

The Importance of Language in Online Dispute Resolution

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Introduction

In traditional, face-to-face dispute resolution words are only one way that parties communicate with each other. Body language, facial expressions, sighs and moans all play a key role in transferring information. Sometimes this non-verbal communication is even more informative than the actual words exchanged; some word for word transcripts of face-to-face conversations are nearly unintelligible to the reader, although it seems that those who were present had no problem understanding what was going on. Interpersonal communication experts have estimated that non-verbal information accounts for more than half of the meaning conveyed in face-to-face communication.¹ Most dispute resolution professionals learn this lesson early in their careers, and as a result they pay close attention to non-verbal cues in addition to the specifics of the positions being articulated by the parties.

Online, however, it is very difficult, if not impossible, to communicate non-verbal information. It is quite a challenge to effectively communicate a moan, sigh, or eyebrow raise through a keyboard. Audio and video conferencing over the internet are still in a nascent state, so most online communication is textual. For this reason, language is relied upon much more heavily in online dispute resolution processes than in face-to-face processes. This reliance on words is not restricted only to disputants. Mediators and arbitrators must also rely on words much more than they might in face-to-face processes. Phraseology that might be quickly overlooked in an in-person conversation can be read over and over again in an online dispute resolution process. Statements composed in haste by one party may be interpreted and re-interpreted by the other side. Such repeated reinterpretations are unusual in face-to-face communications, but they are a very real challenge to online mediators and arbitrators.

The most common concern we hear from professional dispute resolvers regarding online dispute resolution is that the parties will lose important information when they communicate online, which will hamper progress toward resolution. It is true that non-verbal communication can be extremely valuable, but does that mean textual communication is inadequate for effective dispute resolution? This is an unresolved and somewhat controversial issue, for which the arguments go both ways. As the aphorism says, in any ongoing conflict both sides are usually partially correct, and that is the case in this controversy as well. The objective of this article is to elucidate some of the advantages and challenges of textual communication, and, in response, offer some observations about how they can be leveraged and/or ameliorated.

1 A. Mehrabian, 'Nonverbal Betrayal of Feeling' (1971) 5 *Journal of Experimental Research in Personality* 64.

‘Words, words, words...’²

Words can be extremely evocative and subtle in the sentiments they convey. As one participant in an ODR usability study conducted by Anne-Marie Hammond and Michael Lang at Royal Roads University observed, ‘Take Shakespeare and tell me if his characters are devoid of emotion. I don’t need someone rocking in his chair to know if he is nervous, provided of course, that he knows how to write.’³ However, language can be imprecise at the same time as it is evocative.

The precise meanings of words differ slightly from person to person. Individuals often have an ‘ideal’ image in their heads for a particular word or object. When one says the word ‘table’ we each think of something that has several common characteristics (a flat top for putting things on, legs which keep the flat top from touching the ground, etc.) but the actual image in our minds may be quite different. When two individuals read the same book they often create entirely different pictures in their minds, although the words are exactly the same in both cases. The same challenge can emerge in online dispute resolution processes, where parties read the same words but interpret their meaning differently.

Often the emotions around a dispute between two parties and the specific agreements laid out by the words on the page regarding the dispute are quite different. In many legal disputes there are two realities: the realities of the words on the page and the realities of the understanding between the disputants. If the understandings between the disputants fall apart then the words on the page are there to fall back upon like a safety net.

Another challenge of online communication is tone. Sentiments like sarcasm or playful ribbing can be difficult to convey online, as it is difficult to imply the tone behind such statements entirely through text. While younger generations have resorted to innovative techniques in an attempt to communicate tone (such as smiley faces ☺ or abbreviations like IMHO for ‘in my humble opinion’) most people have yet to learn these skills or to integrate the new styles of communication into their online communication.

These language issues can lead to robust and complex challenges in managing online dispute resolution processes. ODR mediators, arbitrators and platform designers must pick their words very carefully so as to avoid misunderstandings with disputants. It may not be enough to simply edit text until it meets the approval of the writer – the text should be shown to a wide cross section of potential users to determine how they will interpret the words on the page, as those interpretations may be significantly different from the intentions of the writer.

Language spoken by technology

Ethan Katsh and Janet Rifkin introduced the idea of the Fourth Party in their seminal book *Online Dispute Resolution*.⁴ This idea elucidated the notion that technology could play such a significant role in a dispute resolution process that it could be considered almost another party at the table. In fact, in some cases, technology’s role as a fourth party may be so effective as to supplant the need for a third party mediator or arbitrator. For example, a computer algorithm can collect confidential bids from disputants and propose a resolution if the bids are within a prescribed range, or a web site can use a series of forms to diagnose a particular

² Shakespeare, *Hamlet*, Act 2, Scene 2.

³ Cited in C. Rule, *Online Dispute Resolution for Business* (Jossey-Bass, 2002) at 288.

⁴ E. Katsh & J. Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass, 2001).

problem, set expectations and propose potential solutions. If these mechanisms are effective then a human mediator or arbitrator may never be necessary.

One of the main roles of a neutral third party is to offer the parties a process to resolve their dispute. By introducing a process to the parties and helping them stay on track neutrals can play an invaluable role in getting past roadblocks that prevented the parties from reaching resolution in the past. Secondly, arbitrators are often tasked with evaluating information gathered from the parties against certain rules and then deciding how the matter should be resolved based on the results of that evaluation. As is increasingly clear from a multitude of ODR projects around the world, technology can sometimes play both of these roles. The process offered to parties can be written into the code of an ODR platform, and information submitted by the parties can be evaluated against rules that have been programmed into the code.

Live mediators and arbitrators know well the importance of reflexive, considered communication in dispute resolution processes. Using inappropriate terms or highly judgmental language can lead parties to feel that the process is not neutral, which can undermine its legitimacy. The new challenge for ODR is that system designers and programmers must be aware of these dangers as well, and work hard to ensure that the language integrated into the platforms and programs they create is similarly scrutinized for inappropriate or judgmental language. In some ways the language used in the code of an ODR platform must be held to an even higher standard, because technology driven processes usually do not have the capability to respond to misinterpretations and alter terms in the middle of a process. Also, ODR processes are often utilized repeatedly by parties, and the language is exactly the same each time. For that reason language programmed into ODR processes must be thoroughly vetted and reviewed by multiple readers before it is deemed acceptable.

Shades of meaning

It has long been a sentiment in the dispute resolution field that we are not very good at explaining and marketing what it is we do. Most people on the street have difficulty seeing the difference between negotiation, mediation, and arbitration. A recent search conducted on eBay revealed several copies of the dispute resolution classic *Getting to Yes* by Roger Fisher and Bill Ury listed under the term 'meditation'. Unfortunately such confusion is commonplace.

Usability testing conducted by eBay in the context of consumer disputes has indicated that some of the key words commonly used in the dispute resolution field (such as 'disputes' and 'cases') have strong negative connotations for many individuals. 'Cases' appeared to imply legal processes to most of the people who heard it, and participants were reluctant to 'file' a 'case' when they did not feel their particular matter was serious enough to merit such a formal process. In disputes where the parties may be more savvy (such as business to business transactions or intellectual property matters) more formal connotations may be appropriate. In addition, the parties will likely have their own counsel, who can help them set accurate expectations for the process. However, whenever parties are on their own to discern the meaning of terminology used all potential interpretations must be anticipated.

The term 'dispute' has tested differently with different users. Some felt it trivialized the matter at hand, while others felt it was too combative, pushing

the other side into a competitive or confrontational orientation too quickly. Some words, like 'claim', imply a sense of entitlement. If a user 'files a claim' there is a sense that they believe they are owed something, or that they have a right to receive some sort of compensation. In some cases these connotations may be desired, but in other circumstances they may reframe the matter in a way that makes resolution more difficult to achieve.

Words like 'negotiate' and 'mediate' may be precise in their meaning, but they often have subtleties of meaning that are lost on the parties. The distinction between 'arbitration' and 'mediation' seems particularly confusing to many people. They also seem like excessively formal processes, laden with rules and constraints that disputants are reluctant to agree to, particularly if they feel like the matter in question is relatively simple and easy to resolve. 'Negotiation' is often understood by the parties, but it may be associated in their minds with more aggressive, hard-edged tactics used by 'professional' negotiators instead of more creative, integrative approaches.

Usability vs accuracy

Disputes often escalate through a variety of stages. Language can track this development. For example, at inception the matter in question may merely be an *issue* or a *concern*. As time passes it may escalate into a *problem*. Once the two sides have an interaction and it is clear that there is a specific issue upon which they do not agree the matter can become a *dispute*. A key connotation of the word *dispute* is that the matter is potentially resolvable. Once the parties give up on finding a resolution, the matter can escalate into a more formal *complaint* process, which may require the parties to initiate a *case* or a *claim*. At this point the responsibility to decide the matter is often taken from the parties and shifted to a third party.

Most ODR providers offer their services after a company's customer service process has done all that it can do, as a precursor to the initiation of formal litigation. At this point in the process it is easier to be sure that the matter in question is accurately referred to as a *dispute*. However, as ODR processes become increasingly integrated into transaction flows (which often increase their efficiency and user friendliness) this question of changing language becomes increasingly complicated.

While changing terms as the matter evolves may be most accurate, and it may lead to the best framing of the process in the minds of the participants, this kind of shifting language can work against the usability of an ODR platform. Users must be able to identify where they should go to initiate a dispute resolution process, and how they can check on progress that has been made and communicate further with the other side. A user who initiates a dispute under the heading 'Disputes', for example, will expect to return to the 'Disputes' area each time they need to update or monitor the dispute. For this reason, usability and interface designers prefer that terms be consistent throughout a process. As a result, the accuracy of terms can often collide with the usability of the ODR platform.

Multiple languages

As part of an effort to localize dispute resolution language on the help pages of its web site, eBay circulated proposed language among a variety of local translators.

They were asked to take the English pages that had been developed to coach buyers and sellers on effective communication and to translate them into their local language and terminology. The original document contained much of the advice eBay provides on a regular basis to its parties (focus on the problem, not the person, look for creative solutions, etc.)

In the course of that process, one translator, from Italy, communicated back her concerns about the language in the document. Much of the advice sounded patronizing in Italian, she explained. And many of the terms used (such as 'win-win') were American sayings without parallel in Italian.

In response, dispute resolution experts in Italy were approached and asked to provide feedback on the translation. With some effort agreement was reached on language that met most of the concerns of the translator. But it was clear that the specificity in meaning assigned to terms in one language does not transfer to literal translations in other languages.

Reusable language

In face-to-face processes there is normally little pre-planned communication. The goal is to get the parties to speak openly and honestly, and to have them react to the developments in the negotiation process as they emerge. If someone was to memorize language and recite it in the course of a dispute resolution process it would likely come out stilted and rehearsed. Face-to-face mediators and arbitrators may have concepts and turns of phrase they re-use, and they may have memorized their opening statements (as there is nothing to react to yet in the session), but beyond that most dispute resolution professionals must train themselves to be light on their feet and to react to situations as they emerge.

In contrast to face-to-face dispute resolution, language is often reusable online. Mediators and arbitrators can draft passages or questions that they like and save them on their hard drive for use in future dispute resolution processes. Dispute resolution professionals can share passages that have proven effective in a wide variety of situations, and that language can be used repeatedly with parties. This can lead to more refined phraseology and more strategic issue framing than might be possible in a synchronous, face-to-face interaction. However, it also puts pressure on neutrals to be extra vigilant in their written communications, so that language is updated appropriately and edited thoroughly to ensure it is specific and appropriate to the issues under consideration.

Ownership of language

In a face-to-face process it is clear who says what words at any given time. Even if a mediator or party repeats the words of another party word for word it still often does not come off as the exact communication of the original speaker. The difference in non-verbals between the two speakers makes the tone of the statement different, even if the words are identical. It often becomes very challenging to analyze the content of statements in great detail because of this inevitable focus on tone.

Online the ownership of a particular statement is more fluid. It is possible for a party to simply highlight, cut and paste the other party's words so that they appear exactly as they originally appeared. This can be very useful as a tool for a neutral, as the lack of non-verbal tone can compel a party to acknowledge ownership of

certain sentiments later in the process. It also can allow for more effective agreement and decision drafting, as the exact words used by the parties can be integrated into final agreements and judgments. Conversely, this fluidity can also lead to a risk that language will become impersonal in online contexts as authors attempt to craft statements that are reusable. Many web sites already rely too heavily on ‘canned’ emails that are not sufficiently specific to the needs and queries of the users. Online dispute resolution practitioners must be wary of such overly generic language, as it can quickly lead users to suspect that they are not really being heard.

Conclusion

Dispute resolution is fundamentally about effective communication. Communication can take many forms, and technology is continuing to expand the range of communication options available to all of us on an almost daily basis. Many of these technological options rely heavily upon words to convey meaning from one party to the other, and for that reason those of us in the online dispute resolution field must strive to be very specific and deliberate in our use of language. The challenges of culture, language and meaning are not simple to solve, so it is unlikely we will ever completely address this problem. Instead we must be vigilant to consider the language we use in our processes and tailor it as best we can to the likely interpretations of those who will read it.