

## 11 ODR AND INTERPERSONAL TRUST

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The existence of trust between individuals makes conflict resolution easier and more effective. This point is obvious to anybody who has been in a conflict. A party who trusts another is likely to believe the other's words, assume that the other will act out of good intentions, and probably look for productive ways to resolve a conflict... The level of trust or distrust in a relationship therefore definitively shapes emergent conflict dynamics...<sup>1</sup>

Trust is on the rise. Perhaps not in practice, but certainly as an area of interest and research. This is clear to anyone tracking the dispute resolution and conflict management fields, and is particularly noticeable in the field of ODR, in which trust has always received special attention.<sup>2</sup>

However, what do people mean when they talk about trust? Zooming in on specific uses of the term, it would seem as if three types of trust are most often discussed:

1. *ODR as a trust-provider/facilitator*: Incorporating ODR into systems such as e-commerce is one measure expected to raise the consumer's level of trust in the system.<sup>3</sup> Future development of the Internet, from a financial perspective, depends to no small extent on the success of e-commerce, which is *absolutely* dependent – perhaps more than on any other element – on trust.<sup>4</sup> This is a fragile condition. As Rule summarized the problem: “Transactions require trust, and the Internet is woefully lacking in trust”.<sup>5</sup>
2. *Users' trust in ODR*: ODR must be marketed, and its technology must be constructed, in such a way that the public will trust it as an efficient and effective way of managing their disputes.<sup>6</sup> This is not something to be taken for granted. In addition to the low

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1 R.J. Lewicki, “Trust, Trust Development and Trust Repair”, in M. Deutsch, E.C. Coleman & E.C. Marcus (eds.), *The Handbook of Conflict Resolution*, San Francisco, Jossey-Bass 2006, p. 110.

2 One telling example of this is that in response to a call for proposals for activities to be included in Cyberweek 2010, the most popular topic suggested by people offering to facilitate discussions was on the role of trust in ODR.

3 See C. Rule & L. Friedberg, “The Appropriate Role of Dispute Resolution in Building Trust Online”, *Artificial Intelligence and Law* (2005) 13, 2.

4 Y.D. Wang & H.H. Emurian, “An Overview of Online Trust: Concepts, Elements, and Implications”, *Computers in Human Behavior* (2005) 21, 1.

5 C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass 2002, p. 98.

6 See M. Abdel Wahab, “Does Technology Emasculate Trust? Confidentiality and Security Concerns in Online Arbitration”, *ICC Bulletin Special Supplement on Using Technology to Resolve Business Disputes*, No. 667,

level of trust all forms of ADR have encountered at one point or another, what ODR practitioner has not heard claims that the public will not buy in to ODR in general as it is a foreign concept; dispute resolution requires warmth and human interaction and internet communication is cold, and distance-creating?

3. *Interpersonal trust*: Parties utilizing ODR experience not only the distrust levels inherent in most conflict situations – they are also hindered by challenges to trust triggered and maintained by the nature of online communication and of the online environment.

While there are some commonalities to these uses of the term trust, there are conceptual differences between them. Additionally, in each there are fundamentally different players doing the trusting and being trusted (or distrusted). I suggest that in order to develop and best understand the nature and roles of trust as these relate to ODR, these topics and foci should be dealt with separately. In that spirit, this chapter will focus on the third context of trust: interpersonal trust between parties to ODR processes.<sup>7</sup>

The goal of this chapter is to enable online negotiators and mediators to understand the vital role that trust plays in these interactions, to identify process-junctures ripe with potential for trust-building (or trust-breaking), and to apply, at these critical junctures, tested methods for trust-building which facilitate negotiation processes and improve their outcome.

In this chapter, we will first define the notion of trust, as it might be applied to interpersonal interactions in ODR settings. Next, we will review the research exploring the effects that trust, or lack thereof, has on these processes. Having established the beneficial effects of trust, we will discuss why online communication and the online environment pose threats to the formation and maintaining of trust. We will break these media effects down into discrete elements, identifying eleven specific challenges to building and maintaining trust in online interactions. Each will be broken down into a dual perspective: challenges, opportunities and best practices for the online negotiator, and challenges, opportunities and best practices for the online mediator.

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2004; P. Gillieron, "From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy", *Ohio St.J. on Disp. Resol.* (2007) 23.

<sup>7</sup> That is not to say that the three types of trust do not affect each other. On the contrary, a type of a halo effect is bound to occur: Trust in a system will affect trust in the human at its other end. Trust in humans will affect the ability to complete transactions, etc. For the purposes of this chapter, we will focus on the third type of trust, mentioning the other two only inasmuch as they affect the third.

## 1 DEFINING TRUST

Many attempts have been made to define trust, across a wide range of disciplines. It has often been pointed out that a trans-disciplinary definition of trust is not feasible or desirable; trust can only be defined in-context, through the definer's own particular perspective.<sup>8</sup> Zooming in on the narrower literature on dispute resolution, one still finds varying definitions of trust. For the purpose of having a shared picture of what we refer to in this chapter, I will adopt a definition previously posited,<sup>9</sup> combining three elements suggested in the literature:

- *Risk*: The existence of risk is a precondition for trust. Only when one is at risk, dependent or vulnerable can his/her behavior or expectations demonstrate trust.<sup>10</sup>
- *Uncertainty*: Trust can manifest only when there is a degree of uncertainty regarding another's future behavior; if the other's behavior is pre-ordained or controlled, trust is unnecessary and moot.<sup>11</sup>
- *Expectations*: One expects that his/her cooperation, or other trust-indicating action, will be reciprocated by the other.<sup>12</sup>

Taken together, these elements portray trust in the context of dispute resolution as an expectation that one's cooperation will be reciprocated, in a situation where one stands to lose if the other chooses not to cooperate. To bring that into the world of ODR practice, from the viewpoint of negotiators and then from the perspective of a mediator.

As negotiators we need our negotiation opposites to trust us every time they are asked to bet on our unguaranteed cooperation. We ask them to do this many times during a process, and not only at its culmination. We request they share information, despite the fact that they cannot be absolutely certain we will not use it to their detriment. We need them to invest time in discussing options for achieving our goals, even though they are not guaranteed our own reciprocal efforts regarding their own issues. At the agreement stage, we request our opposites' agreement to a particular solution, which, as a necessity, requires some concession on their part. They are asked to make this concession without

8 J. Boyd, "The Rhetorical Construction of Trust Online", *Communication Theory* (2003) 13, 4; D. Koeh, "The Nature of and Conditions for Online Trust", *Journal of Business Ethics* (2003) 43, 1; Wang (2005).

9 N. Ebner, "Trust-Building in E-Negotiation", in L. Brennan & V. Johnson (eds.), *Computer-Mediation Relationships and Trust: Managerial and Organizational Effects*, Hershey, PA, Information Science Publishing 2007.

10 Boyd (2003).

11 D. Gambetta, "Can we Trust Trust?", in D. Gambetta (ed.), *Trust: Making and Breaking Cooperative Relations* 1988.

12 D.G. Pruitt & M.J. Kimmel, "Twenty Years of Experimental Gaming: Critique, Synthesis, and Suggestions for the Future", *Annual Review of Psychology* (1977) 28.

absolute certainty that we will stand by our own word, and deliver whatever it is we promise in return. The leaps of faith necessary for all these to happen are generated by trust.

As mediators, we need to be aware of, and sometimes to tweak or affect, all the dynamics described in the previous paragraphs, as they play out between disputing parties. We ask them to deal fairly and openly with each other, to discuss their interests with each other and to desist from unilateral actions that might bring one party benefit – in order to advance or protect the mediation. Under the definition we adopted, these are all trust-affecting requests. However, party-party relations are only one of the trust-affected relationships evolving within the mediation process. As mediators, we also ask parties to trust *us* and to trust the mediation *process*, despite the risk and uncertainty involved and despite the fact that their expectations cannot, ultimately, be fully satisfied by us, but rather by the other party. We ask them to desist, delay, or act in parallel to other alternative processes for solving their problems, while at the same time explaining that there is no certainty regarding the outcome of the mediation process. We invite them to divulge information to us, to explore their interests with us, and to reconsider their assessments and offers – even when they are uncomfortable doing this together with the other party – and their agreeing to do so is predicated on their trust in the mediator.

These examples – only the tip of the iceberg, really – demonstrate the practical importance of understanding, and learning to work with, trust – as negotiators and as mediators. Next, let's turn to the research to explore more fully how trust works in these processes.

## 2 THE ROLE OF TRUST IN NEGOTIATION AND MEDIATION

Trust is essential for conducting any successful negotiation or mediation processes. The professional and academic literature on negotiation and mediation devotes enormous effort to understanding how trust is built, maintained, broken and reconstructed.

Regarding negotiation, research shows trust playing a key role in promoting cooperation,<sup>13</sup> problem solving,<sup>14</sup> information exchange,<sup>15</sup> negotiator effectiveness<sup>16</sup> and achieving integrative solutions.<sup>17</sup> Trust is considered a vital precondition for sharing information,

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13 M. Deutsch, "Cooperation and Trust: Some Theoretical Notes", *Nebraska Symposium on Motivation*, Nebraska, University of Nebraska Press 1962.

14 D.G. Pruitt, J.Z. Rubin & S. Kim, *Social Conflict: Escalation, Stalemate, and Settlement*, (3rd ed.) McGraw Hill 2004.

15 M.J. Kimmel *et al.*, "Effects of Trust, Aspiration and Gender on Negotiation Tactics", *J. Pers. Soc. Psychol.* (1980) 38, 1.

16 A.K. Schneider, "Shattering Negotiations Myths: Empirical Evidence on the Effectiveness of Negotiation Style", *Harvard Negotiation Law Review* (2002) 7.

17 R.J. Lewicki & J.A. Litterer, *Negotiation: Readings, Exercises and Cases*, Irwin, 1985; D. Lax & J.K. Sebenius, *The Manager as Negotiator: Bargaining for Cooperation and Competitive Gain*, Free Press 1986.

arousing generosity and empathy and reciprocating trust-building moves in a negotiation process. Lacking trust one's negotiation opposite leads negotiators to fear that information they impart to that opposite might boomerang back at them, and be used to their own detriment.<sup>18</sup> A trust-filled environment reduces the fear-factor and its resulting behavior. Negotiators no longer focus on the likelihood of perceived catastrophic results in the negotiation process, understanding that the worst outcome of the process will be a mutually agreed upon "no-deal", with the underlying premise of a continuing relationship and possibly of future interactions. This allows for cooperative behavior patterns in the negotiation process. Distrust, on the other hand, causes parties to focus on how their cooperative behavior can be used against them, triggering defensive behavior – negotiators withhold information, attack the other's position and statements, threaten them, and lock themselves into positions from which they cannot easily withdraw.<sup>19</sup> These findings have translated into practice through their centrality in professional training; with negotiation trainees advised to seek out and create opportunities for trust-building whenever possible – as early as possible in the course of a negotiation process,<sup>20</sup> and or even before its formal inception.<sup>21,22</sup>

These findings on negotiation certainly inform the role of trust in mediation as well. The literature on mediation expands on this, taking into account the dual-front nature of trust from a mediation perspective: The trust-relationship between the parties and the mediator, and the trust-relationship between the parties themselves. The mediation literature makes it clear that proper conduct of these two fronts will facilitate resolution; their mismanagement, can quite possibly derail a process. In addition to suggesting trust's general contribution to promoting dispute resolution<sup>23</sup> the literature on mediation suggests additional benefits of trust. Trust in the mediator is an important factor in the question of whether parties agree to mediate, as well as that of whether they settle.<sup>24</sup> The tools of successful mediators include procedures for encouraging interparty trust or suggesting agreements that do not require trust.<sup>25</sup> The ability of a mediator to form rapport with

18 J. Nadler & D. Shestowsky, "Negotiation, Information Technology, and the Problem of the Faceless Other", in L.L. Thompson (ed.), *Negotiation Theory and Research*, New York, Psychology Press 2006.

19 Lewicki & Litterer (1985).

20 *Id.*

21 See M. Morris *et al.*, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations", *Group Dynamics: Theory, Research, and Practice* (2002) 6, 1.

22 For recent works on trust in negotiation, see D.L. Ferrin, D.J. Kong & T.K. Dirk, "Trust Building, Diagnosis, and Repair in the Context of Negotiation", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Singapore, Scientific Publishing 2011; S. Jang & R. Chua, "Building Intercultural Trust at the Negotiating Table", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, Singapore, World Scientific Publishing 2011.

23 C. Moore, *The Mediation Process*, (3rd ed.) San Francisco, Jossey-Bass 2003.

24 See P.J. Carnevale & D.G. Pruitt, "Negotiation and mediation", *Annu. Rev. Psychol* (1992) 43, 1.

25 *Id.*

parties has been found to be the most important ability or skill a mediator can possess.<sup>26</sup> A primary element of this rapport, as the term was used in this study, was parties' trust in the mediator, also discussed as the mediator gaining the confidence of the parties.<sup>27</sup> The flip side of that coin is that a lack of integrity (including trust-breaking behavior) has been found to be widely viewed as a cause of mediator failure.<sup>28</sup>

## 2.1 *What Makes Disputants, or Negotiators, Trust Each Other?*

In negotiation (including mediated negotiation), interparty trust develops along three routes:

*Deterrence-based or calculus-based trust* is premised on our perception that people act in accordance with their own rational self-interest. While this is in itself a questionable assumption,<sup>29</sup> we still base our trust-decisions on it: we conduct a subjective cost/benefit analysis estimating our opposite's own self-interest, and trust them to act as they committed to insofar as this promotes this self-interest. Our negotiation opposites will keep trust only if their payoff is greater that way. If breaking trust would lead them to larger gain (for example, if we lack the ability to punish them for violating trust) – they are likely to pursue this course.<sup>30</sup> In other words, if we calculate that our opposites consider trustworthy behavior to be in their own self-interest – we can trust them. We do not need to passively assess such trust – it can be directly affected or created, for example by introducing punitive clauses for trust-breaking behavior.<sup>31</sup>

*Knowledge-based trust* is grounded in the others' predictability. So far as our knowledge of our negotiation opposites allows us to predict their responses and behaviors, we can estimate the degree to which they can be trusted. This form of trust might result from

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26 S.B. Goldberg, "The Secrets of Successful Mediators", *Negotiation Journal* (2005) 21, 3; S.B. Goldberg & M.L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three", *Negotiation Journal* (2007) 23, 4.

27 On the close relationship between trust and rapport, see J. Nadler, "Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Deal Making", *Harv. Negot. L. Rev.* (2004) 9; A.M. Braeutigam, "What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment", *U. Tol. L. Rev.* (2006) 38.

28 Goldberg (2005).

29 See, e.g. N. Ebner & A. Kamp, "Relationship 2.0: Not Setting Students Up for Failure (This Time)", in C. Honeyman, J. Coben & G. De Palo (eds.), *Venturing Beyond the Classroom: Vol. 2 in the Rethinking Negotiation Teaching Series*, St. Paul, MN, DRI Press 2010.

30 G.D. Paulson & C.E. Naquin, "Establishing Trust via Technology: Long Distance Practices and Pitfalls", *International Negotiation* (2004) 9, 2.

31 See R. Axelrod, *The Evolution of Cooperation*, Basic Brook 1984; T.C. Schelling, *The Strategy of Conflict*, (2nd ed.) Harvard University Press 1980; R.J. Lewicki et al., *Negotiation: Readings, Exercises and Cases*, (4th ed.) McGraw-Hill/Irwin 2002.

study of negotiation opposites, or develop over time as we come to know them through a series of interactions.<sup>32</sup>

*Identification-based trust* is based on us perceiving that our opposites share characteristics, traits and backgrounds with us. People tend to trust negotiation opposites who seem to have these in common with them – even when other factors in the negotiation process may engender suspicion.<sup>33</sup> With the distance and lack of mutual perception inherent in ODR, it comes as no surprise that this route to trust is perhaps the most severely affected by the online medium.<sup>34</sup>

## 2.2 *Whom Do Negotiators Trust?*

Breaking the above down into practical terms indicates that in a negotiation between Negotiator A and Negotiator B, Negotiator B is more likely to trust Negotiator A if:

- a. Negotiator A is perceived as similar to Negotiator B in various ways;
- b. Negotiator B holds some power of reward or sanction over Negotiator A;
- c. Negotiator A displays a positive attitude towards Negotiator B or initiates trusting, cooperative behavior, which invites reciprocation;
- d. Negotiator A makes concessions, signaling motivation for finding a joint solution;<sup>35</sup>
- e. Negotiator B anticipates having future interactions with Negotiator A;<sup>36</sup>
- f. Negotiator A have been helped by Negotiator B in the past (therefore laying the groundwork for expectations that Negotiator A will reciprocate);
- g. Negotiator A is known to have been helpful and cooperative in the past – towards others or, more particularly, towards Negotiator B;<sup>37</sup>
- h. Negotiator B feels s/he knows and understands Negotiator A to a degree granting her/him insight into Negotiator A's system of needs, norms and values.

These inter-party trust dynamics will play out in unassisted negotiation processes, as well as in processes facilitated by third parties. Mediators who trigger, promote or highlight these dynamics (depending on their approach and process model), will affect interparty trust. However, what affects the level of trust between parties and mediators?

<sup>32</sup> Lewicki (2002).

<sup>33</sup> *Id.*

<sup>34</sup> These three routes to establishing trust can each support the dispute resolution process on its own or work in tandem with the others. Lewicki *et al.* (2002) suggest that these three paths to trust are often taken sequentially. Typically, deterrence-based trust forms first. As parties gain knowledge and experience of each other, knowledge-based trust forms. Identification-based trust, particularly in its more extreme forms of empathy, comes last.

<sup>35</sup> Lewicki (1985).

<sup>36</sup> L.L. Thompson, *The Mind and Heart of the Negotiator*, (2nd ed.) Prentice Hall 2001.

<sup>37</sup> Pruitt and Kimmel (1977).

### 2.3 *What Inspires Parties' Trust in Mediators?*

A survey of mediators clearly showed that the ability to gain a party's trust is held to be *the* most valuable skill of the effective mediator. Mediators suggested that trust was most effectively built through the mediator's empathic listening, and to a lesser extent by the mediator displaying honesty and adherence to ethical considerations.<sup>38</sup> Parties to mediation surveyed on this same question agreed with this ranking of trust-building as the effective mediator's primary skill or trait. However they highlighted different mediator actions or tendencies which resulted in them experiencing trust in their mediator. Parties stressed mediators' friendliness, likability, integrity, neutrality, maintaining of confidentiality and preparedness as elements affecting the degree of trust they evoked in parties.<sup>39</sup> These in-depth studies shows that not only do many mediator moves depend on trust, as discussed above – many (or most) mediator moves *affect* trust as well.

## 3 TRUSTBUILDING TOUGH? WAIT TILL YOU GET ONLINE!

Now that we have understood the nature of trust and its role in dispute resolution, we can explore why this concept is threatened in ODR processes, reliant as they are on online communication. First, we will explain why the Internet, in general, is a trust-adverse environment. Next, we will try to conceptualize the notion of the communication media the Internet provides *simultaneously* supporting and threatening the dispute resolution process by affecting interparty trust. Then, we will be prepared to tackle the challenges ODR process face: What communication media does ODR utilize, and how do they affect trust?

### 3.1 *Trust in the Online Environment*

Before we examine the way trust is affected by particular media utilized for ODR, we need to dedicate some thought to the overarching sense of distrust people have whenever they approach the Internet. Its positive characteristics and opportunities notwithstanding, the Internet has become something similar to a bad neighborhood after dark. We watch where we are going, try and stay close to familiar sites, and complain about the lack of competent policing. We constantly warn our children regarding this global neighborhood, telling them not to stray from the main road and above all – not to speak to strangers, let alone take candy from them. This environment is fraught with distrust. No matter what we use

38 S.B. Goldberg, "The Secrets of Successful Mediators", *Negotiation Journal* (2005) 2, 3.

39 S.B. Goldberg & M.L. Shaw, "The Secrets of Successful (and Unsuccessful) Mediators Continued: Studies Two and Three", *Negotiation Journal* (2007) 23, 4.

the Internet for, we are likely to be asked to place our trust in a software platform, a website, an e-vendor or another individual. Patricia Wallace, one of the early writers on the psychology of the Internet, noted how the fact that all of these interactions have been used exploitatively in the past, cause users to approach the Internet bearing a pre-emptive filter of distrust.<sup>40</sup> Over a decade later, this problem has compounded. Even as the Internet has developed into a global library, a world of potential and a connecting media allowing meaningful interactions between everyone on the planet, it has become a hunting ground for predators looking for prey.<sup>41</sup> The predators out for profit are joined by pranksters out there for the thrill, and by others mixing both these motivations.<sup>42</sup> As a result, when we open our browsers or click on our inbox, we are resigned to some level of cautious suspicion, operating at threat warning yellow. This affects any online interactions we engage in.

### 3.2 *It Gets Worse Once We Start Talking*

Communication, held out to be the great trust builder or restorer, is in itself a *hazard* to trust when conducted at a distance. Indeed, even before the Internet hit computers, research made clear that people communicating at a distance through technological means are likely to experience low levels of interpersonal trust and higher rates of disruption and deterioration than those engaged in face-to-face dialogue. Comparing telephone-based communication with face-to-face communication has shown that face-to-face interactions

40 P.M. Wallace, *The Psychology of the Internet*, Cambridge University Press 1999.

41 While more sinister examples exist this is perhaps best exemplified by the phenomena of spam e-mail. One recent study estimated that the volume of spam e-mail sent worldwide is 62 trillion per day. Contrasted with the 15.6 trillion legitimate e-mails sent daily, spam constitutes about 80% of e-mails sent. See McAfee, *The Carbon Impact of Spam Report*, 2009, available at <<http://resources.mcafee.com/content/NACarbonFootprintSpamConfirm>>, last accessed 1 January 2011. Other sources cite higher spam rates, and the numbers are certainly constantly on the rise (see, e.g., Symantec, 2010 – <[www.symantec.com/business/theme.jsp?themeid=threatreport](http://www.symantec.com/business/theme.jsp?themeid=threatreport)>, last accessed 1 January 2011).

42 As perhaps evidenced by the huge number of computer viruses written and circulated around the globe. While the initiators of these programs were originally triggered by motivations similar to face-to-face vandalism and the dubious status conferred by like-minded malware authors (see for example, A. Bissett & G. Shipton, “Some Human Dimensions of Computer Virus Creation and Infection”, *International Journal of Human-Computer Studies*, (2000) Vol. 52, No. 5, pp. 899-913), the financial implications of such applications were not ignored. In 2008, the number of malicious codes tripled the previous year’s figures, rising above the one million varieties mark. Such a rise could probably only be supported if it had financial motivations; it would seem as if over the past few years the for-thrills and for-profit elements of this underworld have merged; malware is now used for identity and financial information theft, and experienced malware writers are marketing kits allowing “newbies” to this new industry to create their own code (see <<http://news.bbc.co.uk/2/hi/technology/7154187.stm>>; also Symantec, Internet Security Threat Report, 2010, available at <[http://eval.symantec.com/mktginfo/enterprise/white\\_papers/b-whitepaper\\_internet\\_security\\_threat\\_report\\_xv\\_04-2010.en-us.pdf](http://eval.symantec.com/mktginfo/enterprise/white_papers/b-whitepaper_internet_security_threat_report_xv_04-2010.en-us.pdf)>, last accessed 1 January 2011).

foster rapport, trusting behavior and cooperation, while their absence in phone communication triggers distrusting, competitive and contentious behavior.<sup>43</sup>

These findings were intensified when researchers began exploring the “bad neighborhood” environment of the Internet. Communicating over the Internet, people develop a sense of disinhibition; possible adverse consequences of negative online interactions are ignored by parties, due to physical distance, reduced accountability and a sense of anonymity.<sup>44</sup> They tend to act more contentiously than face-to-face communicators, as evidenced by more frequent occurrences of swearing, name calling, insults and hostile behavior.<sup>45</sup> Through a prism focused on trust, online communicators find it difficult to build the trust necessary for their opposites to perceive them, and construe their intentions, positively. This often results in them losing control – of the process and of their relationship.

What is it about online communication that makes building or maintaining trust so difficult? To explain this, we need to understand a basic principle in communication theory: *the medium matters*. Messages do not just “happen”, they are exchanged from one communicator to another via a medium. For convenience’s sake, we often assume the medium to be a neutral vehicle for the essence – the message we intended to transmit, or receive. As a result, when we hear a message from another, we assume that we understand them as they meant to be understood. When we say something to another, we assume they understood us as we meant to be heard – or, we blame their own filters for screening us out. What we usually fail to take into account, as we talk, text, phone, mobile phone, e-mail, instant message, Tweet, status change and videoconference our way through life, is that the messages we transmit and receive, and the way we transmit and receive messages, are affected – and sometimes fundamentally altered – by the media we have chosen to convey them through. Understanding the ways in which the medium affects the message – “media effects” – is crucial for designing ODR processes and systems as well as for communicating throughout their implementation.

### 3.3 *Media Effects*

The communication channel through which negotiations are conducted is neither passive nor neutral. Any communication medium influences both ends of the communication

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43 A.L. Drolet & M.W. Morris, “Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts”, *Journal of Experimental Social Psychology* (2000) 36.

44 Wallace (1999).

45 S. Kiesler & L. Sproull, “Group Decision Making and Communication Technology”, *Organizational Behavior and Human Decision Making* (1992) 52, 1.

loop, affecting what information negotiators share and how that information is conveyed,<sup>46</sup> as well as how that information is received and interpreted. These effects are called “media effects”.

Why is some information easily communicated face-to-face, but difficult to convey by e-mail? Why might we respond in one way to something we are told face-to-face, but a very different way to the same message, conveyed by e-mail? Underlying these differences are two dimensions of communication media:<sup>47</sup>

1) *Media richness*: The capacity of any given media to supply “contextual cues”: body language, facial expressions, tone of voice, etc. Face-to-face communication is considered a “rich” medium: it allows for all of these, which account for a significant proportion of a message’s meaning.<sup>48</sup> E-mail is a “lean” medium because it transmits neither visual nor audio cues; we cannot see the other’s gestures or facial expressions, or hear their tone of voice. Denied these contextual cues, negotiators both transmit and receive information differently. Videoconferencing would be somewhere between the two (depending on the quality of transmission, the angle of the cameras, etc.). On the transmitting side, this affects presentation style: e-mail negotiators, as opposed to face-to-face or videoconferencing parties, rely more heavily on logical argumentation, share less personal information and are more task oriented.<sup>49</sup> On the receiving end, further media effects kick in: Information exchanged in e-mail tends to be less nuanced than information exchanged face-to-face,<sup>50</sup> and the elimination of important back-channel and clarifying information such as speech acknowledgements (e.g., “uh-huh” or “huh?”) and reactive body language (e.g., nods)<sup>51</sup> compounds this. Communicating through lean media, negotiators focus on the actual *content* of messages,<sup>52</sup> lending much more importance to the words that are chosen, and their interpretation.

46 Carnevale & Pruitt (1992); R.A. Friedman & S.C. Currall, *E-Mail Escalation: Dispute Exacerbating Elements of Electronic Communication*, Vanderbilt University 2001; K.L. Valley, J. Moag & M.H. Bazerman, “Matter of Trust Effects of Communication on the Efficiency and Distribution of Outcomes”, *Journal of Economic Behavior & Organization* (1998) 34, 2.

47 Z.I. Barsness & A.D. Bhappu, “At the Crossroads of Technology and Culture: Social Influences, Information Sharing, and Sense-making Processes During Negotiations”, in M.J. Gelfand & J.M. Brett (eds.), *The Handbook of Negotiation & Culture*, California, Stanford University Press 2004.

48 B.M. DePaulo & H.S. Friedman, “Nonverbal Communication”, in D.T. Gilbert, S.T. Fiske & G. Lindzey (eds.), *The Handbook of Social Psychology*, Boston, McGraw Hill 1998.

49 See N. Ebner, “Negotiating via e-mail”, in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, Singapore, World Scientific Publishing 2011.

50 Friedman *et al.* (2001); Valley (1998).

51 B. O’Connaill, S. Whittaker & S. Wilber, “Conversations over Video Conferences: An Evaluation of the Spoken Aspects of Video-Mediated Communication”, *Human Computer Interaction* (1993) 8.

52 R.J. Ocker & G.J. Yaverbaum, “Asynchronous Computer-Mediated Communication Versus Face-To-Face Collaboration: Results on Student Learning, Quality and Satisfaction”, *Group Decision and Negotiations* (1999) 8, 5.

2) *Interactivity*: This is the potential of the medium to sustain a seamless flow of information between two or more negotiators.<sup>53</sup> Interactivity has two dimensions.

The first, a temporal dimension, captures the *synchronicity* of interactions. Face-to-face communication and videoconferencing are synchronous and co-temporal. Each party receives a message just as it is produced, resulting in speaking “turns” occurring sequentially. E-mail is typically asynchronous: negotiators can read and respond to others’ messages whenever they happen to open their inbox or choose to reply. Responses are not necessarily sequential; reading messages out-of-order commonly causes misunderstandings.

The second dimension of interactivity is parallel processing, which describes a medium’s ability to allow negotiators to *simultaneously* transmit messages. In face-to-face communication, parallel processing is overt and part of the familiar communication loop. In e-mail communication, simultaneous exchange of messages, or “crossing messages”, causes confusion.

In summary, media richness and interactivity account for important differences across media in the structure, style, and content of information exchanged.<sup>54</sup> Face-to-face communication is far from perfect; however, the more we distance ourselves from face-to-face communication along spectrums of lean/rich media and interactivity, the more we challenge understanding, comfort and rapport. As we will describe at length, below, the outcome is that these media effects – inherent to ODR – affect trust in a significant, and usually detrimental, fashion.

### 3.4 *Trust Reduction in E-Negotiation and E-Mediation: Are We Sure?*

After the previous section, it seems intuitive that interparty trust would be significantly threatened by media effects. Is this borne out by research findings?

Early research showed that negotiators are apt to act contentiously when negotiating with people at a distance such as over the phone.<sup>55</sup> Examining negotiation through “lean media” e-communication, it became apparent to researchers that e-negotiators feel less bound by normatively appropriate behavior than face-to-face negotiators. This plays out in multiple ways, none of them conducive to harmonious agreement: an increased tendency to threaten or voice ultimatums,<sup>56</sup> to adopt contentious, “squeaky wheel” behavior and to

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53 R. Kraut *et al.*, “Task Requirements & Media Choice in Collaborative Writing”, *Human Computer Interactions* (1992) 7, 4.

54 For more detail, see N. Ebner *et al.*, “You’ve Got Agreement: Negotiating Via E-mail”, in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009; Ebner (2011).

55 H. Raiffa, *The Art and Science of Negotiation*, Harvard University Press 1982.

56 Morris (2002), p. 21.

engage in flaming,<sup>57</sup> that particularly rapid conflict escalation phenomena found in online text communication. From a trust-perspective, one could say that that e-negotiators work through a communication channel challenging to trust-building and -maintenance. This insight (which may ring true intuitively for many readers and, for others, tap into their own practical experience) is supported both by indirect and direct measurements of trust in e-negotiation processes.

Trust in negotiation is not only a difficult notion to grasp and define; it is also quite difficult to measure. One way to indirectly assess the degree to which an e-medium is conducive to trust is to measure the degree to which parties negotiating through it behave cooperatively throughout the negotiation *process*; another is to measure the degree to which parties are able to achieve integrative, win/win *outcomes*. Such processes and outcomes might be viewed as possible only when parties trust each other enough to discuss their true needs, preferences and priorities and avoid unnecessary posturing, escalation or walk-outs.<sup>58</sup> The majority of experiments measuring these two indicators have shown that e-negotiation entails lower rates of process cooperation, and lower rates of integrative outcomes, when compared to face-to-face negotiation.<sup>59</sup> While these findings are probably only partially mediated by the issue of trust, other possible explanations suggested,<sup>60</sup> such as increased contentiousness and the difficulty of forming rapport, are also indirect measures of trust, as will be discussed below. These indirect measurements are reinforced by direct questioning of negotiators about the degree of trust they experienced in negotiation counterparts. E-negotiators reported lower levels of trust than did their face-to-face counterparts.<sup>61</sup>

57 L.L. Thompson & J. Nadler, "Negotiating via Information Technology: Theory and Application", *Journal of Social Issues* (2002) 58, 1.

58 See Ebner (2007).

59 V. Arunachalam & W. Dilla, "Judgment Accuracy & Outcomes in Negotiation: A Casual Modeling Analysis of Decision-Aiding Effects", *Organizational Behavior & Human Decision Processes* (1995) 61, 3; Valley (1998); Nadler & Shestowsky (2006). For contrasting research, see A. Galin, M. Gross & G. Gosalker, "E-Negotiation Versus Face-to-Face Negotiation What has Changed- if Anything?", *Computers in Human Behavior* (2007) 23, 1; Nadler & Shestowsky (2006); C.E. Naquin & G.D. Paulson, "Online Bargaining and Interpersonal Trust", *Journal of Applied Psychology* (2003) 88, 1.

60 Ebner (2011).

61 Naquin & Paulson (2003). It should be noted that most of the research detailed above experimented with lean media – e-mail and other text-based channels. Video conferencing has been found to support trust better than text, as should be expected from our discussion of media effects. See N. Bos *et al.*, "Effects of Four Computer-Mediated Communications Channels on Trust Development", *Proceedings of SIGGHI Conference on Human Factors in Computing Systems: Changing the world, changing ourselves*, ACM, 2002. However, videoconferencing is certainly not yet the medium of choice or of market standard in ODR (see Pearlstein, Hanson and Ebner, chapter 19 in this book), and more research is necessary to explore its effect on trust.

3.5 *Challenges to Trust in ODR Processes*

After this discussion of the ways that the internet environment and the communication medium both challenge trust, it should be stressed that their affect spread to all three of the routes to trust mentioned earlier. The development of identification-based trust is hampered by reduction in physical and verbal cues exchanged by parties: we have less to latch on to, and we tend to latch onto elements conducive to the forming of distrust rather than trust. Parties often negotiate with people they do not know, and who are out of the reputation-networks that help us assess and assume what we know about people. People negotiating at-a-distance will often have different cultural norms, making what we assume we know about each other even sketchier. All of these hamper development of knowledge-based trust. Finally, calculus-based trust is handicapped by the limitations of deterrence-at-a-distance. While the US and the Soviet Union's ability to reach out and touch each other allowed some degree of this pillar to form, in smaller-scale transactional interactions elements such as jurisdiction, enforcement, and anonymity make it much more difficult for parties to rely on their ability to affect the other should the deal go sour.

Breaking these wider issues down in this section, we will now frame eleven specific challenges or obstacles to interparty trust in online interactions. After a general portrayal of each obstacle, we will reframe the literature into practical recommendations to negotiators on coping with that obstacle. Next, we will make similar recommendations to mediators.<sup>62</sup> To avoid repetitiveness, it should be said, once and up front, that all of the implications for negotiators are important for mediators to keep in mind. Separate recommendations to mediators will focus, for the main part, on their role in helping parties achieve or maintain a degree of trust suitable for supporting the mediation process. Others will relate to specific issues pertaining to mediator-party trust.

In order to avoid a confusing breakdown of each challenge into several different communication media, the discussion will assume that the primary mode of interaction being used in the interaction is asynchronous exchange of text messages. This way, the discussion addresses the challenges inherent in using very lean media for ODR; challenges and recommendations regarding trust-building in negotiation and mediation through other media can be extrapolated from this, after understanding the different natures of these media as discussed above. Focusing on this medium also owes to its being the most common medium currently used for ODR.<sup>63</sup>

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62 While there is a wide body of literature addressing online communication and online negotiation, relatively few pieces have been written on online mediation (see Ebner, chapter 17 in this book), and only a handful have directly addressed the issue of trust. As a result, some of the recommendations addressing mediators in this chapter are admittedly less grounded in existing literature and combine practical experience and observations with an adaptation of negotiation-related literature to the third party role.

63 See Pearlstein, Hanson & Ebner, chapter 19 in this book.

The following challenges will be discussed:<sup>64</sup>

1. *Lack of contextual cues*: E-negotiators are denied many of the non-verbal cues that we rely on in interpersonal communication for assessing another person's trustworthiness.
2. *Increased attribution, increased misinterpretation*: The tendency to put the worst possible face on another's intentions and meanings increases in e-communication. As a result, e-negotiators will perceive the other's intentions through the most distrusting lens possible.
3. *Increased contentiousness – a vicious cycle*: We have already noted how people are more apt to lash out at each other online. It is difficult to trust someone treating you this way – or to gain someone's trust, after doing this yourself.
4. *Low expectations of trust*: E-negotiators have low expectations regarding the other's trustworthiness walking into the process, and this becomes a self-fulfilling prophesy.
5. *I am anonymous, the other is faceless*: The mutual invisibility inherent in e-negotiation facilitates trust-breaking behavior. It is easier to cause damage to a faceless other, particularly when we feel protected by a shield of anonymity and physical distance.
6. *Physical distance and interpersonal "otherness"*: The sense of separation inherent to e-negotiation results in reduced identification with the other, challenging identity-based trust.
7. *Empathy, online?* Building trust by showing empathy for a negotiating opposite is a challenge even in a rich communication channel; in e-negotiation, the need for empathy is often ignored.
8. *Privacy*: In ODR processes, parties can never know who is "in the room" with you. Messages transmitted, or real-time conferences can be recorded and are beyond a party's control. This might lead to reduced information-sharing and risk-taking, associated with trust.
9. *Human expectations and asynchronous communication*: The Internet incorporates two clashing characteristics: instant access to anything and anyone, and asynchronous communication. This duality gives rise to unmatchable expectations between negotiators, breeding distrust.
10. *Diminished party commitment, investment and focus*: Parties to e-mail negotiation might be less motivated than face-to-face negotiators. The low entry costs associated with online processes means that a party's mere agreeing to participate does not have a trust-inducing effect on the other. A lack of constant, active participation might be interpreted by a negotiation opposite as untrustworthiness.
11. *Negotiating the new dispute resolution environment*: The Internet, still a novelty to many, is distrusted even by its most fervent advocates. Additionally, even professional

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<sup>64</sup> This list incorporates and expands upon a list of challenges discussed in a previous paper, which focused on challenges to e-mail communication in particular. Ebner (2007).

negotiators are inexperienced at e-negotiation, and lack skill at trust-building through online media.

### 3.5.1 Lack of Contextual Cues

Communicating with one another, people rely on contextual cues to interpret others' messages: their facial expressions, body language, tone of voice and other non-verbal hints "padding" the message itself. We infer most of a message's meaning through these cues, in fact, rather than through the spoken message itself.<sup>65</sup> In the rich medium of face-to-face communication we are so overcome with cues that we allow ourselves to ignore some of them (such as by looking away from our counterpart). Communicating through leaner media, however, we are more active in seeking out such cues. Unable to see the face of the person on the telephone with us, we strain to infer meaning from their tone of voice. Text-based online communication, including e-mail and other communication systems common to ODR providers, is a very lean media for conveying contextual cues. Our usual methods for transmitting our trustworthiness to others are rendered valueless, and the senses we have developed to analyze another's cues for assessing credibility are neutralized. Text-based communicators are denied many of the cues that have been found to inspire trust in face-to-face settings: facial expressions, vocal inflections, physical proximity and touch.<sup>66</sup> Experiments comparing interactions through face-to-face, audio, video and text-based communication, found the last to be the *least* supportive of trust-building.<sup>67</sup> Even video-conferencing still falls far short of face-to-face communication.

One communication tool helpful in face-to-face interactions is very tricky to employ using cue-less, lean media: humor. Recent research has shown humor to be a valuable tool in online negotiation, leading to increased trust and satisfaction levels and higher joint gains. This pays off, directly, to the humorous party, in the form of higher individual gains to the initiators of humorous events.<sup>68</sup> However, as anybody who has communicated online knows, humor is often misunderstood, misinterpreted and misattributed – and can easily backfire.

#### 3.5.1.1 Implications for Negotiators

*Learn to read:* Text communication is full of cues – just not those we are used to. Do not skim through a message and assume you will get the gist of it; you will get the wrong gist.

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65 Thompson (2001).

66 These cues are at best replaced with a limited range of emoticons. It is unclear whether this may help or interfere: much as with "real" terms, people use and interpret emoticons differently, paving the way for misunderstanding. In formal communication, the use of emoticons has not yet become the norm, leaving communicators with only the text-based channel.

67 Bos (2002).

68 T.R. Kurtzberg, C.E. Naquin & L.Y. Belkin, "Humor as a Relationship-Building Tool in Online Negotiations", *International Journal of Conflict Management* (2009) 20, 4.

Read messages carefully, paying attention to details such as specific wording and phraseology.

*Careful with those jokes:* If the meaning of a sentence you write is ambiguous, provide the reader with the proper tone of voice to “hear” it in by adding in pointers such as “Forgive my sarcasm, but...” or “Isn’t it funny that...”, even though you might not do so in a face-to-face setting. When using humor, in particular, add in all the cues you can so as to let your counterpart “hear” your tone, and only do so after considering whether your relationship can overcome a misinterpretation of your intended levity.

### 3.5.1.2 *Implications for Mediators*

*Forewarn and forearm:* Incorporate a comment on the challenges of reduced cues in your introduction. Request parties to be as clear as they can, including regarding the tone of voice they are “speaking” in. Ask them to be descriptive regarding their frame of mind, and that mentioning they are writing something angrily, or sarcastically, is more helpful than being ambiguous.

*Ask questions:* If one party sends an ambiguous message to another, you might inquire to the author’s intentions before the receiver has had time to reply. You might do this in joint communication, hoping to receive an answer that will clarify things to the receiver. You might write back a reframed, clear message, asking the author if this is what was meant. Alternatively, you can use reframing or a direct question in a caucus with the author through private communication, with the aim of understanding the author’s frame of mind before you decide how to handle the situation.

*Assume the “explainer” role:* If a message was mistakenly interpreted by the receiver, and you identify this on your own, you can reframe the message or directly explain (e.g., “It sounds to me as if John is saying etc.”)

### 3.5.2 **Increased Attribution, Increased Misunderstanding**

Communicating through lean media cues causes the e-negotiators to focus on the actual *content* of the communicator’s message – while at the same time denying them the means to properly interpret them. This uncertainty as to how to construe messages increases the tendency toward the fundamental attribution error:<sup>69</sup> parties perceive negative actions or statements on their opposite’s part, and interpret these as outgrowth of the other’s negative intentions and character – rather than as unintended results of circumstance. Reduced social presence and fewer contextual cues lend a sense of distance and vagueness to the interaction and these are compounded by the media richness element of interactivity: E-negotiators ask fewer clarifying questions than face-to-face negotiators. This leaves more

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69 R.M. Kramer, “Power, Paranoia, and Distrust in Organizations”, *Research on Negotiation in Organizations* (1995) 5; Thompson (2001).

room for parties to make and reinforce assumptions.<sup>70</sup> Attribution dynamics will cause these assumptions to tend toward the negative. Even if more positive assumptions are made, they are likely to prove unfounded, and one party may later perceive the other's inconsistent actions or statements as a breaking of trust. Failed e-mail negotiations tend to include unclear messages, irrelevant points, and long general statements,<sup>71</sup> each of which provides ample breeding ground for attribution. The power of the fundamental attribution error in e-negotiation, and its effect on interparty trust, is clearly demonstrated by experiments showing that e-negotiators are more likely to suspect their opposite of lying than are face-to-face negotiators, even when no actual deception took place.<sup>72</sup>

#### 3.5.2.1 *Implications for Negotiators*

As negotiators, we can use the slowed-down pace of asynchronous text communication to improve the crafting of our messages, preempting lack of clarity and misunderstandings.

*Use the "subject" field intentionally:* The "subject" field introduces your letter (preparing your opposite for the content), provides a frame through which it will be read (diminishing negative interpretation) and allows your opposite to find it when they want to review it for clarity before responding. This field deserves extra focus.

*Extra clarity:* In addition to careful wording, add on extra "just to clarify" statements even when these would seem superfluous in face-to-face interactions.

*Clear bottom line:* Finally, your basic message, offer or statement must be kept clear. Even if you elaborate in hopes of being understood better, of humanizing the conversation, or of forming rapport, end every message with a very clear "to summarize" paragraph.

*Save by the Bell:* When you are concerned that all this mindfulness and caution might not suffice, do not entrust the situation to text communication, if this is possible. If a situation seems to be deteriorating do to misconstrued messages, simply pick up the phone and call, or arrange to meet in person with, your negotiation opposite.

#### 3.5.2.2 *Implications for Mediators*

*Clarify:* Ask clarifying questions, even if parties do not. By asking for clarification after an unclear message is sent, but before it is answered, you will slow down the process a bit, as the original receiver will wait for the author's clarification.

*Humor-watchers:* Keep a close eye on parties' use of humor. Highlight it if it works (such as by chiming in and using it for an opportunity for rapport building) and defuse

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70 Thompson & Nadler (2002).

71 L.L. Thompson, *The Mind and Heart of the Negotiator*, (3rd ed.) Prentice Hall 2004.

72 Thompson & Nadler (2002).

the situation if it does not (for example, by explaining straight out the risks of using humor online).

*Educate:* When attribution seems to be rearing its head, consider relating to its effects head on, by writing something such as “We all know how things get misunderstood in e-mail communication, so let me be as clear as possible on this point....”<sup>73</sup>

### 3.5.3 Increased Contentiousness: A Vicious Cycle

We have already discussed the tendency of parties-at-a-distance to adopt contentious tactics. As media richness is diminished: the social presence of others is reduced<sup>74</sup> and the perceived social distance among negotiators increases.<sup>75</sup> Online communication tends to be less inhibited, with parties ignoring any adverse consequences of negative online interactions, owing to physical distance, reduced social presence, reduced accountability and a sense of anonymity.<sup>76</sup> Feeling less bound by interaction norms than face-to-face negotiators, online negotiators have an increased tendency to threaten and issue ultimat<sup>77</sup> to lie or deceive;<sup>78</sup> to confront each other negatively, and to engage in flaming.<sup>79</sup> Of course, it is difficult to trust someone treating you this way – or to gain someone’s trust, after doing this yourself. This state of affairs offers little incentive to work at trustbuilding, and instead lead parties down a road of competition if not downright aggression. As a result, in addition to lean media such as e-mail accentuating competitive behavior in negotiations,<sup>80</sup> it leaves parties feeling *justified* for choosing this pattern of behavior.<sup>81</sup> Iterated rounds of contentious moves are likely to be mirrored in a cycle of trust-diminishment, with each competitive move justified by saying that the other started the cycle.

73 S. Summers Raines, “Can Online Mediation be Transformative? Tales From the Front”, *Conflict Resolution Quarterly* (2005) 22, 4.

74 J. Short, E. Williams & B. Christie, *The Social Psychology of Telecommunications*, John Wiley and Sons Ltd. 1976; S.P. Weisband & L. Atwater, “Evaluating Self and Others in Electronic and Face-to-Face Groups”, *Journal of Applied Psychology* (1999) 84, 4.

75 L.M. Jessup & D. Tansik, “Decision Making in an Automated Environment: The Effects of Anonymity & Proximity with a Group Decision Support System”, *Decision Science* (1991) 22, 2; J. Siegel, V. Dubrovsky & S. Kiesler, “Group Processes in Computer-Mediated Communication”, *Organization Behavior & Human Decision Processes* (1986) 37, 2.

76 T.L. Griffith & G.B. Northcraft, “Distinguishing Between the Forest and the Trees: Media, Features, and Methodology in Electronic Communication Research”, *Organization Science* (1994) 5, 2; Wallace (1999); Thompson (2004).

77 Morris *et al.* (2002).

78 C.E. Naquin, T.R. Kurtzberg & L.Y. Belkin, “The Finer Points of Lying Online: E- Mail Versus Pen and Paper”, *Journal of Applied Psychology* (2010) 95, 2.

79 Thompson (2002).

80 Barsness & Bhappu (2004).

81 C.E. Naquin, T.R. Kurtzberg & L.Y. Belkin, “E-Mail Communication and Group Cooperation in Mixed Motive Contexts”, *Social Justice Research* (2008) 21, 4.

### 3.5.3.1 *Implications for Negotiators*

*Use cooperative language intentionally:* A conscious shift from contentious to cooperative language and cues might have an effect. Using terms such as “cooperation”, “agreement” or “relationship” might stave off escalation by reminding the other party of what they are here for, and offering an opportunity to return towards trust-building, as opposed to trust-breaking, dynamics.

*Step out, step in:* Use your distance from the other to take time and “step out” of the discussion in order to respond thoughtfully, rather than merely reacting to the other party’s moves. Encourage your opposite to do the same (e.g., “I realize my ‘No’ was not what you were hoping to hear; why not take some time to think it over, and write me back with your thoughts tomorrow?”).

### 3.5.3.2 *Implications for Mediators*

*Check in often:* Keep a close eye on your inbox. Conflict can escalate very quickly in online communication. A quick response, reassurance, or reference to past errors can mean the difference between a routine discussion and extreme trust-breaking behavior, from which there may be no recovery.

*Initiate cool-off periods:* Parties engaging in flaming can deteriorate months of painstaking trustbuilding efforts in a matter of minutes or hours. You might recommend parties refrain from writing each other for a day or two, to cool off and think about things. Keep your eye on your inbox, though; as they might not be able to refrain from writing.<sup>82</sup>

*Shuttle Diplomacy:* If parties cannot find the trust necessary to engage in civil conversation with each other, consider writing to each of them separately instead of having them write each other.

*Grow thick skin:* With online interactions so rife with contentiousness, it should come as no surprise that parties sometimes act contentiously in their dealing with the mediator. Remember the nature of the process and the effects of the media: Do not get insulted, and do not get sucked in.

## 3.5.4 **Low Expectations of Trust**

Communicating via e-mail, negotiators experience lower levels of trust in their opposites than those experienced by negotiators in similar face-to-face interactions – at *all* stages of the process.<sup>83</sup> Before the process’ inception, e-negotiators report a comparatively low level of trust in their opposite. E-negotiators enter the process with a lower level of pre-negotiation trust in their opposite than do participants in face-to-face negotiations.<sup>84</sup> This initial

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82 Summers Raines (2005).

83 Ebner (2007).

84 Naquin & Paulson (2003).

low expectation regarding interpersonal trust ties into the sinister attribution effect by reinforcing the tendency to seek out reasons to distrust, rather than to recognize trustworthy actions. This becomes a self-fulfilling prophecy: we expect to find our negotiation opposites untrustworthy, and indeed – we find them to be so. This low trust-level persists throughout the course of the negotiation, resulting in diminished process cooperation and information sharing.<sup>85</sup> Suspicions run high: E-negotiators are more likely to suspect their opposite of lying, even when no actual deception has taken place.<sup>86</sup> This mixture of low expectations, low trust manifestation and relatively poor outcomes continues the cycle by lowering our trust expectations even further in anticipation of our *next* e-negotiation process. Participants in e-negotiation experience lower levels of *post*-negotiation trust than face-to-face negotiators – and as a result, they show less desire to engage in future interactions with their negotiation opposites.<sup>87</sup> Surprisingly, these findings hold true even when there is no objective difference in the negotiation outcome. A particular outcome reached face-to-face encourages a degree of trust causing negotiators to look favorably on the possibility of future negotiation interaction with their opposite, greater than that same outcome would achieve if reached through e-negotiation.<sup>88</sup>

#### 3.5.4.1 *Implications for Negotiators*

*Begin early:* Trustbuilding attempts need to begin before your opposite's initial expectations turn into a self-fulfilling prophecy through attribution. Begin these efforts right at the negotiation's launch – and even before the “official” kick off.<sup>89</sup>

*Be prepared for rejection:* Your opposite is not expecting to find you trustworthy; do not be surprised, or discouraged, if your early trustbuilding moves are rejected, misconstrued, ignored or simply un-noticed. Keep trying.

*Don't stop at success:* Trust needs maintaining after it is initially built in order to see it through to the conclusion of a negotiation process. Additionally, maintaining it in such a manner that it continues beyond the negotiation and supports you in a future interaction with the same opposite requires particular effort in online processes.

#### 3.5.4.2 *Implications for Mediators*

*Tech Tour:* As parties enter the platform the first time, give them a guided tour, explaining how the main features work and everything they need to know in order to participate

<sup>85</sup> *Id.*

<sup>86</sup> Thompson (2002).

<sup>87</sup> This trust-downgrading cycle concerns not only one's negotiation opposite, but also ties into one's own self-perceptions regarding negotiation satisfaction and self-trusting: online negotiators tend to feel less satisfied with their outcomes, and less confident in the quality of their performance, than face-to-face negotiators (Naquin & Paulson (2003)).

<sup>88</sup> Naquin & Paulson (2003).

<sup>89</sup> Morris (2002).

effectively. This enhances parties' trust in the mediator, right from the start.<sup>90</sup> When negotiating through e-mail or any other medium other than a tailored platform, provide very clear instructions on how they are to use the medium and invite them to contact you for further guidance. Your skill with the technology being used for the process translates into parties' trust in you.

*Preempt distrust:* Help parties recognize, perhaps by means of a comment in your introduction to the process, that the initial misgivings they may feel walking into an e-mediation process are normal. They are a part of the playing field, and *not* (as they may be telling themselves) an intuitive insight into their opposite's true nature or intentions.<sup>91</sup>

### 3.5.5 I Am Anonymous, the Other Is Faceless

A major challenge to one party's desire to generate trust in their opposite arises from the setting of the encounter itself. Parties sit behind their computers, far away from their faceless opposites, leading each to sense a degree of anonymity, distance and remote detachment. This engenders assumptions that one can get away with trust-breaking behavior at the same time as it lowers moral inhibitions against doing so. This dynamic occurs even when the process takes place between identifiable and accountable parties! The degree of effect this has on negotiation depends on how much effort parties put into "unmasking" each other – or, more pro-actively, unmasking themselves *towards* the other. The more one party perceives the other as an *identifiable other*, as opposed to an anonymous, faceless e-mail address, the more likely they are to share information, rely on them and trust in them.<sup>92</sup> To allow trust to develop, we must incorporate unmasking dynamics into ODR processes – and the earlier on, the better. In fact – there is no need to wait for the main show to begin.

#### 3.5.5.1 Implications for Negotiators

*Work at rapport:* Negotiators have always been reminded to create a positive and unmasked environment for an upcoming process by using pre-negotiation interactions to create instant or *ad hoc* relationships by "bonding"<sup>93</sup> and by "building rapport".<sup>94</sup> To do so, parties are advised to create opportunities to build a positive rhythm of interaction before they reach the table. However, the light, social interactions this requires do not play out so smoothly or intuitively in online conversations.<sup>95</sup> Work at acquiring this ability. Even one

90 A.M.G. Hammond, "How do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) 20, 3.

91 Ebner (2007).

92 Nadler & D. Shestowsky (2006).

93 R.M. Shapiro & M.A. Jankowski, *The Power of Nice: How to Negotiate so Everyone Wins – Especially You!*, John Wiley 1998.

94 Drolet & Morris (2000); Thompson (2002).

95 Ebner (2007).

lighter, bonding sentence, in the framework of a more business-like e-mail can have great effect. You will know that it has, if the other party relates to it at the beginning of their next message.

*Meet if you can:* The challenge of online bonding has led to recommendations that you would do well to hold a preliminary face-to-face meeting with your opposite before beginning an online process, given the potential for trust formed in one venue to spill over into the other.<sup>96</sup>

*Schmooze, and schmooze ahead:* If a face-to-face meeting is impossible or impractical, as will often be the case in ODR processes, try to reach out, before opening a negotiation process or with its very inception, with a short e-mail or phone call, just to introduce yourself and to conduct some very basic “schmoozing”.<sup>97</sup> However, in many ODR processes these suggestions may be impossible, impractical or at odds with the essence of the process. As a result, close attention to an in-process, *online* unmasking process is necessary.

*Unmask yourself:* If it is easier for parties to act distrustfully towards opposites they view as distant and faceless, eliminate that sense by adopting a proactive agenda of making yourself seem human, present, and real in the other’s eyes. This unmasking process might involve sharing personal information, or reducing the perception of distance through shared language, or shared geographical or cultural references. Be selective: consider carefully what to share about yourself, taking advantage of the masking effect to avoid any anticipated bias.

*Unmask the other:* A phrase commonly used in netiquette codes is “Remember the human”: there is a person behind the other screen. Keep this in mind, whether your opposite has had the foresight to engage in unmasking themselves or not. They are not computers or inboxes – they will respond to your messages on emotional, cognitive and behavioral levels which you will then have to deal with.<sup>98</sup> Encourage them to engage in unmasking by asking questions, or dropping other types of references or cues which they may pick up on.

### 3.5.5.2 Implications for Mediators

*Jump-start your own rapport:* Pre-process communication with parties is your opportunity to begin the process of rapport-building. Your introductory remarks set the tone for the mediation, and should include elements of rapport building and professionalism, allowing parties to feel confidence in you on multiple levels.

96 E. Rocco, “Trust Breaks Down in Electronic Contexts but Can be Repaired by Some Initial Face-to-Face Contact”, *Proceedings of the SIGGHI Conference on Human Factors in Computing Systems*, ACM Press 1998.; J. Zheng *et al.*, “Trust Without Touch: Jumpstarting Long-Distance Trust With Initial Social Activities”, *Proceedings of the SIGGHI 2002 Conference on Human Factors in Computing Systems*, ACM Press 2002.

97 Morris (2002); Nadler & Shestowsky (2006).

98 See B. Mayer, *The Dynamics of Conflict Resolution*, San Francisco, Jossey-Bass 2000.

*Keep working at it:* Continue to look for opportunities to form rapport with the parties. One good venue for this is while caucusing, but it can be done in joint messages as well. Mention the weather in your area, or share something else going on in your neck of the woods. Parties' responses to these comments might indicate their own desire to build rapport.<sup>99</sup>

*Model unmasking:* Share some personal information about yourself, as positive modeling of open communication. More often than not, at least one of the parties will respond to this, allowing you to create an unmasking dynamic.

### 3.5.6 Physical Distance and Interpersonal "Otherness"

Taking the previous challenge one step further, online communication not only makes negotiating parties feel anonymous and distant from each other, it causes a perception of difference, of "otherness" between the two parties. Our opposites are anonymous and distant from us, and the structural elements of negotiation has them playing the role of the "other" or the "opponent" – different from us and at odds with us. This poses significant challenges to identity-based trust, which is constructed through perceived *similarities*. This is exacerbated by us knowing little or nothing about many of our online opposites – so this deficit in identification-based trust cannot be counterbalanced by knowledge-based trust. Indeed, the only thing we may know about them is that we need something from them, and/or that they need something from us. This can spiral parties into identification-based *distrust*, as we subconsciously assume that our mutual demands are manifestations of fundamental dissimilarities; our opposites are *nothing* like us, and their attitudes, personality and interests *conflict* with ours.

#### 3.5.6.1 Implications for Negotiators

*Don't just unmask – team up!:* This unmasking process can potentially begin to dispel the "otherness" obstacle, close the perceived distances between yourself and the other by searching for an even stronger variation of identification-based trust: shared group membership. When an individual perceives themselves as belonging to the same group as another, their perceptions of the other become more positive and their level of trust in the other increases. This balances out the "otherness" obstacle, which is in essence a way of saying that you and the other party perceive yourselves as belonging to different "out-groups". While in-group members appreciate each other more, intuitively assuming they share positive traits and attributes such as trustworthiness, they perceive out-group members, as possessing inferior qualities and negative intentions. Development of positive attitudes and identification-based trust towards in-group members plays out online much

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<sup>99</sup> Braeutigam (2006).

as it does offline.<sup>100</sup> resulting in a greater likelihood of agreement between in-group members.<sup>101</sup>

*A new way of reading:* Tune in closely to the other's messages, in order to discover things to connect to as members of a joint in-group. This involves a different type of message reading, in addition to the usual content-assimilation process. Glean all the information you can from your opposite's introductory e-mail and any personal information included in later messages.

*Avoid their stereotyping:* Even as you carefully read your opposite's messages to seek out shared in-group affiliation, note whom they might perceive as belonging to an *out*-group – and avoid fitting into these by not divulging details that may paint you as belonging to that group.

### 3.5.6.2 Implications for Mediators

*Create a team:* Create an *ad-hoc*, mediation process in-group, by using joining terms such as “we have all come here to work on this”, “we are not giving up on this”.

*Careful with caucusing:* One effect of caucusing is reinforcing out-group thinking. At best, it reinforces a false in-group dynamic of one party and the mediator, “against” the other party.

*Borrow from the future:* By discussing parties' futures in terms of a valuable relationship (when relevant), you are, in essence, discussing a future state of in-groupness. Try importing that sense into the current discussion. (e.g., “Let's assume we've worked this out, and three years from now you are working together on an important project. If you encounter disagreement between you, how would you handle that while protecting your project and your relationship?”).

### 3.5.7 Empathy, Online?

Showing empathy as a negotiator or as a third party is a cornerstone of in-process trust-building. One of the basic directives of any book or course focusing on negotiation is that a negotiator should show empathy for his opposite.<sup>102</sup> Mediators are similarly advised to show empathy to parties, either to make up for what they are not receiving from the other party, to give them the support necessary to engage in a difficult process, or to model good communication patterns. Whatever else mediators attempt to achieve by showing empathy,

100 Wallace (1999).

101 D.A. Moore, T.R. Kurtzberg & L.L. Thompson, “Long & Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations & Good Vibrations”, *Organizational Behavior & Human Decision Processes* 1999) 77, 1.

102 W. Ury, *Getting Past No*, Bantam Books 1991; R.H. Mnookin, S.R. Peppet & A.S. Tulumello, *Beyond Winning: Negotiating to Create Value in Deals and Disputes*, The Belknap Press of Harvard University Press 2000; Schneider (2002).

there is no doubt as to its effect on trust: both mediators and parties to mediation name empathy as a core element in building party-mediator trust.<sup>103</sup>

As any practitioner knows, empathizing is a challenge even in a rich communication channel such as face-to-face meetings. It is usually counterintuitive -practitioners being concerned that showing empathy might be perceived as a display of weakness, or as an unprofessional display of personality and emotion. To counterbalance this, literature and training curricula repeatedly stress that empathizing with another does *not* convey weakness, nor does it require giving anything up; it does, on the other hand, show the other our understanding and recognition. It invites reciprocation, resulting in less tension and contentiousness. Moreover, when used correctly, showing empathy goes a long way towards building trust.

In ODR processes media effects make experiencing and transmitting empathy even more difficult. This often results in practitioners under-investing in empathizing. This is clearly not a helpful path to pursue. Empathy has been found to play the same roles online that it does in face-to-face encounters. Regarding trust, specifically, online negotiators showing empathy are trusted by their negotiation opposites more than those who do not.<sup>104</sup>

How can we show empathy for another person via a communication channel with limited contextual cues? We cannot nod understandingly, or smile and lay a supportive hand on our opposite's own.<sup>105</sup> The e-channel necessitates special methods for showing e-empathy.

### 3.5.7.1 *Implications for Negotiators*

*Use your regular toolbox:* While displaying empathy with body language might be challenged by the media, other methods remain at negotiators' disposal – the online versions of those most basic communication tools negotiators are advised to employ with empathy-showing in mind: Active listening, reflecting or summarizing, and asking relevant, productive and to-the-point questions showing interest in your opposite, their needs and concerns.<sup>106</sup> How might these be done online?

*Be descriptive, to show listening:* In your writing, be descriptive of your actions in order to paint a picture for your opposite a previous paper. For example, one good way to demonstrate online “listening” might to stress, in replying to your opposite's messages, that we have read what was said: “I read your message carefully” or “Reading your letter

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103 Goldberg (2005).

104 J. Feng, J. Lazar & J. Preece, “Empathy and Online Interpersonal Trust: A Fragile Relationship”, *Behavior and Information Technology* (2004) 23, 2.

105 While displaying empathy is somewhat easier in videoconferencing, it is still a delicate skill; videoconferencing is currently a bit limited in conveying precise nuance. Time-lag can make some gestures appear clumsy or unsuitable, and – with most of the web cameras currently in use – there is little real sensation of real eye-contact.

106 Ury (1991)

last night, I realized...” might seem like casual opening lines, but they convey a powerful descriptive message to message to your opposite: “I read your message, you have been heard”.<sup>107</sup>

*Clarifying questions show listening:* Copy and paste an ambiguous message right back to your opposite, highlight anything unclear and ask for clarifications. This will not only help you avoid mistakes and breaking trust, it actually *builds* trust, as your message conveys the subtext of “I am listening to you, and it is *very* important for me to make sure I understand you”.

*Do I dare ask?* Ask questions. Take advantage of nature of interactivity in most text-based communication, which allows you to ask multiple questions in a single e-mail without the other breaking in to respond or stopping the flow. This facilitates a show of interest and engagement and shows empathy.

### 3.5.7.2 *Implications for Mediators*

The use of all of the tools mentioned above is crucial for creating and maintaining party-mediator trust. In addition the mediator can use them in order to affect interparty trust.

*Model communication:* Use of these tools can subliminally affect parties, who may start using them themselves. Calling attention to what you are doing can promote this (e.g. by writing “I’m going to summarize what I heard you say, just to make sure I’m clear on what you meant”, instead of proceeding straight to the summary itself).

*Teach communication, achieve empathy:* As noted, use of these tools does not come naturally to parties negotiating online. By teaching their use as communication tools, you can also indirectly affect the flow of empathy. For example, teaching parties to ask questions instead of making assumptions, given the challenges of online communication, might result in increased use of questions, effecting a greater show of empathy and as a result – enhancing trust.

### 3.5.8 **Privacy**

Maintaining a negotiation process’ privacy is never an easy task. In face-to-face negotiation, absent a confidentiality agreement (and too often, in practice, even when one exists!) parties can and do share information about the negotiation with anyone they like. However, meetings can be held behind closed doors, and sensitive information can be related in a lowered voice. Anything shared with external parties will always be subjective, after-the-fact, secondhand (and in legal terms, hearsay). The same extends to mediation: The mediator is bound to respect and maintain parties’ privacy, and in many locales, details of the conversations are precluded from being admissible in court. Outside of the mediation room and courthouse, parties can generally share their experiences as they choose. This

<sup>107</sup> See Ebner (2007).

balance between in-the-room privacy, and out-of-the-room sharing, is a familiar structural aspect of these processes.

In ODR processes, however, parties never know who is “in the room” with them. One party never knows whether their opposites are showing a message to their boss or colleagues. E-mail messages can easily be forwarded to external parties. Even if the ODR platform requires a password protected entry by each party, who is to say there is no one else sitting next to your opposite, looking on? While video-conferencing, how can you know that your opposite is alone and that there is no-one listening in, off camera? Beyond immediate privacy issues, is the issue of privacy through time: The messages you transmit are recorded, forever archived on your opposite’s computer, beyond your control. These might even be tampered with, altering what you wrote or said. Private information shared might become public – due to the other’s bad intentions, or just their technical shortcomings. Who among us has never clicked “reply all” instead of reply, and sent a personal message into a public domain? All this might easily lead to the reduced information-sharing and risk-taking associated with low trust.

#### 3.5.8.1 *Implications for Negotiators*

*Before sending messages:* Consider each address field carefully. To whom should a message be sent? Should anyone appear in the “cc” field? Do you want anyone invisibly lurking on the conversation, from the “bcc” field?

*When receiving messages:* Use the same information fields in reverse, to look for breaches of privacy; review the address fields and tracking information visible in messages you receive from your opposite, and if communicating through e-mail – read through the previous messages recorded in the e-mail. Has your opposite included any internal correspondence you might want to see? Forwarded messages to others? CC’ed someone on this latest message to you?

*Record and Relate:* Record and save the interactions, return to them when things get unclear, and relate to them when it seems the other party is being inconsistent.

*Consult:* Unless you have bindingly agreed not to, share messages with anybody you feel you need to share them with, and consult – often – about the process.

*Watch out:* Increasingly, individuals’ online activities are becoming public, widespread, sought out by future opponents and admissible in court. Be cautious of what you write in an e-mail, particularly before trust is established. A good rule of thumb might be: Do not write anything in an e-mail that you would not want shown on the news.

#### 3.5.8.2 *Implications for Mediators*

*Do not promise what you cannot keep:* Be explicit about what you can promise in terms of confidentiality – and what you cannot. Promise that you will not divulge information, and

describe any security measures your platform incorporates. However, refrain from promising that “We’ll all be keeping this secret”.

*Ask parties:* If parties raise privacy concerns, use this as an opportunity for trustbuilding. Ask for their concerns, ask for their recommendations, do the best you can to provide for them and do not force them into participating in a process that disturbs them. This process has important trustbuilding implications on both the mediator-party and on the party-party fronts.

### 3.5.9 Human Expectations and Asynchronous Communication

The Internet holds the promise of instant access to anything and anyone. We expect quick turnaround for anything we do online, even if there is no contextual justification for this. This expectation of real-time response synchs well with our offline communication patterns, in which real-time communication in the form of face-to-face meetings and phone calls are far more common than letter exchanges through the mail.

On the other hand, most online communication is asynchronous, and includes time-lag and delay. True – e-mails arrive at their destination in an instant, and some ODR platforms immediately notify parties of a new message for them in the process area by e-mail or text message. However, these messages are not read, nor answered, instantly. Parties frequently find themselves waiting for responses from their opposites. This duality of instant and asynchronous gives rise to expectations between negotiators that cannot be met, which breeds anxiety and then suspicion, as distrust of the channel blends with distrust of the other. Not receiving a prompt reply, not only do we question whether our opposites have received our message, we wonder why (if indeed they *have* received it) they are taking so long to respond? E-negotiators build expectations based on their assumption that they can control the rate of message exchange – an assumption they cannot deliver on, and one which the other party is unlikely to. When the other fails to live up to those expectations, frustration and sinister attribution are quick to follow.<sup>108</sup>

#### 3.5.9.1 Implications for Negotiators

*Respond quickly:* Unresponsiveness or lengthy breaks between messages foster anxiety, a fertile breeding ground for distrust. Billy Joel’s advice that “To insure yourself, you’ve got to provide communication constantly”, is a very apt maxim to follow in ODR; Katsh and Rifkin<sup>109</sup> recommend to always respond to an e-mail within twenty-four hours, even if only to say that you are working on, or considering, what your opposite has written, and will get back to them shortly.

<sup>108</sup> Thompson (2002).

<sup>109</sup> E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001.

*Respond frequently:* Even when there is no expectation of a speedy response, frequent message exchanges are more conducive to trust-building within groups than intermittent communication.<sup>110</sup>

*Use asynchronicity:* Synchronous communication necessitates responding to our opposite's behavior on the spot. The built-in time-lag provided by asynchronous communication allows you to control your response, to avoid knee-jerk reactions or emotional hijackings<sup>111</sup> and to think proactively. It allows you to fashion and frame your response thoughtfully and carefully. Re-reading a message we have received, or asking a friend or colleague to read it and tell us their thoughts, can help us avoid falling into the pitfall of negative attribution.

### 3.5.9.2 *Implications for Mediators*

*Responsibility for pace and momentum:* Online, mediators have much greater responsibility for managing the pace of the interaction and for maintaining its momentum, than they do in face-to-face settings. The structural element of consistent contact, and conversational responsiveness, built into face-to-face processes do not exist in online mediation. In addition, parties may be at opposite ends of the globe, in different time zones, on different schedules. There are no pre-determined, scheduled, joint areas of time and space that parties share. We have noted several times the potential effects of non-responsiveness that this structure is conducive to. As mediator, it is your job to maintain the process' momentum. Check in with parties regularly. Respond to most, if not all, of the messages received (even if they were not directed at you, this is your opportunity to show attentiveness, to reflect and reframe) Update parties waiting for their opposites, so they feel attended to. Consciously acting in these ways, you will fill some of the gaps left by communication through the online medium; hopefully preventing those gaps being filled by anxiety, frustration, and attribution.<sup>112</sup>

*Slow down, speed up:* Maintaining momentum does not necessarily mean always maintaining the same pace. If parties seem locked in a flaming cycle, you might suggest they cool off by taking a twenty-four hour break.<sup>113</sup> If you think that a quick response might have a more powerful effect than a delayed response in a particular case, or you feel that a particular delay might threaten the waiting party's trust in the delaying party – reach out with a behind-the-scenes tap, and explain your thinking to the delaying party.

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110 Wallace (1999); J.B. Walther & U. Bunz, "The Rules of Virtual Groups: Trust, Liking, and Performance in Computer-Mediated Communication", *Journal of Communication* (2005) 55, 4.

111 D. Goleman, *Emotional Intelligence*, Bantam Books 1995.

112 See Braeutigam (2006).

113 Summers Raines (2005).

### 3.5.10 Diminished Party Commitment, Investment and Focus

Parties to ODR processes might be less motivated than those in face-to-face processes. Not having displayed the minimum commitment of getting up, getting dressed and coming to the table, they may have not sunk any costs at all in the process. Online communication may provide the easiest venue of them all for making “shot in the dark” approaches. This might provide partial explanation for reports of higher rates of impasse in e-mail negotiation and for the phenomena of online processes simply evaporating, with one or both parties disappearing.

Even highly-committed parties are likely to suffer media-related effects including confusion, low cognitive retention of previous messages and diminished concentration.<sup>114</sup> This is due to several factors, including time-passage between exchanges, the tendency to answer e-mails in spurts and sections rather blocking out time to write full messages, and the fact that we engage in online communication in less-than-optimal surroundings and circumstances. Many of us are aware of our own tendency to treat our inbox as one part of our media multitasking – and not as something we train our full attention on. We check our e-mail as we surf the web, and we might be carrying on an in-person or a phone conversation at the same time. Proud of our ability to multitask, we fail to realize that we are not as good at this as we like to think we are. Recent research shows that “heavy” multitaskers suffer a range of shortcomings as opposed to “focusers”. They are not good at filtering out irrelevant information, and they are easily distracted. They tend to have low detail recall, and they are not skilled at switching between tasks rapidly (a primary element of multitasking behavior).<sup>115</sup> Multitasking parties suffering from any of these shortcomings might be confused and unfocused throughout the process.

#### 3.5.10.1 Implications for Negotiators

*Play the field:* The low commitment and investment level required to engage in e-mail negotiation allows you to expand your knowledge and improve your BATNA by engaging in multiple processes, within the limitations of any legal good-faith requirements.

*Stay on top of things:* Keep your counterpart engaged, by providing regular contact – but do not get too pushy.<sup>116</sup>

*Bridge time gaps:* Use literary style to create the sense of an uninterrupted conversation. For example, write “As I wrote you...” and then copy and paste a quote from your previous letter.

114 Ebner *et al*(2011).

115 E. Ofir, C. Nass & A.D. Wagner, “Cognitive Control in Media Multitaskers”, *Proceedings of the National Academy of Sciences*, 2009.

116 See D. Shipley & W. Schwalbe, “*Send: The Essential Guide to E-Mail for Office and Home*”, Alfred A. Knopf 2007, for some guidance on this balance.

*Stay focused:* The greater the importance of the negotiation to you, the more it pays to concentrate on it. Read and write messages in an environment that allows you to concentrate. Close your Internet web browser while reading and writing a particularly important message.

### 3.5.10.2 *Implications for Mediators*

*Adapt your style:* Parties to online mediation will have lower commitment to the process than face-to-face parties. Learn to identify low-commitment parties, and adapt a style that engages them rather than providing them with reasons (such as heavy investment required) to walk.<sup>117</sup>

*Responsibility for pace and momentum:* See the discussion above, in the previous section. Keep in mind that delays and unclear structure can cause confusion and crossed messages, and can frustrate low-commitment parties to the degree that they will walk away.

## 3.5.11 **Negotiating the New Dispute Resolution Environment**

One of the primary challenges to maintaining trust through online communication is, as Boyd<sup>118</sup> put it, the medium's "novelty, and its attendant mystery". He suggests that there is a degree of spillover: a user's distrust of the medium, due to inexperience, can lead to that user harboring suspicions towards a website's credibility or an e-negotiation opposite's trustworthiness. The flip side of this suggestion is that a successful online experience will therefore lead to a progressively *lower* trust threshold, and the spillover between trust towards the channel and trust towards a dispute opposite might actually begin to work the other way around. In addition, optimism resulting from past experience will facilitate the forming of trust during subsequent interactions. This would suggest that trust-building might become easier as the medium's novelty fades over the course of the next generation.

Here is where the three types of trust listed at the beginning of this chapter come together, and affect one another. Structural solutions have been attempted to several of these challenges. For example, eBay's rating system provides potential clients the opportunity to view the degree to which previous clients were satisfied with a particular vendor. While this system has been very successful in creating an environment of trust sufficient to hold the eBay community together, there are no web-wide rating systems so widely accepted that they have become an integral part of the Internet's commercial infrastructure.<sup>119</sup> In the context of one-on-one processes, structural solutions are even harder to envisage.

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117 S. Summers Raines, "The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace", paper delivered at *The Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia 2004.

118 Boyd (2003), p. 394.

119 Rule & Friedberg (2005).

In a previous piece written with co-authors Anita Bhappu, Jennifer Brown, Kimberlee Kovach and Andrea Kupfer Schneider, focusing on e-mail negotiation, we noted another aspect of the novelty of e-interactions: even professionals in the field are under-trained. The professional and academic negotiation fields have, for the large part, ignored the issue of media effects in training and teaching. Negotiators were trained for interactions “at the table” – always assuming that there would, indeed, be a “table” – some *physical* setting where the parties convened and negotiated.<sup>120</sup> This observation holds true even for e-mail – a familiar medium, compared to some of the channels employed on ODR platforms. Expanding this comment to cover other, less ubiquitous types of media utilized for ODR, the problem is compounded. We have yet to have the benefit of a cadre of professionals trained and experienced in using these media.<sup>121</sup>

#### 3.5.11.1 *Implications for Negotiators*

*Choose your negotiation channel carefully:* Do not agree to conduct communication through a medium you are uncomfortable with, and you would be wise to verify that your opposite is comfortable with the medium as well.

*You must complete your training:* Ignore Yoda’s advice at your own peril. E-negotiation is different from face-to-face processes. Understanding the unique dynamics of e-negotiation will put you at an advantage. However, chances are you have not encountered this topic in any negotiation training you have undergone. Reading this chapter is a good start, and there is a growing body of literature on online communication and negotiation you can peruse.

#### 3.5.11.2 *Implications for Mediators*

*Master your technology:* As mediator, you must be skilled in operating the platform you are working on, or using the medium you are communicating through. Displays of the mediator’s adeptness with the medium builds trust, and displays of clumsiness will erode trust.

*Guide parties:* Provide guidance to parties regarding the medium before the process starts as a trustbuilding measure, in addition to this facilitating their participation in the process.<sup>122</sup> If a party seems to be having difficulties navigating the technological landscape mid-process, reach out and lend a hand.

120 Ebner *et al.* (2009).

121 On first steps in ODR education, see Pearlstein, Hanson and Ebner, chapter 19 in this book. Also see D. Rainey, *Teaching Online Dispute Resolution: Results from a Survey of Students*, 2010, available at <[www.mediate.com/articles/raineyD1.cfm](http://www.mediate.com/articles/raineyD1.cfm)>, last accessed 26 April 2011.

122 Hammond (2003).

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*Use novelty for rapport:* In your introduction, acknowledge that use of this medium for dispute resolution is new, and that Internet-based communication in general is something we are all learning to use, through an ongoing process.

#### 4 CONCLUSION

Trust, that infinitely valuable resource for the purposes of negotiation and dispute resolution, is hard enough to come by under the best of circumstances. Online, for a variety of reasons ranging from technological to psychological, trust is extremely challenging to develop and to maintain. However, awareness and intentional use of online communication media by negotiators and mediators can not only help overcome these challenges, they can provide new methods for trustbuilding unavailable in face-to-face processes.