpractice in the Age of Online Lawyers*, 63 GEO. WASH. L. REV. 332 (1995).

[127] Lanctot, *supra* note 125, at 156; Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 FORDHAM L. REV. 985 (2001); *Recommendations of the Conference on the Delivery of Legal Services to Low-Income Persons*, 67 FORDHAM L. REV. 1751 (1999).

[128] The recommendation can be found at: http//www.abanet.org/cpr/model-def/recomm.pdf. The Report of the Task Force is *available at* http://www.abanet.org/cpr/model-def/taskforce_rpt_429.pdf.

[129] Task Force Report, *supra* note 128, at 5.

the client has likely disclosed, the more personal the interaction, and – most importantly – the more the client is likely to rely on the advice.[130] Most commentators who have addressed the issue to this point have urged that the definition of "attorney-client relationship" be liberally applied to online legal advice to ensure that such services are not only easy and inexpensive to obtain but are also reliable.[131] These commentators have called for regulatory reforms to account for the unique characteristics of the medium.[132]

### C. *Client Confidentiality*

A persistent issue regarding CMC representation is the risk of compromising client confidentiality. Attorneys are, of course, bound to maintain client confidences, a requirement that has been broadly defined by ABA Model Rule 1.6(a) to encompass all communications privately conveyed by the client to the attorney.[133] Subsection (b) authorizes disclosure only in very limited circumstances, such as when disclosure is necessary to prevent the client from committing a criminal act likely to cause death, serious bodily harm, or substantial injury to the financial interests of another or to establish a claim or defense by the lawyer in situations in which his or her representation of the client is an issue in a proceeding.[134]

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[130] *E.g.*, Steimer, *supra* note 126, at 347 ("whether a court is willing to imply an attorney-client relationship from the bulletin board transactions depends in large part on the extensiveness of the advice sought and the fact-intensiveness of the answer given"); Katy Ellen Deady, Note, *Cyberadvice: The Ethical Implications of Giving Professional Advice over the Internet*, 14 GEO. J. LEG. ETHICS 891, 899 (2001).

[131] *E.g.*, Lanctot, *supra* note 125, at 247-59; Moriarty, *supra* note 124, at 434-36.

[132] Lanctot, for example, called for an "unbundling" of legal services so that lawyers giving advice online would owe a duty of professional responsibility with regard to the advice that they give but would not thereby assume further obligations toward the client. Lanctot, *supra* note 125, at 252-59. Others have called for some form of national standard or regulation. *See, e.g.*, Louise L. Hill, *Lawyer Communications on the Internet: Beginning the Millennium with Disparate Standards*, 75 WASH. L. REV. 785, 856 (2000).

[133] Rule 1.6(a) states: "(a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b)."

[134] Amended in 2003, Model Rule 1.6(b) now provides:

> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
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> (1) to prevent reasonably certain death or substantial bodily harm;
>
> (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services;
>
> (3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client

Some in the profession initially believed that the use of email to interact with clients so inevitably created a potential for interception or discovery by others that the medium should not be used without the client's permission. The Board of Professional Responsibility of the Supreme Court of Tennessee, for example, issued an opinion finding that email transmission of client confidences violated the Code of Professional Responsibility "unless the client has consented, the message has been encrypted or the e-mail is via a non-Internet service provider which has been previously determined to be secure."[135] Within six months, however, the Board reversed that position and held that emails could be used to transmit confidential information.[136]

Concerns continued to exist regarding the ability of hackers and persons with ulterior motives to intercept emails and also the capacity of service providers to intrude on communications. Various developments, however, have brought about widespread acceptance of email usage for confidential transmissions.

Of particular importance was Congressional passage of the Electronic Communications Protection Act, which makes it a federal offense to intercept, tamper with, or disclose an electronic transmission.[137] The Act provides for both criminal and civil penalties[138] and establishes that an "otherwise privileged" electronic communication that was intercepted in violation of the Act did not lose its privileged character.[139] Title II of the Act prohibits unauthorized access to stored electronic communications.[140] In addition to the statute, a federal court has held that a person using email has a reasonable expectation of privacy in the communication, such that the government cannot intercept it without obtaining a search warrant.[141]

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has used the lawyer's services;

(4) to secure legal advice about the lawyer's compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(6) to comply with other law or a court order.

135 Board of Prof. Respon. of the Sup. Ct. of Tenn. Advisory Ethics Op. 98-A-650 at 2 (not for publication) (May 22, 1998), *available at* www.tba.org/news/encrypt.html (amended by Ethics Op. 98-A-650(a), note 136, *infra*). *See* Brett R. Harris, *Counseling Clients over the Internet*, 705 PLI/Pat 135, 159-60 (2002).

136 Board of Prof. Respon. of the Sup. Ct. of Tenn. Advisory Ethics Op. 98-A-650(a) (not for publication) (Nov. 19, 1998), *available at* www.tba.org/news/encrypt.html.

137 18 U.S.C. §§ 2510, *et seq.*

138 *Id.*, § 2511.

139 *Id.*, § 2517(4).

140 *Id.*, §§ 2701, *et seq.*

141 United States v. Maxwell, 45 M.J. 406 (C.A.A.F. 1996), *later proceeding*, 46 M.J. 413 (C.A.A.F. 1997).

The court analogized emails to regular mail and telephone conversations, either of which are capable of being intercepted but are nevertheless considered private by any reasonable person.[142] The court did not regard the risk of hacker interception as sufficient to disrupt the expectation of privacy.[143] In addition to the establishment of these legal protections, greater sophistication about the improbability of outsider interception of electronic communication has contributed to a growing confidence in the medium as safe for privileged content.[144]

On the crest of these developments, the A.B.A.'s Standing Committee on Ethics and Professional Responsibility issued a formal opinion stating that a lawyer does not violate the duty of confidentiality by using ordinary email for privileged communications:

> A lawyer may transmit information relating to the representation of a client by unencrypted e-mail sent over the Internet without violating the Model Rules of Professional Conduct (1998) because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, land-line telephonic transmissions, and facsimiles applies to Internet e-mail. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation.[145]

Numerous state ethics panels have reached similar conclusions.[146] Iowa, however, continues to require counsel to obtain the written consent of the client before transmitting "sensitive material" on the "Internet or non-secure Intranet or other forms of proprietary networks."[147]

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142 *United States v. Maxwell*, 45 M.J. at 418.

143 *Id.*

144 *See* Harris, *supra* note 135, at 143-44. For a description of how email works and how unlikely is the interception of entire email messages, see Matthew J. Boettcher & Eric G. Tucciarone, *Concerns over Attorney-Client Communication through E-mail: Is the Sky Really Falling?*, 2002 L. REV. MICH. ST. U. DET. C.L. 127, 129-31. *But see* Seth Richard Lesser, *Privacy Law in the Internet Era: New Developments and Directions*, 701 PLI/Pat 115, 131-32 (2002) (reporting that ingenious hackers have been able to obtain consumer credit card numbers through email purchases even when the numbers have been transmitted in "packets" designed to preserve security).

145 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999).

146 The opinions through June of 2002 are collected and discussed in Harris, *supra* note 135, at 149-61.

147 Iowa Supreme Court Board of Professional Ethics and Conduct, Op. 97-1 (amending Op. 96-1) (Sept. 18, 1997), *available at* www.iowabar.org/ethics.nsf. To our knowledge, Iowa now stands alone in that position. The South Carolina Bar had previously maintained a similar rule but ultimately concluded that the technology was sufficiently advanced that email should be deemed to be at least as secure in transmitting confidential information as other media. Boettcher & Tucciarone, *supra* note 144, at 140. Tennessee underwent a similar transformation. *See* notes 135-36 & accompanying text, *supra*.

Despite the general acceptance of CMC for lawyer-client communications, confidentiality risks persist. The ABA opinion and several of the state ethics opinions advise lawyers to discuss the security concerns with clients and to consider protective measures for the transmission of highly sensitive materials.[148] Encryption programs, which can be purchased at reasonable cost, encode email contents and allow only persons with the key to decode them.[149] "Extranet communication" systems, which use land-based telephone lines for email transmission, presumably offer greater security.[150] Technology also permits the creation of chat rooms in which Internet users can have private conversations that cannot be "overheard" by others.[151]

There are also other risks involved in using email that require caution. Before communicating with a client or sending sensitive information, the attorney should be aware of email security on the recipient's end. For example, many employers maintain the right and means to monitor employees' email.[152] Accordingly, an attorney should not email a client at a work address until and unless the attorney has determined the degree of email confidentiality the client has in the workspace. That determination may require doing more than simply asking the client since employees may be unaware of their employer's policy on email monitoring. Lawyers should also ensure that their own systems are secure. Use of a personal email account by either lawyer or client may present problems if other members of a household share the address or can gain access to it.

The problems that stem from the informality of email correspondence, discussed above in connection with the "Skills Dimension" of CMC communications, also have implications for client confidentiality. Sending messages is so easy, so fast, and so irrevocable that mistaken disclosures and indiscretions are more likely than with the more deliberate media of faxes and mail. Once the "send" button is clicked, the email is gone and delivered; there is no more opportunity for contemplation.[153] The informality of email can diminish the reflection

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148 ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 99-413 (1999); *see* Boettcher & Tucciarone, *supra* note 144, at 139-40.

149 *See, e.g.*, Boettcher & Tucciarone, *supra* note 144, at 143-44; Lesser, *supra* note 144, at 130-32.

150 Boettcher & Tucciarone, *supra* note 144, at 144.

151 Kali Munro, *Conflicts in Cyberspace: How to Resolve Conflict On-Line*, in PSYCHOLOGY OF CYBERSPACE, at 3 (May 2002), *available at* http://www.rider.edu/~suler/psycyber/conflict.html. *See also* Suler, *supra* note 94.

152 Such monitoring does not violate the ECPA. *See* 18 U.S.C. § 2511(2)(a)(i).

153 Some e-mail systems permit senders to recall a message. For example, Microsoft Outlook allows recall of a message (by clicking the button under the Action heading) so long as the recipient has not yet opened the email message.

and professionalism that should go into correspondence.[154] Certainly, much email comes and goes without the attention to punctuation, grammar, and form that individuals typically invest in their hard copy correspondence, with the result that there are far greater risks for inappropriate communications. Counsel should also be careful when responding or sending to groups and list-serves to ensure that the correct choice is made between "respond to sender" and "respond to all" and that the message is not transmitted to individuals who should not be parties to a conversation.

### *D. Impact of Disclosure on the Attorney-Client Privilege*

If a CMC message is intercepted, received, or retrieved by someone other than the client, questions arise about the impact of the disclosure on the attorney-client privilege. Under the Electronic Communications Protection Act, no otherwise privileged communication loses that status upon being either deliberately or intentionally intercepted or acquired from storage.[155] The Act does not, however, dictate what is "otherwise privileged"; that determination must be made by reference to state law.[156] If an individual other than the intended recipient of a communication intercepts or gains access to it, the privilege is obviously compromised but is not forfeited for future evidentiary and discovery purposes.[157]

Inadvertent disclosures present more difficult issues. The states have responded with various approaches. The traditional (and currently the minority) view holds that even inadvertent disclosures waive the privilege, including when the disclosures were made by counsel.[158] The harshness of this rule is designed to foster special care by attorneys to safeguard client confidentiality. At the opposite pole,

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[154] *See, e.g.*, Harris, *supra* note 135, at 142-43:

> The spontaneity of the process should not interfere with deliberateness required in counseling clients. The fact that e-mail and Internet communications, by their technical nature, can take place at such a fast-pace and to a broad audience simultaneously may be a drawback in this respect over more traditional forms of written communication, which by their timing incorporate a natural delay before mass distribution, giving an opportunity for greater reflection.

[155] *See supra* notes 137-40 & 152 and accompanying text (discussing ECPA). *See also* Julie Rubin, *The Impact of E-Mail on the Lawyer's Duty of Confidentiality*, 36 MD. B.J. 56, 56 (Aug. 2003).

[156] Rubin, *supra* note 155, at 56.

[157] *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW OF LAWYERING § 71, which provides that an attorney-client communication is privileged "if, at the time and in the circumstances of the communication, the communicating person reasonably believes that no one will learn the contents of the communication except a privileged person[.]"

[158] *E.g.*, FDIC v. Singh, 140 F.R.D. 252 (D. Me 1992); Underwater Storage, Inc. v. United States Rubber Co., 314 F. Supp. 546 (D.D.C. 1970); Boettcher & Tucciarone, *supra* note 144, at 135-36.

some courts have held that a "waiver" is not valid unless it has been knowing and intelligent, and that an inadvertent disclosure is not a knowing one. In the latter jurisdictions, a disclosure threatens the privilege only if it is intentional.[159] An intermediate (currently the majority) approach undertakes a case-by-case analysis of a disclosure's effect upon the privilege, examining factors such as the steps taken to prevent inadvertent disclosure, the number and extent of the disclosures, the promptness of any efforts to mitigate the disclosure, and the interests of justice.[160] Even under this standard, however, a lawyer risks an ethical violation and a potential malpractice action for a lack of diligence in protecting electronic communications and ensuring that the client takes appropriate steps to preserve the privilege.

## CONCLUSION

When we read *The Lawyering Process* twenty-five years ago (and again on subsequent occasions), we came away with a broad array of important insights. The primary lessons included the need for lawyers to engage in a persistent practice of deconstructing and analyzing their preparations and performance, with attention to both the skills and ethical dimensions. We also learned the value of interdisciplinary study: that legal scholarship does not hold all the analysis and learning that can benefit lawyers. And we learned that good lawyers have to stay vigilantly aware of the ever-changing world in which they function and must be prepared to adjust to those changes that affect the representation of clients.[161]

In this article, we have attempted to put these lessons to use by exploring other disciplines and by taking a preliminary stab at deconstructing the lawyering skills that are needed for, and the ethical issues in tension with, effective lawyering in the fast-changing world of computer-mediated communication. Gary and Bea wanted their students

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159 *See* Rubin, *supra* note 155, at 56.

160 *See* Boettcher & Tucciarone, *supra* note 144, at 136-37; Harry M. Gruber, Note, *E-Mail: The Attorney-Client Privilege Applied*, 66 GEO. WASH. L. REV. 624, 643-44 (1998); Amy M. Fulmer Stevenson, Comment, *Making a Wrong Turn on the Information Superhighway: Electronic Mail, the Attorney-Client Privilege and Inadvertent Disclosure*, 26 CAP. U. L. REV. 347, 363-64 (1997).

161 In addressing how it feels and what it means to enter (and grow in) the practice of law, Gary and Bea advised students:

> [W]e begin where you will begin: with your own capacity to understand and learn from your experience and the situations in which you find yourself . . .[,] to make some sense of your encounter with the day-to-day legal world.

BELLOW & MOULTON, *supra* note 1, at 2. In advising students and lawyers how to adjust to "an inevitable and taken-for-granted reality," Gary and Bea quoted from Peter Berger's description of the social experience. *See id.* at 9 (quoting PETER BERGER, INVITATION TO SOCIOLOGY).

to become lawyers who would continue to engage in such cross-disciplinary study and self-analysis, who would continue to learn, and who would – by those measures – become and remain good lawyers. Our exercise in trying to follow their advice has taught us a lot about computer-mediated communication and just enough to know that we do not know nearly enough. The CMC world offers great opportunities for lawyers to (among other things) enhance their productivity[162] and efficiency and to make legal services more widely available to underserved people.[163] But the medium's impact on lawyering skills and ethical issues requires further analysis, and the members of the legal academy and the practicing bar must provide the requisite attention to these subjects in the coming years.

[162] As an example, we offer this article, which was a team effort created entirely through computer-mediated communication. Some people, you see, work together much better when they are at a distance from each other. :-)

[163] An e-Lawyering site that will be of interest to many clinical law teachers is the one maintained by Neighborhood Legal Services of Essex County, Massachusetts. NLS has expanded its efforts to serve its client community by providing online "advice" in such areas as employment rights, discrimination, elder law, domestic violence, family law, and access to housing and public assistance. *See* http://www.neighborhoodlaw.org/ (last visited August 22, 2003).