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FITTING THE COMMUNICATION FORUM TO THE MEDIATION FUSS: CHOOSING THE APPROPRIATE COMMUNICATION MODE FOR MEDIATION IN THE POST-PANDEMIC WORLD

Dorcas Quek Anderson*

ABSTRACT

Since the COVID-19 pandemic, mediations have shifted dramatically from face-to-face settings to the virtual realm, resulting in the widespread acceptance of using virtual communication channels, including videoconferencing, audio calls, and text messaging. With the waning of the pandemic, mediators and parties presently face a plethora of choices in fitting their mediation to the appropriate communication channel. Thus, having an accurate, evidence-based understanding of different communication modes' impact on mediation is necessary to design an optimal mediation process.

Some decades ago, Sander and Goldberg formulated the phrase “fitting the forum to the fuss” to describe the process of choosing the most appropriate dispute resolution option to fit characteristics of each dispute and parties' needs. Currently, there is a palpable need for the fitting of a rather different forum—the mode of communication—to the fuss. This article discusses how parties can best customize the mediation process by fitting the “communication forum” to the “mediation fuss.” To understand the characteristics of communication forums, the article draws from a

range of disciplines to distil the relevant research on four modes of communication: face-to-face interaction, videoconferencing, audio calls, and text messaging. The article proposes discerning the “mediation fuss” by examining disputants’ objectives, likely obstacles to resolution, and the likely mediation model to be utilized. It argues that these factors enable the mediator to ascertain which of five goals are most applicable to the particular dispute: building of rapport and trust; facilitating mutual understanding of perspectives and interests; managing power imbalances and safety concerns; ensuring procedural justice; and encouraging creative and collaborative problem-solving. Relying on current research findings, the article analyzes the impact of differing communication forums on these five mediation goals. Lastly, it proposes a basic framework for fitting the communication forum to the mediation fuss. This framework aims to encourage mediators to consider, in consultation with the parties, the most appropriate communication mode to convene mediation for the particular dispute and to thoughtfully modify their mediation techniques and tools to suit the relevant communication mode.

I. INTRODUCTION

Since the COVID-19 pandemic, mediations have shifted dramatically from the face-to-face setting to the virtual realm, resulting in a widespread acceptance of the use of virtual communication channels, including videoconferencing, audio calls, and text messaging.¹ With the waning of the pandemic, mediators and their users presently face a plethora of choices in fitting their mediation to the appropriate communication channel.² The default communication mode for mediation may no longer be in-person communication.³ Other more complex arrangements have also

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¹ See Jean R. Sternlight & Jennifer K. Robbennolt, *High-Tech Dispute Resolution: Lessons from Psychology for a Post-Covid-19 Era*, DEPAUL L. REV. 701, 702 (2022).

² *Id.* at 756.

³ Katie Shonk, *Using Online Dispute Resolution to Resolve Workplace Conflict*, PROGRAM ON NEGOT. HARV. L. SCH.,

emerged, such as the use of hybrid communications involving remote and in-person participation in the mediation.⁴

Many years ago, Sander and Goldberg formulated the phrase “fitting the forum to the fuss” to describe the process of choosing the most appropriate dispute resolution process to fit characteristics of each dispute and the needs of the parties.⁵ The dispute resolution field has firmly established this foundational concept, informing legal advisors on the utility of customizing their clients’ needs to suitable dispute resolution modes, including mediation and arbitration.⁶ Decades later, after many courts and dispute resolution practitioners have swiftly embraced videoconferencing and other virtual tools, there is a palpable need for the fitting of a rather different forum—the mode of communication—to the fuss.⁷ While the choice of the appropriate communication modes occurs within all dispute resolution processes, this article focuses specifically on the choice of customization within the mediation process.

Mediation is negotiation carried out with the assistance of a third party who has no power to impose an outcome on the disputing parties.⁸ The mediator facilitates negotiations to enable better communication, encourage problem-solving, and develop a consensual resolution.⁹ The success of this process is arguably dependent on optimal communication between all the parties.¹⁰ Variations in attributes of the communication channels are likely to have a substantial impact on the mediation outcome and, consequently, the disputants’ satisfaction levels and the mediation’s

<https://www.pon.harvard.edu/daily/mediation/using-online-dispute-resolution-to-resolve-workplace-conflict/> (last visited Apr. 22, 2024).

⁴ Chris McDonald, *Post-Pandemic ‘Hybrid’ Meetings and Mediations: Paving the Way with Technology and Technique*, 39 N.Y. STATE BAR ASS’N, INSIDE 17, 17 (2021).

⁵ See generally Frank E. A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49 (1994).

⁶ *Id.*

⁷ See generally REMOTE COURTS WORLDWIDE, <https://remotecourts.org> (last visited Apr. 16, 2024).

⁸ STEPHEN B. GOLDBERG ET AL., *DISPUTE RESOLUTION: NEGOTIATION, MEDIATION AND OTHER PROCESSES* 121 (6th ed. 2012); DWIGHT GOLANN & JAY FOLBERG, *MEDIATION: THE ROLES OF ADVOCATE AND NEUTRAL* 97 (3d ed. 2016).

⁹ CARRIE J. MENKEL-MEADOW ET AL., *MEDIATION: PRACTICE, POLICY, AND ETHICS* 85 (2d ed. 2013).

¹⁰ See generally Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding*, *Agendas*, 38 FAM. & CONCIL. CTS. REV. 27 (2000).

legitimacy.¹¹ Therefore, it is pertinent to examine the implications of using different communication modes on the mediation process and to make appropriate adjustments to mediation practice and theory.

This article discusses the seminal concept of fitting the forum to the fuss and proposes adapting this framework to fit the “communication forum”—the communication mode—to the “mediation fuss”—the mediator’s goals in the relevant dispute. The article examines four different communication forums—face-to-face interaction, videoconferencing, audio calls, and text messaging. Drawing from a range of disciplines including negotiation, communication studies, and psychology, the salient research concerning the impact of communication modes on human interaction is examined. Turning to analyze the “mediation fuss,” the article discusses how to discern the primary goals of each mediation based on the needs of the disputants, obstacles to settlement, and the mediation model most likely to be adopted. This article argues that common mediation goals closely connected to communication relate to the building of rapport and trust; facilitating mutual understanding of perspectives and interests; managing power imbalances and safety concerns; ensuring procedural justice; and encouraging creative problem-solving. Relying on existing research, the impact of differing communication forums on common mediation goals is analyzed. Lastly, the article proposes a basic framework of fitting the communication forum to the mediation fuss, with two purposes: assisting mediators and legal advisors to choose the most appropriate communication mode for their mediation and informing mediators on the adaptation of strategies to suit the mode of communication. This framework also helps to identify gaps in the current research on communication media that could be addressed by future studies. While fitting the communication forum to the mediation fuss will undoubtedly increase future developmental complexity and expansion of communication channels, it is nevertheless a crucial task for the mediation profession, whose work is inextricably connected with the effective facilitation of communication.

¹¹ See Jean R Sternlight, *Pouring a Little Psychological Cold Water on Online Dispute Resolution*, J. DISP. RESOL. 1, 19–20 (2020) (highlighting that the type of online communication has an impact on the disputants’ ability to communicate and learn much about concerns, emotions, or state of mind, and may also have an impact on the building of trust and rapport).

**II. FITTING THE FORUM TO THE FUSS: A CONCEPT
EMINENTLY SUITABLE FOR MEDIATION**

Sander and Goldberg formulated the seminal concept of fitting the forum to the fuss several decades ago to help legal advisors select a suitable dispute resolution option, such as mediation or arbitration, for their clients.¹² This exercise essentially comprises of two steps.¹³ The first entails an appreciation of the primary characteristics of dispute resolution options.¹⁴ These options are typically categorized into evaluative and consensual procedures, with differing levels of formality and outcomes.¹⁵ Evaluative dispute resolution options are primarily adjudicative processes, such as arbitration and court adjudication, and are associated with a high degree of formality: the determination of rights based on the application of agreed rules to a set of facts.¹⁶ By comparison, consensual options, including negotiation and mediation, are usually more informal and oriented towards to the exploration of underlying interests instead of rights.¹⁷ Depending on the context and degree of legal assistance required, the dispute resolution options will vary in terms of costs and duration.¹⁸ The second prong of fitting the forum to the fuss involves an analysis of the dispute or “fuss.”¹⁹ In this regard, Sander and Goldberg suggested two lines of inquiry: understanding the client’s goals in making a forum choice, and considering which forum is most likely to overcome the significant obstacles to settlement.²⁰ Common client goals include obtaining vindication, setting precedents, maintaining relationships, protecting privacy, enhancing speed, and minimizing costs.²¹ Impediments to settlement could include poor communication, different views of the law and facts, need to express emotions, and need to establish important principles.²² Parties match key objectives and ways to overcome obstacles to the primary features of the forum to discern the most appropriate dispute resolution option.²³

¹² Sander & Goldberg, *supra* note 5, at 50.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ *Id.* at 51.

¹⁶ *Id.*

¹⁷ GOLDBERG ET AL., *supra* note 8, at 2–3.

¹⁸ *Id.* at 53.

¹⁹ *Id.* at 50.

²⁰ *Id.*

²¹ *Id.* at 51–54.

²² *Id.* at 52–54.

²³ *Id.*

As an illustration, a legal advisor representing a company suing another corporation for its default in paying for the delivery of goods will determine whether the client is chiefly interested in re-establishing its business relationship with the other, or in recovering as much money as possible.²⁴ The client could have the former objective, suggesting that a consensual process such as mediation may be suitable.²⁵ At the same time, a potential barrier to settlement could be the parties' differing views of the facts, which suggests the need for an evaluative procedure.²⁶ Under these circumstances, the disputing parties may begin with mediation and switch to an evaluative procedure if necessary.²⁷ If reducing time and costs were also a significant client goal, it would be advisable to attempt mediation first because mediation meets the goals of cost, speed and relationship promotion.²⁸

Since 1994, parties have infused the concept of fitting the forum to the fuss into the dispute resolution industry in significant ways.²⁹ In the discipline of dispute system design, the system designer seeks a deep appreciation of the overall goals, stakeholders, context, and types of disputes before discerning the appropriate dispute resolution processes to incorporate into the dispute system.³⁰ Furthermore, experts have designed hybrid dispute resolution processes by utilizing the same rationale inherent in the concept of fitting the forum to the fuss.³¹ The disputants' priorities may include

²⁴ *Id.* at 64–66.

²⁵ *Id.* at 65.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ See generally Michal Albertstein, *ADR and Collective Trauma: Constructing the Forum for the Traumatic Fuss*, 10 CARDOZO J. CONFLICT RESOL. 11 (2008); Andrea Kupfer Schneider, *How does DSD Help Teach About Community Conflict (And How Can Community Conflict Help Illustrate DSD)?*, 13 U. ST. THOMAS L.J. 370 (2017); Paola Lucarelli et al., *Fitting the Forum to the Fuss While Seeking the Truth: Lessons From Judicial Reforms in Italy*, 36 OHIO ST. J. ON DISP. RESOL. 213 (2020); Amy J. Schmitz, *Measuring "Access to Justice" in the Rush to Digitize*, 88 FORDHAM L. REV. 2381 (2020); John Lande & Gregg Herman, *Fitting the Forum to the Family Fuss: Choosing Mediation, Collaborative Law, or Cooperative Law for Negotiating Divorce Cases*, 41 FAM. CT. REV. 280 (2004); Timothy Hedeon, *Remodeling the Multi-Door Courthouse To "Fit the Forum to the Folks": How Screening and Preparation Will Enhance ADR*, 95 MARQ. L. REV. 941 (2012).

³⁰ See generally LISA BLOMGREN AMSLER ET AL., *Analytic Framework for Dispute System Design*, in DISPUTE SYSTEM DESIGN: PREVENTING, MANAGING, AND RESOLVING CONFLICT 22 (2020).

³¹ See generally *id.* at 39.

both the need to enforce a principle and the need for a speedy resolution.³² Processes such as mini-trial, early neutral evaluation, and mediation-arbitration have thus been designed to address these dual objectives.³³

In the same vein, the concept of fitting the forum to the fuss is eminently suitable to guide the mediator in selecting the suitable communication mode for a dispute.³⁴ Both prongs of the concept—discerning the fuss and matching the forum to the fuss—are instructive in fitting the “mediation forum” to the “mediation fuss.”³⁵ With regard to the mediation fuss, we may distill the mediator’s goals in a particular dispute by considering the disputants’ goals and the underlying obstacles to settlement.³⁶ For instance, a company may have advanced a claim against another corporation for supplying defective products. These companies had a longstanding business relationship in the past decade, and this is the first major dispute they have encountered. The mediator discerns from pre-mediation conversations that both companies seek to maintain or improve their business relationship. At the same time, the mediator learns that a key barrier to settlement is a lack of clear communication between the companies’ management personnel, which has been exacerbated by a recent change of leadership in the supplier company. It is thus important for the mediator to help the disputants effectively communicate their perspectives and to rebuild trust during the mediation, to restore the companies’ business relationship. Hence, the “mediation fuss”—the mediator’s goals in the particular dispute—may be understood by an appreciation of the disputants’ objectives and the underlying impediments to settlement.³⁷

The second prong of the concept of fitting the communication forum to the mediation fuss is equally significant.³⁸ It is critical to develop a sound understanding of the salient features of different “communication forums.”³⁹ As dispute resolution scholars have noted, the distinctions between different communication media have significant implications on the dynamics of both negotiation and mediation.⁴⁰ In this regard,

³² Sander & Goldberg, *supra* note 5, at 51–54.

³³ *Id.*

³⁴ *See generally id.*

³⁵ *Id.* at 50.

³⁶ *Id.* at 51–53.

³⁷ *Id.* at 54.

³⁸ *Id.* at 50.

³⁹ *Id.* at 50–51.

⁴⁰ *See* Andrea Kupfer Schneider & Sean A. McCarthy, *Choosing Among Modes of Communication*, in *THE NEGOT.’S DESK REFERENCE* 107, 109–

Goldberg and Sanders aptly note that their suggested way of matching parties' objectives to dispute resolution options is premised on assumptions concerning how these procedures are typically structured.⁴¹ Similarly, there are deeply embedded and often contradictory assumptions underlying existing practices on choosing the suitable communication mode for mediation. A mediation practitioner who aims to restore the parties' relationship and believes that face-to-face interaction encourages the expression of negative emotions more than videoconferencing is likely to choose videoconferencing as the preferred communication mode.⁴² In marked contrast, a mediator who shares the same goal of maintaining the relationship, but who assumes that parties behave more collaboratively in face-to-face interactions than videoconferencing, will probably conduct the mediation in-person.⁴³ There is, however, a wide body of research that could inform the mediation profession on how human interactions vary across different communication modes.⁴⁴ It is therefore paramount that mediators base their practices on evidence-based understandings of communication forums instead of assumptions. Only then can the mediation fuss be matched to the unique characteristics of the appropriate communication mode.

In summary, the foundational concept of fitting the forum to the fuss is eminently useful in adapting future mediation practice to the qualities of different modes of communication. This concept underscores the importance of attaining an accurate appreciation of communication media and delineating the overarching goals of a mediation. The following sections discuss these two stages.

III. UNDERSTANDING THE CHARACTERISTICS OF DIFFERENT COMMUNICATION FORUMS

The communication forums examined in this article refer to different channels of sharing information including face-to-face interaction, making telephone or audio calls, sending text messages,

110 (Christopher Honeyman & Andrea Kupfer Schneider eds., 2017) (commenting that the communication mode determines how much we can see or hear the other party, which in turn affects negotiators' ability to build rapport and trust).

⁴¹ Sander & Goldberg, *supra* note 5, at 66.

⁴² Sternlight & Robbennolt, *supra* note 1, at 728 (observing that some judges and mediators prefer online proceedings to in-person proceedings as they believe emotional outbursts can be avoided).

⁴³ *Id.* (noting that some other judges and mediators believe that disputants must work through their emotions in-person to reach a lasting settlement).

⁴⁴ See generally *infra* Part III.

and videoconferencing. A wide array of technological platforms and applications are increasingly integrating these conventional channels.⁴⁵ By way of illustration, a user of the Zoom platform could use videoconferencing, while also concurrently relying on the “chat” function to exchange text messages. Alternatively, one could use only the audio function without turning on one’s camera, which will be synonymous with making an audio call using the WhatsApp program.⁴⁶ This article will focus on four basic communication channels—face-to-face, audio, video, and text messaging—instead of specific technological platforms that may incorporate the use of one or more communication modes. This ensures the continual relevance of the synthesized findings for mediators amidst future technological changes that may harness these communication channels in novel ways.

The forums examined in the original concept of fitting the forum to the fuss included non-binding dispute resolution options.⁴⁷ These include non-binding options such as mediation as well as ministerial and binding ones such as court hearings and arbitration.⁴⁸ The distinctions between these processes were relatively uncontroversial in relation to speed of resolution, legal costs, degree of privacy, obtaining a neutral opinion, setting a precedent, and likelihood of maintaining the disputants’ relationship.⁴⁹

In sharp contrast, the distinctions between communication forums are more equivocal. As will be demonstrated below, the characteristics of different communication media are derived from research findings traversing multiple disciplines including communication studies, psychology, and dispute resolution, which may not be unanimous in their conclusions. Furthermore, these studies examine the likely impact of different communication

⁴⁵ Cristina Alexander, *WhatsApp is Copying Two of Zoom’s Best Video-Calling Features*, DIGITAL TRENDS (Sept. 26, 2022), <https://www.digitaltrends.com/mobile/whatsapp-call-links-32-people-group-call-news/> (describing WhatsApp introduction of group video calls to the existing feature of group audio calls).

⁴⁶ See *Enabling or disabling in-meeting chat*, ZOOM SUPPORT (Nov. 14, 2023), https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0060343; Zoom Community, ZOOM SUPPORT, https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0060343%20and%20https:%2F%2Fsupport.zoom.com%2Fhc%2Fen%2Farticle%3Fid%3Dzm_kb&sysparm_article=KB0062043 (last visited Apr. 16, 2024).

⁴⁷ Sander & Goldberg, *supra* note 5, at 50–51.

⁴⁸ *Id.*

⁴⁹ See *id.* at 54–59.

channels on human interactions, which will invariably vary according to individual traits, as well as evolve over time as customs and behavior in the use of communication channels change.⁵⁰ As such, it is an exceedingly complex task to understand the characteristics of different communication forums.

Nonetheless, available research findings distil prominent trends. The salient research explores the subject of human interaction across communication media by either: (1) analyzing the particular attributes of communication modes or, (2) studying human reaction—including emotional expression and conduct—to different media.⁵¹ This article will summarize these two approaches in turn.

A. THE ATTRIBUTES OF COMMUNICATION MEDIA

One major cluster of theories focuses on the characteristics of the relevant medium.⁵² Ebner, who writes extensively on the impact of technology on dispute resolution, aptly observes based on communication theories that “the medium matters.”⁵³ Specific characteristics of the communication channel influence “what information negotiators share,” “how that information is conveyed,” and “how [it] is received and interpreted.”⁵⁴ This cluster of theories examine two prominent aspects of media: media richness and media synchronicity.⁵⁵

Media richness, which Daft and Lengel developed, analyzes the degree to which the medium supports the conveying of multiple verbal and non-verbal cues.⁵⁶ Media richness comprises four

⁵⁰ Ingmar Geiger, *From Letter to Twitter: A Systematic Review of Communication Media in Negotiation*, 29 GRP. DECISION & NEGOT. 207, 243–44 (2020).

⁵¹ See generally Noam Ebner, *The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation Mediation*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 73 (Daniel Rainey et al. eds., 2021); Susan Sprecher, *Initial Interactions Online-Text, Online-Audio, Online-Video, or Face-to-Face: Effects of Modality on Liking, Closeness, and Other Interpersonal Outcomes*, 31 COMPUTS. HUM. BEHAV. 190 (2014).

⁵² See generally Ebner, *supra* note 51.

⁵³ *Id.* at 96.

⁵⁴ *Id.* at 94.

⁵⁵ Geiger, *supra* note 50, at 210–15.

⁵⁶ See generally Richard L. Daft & Robert H. Lengel, *Information Richness: A New Approach to Managerial Behavior and Organization Design*, 6 RSCH. ORGANIZATIONAL BEHAV. 191 (1984); Richard L. Daft & Robert H. Lengel, *Organizational Information Requirements, Media Richness and Structural Design*, 32 MGMT. SCI. 554 (1986).

dimensions: (1) “the number of cue systems supported by the medium;” (2) the medium’s capacity for “immediacy of feedback” between communicators; (3) “the potential for natural language;” and (4) the degree of “message personalization.”⁵⁷ Under this model, face-to-face communication is the “richest mode,” followed by videoconference, telephone calls, e-mails, and text message.⁵⁸ E-mail, for instance, is a “lean medium” due to the constraints in discerning visual and audio cues.⁵⁹ Email is closely comparable to text messaging in media richness.⁶⁰ By comparison, videoconferencing facilitates the conveying of more verbal and non-verbal cues.⁶¹ Many platforms such as Zoom and Microsoft Teams also allow parties to share whiteboards, slides, or other visual aids.⁶² Nevertheless, videoconferencing lacks the tactile level of face-to-face communication.⁶³ While participants are able to see each other’s faces more closely and continuously than they could in-person, they are unable to observe the other’s full body and, consequently, the full range of non-verbal cues.⁶⁴ The degree of immediacy of feedback will also depend on the quality of technology such as the speed of internet connection.⁶⁵

One aspect of media richness theory—immediacy of feedback—further develops the concept of media synchronicity or

⁵⁷ Joseph B. Walther, *Theories of Computer-Mediated Communication and Interpersonal Relations*, in THE HANDBOOK OF INTERPERSONAL COMMUNICATION 443, 448 (Mark L. Knapp & John A. Daly eds., 2011).

⁵⁸ *Id.*

⁵⁹ Ebner, *supra* note 51, at 97.

⁶⁰ Noam Ebner, *Negotiation Via Text Messaging*, in THE NEGOTIATOR’S DESK REFERENCE 133 (Christopher Honeyman & Andrea K. Schneider eds., 2017), arguing that some forms of text messaging limit the number of characters and therefore slightly diminishes media richness in comparison to email.

⁶¹ *Id.*

⁶² See Janette Novak & Rob Watts, *Microsoft Teams Vs. Zoom (2023 Comparison)*, FORBES (Sept. 12, 2023), <https://www.forbes.com/advisor/business/software/microsoft-teams-vs-zoom/>.

⁶³ Ebner, *supra* note 51, at 101–02.

⁶⁴ *Id.* (finding “. . . from our human-touch perspective, their work pinpointed the decrease in trust between videoconferencing negotiators (statistically insignificant though it was) as resulting specifically from diminishment of social presence. When negotiators sensed diminished social presence of their counterpart, they trusted them less. They also noted that the issue of whether the negotiation was recorded or not had no impact on interparty trust.”).

⁶⁵ Sternlight & Robbennolt, *supra* note 1, at 708.

interactivity.⁶⁶ With immediacy of feedback, the specific medium trait examined involves the extent to which feedback enables communicators to achieve “a shared pattern of coordinated synchronous behavior with a common focus.”⁶⁷ Researchers analyze synchronicity according to five characteristics: symbols (the different ways a message may be encoded); transmission velocity (resembling immediacy of feedback); rehearsability (degree to which a message may be edited before sending); reprocessability (receiver’s ability to re-examine the process during or after communication); and parallelism (whether all parties can transmit and receive at the same time).⁶⁸

Within media synchronicity, scholars divide communication media into asynchronous and synchronous modes based on the degree participants are able to communicate in real time and engage in simultaneous communication.⁶⁹ Email and text messaging would be asynchronous modes if the communicators decide to hold their responses instead of responding to one another in real time.⁷⁰ Therefore, communicators using such asynchronous modes are able to “exercise more control over the content and timing of each message.”⁷¹ Synchronous modes facilitate “shorter and quicker back-and-forth turn-taking” in communication, as well as provide communicators with the opportunity to check for “misunderstandings and [to] obtain immediate feedback.”⁷² While videoconferences, audio calls, and in-person communications are usually synchronous media, videoconferencing under the present technology-related constraints does not allow “parallel or simultaneous communication.”⁷³ Turn-taking during videoconferencing is challenging when there are transmission delays and the participant does not wish to appear to be interrupting.⁷⁴ Notably, a recent study found videoconferencing

⁶⁶ See Alan R. Dennis et al., *Media, Tasks, and Communication Processes: A Theory of Media Synchronicity*, 32 MGMT. INFO. SYS. Q. 575 (2008).

⁶⁷ *Id.* at 581.

⁶⁸ *Id.* at 584–87.

⁶⁹ *Id.* at 581.

⁷⁰ Sternlight & Robbennolt, *supra* note 1, at 710.

⁷¹ *Id.* at 711.

⁷² *Id.*

⁷³ *Id.* at 710–11.

⁷⁴ See Katrin Raake et al., *Why Are You So Slow? – Misattribution of Transmission Delay to Attributes of the Conversation Partner at the Far-End*, 72 INT’L J. HUM.-COMPUT. STUD. 477, 486 (2014).

created greater turn-taking inequality than audio communication.⁷⁵ By contrast, when communicators used audio mode alone, the lack of video helped them to “regulate their conversation more smoothly by engaging in more equal exchange of turns.”⁷⁶

Researchers criticize media richness and media synchronicity theories as emphasizing the static properties of media instead of exploring how different individuals use the relevant media or considering other factors that influence communicators’ response to the media.⁷⁷ In this regard, researchers have noticed that the phenomenon of “Zoom fatigue” runs counter to the assumption under these theories that video conferencing is a relatively rich medium.⁷⁸ Lately, there has been greater examination of the impact of media attributes on human attention span.⁷⁹ Theorists posit that nonverbal overload occurs in videoconferencing because of discomfort with eye gaze at a close distance; cognitive overload in monitoring one’s nonverbal cues and making sense of cues received; stress from seeing one’s own image (mirror anxiety); and the sense of being trapped sitting in front of a camera.⁸⁰ Notably, recent studies suggest that mirror anxiety caused by seeing one’s self view and the discomfort with being gazed are significant predictors of Zoom fatigue.⁸¹ Switching on one’s camera in videoconferencing seems to exacerbate fears about self-presentation and concerns about managing impressions.⁸² In sum, while videoconferencing may offer more channels for conveying cues, the enhancement of visual cues has, paradoxically, resulted in fatigue and reduced focus, compromising the quality of communication.⁸³ Hence, there is evidently great complexity in how humans use communication media, as media richness and synchronicity alone cannot explain intriguing phenomena such as Zoom fatigue.⁸⁴

⁷⁵ Maria Tomprou et al., *Speaking out of Turn: How Video Conferencing Reduces Vocal Synchrony and Collective Intelligence*, 16 PLOS ONE 1, 8 (2021).

⁷⁶ *Id.* at 10.

⁷⁷ See Walther, *supra* note 57, at 449–50.

⁷⁸ Sternlight & Robbennolt, *supra* note 1, at 718.

⁷⁹ Jeremy N. Bailenson, *Nonverbal Overload: A Theoretical Argument for the Causes of Zoom Fatigue*, 2 TECH., MIND, & BEHAV. 1 (2021).

⁸⁰ *Id.*

⁸¹ *Id.* at 4.

⁸² Kristen M. Shockley et al., *The Fatiguing Effects of Camera Use in Virtual Meetings: A Within-Person Field Experiment*, 106 J. APPLIED PSYCH. 1137, 1138 (2021).

⁸³ Sternlight & Robbennolt, *supra* note 1, at 729.

⁸⁴ Shockley et al., *supra* note 82, at 1139.

Similarly, other theories also cast attention to factors influencing the individual's response to media properties. The social information processing theory suggests communicators are motivated to develop "affinity" and "interpersonal impressions" regardless of the communication mode.⁸⁵ When nonverbal cues are unavailable, they will adapt their interpersonal communication to whatever cues remain when communicating and will continue to adapt over time to the available communication channels.⁸⁶ Communicators using lean media—that convey few verbal and non-verbal cues—will simply need more time to establish similar results as those using rich channels.⁸⁷ Furthermore, they may develop other unique ways to transmit socio-emotional cues through lean media.⁸⁸ In the same vein, channel expansion theory challenges the media richness theory by arguing that as individuals gain more experience with a particular medium, it becomes a richer medium for them.⁸⁹ Similar to social information processing theory, channel expansion theory posits that users with experience in the medium will learn how to encode and decode messages.⁹⁰ Another factor that expands the richness of the channel is increasing familiarity with the other communicator.⁹¹

In summary, although media richness and synchronicity theories are foundational concepts within communication studies, researchers increasingly devote greater attention to factors that moderate the communicators' responses to the particular medium.⁹² Following the widespread usage of videoconferencing in the last two years, new and emerging research continues to explore the

⁸⁵ Walther, *supra* note 57, at 458.

⁸⁶ See Susan Sprecher, *Initial Interactions Online-Text, Online-Audio, Online-Video, or Face-to-Face: Effects of Modality on Liking, Closeness, and Other Interpersonal Outcomes*, 31 COMPUTS. HUM. BEHAV. 190, 190–91 (2014); Walther, *supra* note 57, at 458.

⁸⁷ Walther, *supra* note 57, at 459.

⁸⁸ John R. Carlson & Robert W. Zmud, *Channel Expansion Theory: A Dynamic View of Media and Information Richness Perceptions*, 1 ACADEMY MGMT. PROC. 280, 283 (1994).

⁸⁹ Walther, *supra* note 57, at 457.

⁹⁰ Carlson & Zmud, *supra* note 88; Scott C. D'Urso & Stephen A. Rains, *Examining the Scope of Channel Expansion: A Test of Channel Expansion Theory with New and Traditional Communication Media*, 21 MGMT. COMM. Q. 486, 500 (2008).

⁹¹ D'Urso & Rains, *supra* note 90, at 491; Eva M. Pesendorfer & Sabine T. Koeszegi, *Social Embeddedness in Electronic Negotiations*, 16 GRP. DECISION & NEGOT. 399, 409–10 (2007).

⁹² See generally Dennis et al., *supra* note 66.

complex interface between these factors and the richness of communication modes.⁹³

B. SOCIAL-PSYCHOLOGICAL THEORIES

Another cluster of theories adopt a socio-psychological perspective, exploring the impact of communication channels on emotions, relationships, and behavior.⁹⁴ Social presence theory proposes that different media have varying capacities to transmit classes of nonverbal content.⁹⁵ The fewer number of cue systems the media supports, the less one may experience warmth and involvement of the other person.⁹⁶ Other related theories have also emerged, such as the reduced social cues theory, which suggests that lack of cues leads to difficulties in attuning to others' characteristics, resulting in more self-focused behavior that is resistant to influence.⁹⁷ The widespread use of videoconferencing during the pandemic has evidently revived the popularity of social presence theory.⁹⁸ In fact, recent interviews of diplomats engaging in international peace negotiations via videoconferencing underscore the intense loss of social presence.⁹⁹ Diplomats lamented their loss of "the ability to sense, judge and feel" the other person and the situation, a sense of togetherness, and a sense of trust.¹⁰⁰ In one study, the diplomats also noted virtual meetings favored a dynamic that was detrimental to building relationships because conversations

⁹³ See, e.g., Shockley et al., *supra* note 82; Bailenson, *supra* note 79; Tomprou et al., *supra* note 75; Sternlight & Robbennolt, *supra* note 1; Ebner, *supra* note 51.

⁹⁴ See J.A. Short, *Effects of Medium of Communication on Experimental Negotiation*, 27 HUM. RELS. 225 (1974).

⁹⁵ See Alice F. Stuhlmacher & Maryalice Citera, *Hostile Behavior and Profit in Virtual Negotiation: A Meta-Analysis*, 20 J. BUS. & PSYCH. 69, 72 (2005).

⁹⁶ See *id.*; Short, *supra* note 94.

⁹⁷ Lee Sproull & Sara Kiesler, *Reducing Social Context Cues: Electronic Mail in Organizational Communication*, 32 MGMT SCI. 1492, 1509 (1986).

⁹⁸ See Corneliu Bjola & Ilan Manor, *The Rise of Hybrid Diplomacy: From Digital Adaptation to Digital Adoption*, 98 INT'L AFFS. 471, 488 (2022).

⁹⁹ See *id.* at 483; Isabel Bramsen & Anine Hagemann, *The Missing Sense of Peace: Diplomatic Approachment and Virtualization During the COVID-19 Lockdown*, 97 INT'L AFFS. 539 (2020) (exploring the views of diplomats representing their countries in peace talks, such as negotiations in relation to United Nations General Assembly).

¹⁰⁰ Bramsen & Hagemann, *supra* note 99, at 548.

were directed and linear, and there were fewer opportunities to engage in unofficial “corridor conversations.”¹⁰¹

Similar to the preceding cluster concentrating on media effects, theorists increasingly refine social-psychological theories to examine individual traits moderating impact of the use of different media.¹⁰² As previously discussed, the social information processing theory questions both media richness and social presence theories.¹⁰³ It argues that individuals may, with time, build social presence with media with fewer cue channels.¹⁰⁴ A recent review of factors affecting social presence also found that other contextual factors were also influential in affecting social presence, such as the use of identity cues and traits of the communicators.¹⁰⁵

More recently, the communication orientation model highlights the importance of communicators’ orientations in managing conflicts.¹⁰⁶ The presence or absence of more cues in a communication medium has little impact on negotiators who have a cooperative mindset or already have positive relationships with their counterparts.¹⁰⁷ These negotiators are likely to make concrete efforts to build relationships regardless of the communication channel.¹⁰⁸ The availability of multiple channels facilitates the quick establishment of rapport in negotiation only for individuals that have a neutral orientation—without preexisting cooperative or noncooperative tendency—towards approaching conflicts.¹⁰⁹ In stark contrast, communicators who have an uncooperative mindset will not benefit from having more communication channels as the conflict may be intensified.¹¹⁰ A reduction of available channels will be more helpful to allow such communicators to moderate their reactions.¹¹¹ The communication orientation model introduces a

¹⁰¹ Bjola & Manor, *supra* note 98, at 488.

¹⁰² Catherine S. Oh et al., *A Systematic Review of Social Presence: Definition, Antecedents, and Implications*, 5 FRONTIERS IN ROBOTICS & AI 1, 25 (2019).

¹⁰³ See Walther, *supra* note 57, at 458–60.

¹⁰⁴ *Id.* at 459.

¹⁰⁵ See Oh et al., *supra* note 102, at 25.

¹⁰⁶ See Roderick I. Swaab et al., *The Communication Orientation Model: Explaining the Diverse Effects of Sight, Sound, and Synchronicity on Negotiation and Group Decision-Making Outcomes*, 16 PERSONALITY & SOC. PSYCH. REV. 25 (2012).

¹⁰⁷ *Id.* at 30.

¹⁰⁸ *Id.* at 31.

¹⁰⁹ *Id.* at 32.

¹¹⁰ *Id.* at 31–32.

¹¹¹ *Id.*

nuanced analysis of the impact of limited cues on relationship-building.¹¹²

Apart from exploring the influence of communication modes on social presence and relationships, psychological research also illustrates how emotions and negotiating behavior are impacted.¹¹³ The availability of more cue channels is a double-edged sword.¹¹⁴ Although a rich medium may facilitate the conveying of information and building of relationships, it could also result in more channels to express hostile emotions directly.¹¹⁵ By contrast, fewer cue channels, such as text messaging, could result in the inaccurate transmission of emotions.¹¹⁶

Moving beyond transmission of emotions, other studies illustrate whether fewer cues within communication media could easily encourage negative emotions and hostile behavior. Some research suggests that lean media could weaken perceptions of social norms or accentuate feelings of social distance, thereby encouraging communicators to behave in more antisocial ways or to practice deception.¹¹⁷ A meta-analysis of relevant studies in 2005 found that in-person negotiations were less hostile than virtual ones.¹¹⁸ Recent studies on international diplomacy conducted during the pandemic also corroborate this finding.¹¹⁹ Studies observed that coercive tactics, such as stonewalling, were more easily deployed in videoconferencing than in face-to-face

¹¹² See generally *id.*

¹¹³ See Sternlight & Robbennolt, *supra* note 1, at 725–28.

¹¹⁴ Swaab et al., *supra* note 106, at 31.

¹¹⁵ *Id.*

¹¹⁶ Sternlight & Robbennolt, *supra* note 1, at 727, referring to Justin Kruger et al., *Egocentrism over E-Mail: Can We Communicate as Well as We Think?*, 89 J. PERS. SOC. PSYCHOL. 925, 926 (2005); Terri R. Kurtzberg, Charles E. Naquin & Liuba Y. Belkin, *Humor as a Relationship-Building Tool in Online Negotiations*, 20 INT'L J. CONFLICT MGMT. 377, 379–80 (2009); Emily Pronin, Carolyn Wall & Lee Ross, *Understanding Misunderstanding: Social Psychological Perspectives*, in HEURISTICS AND BIASES: THE PSYCHOLOGY OF INTUITIVE JUDGMENT 636, 644 (Thomas Gilovich et al. eds., 2002).

¹¹⁷ E.M. Pesendorfer & S. Koeszegi, *Hot Versus Cool Behavioural Styles in Electronic Negotiations: The Impact of Communication Mode*, 15 GRP. DECISION & NEGOT. 141 (2006); Susan A. Bandes & Neal Feigenson, *Empathy and Remote Legal Proceedings*, 51 SW. L. REV. 20, 29–32 (2021).

¹¹⁸ Stuhlmacher & Citera, *supra* note 95, at 87.

¹¹⁹ See generally Bjola & Manor, *supra* note 98; Corneliu Bjola & Michaela Coplen, *Virtual Venues and International Negotiations: Lessons from the COVID-19 Pandemic*, 28 INT'L NEGOT. 69, 88 (2022); and Bramsen & Hagemann, *supra* note 99.

diplomacy negotiations. For instance, it was easier for negotiators to hold up proceedings by hiding behind a turned-off camera. It was also less costly to stonewall (not respond to the other party) by indefinitely postponing meetings or scheduling meetings for very short time periods.¹²⁰ One other novel negotiation tactic researchers observed included the feigning of technical difficulties to disrupt the dynamics of meetings or to pretend that one did not hear well.¹²¹

As with the earlier theories, not all studies have reflected an increase of negative emotions with less rich media. This has been particularly so with the asynchronous use of text messaging. Two studies found the presence of a visual barrier, such as in text messaging, could inhibit competitive behavior compared to face-to-face negotiations.¹²² Furthermore, ample response time in text messaging could allow the communicator time to consider responses and to better manage one's emotional response, thus reducing the level of contention in a dispute.¹²³ The presence of contrary findings is likely attributable to different traits within communicators. The communication orientation model is once again instructive in taking into account the communicators' default orientations in managing disputes.¹²⁴

Based on the above brief survey of the theories, communication modes are typically analyzed according to attributes of media richness and the ability to convey presence of the other person.¹²⁵ Despite depictions of a linear relationship between media richness and ease of communication, recent post-pandemic research casts doubt on richer media always fostering good communication and discouraging negativity or hostility.¹²⁶ These findings that run counter to conventional media richness and social presence theories are explained by variations in how individuals respond to

¹²⁰ Bjola & Coplen, *supra* note 119, at 83.

¹²¹ *Id.*

¹²² Ingmar Geiger & Jennifer Parlamis, *Is There More to Email Negotiation than Email? The Role of Email Affinity*, 32 COMPUT. HUM. BEHAV. 67, 74–75 (2014); Peter J.D. Carnevale & Alice M. Isen, *The Influence of Positive Affect and Visual Access on the Discovery of Integrative Solutions in Bilateral Negotiation*, 37 ORG. BEHAV. HUM. DECISION PROCESSES 1, 11 (1986).

¹²³ Anne-Marie G. Hammond, *How Do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261 (2003); Eva-Maria Pesendorfer & Sabine T. Koeszegi, *Hot Versus Cool Behavioural Styles in Electronic Negotiations: The Impact of Communication Mode*, 15 GRP. DECISION & NEGOT. 141 (2006).

¹²⁴ See generally Swaab et al., *supra* note 106.

¹²⁵ *Id.*

¹²⁶ See, e.g., Hammond, *supra* note 123.

communication modes.¹²⁷ The communication orientation model has emerged as a dominant explanation of how one's orientation to managing conflicts greatly impacts the building of relationships across different communication modes.¹²⁸ Therefore, a nuanced understanding of different communication forums and a considered matching of the mediation fuss to the forum is required because of the varied responses to communication channels.¹²⁹ The article turns next to explore the mediation fuss, before proposing a framework to fit the forum to the mediation fuss.

IV. DISCERNING THE CONTOURS OF THE "MEDIATION FUSS"

When discerning the contours of the mediation fuss to choose an appropriate communication forum, it is crucial to first examine the role of communication within mediation.¹³⁰ Communication skills, including both verbal and non-verbal manifestations, are foundational to a mediator's toolbox.¹³¹ A variety of metaphors describe the mediator's management of communication.¹³² For example, the mediator as a referee offers each party an equal place at the bargaining table and allows each voice to be heard.¹³³ Furthermore, the mediator can be a host who convenes the parties' discussions, as well as a guide who steers the parties towards effective negotiation behavior.¹³⁴ In addition, the mediator may be a master communicator and translator, gleaned insights from conversations rife with extreme positions and blame to help parties hear one another's interests, issues, principles and values.¹³⁵ In sum, an effective mediator has to observe the disputing parties' interactions, be intentional about fostering good communication, and harness an array of interventions to facilitate a productive conversation that would ideally result in mutual agreement.¹³⁶

How then can the mediation fuss be discerned in a particular dispute for the purpose of fitting it to a communication forum? The concept of fitting the forum to the fuss was devised to enable a dispute to be resolved according to the disputants' priorities, which

¹²⁷ See Swaab et al., *supra* note 106.

¹²⁸ *Id.*

¹²⁹ See generally Sander & Goldberg, *supra* note 5.

¹³⁰ *Id.*

¹³¹ MENKEL-MEADOW ET AL., *supra* note 10, at 91.

¹³² See *id.*

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Id.*

could include minimizing costs or obtaining a precedent.¹³⁷ The process is a disputant-centric one underpinned by the disputants' goals, premised on the assumption that a legal advisor seeks to advance the client's goals.¹³⁸ While matching these goals with the unique characteristics of each dispute resolution option, the legal advisor also considers which option is most optimal in addressing the key barriers to resolution.¹³⁹

A mediator, like a legal advisor, will arguably take into account the parties' goals in agreeing to attempt mediation when deciding on the most appropriate communication mode.¹⁴⁰ However, instead of impinging on priorities such as obtaining a speedy resolution, these goals have to relate to the parties' interactions.¹⁴¹ Such priorities may be evident from the nature of the dispute and what the mediator may learn from pre-mediation conferences.¹⁴² For instance, a company may have advanced a claim against another corporation for supplying defective products. These companies had a longstanding business relationship in the past decade, and this is the first major dispute they have encountered. The mediator discerns from pre-mediation conversations that both companies seek to maintain or improve their business relationship. At the same time, the mediator learns that a key barrier to settlement is a lack of clear communication between the companies' management personnel, which has been exacerbated by a recent change of leadership in the supplier company. It is thus important for the mediator to help the disputants effectively communicate their perspectives and to rebuild trust during the mediation, to restore the companies' business relationship. By comparison, a couple undergoing divorce may be less interested in rebuilding their relationship when attending mediation to discuss only the division of their matrimonial assets. Furthermore, one spouse may be easily overwhelmed by contentious interactions with the other due to previous experiences of emotionally abusive communication. The mediator in this dispute may discern that the parties' overarching aim is to amicably negotiate a dissolution of their marriage, and that one spouse has significant safety concerns.

This article proposes that the mediation fuss is properly understood when the mediator considers the disputants' goals in

¹³⁷ Sander & Goldberg, *supra* note 5, at 50–54.

¹³⁸ *Id.* at 51–52; Frank E. A. Sander & Lukasz Rozdeicz, *Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach*, 11 HARV. NEGOT. L. REV. 1, 4 (2006).

¹³⁹ *Id.* at 54–59.

¹⁴⁰ *Id.* at 52.

¹⁴¹ *Id.*

¹⁴² *Id.* at 58–59.

relation to their desired relationship and interactions.¹⁴³ In this regard, the mediator, unlike a legal advisor, has to consider not only the common goals of all disputants, but the particular needs of each party.¹⁴⁴ A case in point is the earlier illustration concerning mediation of a divorce, where only one spouse may have safety concerns that impinge on the interactions to be managed in mediation. Additionally, the barriers to resolution in relation to communication could also be considered, including any communication breakdown.¹⁴⁵ The parties' relationship goals and obstacles to resolution guide the mediator in discerning the importance of relationship-building within the mediation and, consequently, the most appropriate nature of communication and interaction.¹⁴⁶

While the mediation fuss could be discerned from a disputant-centric perspective, it is influenced by the mediation model adopted by the mediator.¹⁴⁷ For instance, the transformative mediator will seek to empower the parties to have a better understanding of themselves and to make positive shifts in their interactions.¹⁴⁸ On the other hand, an evaluative mediator will assume that the parties want the mediator's direction and views on the potential ways to resolve the matter.¹⁴⁹ The specific mediation style could be determined by a confluence of factors, including both the mediator's preferred model and the parties' preferences.¹⁵⁰ To discern the contours of the mediation fuss, it is therefore necessary to refer to the goals associated with a particular mediation model in addition to the parties' goals.¹⁵¹

In this respect, this article will focus on the facilitative, interest-based mediation model— where the mediator assists the parties' negotiations without evaluating and encourages them to consider underlying interests— (“interest-based model”) for

¹⁴³ See generally *id.* at 49–50.

¹⁴⁴ See James A. Wall & Ann Lynn, *Mediation: A Current Review*, 37 J. CONFLICT RESOL. 160, 168, 171–73 (1993).

¹⁴⁵ *Id.* at 176.

¹⁴⁶ MENKEL-MEADOW ET AL., *supra* note 10, at 205.

¹⁴⁷ See Sander & Goldberg, *supra* note 5, at 50.

¹⁴⁸ See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION: THE TRANSFORMATION APPROACH TO CONFLICT* 45–46, 55 (2005).

¹⁴⁹ See Leonard L. Riskin, *Mediator Orientations, Strategies and Techniques*, 12 ALTS. TO HIGH COST LITIG. 111, 111 (1994); Leonard L. Riskin, *Decisionmaking in Mediation: The New Old Grid and the New New Grid System* 79 NOTRE DAME L. REV. 1, 12–13 (2003).

¹⁵⁰ Riskin, *Mediator Orientations*, *id.* at 111–12.

¹⁵¹ *Id.*; see generally Sander & Goldberg, *supra* note 5, at 50.

principally two reasons.¹⁵² First, a mediator aiming to uncover underlying interests will usually seek to facilitate a high degree of interaction and communication between the disputants.¹⁵³ The interest-based model is thus apt for studying the impact of different communication channels on the parties' interactions.¹⁵⁴ Second, the interest-based mediation model is arguably the predominant framework used for mediation training.¹⁵⁵ It is the common starting point for understanding the basic principles of conflict management.¹⁵⁶ More experienced mediators who grasp these integral principles are subsequently able to adapt them to other models such as the evaluative and transformative models.¹⁵⁷

What then are the goals of the interest-based mediator when managing the parties' interactions? The following five objectives are proposed:

A. BUILDING RAPPORT AND TRUST

A major goal of the interest-based mediator is to build understanding between the mediator and parties.¹⁵⁸ Mediators often build such a connection through empathetic listening by acknowledging the speaker through words and nonverbal behavior in a way that invites communication to continue.¹⁵⁹ Put another way, the mediator uses various tools to build rapport or a sense of

¹⁵² See GOLANN & FOLBERG, *supra* note 9, at 97; DWIGHT GOLANN, *MEDIATING LEGAL DISPUTES: EFFECTIVE TECHNIQUES TO RESOLVE CASES 3–14* (2d ed. 2021); Riskin, *Mediator Orientations*, *supra* note 149; and Riskin, *Decisionmaking in Mediation*, *supra* note 149, at 13.

¹⁵³ GOLANN & FOLBERG, *supra* note 9, at 95–97.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 109–28.

¹⁵⁶ *Id.*

¹⁵⁷ Kenneth F. Dunham, *Practical Considerations in Mediation Training: Should Mediators Be Trained to Adapt to the Circumstances of Each Case*, 11 APPALACHIAN L.J. 185, 191 (2012) (noting that the vast majority of professional mediators are trained in a purely facilitative style, but subsequently replace it with a more evaluative approach or use a compilation of several styles to achieve the desired results).

¹⁵⁸ See GARY FRIEDMAN & JACK HIMMELSTEIN, *The Loop of Understanding*, in CHALLENGING CONFLICT: MEDIATION THROUGH UNDERSTANDING 59 (2008).

¹⁵⁹ *Id.* at 70; Richard Salem, *Empathic Listening*, BEYOND INTRACTABILITY (Jul. 2003), <https://www.beyondintractability.org/essay/empathic-listening> (“Empathic listening (also called active listening or reflective listening) is a way of listening and responding to another person that improves mutual understanding and trust.”).

connection with the parties.¹⁶⁰ Many means of building rapport are nonverbal, such as making eye contact, physical orientation, smiling and nodding or using subtle mimicry of the other persons' nonverbal body language.¹⁶¹ Rapport is closely related to the concept of trust, which is described as identification with another person's desires and intentions due to an effective understanding and appreciation of mutual desires.¹⁶² The mediator's ability to help the disputants depends heavily on earning the parties' trust.¹⁶³ Only then can the parties be candid with the mediator and value the mediator's interventions.¹⁶⁴

The mediator also aims to enhance rapport and trust between the disputing parties.¹⁶⁵ As a master communicator and translator, the mediator seeks to enable the parties to hear one another so as to reorient them toward each other.¹⁶⁶ Mediators harness a range of tools, such as clarifying, summarizing, and reframing the parties' statements to help them gain greater understanding of their respective perspectives.¹⁶⁷ As such, the interest-based mediator effectively seeks to enhance the level of rapport amongst disputants and to rebuild trust.¹⁶⁸ The forging of trust makes conflict resolution easier as the parties are more likely to believe each other's words and assume the other is acting out of good intentions.¹⁶⁹

¹⁶⁰ See Salem, *supra* note 145.

¹⁶¹ See Johannes M. Basch et al., *It Takes More Than a Good Camera: Which Factors Contribute to Differences Between Face-to-Face Interviews and Videoconference Interviews Regarding Performance Ratings and Interviewee Perceptions?*, 36 J. BUS. PSYCH. 921, 922–23 (2021); Nikki Blacksmith et al., *Technology in the Employment Interview: A Meta-Analysis and Future Research Agenda*, 2 PERS. ASSESSMENT DECISION 12, 12–14 (2016).

¹⁶² Roy Lewicki & Edward C. Tomlinson, *Trust, Trust Development, and Trust Repair*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 104–36 (Morton Deutsch et al. eds., 2014).

¹⁶³ *Id.*

¹⁶⁴ See generally GOLDBERG ET AL., *supra* note 9; Nancy Rogers & Richard Salem, *A Student's Guide to Mediation and the Law*, in DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, ARBITRATION AND OTHER PROCESSES 123–28 (Stephen Goldberg et al. eds., 1987).

¹⁶⁵ MENKEL-MEADOW ET AL., *supra* note 10, at 205.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*; Lela P. Love, *Training Mediators to Listen: Deconstructing Dialogue and Constructing Understanding, Agendas, and Agreements*, 38 FAM. & CONCILIATION CTS. REV. 27, 30–31 (2000).

¹⁶⁸ Love, *supra* note 167, at 30–31, 33.

¹⁶⁹ See generally Lewicki & Tomlinson, *supra* note 162.

B. FACILITATING MUTUAL UNDERSTANDING OF PERSPECTIVES AND INTERESTS

Apart from building trust, an integral goal of interest-based mediation is to help the disputants gain mutual understanding of their differing interests and perspectives.¹⁷⁰ The parties' sharing and understanding of their underlying interests and concerns is fundamental to a shift of their focus from positions to underlying interests,¹⁷¹ leading to the opportunity to discover possible solutions,¹⁷² value creation, and integrative outcomes.¹⁷³

C. ENSURING PROCEDURAL JUSTICE

In mediation scholarship it is increasingly recognized that the process influences parties' perceptions of the fairness of mediation outcomes.¹⁷⁴ Procedural justice research highlights how the undermining of party autonomy in court-connected mediations will result in a drastic decline in procedural justice.¹⁷⁵ Four factors influence procedural justice in dispute resolution: (1) opportunity to express one's views ("voice"); (2) being treated with dignity and respect ("respect"); (3) a neutral forum applying the same standards to all and treating parties in an even-handed manner ("even-handedness"); and (4) the sense of trustworthy consideration by the other party ("trustworthy consideration").¹⁷⁶ Hollander-Blumoff and Tylor's empirical work on negotiation found that interpersonal

¹⁷⁰ Love, *supra* note 167, at 30, 33–35.

¹⁷¹ Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 795–801 (1984) (explaining that litigants usually ask for relief in the form of damages, but this relief (or position) is a proxy for underlying interests (what they hope to achieve and accomplish), and noting the importance of uncovering underlying interests).

¹⁷² HAL ABRAMSON, *MEDIATION REPRESENTATION: ADVOCATING AS A PROBLEM SOLVER* 54–55 (3d ed. 2013).

¹⁷³ Menkel-Meadow, *supra* note 171, at 804–09 (explaining that unearthing underlying interests helps create more possible solutions because not all the parties' needs will be mutually exclusive, and the exploitation of complementary needs will produce a wider variety of solutions).

¹⁷⁴ See, e.g., Nancy. Welsh, *Do You Believe in Magic? Self-Determination and Procedural Justice Meet Inequality in Court-Connected Mediation*, 70 SMU L. REV. 721, 733–34 (2017).

¹⁷⁵ *Id.* at 733–37.

¹⁷⁶ *Id.* at 733–34; see Tom R. Tyler, *Psychological Models of the Justice Motive: Antecedents of Distributive and Procedural Justice*, 67 J. PERSONALITY SOC. PSYCH. 850, 857–58 (1994).

treatment—voice and respect—had the greatest impact on negotiators' perception of fairness of process and outcomes.¹⁷⁷ Similar findings concerning the importance of voice and respect also apply in relation to procedural justice in court mediation.¹⁷⁸ Given the likely impact of communication media on emotions, social presence and rapport, it is highly likely that the communication mode also influences the parties' perceptions of interpersonal treatment and consequently, procedural justice of the mediation process.¹⁷⁹

D. MANAGING POWER IMBALANCES AND SAFETY CONCERNS

Power and information asymmetries may undermine the quality of party self-determination and have a prejudicial impact on the substantive outcome of the mediation.¹⁸⁰ Many commentators express grave concerns that disadvantaged parties within mediations may find themselves pressurized by the more powerful party, or may unknowingly compromise their rights.¹⁸¹ Delgado et al. cautioned that informal dispute resolution tends to increase prejudice towards vulnerable disputants, such as minorities, because there are few rules to constrain conduct.¹⁸² Grillo¹⁸³ and Astor¹⁸⁴ noted dangers of power disparities in the area of family dispute resolution, particularly when there are economic differentials and intimate partner violence. The inequality in these relationships could

¹⁷⁷ See Rebecca Hollander-Blumoff, *Formation of Procedural Justice Judgments in Legal Negotiation*, 26 GRP. DECISION & NEGOT. 19, 32 (2017); Rebecca Hollander-Blumoff & Tom R. Tyler, *Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance and Integrative Potential*, 33 L. & SOC. INQUIRY 473, 490 (2008).

¹⁷⁸ See generally Jill Howieson, *Perceptions of Procedural Justice and Legitimacy in Local Court Mediation*, 9 MURDOCH U. ELEC. J. L. 1 (2002).

¹⁷⁹ See generally Hollander-Blumoff, *supra* note 177; Hollander-Blumoff & Tyler, *supra* note 176.

¹⁸⁰ See, e.g., Richard Delgado et al., *Fairness and Formality: Minimizing the Risk of Prejudice in ADR*, WIS. L. REV. 1359 (1985).

¹⁸¹ *Id.* at 1360–61; see also Ellen Waldman & Lola Akin Ojelabi, *Mediators and Substantive Justice: A View from Rawls' Original Position* 30 OHIO ST. J. ON DISP. RESOL. 391, 423 (2016).

¹⁸² *Id.*

¹⁸³ Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1610 (1991).

¹⁸⁴ Hillary Astor, *Violence and Family Mediation: Policy*, 8 AUSTL. J. FAM. L. 3, 5–10 (1994).

undermine the victims' ability to negotiate and even jeopardize their safety.¹⁸⁵

Notwithstanding the need for mediator impartiality, it is increasingly recognized that mediators must manage deficiencies in disputants' ability to exercise autonomy.¹⁸⁶ For instance, the American Bar Association Model Standards for Mediators state that a mediator should explore potential accommodations or adjustments for parties facing difficulties comprehending or participating in the mediation.¹⁸⁷ Furthermore, the Australian Mediator Standards Board's Practice Standards require their mediators to be "alert to changing balances of power . . . and manage the mediation accordingly," and to "consider the safety and comfort of participants."¹⁸⁸ With regard to family mediation, mediation between intimate partners is usually preceded by separate screening sessions with each party to discern the extent of intimate partner violence that would result in mediation being uncomfortable, ineffective or unsafe.¹⁸⁹ Based on the screening results, the mediator then chooses an appropriate communication mode to conduct the mediation.¹⁹⁰

¹⁸⁵ *Id.*; Amy Holtzworth-Munroe, *Controversies in Divorce Mediation and Intimate Partner Violence: A Focus on the Children*, 16 AGGRESSION & VIOLENT BEHAV. 319, 320 (2011).

¹⁸⁶ See generally Ellen Waldman, *The Concept of Justice in Mediation: A Psychobiography*, 6 CARDOZO J. CONFLICT RESOL. 247 (2004); Waldman & Ojelabi, *supra* note 181; and Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform* 100 MARQ. L. REV. 81 (2016).

¹⁸⁷ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, STANDARD VI.10 (AM. ARB. ASS'N, AM. BAR ASS'N, & ASS'N FOR CONFLICT RESOL. 2005),

https://www.americanbar.org/content/dam/aba/administrative/dispute_resolution/dispute_resolution/model_standards_conduct_april2007.pdf.

¹⁸⁸ AUSTRALIA NATIONAL MEDIATION ACCREDITATION SYSTEM, PRACTICE STANDARDS § 6 (2015), <https://msb.org.au/themes/msb/assets/documents/practice-standards.pdf>.

¹⁸⁹ Elizabeth Clemants & Alan Gross, *Why Aren't We Screening? A Survey Examining Domestic Violence Screening Procedures and Training Protocol in Community Mediation Centers*, 24 CONFLICT RESOL. Q. 413, 418 (2007) (referring to the practice of meeting privately with each party to ask questions about past and present violence before deciding whether the parties are able to negotiate for themselves in a mediation).

¹⁹⁰ See CONNIE J. A. BECK ET AL., INTIMATE PARTNER ABUSE IN DIVORCE MEDIATION: OUTCOMES FROM A LONG-TERM MULTI-CULTURAL STUDY 1, 96–97 (2011) (unpublished report for National Institutes of Justice, No. 236868), <https://www.ojp.gov/pdffiles1/nij/grants/236868.pdf>; Shereen

**E. ENCOURAGING CREATIVE AND COLLABORATIVE
PROBLEM-SOLVING**

Finally, the interest-based mediator usually encourages party creativity in forming solutions and breaking impasses.¹⁹¹ The mediator aims to provide parties with an environment in which they do not feel threatened and are consequently open to novel ideas.¹⁹² The parties are urged to think creatively beyond legal rights and obligations, and to jointly invent novel ways to meet their interests.¹⁹³ An atmosphere conducive to creativity is usually fostered by helping the parties see the conflict as a mutual problem to be solved collaboratively through the joint discovery of satisfactory solutions.¹⁹⁴

The five objectives noted above are not meant to be exhaustive or representative of all types of mediations.¹⁹⁵ On the contrary, these goals could exist in varying degrees, depending on the disputants' specific goals.¹⁹⁶ Moreover, although these goals are framed in relation to the interest-based mediation model, they may be suitably modified for other mediation styles.¹⁹⁷ For instance, if an evaluative mediation model is being utilized due to the parties' preferences, and the parties are not primarily interested in preserving their relationship, the goals of facilitating understanding and building trust may not be ascribed the highest priority.¹⁹⁸

Notwithstanding the variability of intensity in these goals, some of the objectives are likely to apply to all mediations, regardless of the mediation model.¹⁹⁹ A mediator will likely seek to build good rapport and trust with the disputants, even if the disputants are not concerned with establishing rapport with one another.²⁰⁰ A positive mediator-disputant relationship is essential to the effectiveness of the mediation process, regardless of the

G. Bingham et al., *Mediator and Survivor Perspectives on Screening for Intimate Partner Abuse*, 31 CONFLICT RESOL. Q. 305, 308 (2014).

¹⁹¹ See PETER T. COLEMAN & MORTON DEUTSCH, *Some Guidelines for Developing a Creative Approach to Conflict*, in THE HANDBOOK OF CONFLICT RESOLUTION: THEORY AND PRACTICE 403 (3d ed. 2014).

¹⁹² *Id.* at 478.

¹⁹³ See generally ABRAMSON, *supra* note 172.

¹⁹⁴ See COLEMAN & DEUTSCH, *supra* note 191, at 478.

¹⁹⁵ See *supra* Part VI(A)–(E).

¹⁹⁶ See MENKEL-MEADOW ET AL., *supra* note 9, at 205.

¹⁹⁷ See Riskin, *supra* note 149, at 11–12; Sander & Goldberg, *supra* note 5, at 50.

¹⁹⁸ See Riskin, *supra* note 149, at 11–12.

¹⁹⁹ See generally Sander & Goldberg, *supra* note 5.

²⁰⁰ See generally Lewicki & Tomlinson, *supra* note 162.

mediation style.²⁰¹ Similarly, the goal of ensuring procedural justice impinges on the perceived legitimacy of the mediation and the confidence placed in the mediator.²⁰² As such, this objective is also likely to exist across mediations of different disputes.²⁰³ Finally, the goal of managing severe power imbalances and safety concerns is an obligation imposed on mediators in many mediation standards²⁰⁴ and can therefore be applicable regardless of the disputants' and mediator's personal preferences.

In sum, the "mediation fuss" in relation to communication forums can be understood by ascertaining the primary mediation objectives in relation to the suggested five goals listed above.²⁰⁵ To ascertain which of the five goals are most applicable to the mediation, the mediator could take into account the disputants' objectives, the likely obstacles to resolution, and the likely mediation model to be utilized.²⁰⁶ These three factors will invariably differ across disputes, resulting in rather different ways of characterizing the "mediation fuss."²⁰⁷

V. EXAMINING THE IMPACT OF COMMUNICATION FORUMS ON THE MEDIATION FUSS

Having delineated the mediator's objectives in relation to the facilitation of communication, and having earlier examined the attributes of different communication forum, this section discusses the impact of different communication forums on each of these objectives.

A. BUILDING RAPPORT AND TRUST

1. RAPPORT

As argued in the preceding section, the interest-based mediator aims to enhance the parties' sense of rapport to orient them towards each other and facilitate greater understanding of mutual perspectives.²⁰⁸ The mediator also seeks to build a connection with

²⁰¹ *Id.*

²⁰² *See generally* Howieson, *supra* note 178.

²⁰³ *See* Hollander-Blumoff & Tyler, *supra* note 177, at 490.

²⁰⁴ *See, e.g.,* MODEL STANDARDS OF CONDUCT FOR MEDIATORS *supra* note 187; AUSTRALIA NATIONAL MEDIATION ACCREDITATION SYSTEM, *supra* note 18.

²⁰⁵ *See supra* Part VI(A)–(E).

²⁰⁶ *See* Sander & Goldberg, *supra* note 5, 54–59.

²⁰⁷ *Id.*

²⁰⁸ *See supra* Part VI(A).

the parties to motivate them to work with the mediator to resolve the dispute.²⁰⁹ In this regard, early theories of media richness and social presence suggest that a reduction in nonverbal cue channels will render rapport building within mediation more challenging due to the lack of ability to sense another, and reduced opportunities to build connections through nonverbal ways.²¹⁰

Several studies validate these hypotheses with respect to text-only negotiations. Yuan et al. found the addition of audio and video channels to text-based negotiations increased mutual acceptance, familiarity with the counterparty, and trust.²¹¹ Another study showed higher social presence in face-to-face negotiations enhanced mutual feelings of trust and understanding compared to text messaging and emails.²¹² A 2020 study comparing mediation completed in-person and mediation completed through synchronous text messaging found disputants felt more understood and increasingly trusted one another after face-to-face rather than text-based mediation.²¹³ Notably, the disputants also perceived their mediator to be more trustworthy and professional in the face-to-face setting.²¹⁴ Other studies indicate lower levels of rapport in negotiations completed with audio channels compared to face-to-face communication.²¹⁵

In addition to the constraints in transmitting non-verbal information, communication media may also affect rapport by influencing the pace and dynamics of conversations.²¹⁶ While videoconferencing appears to offer more nonverbal channels than audio calls, it is more challenging for users to take turns when

²⁰⁹ See generally FRIEDMAN & HIMMELSTEIN, *supra* note 158.

²¹⁰ Walther, *supra* note 57, at 459.

²¹¹ Yufei Yuan et al., *The Effects of Multimedia Communication on Web-Based Negotiation*, 12 GRP. DECISION & NEGOT. 89, 104 (2003).

²¹² Yvonne van der Toorn et al., *Trust and Understanding in Face-to-Face and Online Negotiations*, in DECISION SUPPORT SYSTEMS IV – INFORMATION AND KNOWLEDGE MANAGEMENT IN DECISION PROCESSES: EURO WORKING GROUP CONFERENCES 37 (Isabelle Linden et al. eds., 2014).

²¹³ Debby Damen et al., *The Effect of Perspective-Taking on Trust and Understanding in Online and Face-to-Face Mediations*, 29 GRP. DECISION & NEGOT. 1121 (2020).

²¹⁴ *Id.* at 1148.

²¹⁵ Paul W. Paese et al., *Caught Telling the Truth: Effects of Honesty and Communication Media in Distributive Negotiations*, 12 GRP. DECISION & NEGOT. 537, 540 (2003); Aimee L. Drolet & Michael W. Morris, *Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts*, 36 J. EXPERIMENTAL SOC. PSYCH. 26, 45 (2000).

²¹⁶ See generally Tomprou et al., *supra* note 75.

speaking using the former.²¹⁷ When examining this phenomenon, Tomprou et al. showed when communicators used audio cues only, the lack of video helped them to regulate their conversation more smoothly by engaging in more equal exchange of turns.²¹⁸ Video access seemed to compromise the favorable effect of audio cues.²¹⁹ In a similar vein, neuroscience research has found that Zoom videoconferencing interaction decreases conversational turn-taking.²²⁰ The recent research on Zoom fatigue further underscores the surprisingly detrimental effect of visual cues offered through video; the presence of video resulted in reduced focus due to fears regarding self-presentation and the ability to manage impressions.²²¹ In light of this evidence, it is not surprising that a large body of research has not found greater rapport for negotiations using videoconferencing than audio calls. For example, Sprecher found initial interactions using Skype audio led to almost identical degrees of affiliation compared to conversations using Skype video, positing that video interactions may not be any more advantageous than a conversation held over a phone, at least within brief initial interactions.²²² Similarly, Yuan et al. showed the addition of a video channel to text messaging or to audio communication did not significantly improve communication efficiency or rapport; rather, it seemed to distract negotiators from focusing on their task.²²³ Finally, Balters et al. found that lower levels of conversational turn-taking in Zoom videoconferencing compared to in-person interactions were associated with lower subjective ratings of cooperation, thus suggesting lower levels of rapport when using videoconferencing.²²⁴

2. TRUST

Establishing connections is closely related to the mediator's goal of building trust with the disputants and helping them to re-

²¹⁷ *Id.* at 10.

²¹⁸ *Id.* at 9–10.

²¹⁹ *Id.*

²²⁰ Stephanie Balters et al., *Virtual (Zoom) Interactions Alter Conversational Behavior and Interbrain Coherence*, 43 J. NEUROSCI. 2568 (2023).

²²¹ See generally Bailenson, *supra* note 79; Shockley et al., *supra* note 82, at 1144.

²²² See generally Sprecher, *supra* note 86.

²²³ See generally Yuan et al., *supra* note 211.

²²⁴ Balters et al., *supra* note 220, at 2573–74.

establish mutual trust.²²⁵ Trust levels could be easily compromised by difficulty in both the mediator and disputants' ability to accurately understand one another.²²⁶ In this respect, some research suggests less rich media—specifically e-mail—may cause difficulty in accurately discerning the other person's emotions.²²⁷ Bos et al. found negotiators using text chat had the greatest difficulties in establishing trust-based cooperation compared with those using audio calls, videoconferencing, and face-to-face communication in establishing trust-based cooperation.²²⁸ In addition, negotiators using audio and video channels took longer than face-to-face negotiators in establishing trust.²²⁹ Even after trust was established, it was more fragile than in-person negotiation as these negotiators showed susceptibility to opportunistic defections.²³⁰

In relation to videoconferencing, some studies posit that an accurate understanding of credibility could be more difficult as communicators tend to focus unduly on nonverbal cues, particularly the accentuated visual cues.²³¹ Nonverbal behavior such as averted eye gaze or distraction may be wrongly construed as reflecting deception.²³² Such errors will arguably contribute to constraints in the mediator and the parties' accurate understanding of their perspectives.²³³ However, one 2019 study comparing in-person and videoconferencing mediation did not find any significant differences in the parties' trust in the mediator.²³⁴ Be that as it may, this study did not examine the impact of videoconferencing on trust levels between the disputants or even the mediator's trust in the

²²⁵ See Albie M. Davis & Howard Gadlin, *Mediators Gain Trust the Old-Fashioned Way-We Earn It*, 4 NEGOT. J. 55, 57, 60 (1988).

²²⁶ See Cristoph Laubert & Jennifer Parlamis, *Are You Angry (Happy, Sad) or Aren't You? Emotion Detection Difficulty in Email Negotiation*, 28 GRP. DECISION & NEGOT. 377, 398 (2019).

²²⁷ *Id.*

²²⁸ Nathan Bos et al., *Effects of Four Computer-Mediated Communication Channels on Trust Development* 135 (Conference on Human Factors in Computing Systems, 2002).

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See Sternlight & Robbennolt, *supra* note 1, at 737, referring to Bella M. DePaulo et al., *Cues to Deception*, 129 PSYCH. BULL. 74, 106 (2003); Gordon D. Hemsley & Anthony N. Doob, *The Effect of Looking Behavior on Perceptions of a Communicator's Credibility*, 8 J. APPLIED SOC. PSYCH. 136, 143 (1978).

²³² Hemsley & Doob, *supra* note 231, at 143.

²³³ *Id.*

²³⁴ Susan Nauss, *Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution*, 49 STETSON L. REV. 109, 142 (2019).

disputants.²³⁵ As such, the overall research relating to negotiation suggests the need for mediators to be more acutely aware of the danger of potential misconstruing intentions and motivations, which could impact the trust levels between the disputants, as well as the disputants' trust in the mediator.

In summary, the available studies suggest there are lower levels of rapport and trust in negotiations done through text messaging and audio than face-to-face.²³⁶ Contrary to media richness theory, videoconferencing may not necessarily result in greater levels of rapport than using an audio channel alone.²³⁷ As noted by Geiger, who surveyed the available studies, the empirical research strongly suggests the formation of trust in negotiation benefits from face-to-face communication.²³⁸

3. THE IMPACT OF OTHER FACTORS

Admittedly, these general trends involving technological innovation may be moderated by other factors. With more time, negotiators who use only text messaging seem to catch up in their rapport-building with other negotiators who use richer media.²³⁹ Moreover, negotiators who have prior interactions with one another, or who expect to interact again in the future, may not suffer from reduced rapport levels.²⁴⁰ Nonetheless, these exceptions may arguably be inapplicable to the mediator's goal of establishing trust with the parties. A mediator using videoconferencing would presumably not have known the disputants before the mediation because of the need to avoid conflict of interests and should therefore anticipate that building rapport will not be as easy as in-person mediation. Furthermore, while mediators could conceivably foster rapport in videoconferencing with more time, the research on Zoom fatigue suggests that longer durations of videoconferencing could exacerbate the loss of attention, which would also be detrimental to the building of trust and relationships within mediation.²⁴¹

²³⁵ See generally *id.*

²³⁶ See generally Laubert & Parlamis, *supra* note 226, Bos et al., *supra* note 228.

²³⁷ See generally Hemsley & Doob, *supra* note 231; Tomprou et al., *supra* note 75.

²³⁸ Geiger, *supra* note 50, at 239–40.

²³⁹ Sprecher, *supra* note 86, at 191.

²⁴⁰ See D'Urso & Rains, *supra* note 90; Pesendorfer & Koeszegi, *supra* note 117.

²⁴¹ See Bailenson, *supra* note 79; Shockley et al., *supra* note 82, at 1144.

**B. FACILITATING MUTUAL UNDERSTANDING OF
PERSPECTIVES AND INTERESTS**

The building of rapport and trust lays the foundation for another integral goal of the problem-solving mediator: helping the disputants articulate and attain a mutual understanding of their interests and perspectives. As one mediator observed, a facilitative mediation process is grounded on “in-depth, nuanced, and often intense interest-based analysis.”²⁴² Interests refer to the underlying human motivators that press humans into action.²⁴³ The effective mediator seeks to uncover the underlying interests of disputants so solutions may be formed to address these needs.²⁴⁴ However, it is challenging to articulate vulnerable interests such as reputation, respect, and security amidst the tension caused by a conflict.²⁴⁵

1. TRANSMISSION OF EMOTIONS

Building rapport and trust sets the parties at ease, creating a safe space for them to vulnerably share their interests and perspectives.²⁴⁶ Another important aspect to consider is the parties’ ease of emotional expression when using communication media.²⁴⁷ Although some mediators may prefer to reduce the expression of negative emotions due to the associated difficulty in controlling the parties’ interaction, emotions are a rich source for discerning underlying interests.²⁴⁸ Fisher and Shapiro note how emotions uncover core concerns such as appreciation, autonomy and affiliation and may thus provide rich insights into deep-seated motivations in a dispute.²⁴⁹ Hence, emotional distance may not necessarily assist the mediator, for it could result in concealing critical information on the disputants’ needs.²⁵⁰ Thus, some

²⁴² John Van Winkle, *An Unintended Consequence of Zoom Mediations*, MEDIATE.COM (Feb. 16, 2023), <https://mediate.com/van-winkle-an-unintended-consequence-of-zoom-meditations/#:~:text=As%20described%20above%2C%20an%20unintended,health%20and%20safety%20concerns%20exist>.

²⁴³ Love, *supra* note 167, at 33.

²⁴⁴ See GOLANN, *supra* note 152, at 3–14.

²⁴⁵ See *id.*

²⁴⁶ See *supra* Part IV(A) for discussion on building rapport and trust.

²⁴⁷ See generally Schneider & McCarthy, *supra* note 41.

²⁴⁸ See ROGER FISHER & DANIEL SHAPIRO, BEYOND REASON: USING EMOTIONS AS YOU NEGOTIATE 157 (2005).

²⁴⁹ See *id.* at 19.

²⁵⁰ *Id.*

mediators believe disputants must work through their emotions together to reach a sustainable resolution of their dispute.²⁵¹

The available research on the impact of communication media on emotional expression is equivocal. Media richness and social presence theories suggest that a lean medium with fewer verbal cue channels renders it challenging to detect emotions, and may result in miscommunication and inaccurate transmission of emotions.²⁵² For instance, Hammond found most participants using online chat for mediation felt the process was detached and devoid of emotional interplay.²⁵³ On the other hand, negotiators are capable of adapting to a leaner medium by expressing their emotions more directly and explicitly and with other means such as emoticons (i.e., pictorial icons conveying emotions or sentiments).²⁵⁴ Hence, there is ambivalence on whether leaner media reduces expression of emotions, leading to difficulties in the mediator's task of uncovering underlying interests.²⁵⁵

²⁵¹ See, e.g., TRICIA S. JONES, *Emotion in Mediation: Implications, Applications, Opportunities, and Challenges*, in THE BLACKWELL HANDBOOK OF MEDIATION: BRIDGING THEORY, RESEARCH, AND PRACTICE 277 (Margaret S. Herrman ed., 2006); Meriem Kalter et al., *A Matter of Feelings: Mediators' Perceptions of Emotion in Hierarchical Workplace Conflicts*, 12 FRONTIERS PSYCH. 1, 2 (2021).

²⁵² See Emmelyn Croes et al., *Teasing Apart the Effect of Visibility and Physical Co-Presence to Examine the Effect of CMC on Interpersonal Attraction*, 55 COMPUT. HUM. BEHAV. 468, 473 (2016); Sara Kiesler & Lee Sproull, *Group Decision Making and Communication Technology*, 52 ORG. BEHAV. & HUM. DECISION PROCESSES 96, 116–17 (1992); Sproull & Kiesler, *supra* note 97; Kris Byron, *Carrying Too Heavy a Load? Communication and Miscommunication of Emotion by Email*, 33 ACAD. MGMT REV. 309, 311–12 (2008).

²⁵³ Hammond, *supra* note 123, at 275.

²⁵⁴ See Sternlight & Robbennolt, *supra* note 1, at 726, referring to Daantje Derks, Agneta H. Fischer & Arjan E.R. Bos, *The Role of Emotion in Computer-Mediated Communication: A Review*, 24 COMPUT. HUM. BEHAV. 766 (2008); Nerea Aldunate & Roberto González-Ibáñez, *An Integrated Review of Emoticons in Computer-Mediated Communication*, 7 FRONTIERS PSYCH. 1, 3 (2017); Michele Griessmair & Sabine T. Koeszegi, *Exploring the Cognitive-Emotional Fugue in Electronic Negotiations*, 18 GRP. DECISION & NEGOT. 213, 215 (2009); Shao-Kang Lo, *The Nonverbal Communication Functions of Emoticons in Computer-Mediated Communication*, 11 CYBERPSYCH. & BEHAV. 595, 597 (2008); Joseph B. Walther & Kyle P. D'Addario, *The Impacts of Emoticons on Message Interpretation in Computer-Mediated Communication*, 19 SOC. SCI. COMPUT. REV. 324, 341–42 (2001).

²⁵⁵ Compare Hammond, *supra* note 123, at 275, with Sternlight & Robbennolt, *supra* note 1, at 726.

Apart from the number of non-verbal cue channels, certain media may encourage more task-oriented behavior and less conveying of emotions.²⁵⁶ In this respect, the prevailing Zoom etiquette often involves getting the meeting underway shortly after participants have signed in, thereby forgoing any pre-meeting gathering time for small talk that would usually occur in face-to-face meetings.²⁵⁷ Such a culture could conceivably affect mediations conducted with videoconferencing.²⁵⁸ An American mediator similarly indicated the tendency in Zoom mediations to shun longer joint sessions involving all parties.²⁵⁹ Mediators may also lack expressions of empathy when using videoconferencing.²⁶⁰ The research concerning videoconferencing therefore challenges conventional theories that videoconferencing, as a richer media than text messaging, results in a greater degree of emotional expression.

2. NEGATIVE EMOTIONS AND HOSTILE BEHAVIOR

Other studies have explored the impact of communication media on the expression of negative emotions. While some researchers argue emotions provide rich insights into the disputants' underlying interests, the excessive display of hostile emotions within mediation arguably undermines the mediator's goal of providing a safe space for the parties to share and understand their perspectives.²⁶¹ In this respect, Stuhlmacher and Citera found in-person negotiations were less hostile than virtual ones.²⁶² Furthermore, hard or coercive tactics are more easily deployed in videoconferencing than in face-to-face negotiations,²⁶³ and more frequently used in text messaging than in-person negotiations.²⁶⁴

²⁵⁶ See Geiger & Parlamis, *supra* note 122.

²⁵⁷ See Bob Frisch & Cary Greene, *Make Time for Small Talk in Your Virtual Meetings*, HARV. BUS. REV. (Feb. 18, 2021), <https://hbr.org/2021/02/make-time-for-small-talk-in-your-virtual-meetings> (noting the importance of gathering time before meetings as crucial "side conversations that lift emotions and promote well-being. It's one way we strengthen and deepen relationships").

²⁵⁸ See *id.*; see also Simeon H. Baum, *Online Mediation in a Time of Coronavirus*, 13 N.Y. DISP. RESOL. LAW. 34, 41 (2020).

²⁵⁹ Baum, *supra* note 258, at 41.

²⁶⁰ Ebner, *supra* note 51, at 101.

²⁶¹ See FISHER & SHAPIRO, *supra* note 248, at 157; Stuhlmacher & Citera, *supra* note 95.

²⁶² Stuhlmacher & Citera, *supra* note 95, at 86.

²⁶³ See generally Bjola & Coplen, *supra* note 119.

²⁶⁴ Amira Galin et al., *E-Negotiation versus Face-to-Face Negotiation What Has Changed—If Anything?*, 23 COMPUT. HUM. BEHAV. 787, 795 (2007).

Nevertheless, the degree of hostile emotions ultimately hinges on the orientations of negotiators in managing conflicts.²⁶⁵ Non-cooperative negotiators using richer media may be inclined to express emotions consonant with competitive or hostile behavior.²⁶⁶ The lack of visual and vocal channels, such as in text messaging, is likely to inhibit the emotional expression of competitive behavior.²⁶⁷ Thus, individual differences in conflict management styles likely explain why other studies found the use of text inhibited competitive behavior compared to face-to-face negotiations²⁶⁸ which allowed negotiators to better manage their emotions.²⁶⁹

In summary, the mediator must weigh the overall consequences of emotional expression in a rich medium with the potential detriment resulting from the lack of emotional communication in a leaner mode of communication. It is tempting to assume that a lean medium will be conducive to mediation merely because there is likely to be greater emotional restraint than in a face-to-face setting.²⁷⁰ Nonetheless, such an assumption neglects the critical connection between emotional expression and the mediator's crucial task of facilitating the disputants' articulation and understanding of their interests.²⁷¹

3. THE IMPACT OF INDIVIDUAL TRAITS

Similar to the earlier section on establishing of rapport and trust, there are exceptions to the above trends due to the impact of disputants' individual traits. According to social information processing theory, communicators are able to adapt to the medium and express their emotions in unique ways despite constraints in the number of cue channels.²⁷² Notably, negotiators who already have cooperative tendencies are likely to build relationships and express their emotions constructively regardless of the type of medium used.²⁷³ On the other hand, non-cooperative negotiators using richer media may be inclined to express emotions consonant with competitive or hostile behavior.²⁷⁴ For such individuals, it is likely

²⁶⁵ See generally Geiger, *supra* note 50; Pesendorfer & Koeszegi, *supra* note 117.

²⁶⁶ See generally Stuhlmacher & Citera, *supra* note 95.

²⁶⁷ See generally Swaab et al., *supra* note 106.

²⁶⁸ See Geiger, *supra* note 50.

²⁶⁹ See Pesendorfer & Koeszegi, *supra* note 117.

²⁷⁰ See Geiger, *supra* note 50.

²⁷¹ *Id.*

²⁷² See Croes et al., *supra* note 252.

²⁷³ See generally Swaab et al., *supra* note 106.

²⁷⁴ See Stuhlmacher & Citera, *supra* note 95.

the presence of more visual or other barriers (such as in text messaging) would inhibit the emotional expression of their competitive behavior.²⁷⁵

C. ENSURING PROCEDURAL JUSTICE

Most procedural justice research is in the face-to-face setting.²⁷⁶ As highlighted in Part IV, interpersonal treatment—the opportunity to express one’s views, feel understood, and be treated with courtesy and respect—exerts the greatest impact on negotiators’ perception of fairness of process and outcomes.²⁷⁷ Evidently, communication media plays an integral role in influencing perceptions of interpersonal treatment and consequently, procedural justice of the mediation process.²⁷⁸ In particular, research concerning the impact of communication modes on building of rapport and facilitating mutual understanding of perspectives is pertinent.²⁷⁹ Difficulties in building rapport as well as cue channel limitations inhibiting the ability to express one’s views will arguably constraint the parties’ sense of being heard and consequently undermine procedural justice levels within mediation. In this regard, it has been observed—albeit in the context of criminal court proceedings—that prisoners participating in legal hearings via videoconferencing did not always feel heard and found the online process more disempowering than in-person proceedings.²⁸⁰ Sternlight and Robbenolt argue that these prisoners’ experience of voice and respectful treatment (as aspects of procedural justice) may have been undermined.²⁸¹ It is conceivable that similar effects of communication mode on the sense of being heard within mediation will also undermine procedural justice. These are significant implications, as lower perceptions of fair outcomes will in turn reduce the perceived legitimacy of mediation, resulting in potentially lower compliance with the mediated settlement outcomes. Hence, the impact of communication media on

²⁷⁵ See Geiger & Parlamis, *supra* note 122.

²⁷⁶ See, e.g., Hollander-Blumoff, *supra* note 177; Tyler, *supra* note 176.

²⁷⁷ Hollander-Blumoff, *supra* note 177, at 38.

²⁷⁸ See Welsh, *supra* note 174, at 733–34.

²⁷⁹ See *supra* Part IV(A) on building rapport and trust.

²⁸⁰ CAROLYN MCKAY, THE PIXELATED PRISONER: PRISON VIDEO LINKS, COURT “APPEARANCE” AND THE JUSTICE MATRIX 103, 114–15 (2018); Carolyn McKay and Kristin Macintosh, *Digital Vulnerability: People-in-Prison, Videoconferencing and the Digital Criminal Justice System* JOURNAL OF CRIMINOLOGY 1, 11–13 (2024).

²⁸¹ Sternlight & Robbenolt, *supra* note 1, at 750–51.

mediation transcends the intangible aspects of the mediation process, affecting even the legitimacy of the mediation outcome.

D. MANAGING POWER IMBALANCES AND SAFETY CONCERNS

While disputants in a mediation—particularly those involved in abusive relationships—may desire to establish rapport with the mediator and feel understood, they may also prefer to have reduced interaction with the other party when severe power imbalances are present, causing fear or a sense of intimidation.²⁸² In disputes involving intimate partner violence (IPV), these fears may pertain not only to physical violence, but also to emotionally abusive coercion and control.²⁸³ In this vein, shuttle mediation, which involves keeping the disputants physically separated in different locations and relying on the mediator to conduct private meetings, is often used for disputes involving IPV.²⁸⁴ Moreover, psychological and physical safety may be compromised when there is no assurance of privacy and confidentiality.²⁸⁵ Thus, the mode of communication greatly influences both the perceived level of privacy in the mediation and the degree of intimidation occasioned by disparities in power.²⁸⁶

The psychological research concerning the impact of communication media on situations of power imbalances is rather nuanced. Where there are physical safety concerns or one disputant tends to dominate the mediation through more vocal forms of communication, a less rich medium would benefit the more vulnerable party.²⁸⁷ The physical barrier between the parties could assuage concerns about physical violence.²⁸⁸ Furthermore, a leaner medium could diminish the intended impact of intimidating or emotionally abusive communication by the more dominant disputant; however, the audio and visual aspects of any intimidating

²⁸² See Ann L. Milne, *Mediation and Domestic Abuse*, in *DIVORCE & FAMILY MEDIATION: MODELS, TECHNIQUES, AND APPLICATIONS* 304 (Jay Folberg et al. eds., 2004).

²⁸³ See Joan B. Kelly & Michael P. Johnson, *Differentiation Among Types of Partner Violence: Research Update and Implications for Interventions*, 46 *FAM. CT. REV.* 476 (2008).

²⁸⁴ See Fernanda S. Rossi et al., *Shuttle and Online Mediation: A Review of Available Research and Implications for Separating Couples Reporting Intimate Partner Violence of Abuse*, 55 *FAM. CT. REV.* 390 (2017).

²⁸⁵ See Sternlight & Robbennolt, *supra* note 1, at 712.

²⁸⁶ *Id.*

²⁸⁷ See Rossi et al., *supra* note 284, at 396.

²⁸⁸ *Id.*

behavior could be amplified in videoconferencing mediation.²⁸⁹ Moreover, the lower degree of formality compared to a face-to-face setting helps reduce tension.²⁹⁰ In addition, videoconferencing software provides another opportunity to reduce perceived power disparities.²⁹¹ In this regard, there is an “equalizing effect” of seeing all participants’ images of the same size in the Zoom platform;²⁹² this is borne by research showing smaller images on video communication tend to carry less emotional impact.²⁹³ In light of these characteristics of leaner media, videoconferencing mediation has been used in disputes between IPV partners to allow parties to interact while reducing the risk of both physical harm and psychological intimidation.²⁹⁴

Although less media rich modes may diffuse tension and intimidating behavior, they concurrently limit the mediator’s ability to effectively manage power imbalances.²⁹⁵ Most research and

²⁸⁹ *Id.*

²⁹⁰ Sternlight & Robbennolt, *supra* note 1, at 715, referring to Suzie Forell et al., *Legal Assistance by Video Conferencing: What Is Known?* JUST. ISSUES: L. & JUST. FOUND. 1 (Paper No. 15, Nov. 2011).

²⁹¹ *Id.*

²⁹² See, e.g., Stephanie Francis Ward, *Thanks to Chief Justice, the Michigan Supreme Court Pivoted to Remote Proceedings During Covid-19*, AM. BAR ASS’N J. (Feb. 1, 2021) <https://www.abajournal.com/legalrebels/article/thanks-to-chief-justice-the-michigan-supreme-court-pivoted-to-remote-proceedings-during-covid-19> (quoting Bridget Mary McCormack, chief justice of the Michigan Supreme Court: “When you are in the comfort of your own home, where you feel safe and secure, it’s easier to feel confident in letting the court know what’s on your mind. Also, everybody’s Zoom boxes are kind of the same size. There’s something equalizing about that.”).

²⁹³ See Wendy P. Heath & Bruce D. Grannemann, *How Video Image Size Interacts with Evidence Strength, Defendant Emotion, and the Defendant-Victim Relationship to Alter Perceptions of the Defendant*, 32 BEHAV. SCI. & L. 496 (2014); Maurizio Codispoti & Andrea De Cesarei, *Arousal and Attention: Picture Size and Emotional Reactions*, 44 PSYCHOPHYSIOLOGY 680 (2007).

²⁹⁴ See generally Holtzworth-Munroe, *supra* note 185.

²⁹⁵ For participants entering negotiation with an uncooperative stance, the presence of real-time multiple-channel interaction may increase the potential for bad behavior, and limiting the available channels could therefore help to de-intensify the conflict. See Sternlight & Robbennolt, *supra* note 1, at 734, referring to Swaab et al., *supra* note 106. But see Sternlight & Robbennolt, *supra* note 1, at 728 (noting that some mediators prefer the in-person setting to deal with disputes with high emotional temperatures and distrust as they are more able to use their presence to build trust and rapport. Sternlight refers to one mediator’s description of mediating online as having “one arm tied behind their back and a patch

commentaries focus on benefits of diminishing the intimidating communication of the more dominant party without underscoring the significant implications of a reduced sense of the mediator's presence.²⁹⁶ A mediator in the face-to-face setting will conventionally rely on timely verbal interventions (or even interruptions) to allow all parties to have equal opportunities to express themselves.²⁹⁷ Mediators are also accustomed to "reading the room" and the body language of all participants carefully.²⁹⁸ In contrast, by using videoconferencing software, a mediator faces considerable constraints in speaking over the parties or urging them to exercise restraint in their language as the mediator's presence is greatly reduced to a small image on the participants' screens.²⁹⁹ The mediator may also engage in more clumsy interventions such as muting a participant, which participants may not perceive positively.³⁰⁰ Non-verbal cues are less easy to grasp, resulting in the mediator's reduced ability to discern the parties' state of mind and to intervene appropriately.³⁰¹ When dealing with disputants who are

over one eye"); *see also* Mary Bandham-Hall, *Online Mediation – Why I Believe in Face-to-Face Mediation*, HUFFINGTON POST UK (July 27, 2017), https://www.huffingtonpost.co.uk/mary-banham-hall/online-mediation_b_17577438.html.

²⁹⁶ Sternlight & Robbennolt, *supra* note 1, at 728, referring to Eric R. Galton, *The Remarkable (and Often Very Surprising) Benefits of Virtual Mediation*, MEDIATE.COM (June 2021), <https://www.mediate.com/articles/galton-benefits-virtual.cfm> (observing that parties and counsel on videoconferencing mediation are noticeably calmer and more civil); Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, MEDIATE.COM (Dec. 2000), <https://www.mediate.com/articles/rule.cfm> (arguing that asynchronous modes of communication such as text messaging may prevent parties from reacting emotionally by giving them the opportunity to step back and reflect before responding).

²⁹⁷ *See* Sternlight & Robbennolt, *supra* note 1.

²⁹⁸ *See* Drolet & Morris, *supra* note 215, at 28, 32.

²⁹⁹ *See* Heath & Grannemann, *supra* note 293, at 497.

³⁰⁰ Emma Rowden & Anne Wallace, *Remote Judging: The Impact of Video Links on the Image and the Role of the Judge*, 14 INT'L J. L. IN CONTEXT 504, 518 (2018) (noting that judges have used the "mute" function when faced with factious defendants appearing via videoconferencing and commenting that such a practice may have a negative impact on perceptions of due process and legitimacy of the court).

³⁰¹ Greg Bond, *Feeling the Non-Verbal: Analogue and Digital Communication in Mediation, Facilitation and Training*, KLUWER MEDIATION BLOG (June 24, 2020), <https://mediationblog.kluwerarbitration.com/2020/06/24/feeling-the-non-verbal-analogue-and-digital-communication-in-mediation-facilitation-and-training/>.

disengaged from the mediation, the mediator also has limited ways to urge them to cease multi-tasking or prevent them from exiting the videoconferencing session.³⁰² In summary, mediators may find it more challenging to manage the interactions between disputants of uneven power, particularly in mediation joint sessions. It is apposite that mediators in family disputes involving IPV face considerable difficulties in facilitating the parties' narration of their stories on videoconferencing platforms without arousing anger or fear.³⁰³ Family mediators using videoconferencing are trained to permit direct communication between parties on the video screen, but to frequently check with parties whether either would like to end the visual or audio portion of the mediation.³⁰⁴

In addition, benefits offered by physical distance must be evaluated together with the disputants' perceptions of privacy in the chosen communication mode.³⁰⁵ The introduction of enhanced security settings has greatly reduced the risk of unauthorized access to video recording software.³⁰⁶ Despite these improvements, some scholars highlight that expectations of privacy may be lower for videoconferencing or audio calls than for an in-person processes because of the ease to illicit record as well as constraints in detecting the presence of other participants observing the mediation.³⁰⁷ Although participants may have greater assurance of physical safety, any perceived lack of confidentiality would undermine their emotional safety.³⁰⁸

In sum, the benefits of reducing the impact of hostile communication must be carefully balanced with drawbacks occasioned by the mediator's diminished ability to manage power imbalances and disruptions, and any perceived lack of privacy by the disputants. The impact of the communication mode on the management of safety concerns and power imbalances is thus multi-

³⁰² *Id.*

³⁰³ See Rossi et al., *supra* note 284, at 396.

³⁰⁴ See Amy G. Applegate et al., *Preparing Mediators to Mediate Cases Reporting High IPV in a Randomized Controlled Trial: The Importance of a Mediation Manual, Training, and Consultation*, 59 FAM. CT. REV. 725, 725 (2021).

³⁰⁵ See Basch et al., *supra* note 161, at 926, 934.

³⁰⁶ See *End-to-end (E2EE) encryption for meetings*, ZOOM SUPPORT (Feb. 28, 2024), https://support.zoom.com/hc/en/article?id=zm_kb&sysparm_article=KB0065408.

³⁰⁷ See, e.g., Basch et al., *supra* note 161, at 926, 934; Ebner, *supra* note 51, at 119.

³⁰⁸ Ebner, *supra* note 51, at 115.

faceted and be thoughtfully evaluated by the mediator together with the disputants.

E. ENCOURAGING PROBLEM-SOLVING

1. COLLABORATIVE BEHAVIOR

As alluded to in Part V(B), excessive displays of negative emotions, while beneficial in reflecting underlying interests, can result in a contentious mediation that inhibits collaboration.³⁰⁹ This begs the question of whether the mode of communication could influence the disputants' propensity to be competitive or collaborative. As noted earlier, early social-psychological research found greater hostility in negotiations using text messaging compared to face-to-face negotiations.³¹⁰ Stuhlmacher and Citera illustrated the visual anonymity in these modes may accentuate the psychological distance felt by the communicators.³¹¹

Nonetheless, this theory is not supported in recent research on videoconferencing, which supposedly decreases visual anonymity compared to text messaging.³¹² Recent surveys of diplomats reported coercive tactics seem to be more easily displayed in videoconferencing than in face-to-face diplomacy talks.³¹³ Additionally, related research on the impact of communication media on trust, rapport, and attention span also collectively suggest video-conferencing may not necessarily be conducive to encouraging trust-building behavior.³¹⁴ This is due in part to the distractions posed by prominent visual cues, which could result in the lack of collaboration.³¹⁵ In sum, mediation conducted by videoconferencing is evidently not equivalent to face-to-face mediation.³¹⁶ The astute mediator must discern the impact of the mode on collaborative behavior, bearing in mind, of course, the influence of the disputants' individual traits, to be equipped with ways to manage the display of contentious behavior.³¹⁷

³⁰⁹ See Galin et al., *supra* note 264, at 790.

³¹⁰ *Id.* at 795; Stuhlmacher & Citera, *supra* note 95, at 71.

³¹¹ Stuhlmacher & Citera, *supra* note 95, at 71–72.

³¹² See, e.g., Bramsen & Hagemann, *supra* note 100, at 548, 558.

³¹³ *Id.* at 550–53.

³¹⁴ See Bailenson, *supra* note 79, at 3.

³¹⁵ *Id.*; Shockley et al., *supra* note 84, at 1142.

³¹⁶ See Bramsen & Hagemann, *supra* note 100, at 550–53.

³¹⁷ See Ebner, *supra* note 51, at 138.

2. CREATIVITY

Problem-solving behavior is not only affected by the parties' collaborative behavior, but also their propensity for creativity.³¹⁸ After all, the interest-based mediator seeks to encourage parties to engage in creative problem-solving.³¹⁹ Recent research concerning Zoom fatigue is not particularly heartening in this respect, for the loss of attention and focus in videoconferencing will reduce individuals' capacity to think creatively.³²⁰ One study done in five countries investigated the impact of videoconferencing on creativity, finding videoconferencing hampered creative idea generation because it focused communicators on a screen, resulting in a "narrower cognitive focus" than face-to-face communication.³²¹ This finding has significant implications for mediations as the potential for arriving at creative solutions could be compromised, thus limiting the capacity for value creation.³²²

VI. FITTING THE COMMUNICATION FORUM TO THE MEDIATION FUSS: A PROPOSED FRAMEWORK

Drawing different elements of the above research together, Table 1 summarizes discernible trends on the impact of communication forum on the mediation fuss:

³¹⁸ Rossi et al., *supra* note 284, at 393.

³¹⁹ *Id.*

³²⁰ *Id.*; Bailenson, *supra* note 79, at 3.

³²¹ Melanie S. Brucks & Jonathan Levav, *Virtual Communication Curbs Creative Idea Generation*, 605 NATURE 108, 108 (2020).

³²² *Id.* at 108, 111.

TABLE 1

MEDIATION GOALS		COMMUNICATION MODE			
		Text messaging (Text)	Audio call (Audio)	Videoconferencing (Video)	Face-to-Face (F2F)
Building Rapport & Trust	Rapport	<ul style="list-style-type: none"> Higher social presence in F2F negotiations enhanced mutual feelings of understanding more than text³²³ Addition of video channel to text or audio communication did not significantly increase rapport³²⁴ Disputants felt more understood in F2F than in text mediation³²⁵ 	<ul style="list-style-type: none"> Sense of affiliation not higher in video than audio negotiation³²⁶ Addition of video channel to text or audio communication did not significantly increase rapport³²⁷ Using audio without video helped communicators regulate conversation more smoothly with more equal turn taking³²⁸ 	<ul style="list-style-type: none"> Sense of affiliation not higher in video than audio negotiation³²⁹ Addition of video channel to text or audio communication did not significantly increase rapport but distracted negotiators from their task³³⁰ Using video with audio caused communicators to regulate conversation less smoothly with less equal turn taking³³¹ Fatigue and reduced focus with video because of fears about self-presentation and managing impressions³³² 	<ul style="list-style-type: none"> Higher social presence in F2F negotiations enhanced mutual feelings of understanding more than text³³³ Disputants felt more understood in F2F than in text mediation³³⁴ Compared with F2F, there seems to be more fatigue and reduced focus with video because of fears about self-presentation and managing impressions³³⁵

³²³ van der Toorn et al., *supra* note 212.

³²⁴ Yuan et al., *supra* note 211, at 90.

³²⁵ Damen et al., *supra* note 213, at 1121.

³²⁶ Sprecher, *supra* note 86, at 195.

³²⁷ Yuan et al., *supra* note 211, at 90.

³²⁸ Tomprou et al., *supra* note 75, at 7–8.

³²⁹ Sprecher, *supra* note 86, at 195.

³³⁰ Yuan et al., *supra* note 211, at 90.

³³¹ Tomprou et al., *supra* note 75, at 7–8.

³³² Bailenson, *supra* note 79, at 4; Shockley et al., *supra* note 82, at 1142.

³³³ van der Toorn et al., *supra* note 212.

³³⁴ Damen et al., *supra* note 213, at 1129, 1140–44, 1148.

³³⁵ Bailenson, *supra* note 79, at 4; Shockley et al., *supra* note 82, at 1142.

Building Rapport & Trust	Trust	<ul style="list-style-type: none"> Negotiators fared worse in establishing trust-based cooperation compared to audio, video & F2F³³⁶ Negotiators using text take longer than F2F negotiators to build trust; trust is more fragile than F2F in terms of susceptibility to defection³³⁷ Disputants trusted one another and perceived mediator to be more trustworthy & professional in F2F than in text mediation³³⁸ 	<ul style="list-style-type: none"> Negotiators fared better in establishing trust-based cooperation compared to text³³⁹ 	<ul style="list-style-type: none"> Negotiators fared better in establishing trust-based cooperation compared to text³⁴⁰ No significant difference in disputants' trust for mediator in video and F2F mediation³⁴¹ 	<ul style="list-style-type: none"> Negotiators fared better in establishing trust-based cooperation compared to text³⁴² Negotiators using text take longer than F2F negotiators to build trust; trust is more fragile than F2F in terms of susceptibility to defection³⁴³ Disputants trusted one another and perceived mediator to be more trustworthy & professional in F2F than in text mediation;³⁴⁴ no significant difference in disputants' trust for mediator in F2F and video mediation³⁴⁵
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³³⁶ Bos et al., *supra* note 228, at 135.³³⁷ *Id.*³³⁸ Damen et al., *supra* note 213, at 1131, 1148.³³⁹ Bos et al., *supra* note 228, at 135.³⁴⁰ *Id.*³⁴¹ Nauss, *supra* note 234, at 109.³⁴² Bos et al., *supra* note 228, at 135.³⁴³ *Id.*³⁴⁴ Damen et al., *supra* note 213, at 1131, 1148.³⁴⁵ Nauss, *supra* note 234, at 109.

Building Rapport & Trust	Impact of Other Factors	<ul style="list-style-type: none"> • TIME: With more time, negotiators using only text seem to catch up in their rapport-building with other negotiators using richer media³⁴⁶ • PRIOR INTERACTIONS: Negotiators who have prior interactions with one another or who expect to interact again in the future may not suffer from reduced rapport levels³⁴⁷ 	<ul style="list-style-type: none"> • TIME: With more time, negotiators using only text seem to catch up in their rapport building with other negotiators using audio³⁴⁸ • PRIOR INTERACTIONS: Negotiators who have prior interactions with one another or who expect to interact again in the future may not suffer from reduced rapport levels³⁴⁹ 	<ul style="list-style-type: none"> • TIME: With more time, negotiators using only text seem to catch up in their rapport building with other negotiators using video³⁵⁰ • PRIOR INTERACTIONS: Negotiators who have prior interactions with one another or who expect to interact again in the future may not suffer from reduced rapport levels³⁵¹ 	<ul style="list-style-type: none"> • TIME: With more time, negotiators using only text seem to catch up in their rapport building with other negotiators using F2F³⁵² • PRIOR INTERACTIONS: Negotiators who have prior interactions with one another or who expect to interact again in the future may not suffer from reduced rapport levels³⁵³
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³⁴⁶ Sprecher, *supra* note 86, at 195.

³⁴⁷ Walther, *supra* note 57, at 446–47; Sprecher, *supra* note 86, at 195.

³⁴⁸ Sprecher, *supra* note 86, at 195.

³⁴⁹ Walther, *supra* note 57, at 446–47; Sprecher, *supra* note 86, at 195.

³⁵⁰ Sprecher, *supra* note 86, at 195.

³⁵¹ Walther, *supra* note 57, at 446–47; Sprecher, *supra* note 86, at 195.

³⁵² Sprecher, *supra* note 86, at 195.

³⁵³ Walther, *supra* note 57, at 446–47; Sprecher, *supra* note 86, at 195.

Understanding of Perceptions & Interests	Transmission of Emotions	<ul style="list-style-type: none"> Media richness and social presence theories suggest that text as leaner medium makes it challenging to detect emotions, resulting in inaccurate transmission of emotions³⁵⁴ 	<ul style="list-style-type: none"> Media richness and social presence theories suggest that audio as lean medium makes it challenging to detect emotions, resulting in inaccurate transmission of emotions³⁵⁵ 	<ul style="list-style-type: none"> Media richness and social presence theories suggest that video as rich medium makes it easier than audio and text to detect and accurately transmit emotions³⁵⁶ 	<ul style="list-style-type: none"> Media richness and social presence theories suggest that F2F as richer medium makes it easier to detect emotions, resulting in more accurate transmission of emotions³⁵⁷
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³⁵⁴ Croes et al., *supra* note 252, at 471, 475; Kiesler & Sproull, *supra* note 252, at 103; Byron, *supra* note 252, at 309.

³⁵⁵ Croes et al., *supra* note 252, at 471, 475; Kiesler & Sproull, *supra* note 252, at 103; Byron, *supra* note 252, at 309.

³⁵⁶ Croes et al., *supra* note 252, at 471, 475; Kiesler & Sproull, *supra* note 252, at 103; Byron, *supra* note 252, at 309.

³⁵⁷ Croes et al., *supra* note 252, at 471, 475; Kiesler & Sproull, *supra* note 252, at 103; Byron, *supra* note 252, at 309.

Understanding of Perceptions & Interests	Negative Emotions & Hostile Behavior	<ul style="list-style-type: none"> • Presence of visual barrier could inhibit competitive behaviour compared to F2F negotiation;³⁵⁸ allowing negotiators to be more thoughtful in their responses and be less hostile³⁵⁹ • However, virtual negotiations were more hostile than virtual ones;³⁶⁰ and more forcing behaviour observed in text than F2F negotiations³⁶¹ 	<ul style="list-style-type: none"> • Virtual negotiations were more hostile than F2F ones³⁶² 	<ul style="list-style-type: none"> • Virtual negotiations were more hostile than F2F ones³⁶³ • Coercive tactics observed to be more easily deployed in videoconferencing than in face-to-face negotiations³⁶⁴ 	<ul style="list-style-type: none"> • In-person negotiations were less hostile than virtual ones³⁶⁵
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³⁵⁸ Carnevale & Isen, *supra* note 122, at 1,10; Geiger, *supra* note 50, at 215.

³⁵⁹ Hammond, *supra* note 123, at 261; Pesendorfer & Koeszegi, *supra* note 117, at 153.

³⁶⁰ Stuhlmacher & Citera, *supra* note 95, at 81.

³⁶¹ Galin et al., *supra* note 264, at 795.

³⁶² Stuhlmacher & Citera, *supra* note 95, at 81.

³⁶³ *Id.*

³⁶⁴ See generally Bjola & Coplen, *supra* note 119,

³⁶⁵ Stuhlmacher & Citera, *supra* note 95, at 81.

Understanding of Perceptions & Interests	Impact of Communication on Orientation	<ul style="list-style-type: none"> Negotiators with cooperative tendencies likely to build relationships and express their emotions constructively regardless of the type of medium used³⁶⁶ 	<ul style="list-style-type: none"> Negotiators with cooperative tendencies likely to build relationships and express their emotions constructively regardless of the type of medium used³⁶⁷ 	<ul style="list-style-type: none"> Non-cooperative negotiators using richer media may be inclined to express more emotions consonant with competitive or hostile behaviour 	<ul style="list-style-type: none"> Non-cooperative negotiators using richer media may be inclined to express more emotions consonant with competitive or hostile behaviour³⁶⁸
Ensuring Procedural Justice	Voice & Trustworthiness by Consideration	<ul style="list-style-type: none"> Lower rapport levels (above) for leaner media will arguably undermine procedural justice aspects of voice and sense of trustworthy consideration³⁶⁹ 	<ul style="list-style-type: none"> Lower rapport levels (above) for leaner media will arguably undermine procedural justice aspects of voice and sense of trustworthy consideration³⁷⁰ 	<ul style="list-style-type: none"> Lower rapport levels (above) for richer media will arguably undermine procedural justice aspects of voice and sense of trustworthy consideration³⁷¹ 	<ul style="list-style-type: none"> Lower rapport levels (above) for richer media will arguably undermine procedural justice aspects of voice and sense of trustworthy consideration³⁷²

³⁶⁶ See generally Swaab et al., *supra* note 106.

³⁶⁷ *Id.*

³⁶⁸ *Id.*

³⁶⁹ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷⁰ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷¹ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷² Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

Ensuring Procedural Justice	Perceived Legitimacy	<ul style="list-style-type: none"> Lower rapport levels (above) will be detrimental to perceived legitimacy of mediation outcomes³⁷³ 	<ul style="list-style-type: none"> Lower rapport levels (above) will be detrimental to perceived legitimacy of mediation outcomes³⁷⁴ 	<ul style="list-style-type: none"> Lower rapport levels (above) will be detrimental to perceived legitimacy of mediation outcomes³⁷⁵ 	<ul style="list-style-type: none"> Higher rapport levels (above) will be detrimental to perceived legitimacy of mediation outcomes³⁷⁶
Managing Power Imbalances & Safety Concerns	Safety Concerns	<ul style="list-style-type: none"> Leaner medium may benefit “weaker” party because of physical barrier addressing safety concerns & diminished impact of intimidating communication³⁷⁷ 	<ul style="list-style-type: none"> Expectations of privacy may be lower for videoconferencing or audio calls than F2F, reducing sense of emotional safety³⁷⁸ 	<ul style="list-style-type: none"> Video could assuage concerns about physical violence and diminish intended impact of intimidating communication³⁷⁹ Expectations of privacy may be lower for videoconferencing or audio calls than F2F³⁸⁰ 	<ul style="list-style-type: none"> Shuttle mediation – keeping the disputants physically separated in different locations and relying on the mediator to conduct private meetings – has been used for disputes involving intimate partner violence³⁸¹

³⁷³ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷⁴ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷⁵ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷⁶ Hollander-Blumoff & Tyler, *supra* note 177, at 492; Hollander-Blumoff, *supra* note 177, at 19.

³⁷⁷ See generally Basch et al., *supra* note 161.

³⁷⁸ *Id.*; Ebner, *supra* note 51.

³⁷⁹ See generally Holtzworth-Munroe, *supra* note 185.

³⁸⁰ See generally Basch et al., *supra* note 161.

³⁸¹ See generally Rossi et al., *supra* note 284.

Managing Power Imbalances & Safety Concerns	Power Imbalances			<ul style="list-style-type: none"> • There is “equalising effect” in seeing participants’ images of same size in video; smaller images on video tend to carry less emotional impact³⁸² • However, mediator may face difficulty compared to F2F in managing interactions without arousing anger or fear³⁸³ 	
Encouraging Creative & Collaborative Problem Solving	Collaborative Behavior	<ul style="list-style-type: none"> • Greater hostility found in text negotiations than F2F • However, some studies suggest more offensive and competitive behaviour in F2F than asynchronous text messaging 		<ul style="list-style-type: none"> • Coercive tactics seem more easily displayed in video than in F2F diplomacy talks³⁸⁴ 	<ul style="list-style-type: none"> • Less hostility found in F2F negotiations than text negotiations as visual anonymity may accentuate psychological distance³⁸⁵ • However, some studies suggest more offensive and competitive behaviour in F2F than asynchronous text messaging³⁸⁶

³⁸² See generally Bramsen & Hagemann, *supra* note 99; Ward, *supra* note 292; Heath & Grannemann, *supra* note 293; Codispoti & De Cesarei, *supra* note 293.

³⁸³ See generally Rossi et al., *supra* note 284; Applegate et al., *supra* note 304.

³⁸⁴ See generally Bramsen & Hagemann, *supra* note 99.

³⁸⁵ See generally Stuhlmacher & Citera, *supra* note 95.

³⁸⁶ See generally Swaab et al., *supra* note 106.

Encouraging Creative & Collaborative Problem Solving	Creativity			<ul style="list-style-type: none">• Video hampered creative idea generation more than F2F because it focused communicators on a screen, resulting in a narrower cognitive focus³⁸⁷	<ul style="list-style-type: none">• Video hampered creative idea generation more than F2F because it focused communicators on a screen, resulting in a narrower cognitive focus³⁸⁸
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³⁸⁷ See generally Brucks & Levav, *supra* note 321.
³⁸⁸ *Id.*

**A. SUMMARY OF SALIENT RESEARCH FINDINGS ON THE
IMPACT OF COMMUNICATION MEDIA ON MEDIATION**

Collectively, the research suggests the use of richer communication modes with multiple cue channels enhance the building of rapport and trust between negotiators.³⁸⁹ Nevertheless, the leaner to richer modes cannot be viewed linearly as a neat spectrum in facilitating interpersonal relationship-building.³⁹⁰ The more recent studies on videoconferencing have cast doubt on the superiority of videoconferencing compared to audio calls in establishing rapport and trust.³⁹¹ Furthermore, videoconferencing cannot be treated interchangeably with in-person communication because it causes more distractions due to communicators' fears of self-presentation, limits in attention span due to cognitive overload, and its inability to facilitate natural turn-taking in conversations.³⁹² Additionally, media's impact on rapport depends on several factors.³⁹³ First, negotiators who are not strangers, or who expect to have future interactions, may find ways to adapt to the lack of cue channels to build rapport.³⁹⁴ Secondly, negotiators who have difficulty establishing trust with leaner modes, such as text messaging, may eventually be able to do so when given more time.³⁹⁵

The findings concerning the impact of communication mode on rapport and trust have pertinent implications on procedural justice within mediation.³⁹⁶ Suboptimal levels of rapport between negotiators will reduce their sense of voice and ability to provide trustworthy consideration, leading to low perceptions of fairness and legitimacy of the agreed outcomes.³⁹⁷ In the same vein, difficulties faced by the mediator in establishing rapport with the disputants will arguably undermine procedural justice, reducing the perceived

³⁸⁹ See van der Toorn et al., *supra* note 212; Ebner, *supra* note 51.

³⁹⁰ See van der Toorn et al., *supra* note 212; Damen et al., *supra* note 213; Bailenson, *supra* note 79; Shockley et al., *supra* note 82; Bos et al., *supra* note 228; Nauss, *supra* note 234; Sprecher, *supra* note 86; Walther, *supra* note 57.

³⁹¹ See Sprecher, *supra* note 86; Yuan et al., *supra* note 211; Bailenson, *supra* note 79; Shockley et al., *supra* note 82; Tomprou et. al., *supra* note 75.

³⁹² See Sprecher, *supra* note 86; Yuan et al., *supra* note 211.

³⁹³ See Bailenson, *supra* note 79; Shockley et al., *supra* note 82; Tomprou et al., *supra* note 75.

³⁹⁴ See Walther, *supra* note 57; Sprecher, *supra* note 86.

³⁹⁵ See Carlson & Zmud, *supra* note 88.

³⁹⁶ See Hollander-Blumoff & Tyler, *supra* note 177.

³⁹⁷ *Id.*

legitimacy of the mediation process and potentially resulting in lower compliance rates with mediated outcomes.³⁹⁸

With regard to the mediator's goal of facilitating the disputants' understanding of mutual perspectives, the current research is equivocal.³⁹⁹ Some studies suggest that a lean medium may easily lead to miscommunication and inaccurate transmission of emotions, which could hamper the mediator's task to enhance the parties' mutual understanding.⁴⁰⁰ In addition, face-to-face interactions have been observed to be less hostile than virtual negotiations such as videoconferencing.⁴⁰¹ On the other hand, other research found the absence of visual and vocal channels in lean media could inhibit hostile behavior and enable negotiators to better manage their emotional response to the dispute.⁴⁰² These contradictory findings are likely caused by negotiators' differing communication orientations.⁴⁰³ Negotiators with cooperative tendencies often build relationships and engage in collaboration regardless of the medium used.⁴⁰⁴ By contrast, non-cooperative negotiators may be inclined to express more hostile emotions when using richer media such as face-to-face interaction.⁴⁰⁵ As such, the mediator may not be able to reliably predict the ease of facilitating mutual understanding across different communication modes.⁴⁰⁶ Thus, the degree of emotional expression and competitive behavior hinges on the parties' individual orientation towards disputes.⁴⁰⁷

Turning to another integral mediator goal, managing safety concerns and power imbalances, both the research and current mediation practice affirm the importance of avoiding face-to-face interactions when there are concerns about physical violence or emotionally abusive communications.⁴⁰⁸ A leaner medium, like videoconferencing, may also help reduce perceived power disparities and diminish the intended effect of intimidating

³⁹⁸ *Id.*

³⁹⁹ Croes et al., *supra* note 252; Kiesler & Sproull, *supra* note 252; Byron, *supra* note 252.

⁴⁰⁰ *See* Croes et al., *supra* note 252.

⁴⁰¹ *See* Stuhlmacher & Citera, *supra* note 95.

⁴⁰² *See* Ebner, *supra* note 51.

⁴⁰³ *See* Geiger, *supra* note 50.

⁴⁰⁴ *See* Swaab et al., *supra* note 106.

⁴⁰⁵ *Id.*

⁴⁰⁶ *Id.*

⁴⁰⁷ *Id.*

⁴⁰⁸ *See* Rossi et al., *supra* note 284; Applegate et al., *supra* note 304; Sternlight & Robbennolt, *supra* note 1.

behavior.⁴⁰⁹ Notwithstanding these benefits, the disputants' expectations of privacy may be lower for videoconferencing or audio calls than for an in-person mediation because of the ease of illicit recording.⁴¹⁰ Although participants may have greater assurance of physical safety, any perceived lack of confidentiality could undermine their emotional safety.⁴¹¹ Moreover, while leaner modes could diffuse tension and intimidating behavior, they concurrently limit the mediator's ability to effectively manage the interactions between disputants of uneven power.⁴¹² This is due to the limited options the mediator has to urge disputants to cease multi-tasking or to avoid arousing anger when sharing their perspectives.⁴¹³

Finally, the mediator usually seeks to steer parties towards creative and collaborative problem-solving behavior so as to arrive at a consensus.⁴¹⁴ The latest research concerning the impact of communication media on creativity is dismal.⁴¹⁵ The use of videoconferencing compared to face-to-face interaction results in a narrower cognitive focus, hindering creative idea generation.⁴¹⁶ Additionally, where leaner modes like text messaging encourage more hostile emotions and competitive behavior, the resulting lack of a collaborative atmosphere is not conducive for joint problem-solving and the generation of creative solutions.⁴¹⁷

B. IMPLICATIONS FOR MEDIATORS AND DISPUTANTS: HOW TO FIT THE COMMUNICATION FORUM TO THE FUSS

Admittedly, these current trends are likely to evolve in the future amidst the widespread use of videoconferencing in the post-pandemic world.⁴¹⁸ As suggested by social information processing

⁴⁰⁹ See generally Bramsen & Hagemann, *supra* note 99; Ward, *supra* note 292; Heath & Grannemann, *supra* note 293; Codispoti & De Cesarei, *supra* note 293;

⁴¹⁰ See Basch et al., *supra* note 161; Ebner, *supra* note 51.

⁴¹¹ See Basch et al., *supra* note 161; Ebner, *supra* note 51.

⁴¹² See Bond, *supra* note 301.

⁴¹³ *Id.*

⁴¹⁴ See Brucks & Levav, *supra* note 321; COLEMAN & DEUTSCH, *supra* note 191.

⁴¹⁵ See Brucks & Levav, *supra* note 321.

⁴¹⁶ *Id.*

⁴¹⁷ *Id.*

⁴¹⁸ See generally Jeffrey M. Jones, *Remote Work Stable at Higher Rate Post-Pandemic* (Sept. 15, 2023) GALLUP, <https://news.gallup.com/poll/510785/remote-work-stable-higher-rate->

theory, individuals tend to adapt over time to the available communication channels and find suitable ways to build affinity when using leaner media.⁴¹⁹ Nevertheless, it is imperative for current mediation practice to evolve and take into account the fascinating insights offered by the multi-disciplinary research. Broadly, there are two ways in which mediation practice may be informed by the latest research: (1) choosing the most appropriate communication mode to mediate the particular dispute, and (2) adapting mediation interventions to account for disputants' different behavior across different communication media.⁴²⁰

1. CHOOSING THE MOST APPROPRIATE COMMUNICATION MODE TO MEDIATE THE PARTICULAR DISPUTE

As previously mentioned, fitting the mediation forum to the fuss involves two steps that are analogous to Sander and Goldberg's original concept.⁴²¹ An analysis of the "mediation fuss" entails understanding the disputants' primary goals concerning relationship-building, the significant obstacles to settlement, and the likely mediation model.⁴²² The mediator, together with the disputants, may then ascertain which of the five goals outlined in Table 1 are most applicable to the dispute.⁴²³ Second, the relevant goals of the mediation fuss may then be fitted to the corresponding features of the communication forum that are also reflected in Table 1, in order to make a considered decision on the most appropriate mode of communication.⁴²⁴

Reference to the two earlier case studies will illustrate how Table 1 may be utilized to fit the communication forum to the mediation fuss. In the first scenario, a company has advanced a claim against another corporation for supplying defective products. These companies have a longstanding business relationship, and this

post-pandemic.aspx; *The Future of Work After COVID-19 Pandemic*, MCKINSEY GLOB. INST. (Feb. 18, 2021) <https://www.mckinsey.com/featured-insights/future-of-work/the-future-of-work-after-covid-19> (noting that the use of videoconferencing during the pandemic has ushered in a new acceptance of virtual meetings and that virtual meetings are likely to continue).

⁴¹⁹ See Walther, *supra* note 57.

⁴²⁰ See generally Sander & Goldberg, *supra* note 5; Sternlight & Robbennolt, *supra* note 1.

⁴²¹ Sander & Goldberg, *supra* note 5.

⁴²² *Id.* at 50–51.

⁴²³ See *supra* Table 1; see also *id.* at 49–50; *supra* Part IV(A) to (E).

⁴²⁴ See *supra* Table 1; Sander & Goldberg, *supra* note 5, at 54–59.

is the first major dispute they have encountered. The mediator discerns from pre-mediation conversations that both companies seek to maintain or improve their business relationship. At the same time, the mediator learns that a key barrier to settlement is a lack of clear communication among the companies' management personnel, which a recent change of leadership in the supplier company exacerbated. Thus, it is important for the mediator to help the disputants rebuild trust and effectively communicate their perspectives during the mediation to restore the companies' business relationship. Therefore, the first two goals in Table 1 are the most salient.⁴²⁵ Based on the research summarized in the corresponding rows, a richer communication forum will make it easier for the mediator to facilitate the re-building of rapport and trust amongst the parties.⁴²⁶ Furthermore, a richer forum could lead to more accurate detection and transmission of emotions that would enable the mediator to assist the parties in understanding each other's interests and perspectives.⁴²⁷ As such, videoconferencing and face-to-face modes are potentially appropriate forums to facilitate the conveying of perspectives and emotions and to build rapport and trust.⁴²⁸ Nevertheless, the mediator should be aware of the drawbacks of using videoconferencing vis-à-vis in-person mediation, including greater fatigue, reduced focus, and difficulty in regulating the conversation smoothly, which could undermine the goal of building rapport.⁴²⁹ Because of these limitations, a face-to-face mediation would be the best forum if feasible for all parties.⁴³⁰

The second scenario involves a couple undergoing divorce who are primarily concerned with the division of their matrimonial assets and comparatively less interested in rebuilding their relationship when attending mediation. The mediator may have discerned the parties' overarching aim is to amicably negotiate a dissolution of their marriage, and that one spouse has significant safety concerns. In such circumstances, the goals of encouraging problem solving behavior, managing power imbalances, and being mindful of accommodating safety concerns in Table 1 are most

⁴²⁵ See *supra* Table 1 illustrating the first two goals of rapport and trust.

⁴²⁶ See *supra* Table 1; see generally van der Toorn et al., *supra* note 212; Sprecher, *supra* note 86; Yuan et al., *supra* note 211; Damen et al., *supra* note 213; Bailenson, *supra* note 79; Shockley et al., *supra* note 82; Tomprou et al., *supra* note 75; Bos et al., *supra* note 228; Nauss, *supra* note 234.

⁴²⁷ See generally Lewicki & Tomlinson, *supra* note 162.

⁴²⁸ See generally Nauss, *supra* note 234.

⁴²⁹ See generally Bailenson, *supra* note 79.

⁴³⁰ *Id.*

pertinent.⁴³¹ Referring once again to the rows corresponding with these goals, in-person shuttle mediation, that keeps parties physically separate, would seem suitable to address the safety concerns.⁴³² Alternatively, parties may utilize videoconferencing because of its equalizing effect, although the mediator must be weary of potential difficulties in regulating the parties' interactions in joint sessions.⁴³³ Some mediators also use asynchronous text messaging in conjunction with videoconferencing in online dispute resolution systems because the parties may have more thoughtful interactions when given more time to respond in text messaging.⁴³⁴ In short, it would be prudent to conduct the mediation using a leaner medium than face-to-face interaction to increase the psychological distance between the parties and, consequently, encourage a greater sense of safety and the likely display of less hostile behavior.⁴³⁵

It is evident from these two case studies that the parties' goals and the primary obstacles to settlement will vary considerably according to the nature of dispute.⁴³⁶ In divorce mediations, the parties are highly likely to seek a clean break to their relationship instead of improving their marriage.⁴³⁷ In labor disputes, there could be major power disparities between the employer and employee that the mediator will have to manage.⁴³⁸ In business-to-business disputes, there could be comparably less acute concerns about safety, and greater interest in preserving business relationships or in recouping financial losses.⁴³⁹ Several other disputant goals may include the need to express emotions; the desire to clarify different views of facts; or the need to arrive at creative, non-monetary solutions.⁴⁴⁰ Consequently, the mediator must be astute in recognizing the prominent goals of parties and impediments to an agreement, fitting the fuss to the appropriate communication mode.⁴⁴¹

⁴³¹ See *supra* Table 1.

⁴³² See generally Basch et al., *supra* note 161; Holtzworth-Munroe, *supra* note 185; Rossi et al., *supra* note 284.

⁴³³ See Basch et al., *supra* note 161.

⁴³⁴ See Amy J. Schmitz, *Evolution and Emerging Issues in Consumer Online Dispute Resolution (ODR)* 1, 4 (Ohio St. Legal Stud. Rsch. Paper, No. 714, 2022).

⁴³⁵ See Stuhlmacher & Citera, *supra* note 95; Milne, *supra* note 282.

⁴³⁶ See Sander & Goldberg, *supra* note 5, at 51–52.

⁴³⁷ See BECK ET AL., *supra* note 190.

⁴³⁸ See Ward, *supra* note 292.

⁴³⁹ See Hollander-Blumoff & Tyler, *supra* note 177.

⁴⁴⁰ See Walther, *supra* note 57; Holtzworth-Munroe, *supra* note 185; Brucks & Levav, *supra* note 321.

⁴⁴¹ See Sander & Goldberg, *supra* note 5, at 51–52.

As Sander and Goldberg aptly observed, the original concept of fitting the forum to the fuss offers a valuable framework to clarify the parties' interests involved and promote a thoughtful weighing of these interests.⁴⁴² In a similar vein, mediators who engage in a thoughtful analysis to fit the contours of the dispute to the appropriate communication forum will be spurred to consider overarching goals and impediments to settlement with the disputants.⁴⁴³ Instead of using the most common or convenient forum of communication, the mediator must be proactive in designing a mediation process customized to the parties' needs that is most likely to lead to a successful outcome.⁴⁴⁴

2. ADAPTING MEDIATION INTERVENTIONS TO ACCOUNT FOR DISPUTANTS' DIFFERENT BEHAVIOR ACROSS DIFFERENT COMMUNICATION MEDIA

Apart from assisting the mediator in choosing the proper communication forum, the above framework also benefits the mediator in making adaptations to mediation strategies. Consider for instance the first case study of two companies seeking to preserve their longstanding business relationship through attempting mediation. Suppose the mediator and parties decide to use videoconferencing because of the constraints of meeting in person. Because rapport-building and facilitating mutual understanding of perspectives are important goals in the mediation, the mediator could adapt the process to overcome constraints imposed by the videoconferencing medium.⁴⁴⁵ For example, because parties may need more time to establish rapport, the mediator could convene pre-mediation meetings with each party to start building relationships even before the mediation commences.⁴⁴⁶ Furthermore, to ensure the parties understand each other's emotions and perspectives, the mediator could be deliberate

⁴⁴² *Id.*

⁴⁴³ *Id.*

⁴⁴⁴ *Id.*

⁴⁴⁵ See generally van der Toorn et al., *supra* note 212; Sprecher, *supra* note 86; Yuan et al., *supra* note 211.

⁴⁴⁶ See Robin Gise, *Effective Virtual Mediation: 10 Lessons after 10 Months*, JAMS ADR BLOG (Feb. 4, 2021), <https://www.jdsupra.com/legalnews/effective-virtual-mediation-10-lessons-8381257/>; see also Marco Imperiale & Meyer J. Sankary, *Mediation before the Mediation: The Important Role of a Pre-Mediation Session*, MEDIATE.COM (Oct. 25, 2022), <https://mediate.com/mediation-before-the-mediation-the-important-role-of-a-pre-mediation-session/>.

in summarizing and reframing the parties' sharing, as well as finding different ways to acknowledge the personal dimension of mediation to "rehumanize the participants."⁴⁴⁷ The mediator could also explore the possibility of having several videoconferencing sessions and sufficient breaks to ensure the parties' attention and creative ability are not severely diminished.⁴⁴⁸ Other adaptations to mediation strategies could include the combination of several modes of communication.⁴⁴⁹ A mediation could first commence face-to-face and be subsequently continued on videoconferencing and e-mail communication.⁴⁵⁰ This arrangement helps to build rapport between the mediators and the parties in the initial stages of mediation.⁴⁵¹

In addition, the parties' individual characteristics may inform the adaption of mediation interventions to the videoconferencing forum.⁴⁵² As Schneider and McCarthy explain, it is important to understand the default preferences of each party when choosing a communication forum for dispute resolution.⁴⁵³ According to communication orientation theory, non-cooperative negotiators may be inclined to express emotions when using videoconferencing rather than leaner media such as text messaging.⁴⁵⁴ Hence, if the mediator discerns one or more disputant is more predisposed to competitive behavior, the mediator may need to proactively regulate the parties' interactions to preempt the exchange of hostile communications or the use of coercive tactics.⁴⁵⁵ Interventions in this vein could include setting and enforcing stricter mediation ground rules to obtain parties' commitment to the use of respectful behavior and language.⁴⁵⁶

In summary, fitting the parties' goals and settlement obstacles to the different features of each communication medium

⁴⁴⁷ See Baum, *supra* note 258, at 34 & 42.

⁴⁴⁸ See Clare Fowler, *Zoom Fatigue Uncovers Mediators' Secret Weapon*, MEDIATE.COM (Sept. 5, 2020), <https://mediate.com/zoom-fatigue-uncovers-mediators-secret-weapon/>; see also Frank Burke, *In an ODR World, Is the Time Right to Switch to Multiple Shorter, Staggered Mediation Sessions?*, MEDIATE.COM (Jul. 21, 2020), <https://mediate.com/in-an-odr-world-is-the-time-right-to-switch-to-multiple-shorter-staggered-mediation-sessions/>.

⁴⁴⁹ See Sander & Goldberg, *supra* note 5, at 50–51.

⁴⁵⁰ See Baum, *supra* note 258, at 41.

⁴⁵¹ See Drolet & Morris, *supra* note 215.

⁴⁵² See generally Schneider & McCarthy, *supra* note 41.

⁴⁵³ *Id.*

⁴⁵⁴ See Swaab et al., *supra* note 106.

⁴⁵⁵ See Stuhlmacher & Citera, *supra* note 95.

⁴⁵⁶ *Id.*

helps the mediator to be cognizant of constraints and advantages of the chosen medium, and to proactively consider strategies to overcome difficulties as well as harness benefits inherent in each communication mode.⁴⁵⁷

C. LIMITATIONS AND DIRECTIONS FOR FUTURE RESEARCH

As with any other framework, there are limitations to the proposed approach of fitting the communication forum to the mediation fuss. First, it is increasingly recognized that each communication medium is not static in its qualities and resulting human behavior.⁴⁵⁸ Consequently, it is critical to gain a deeper understanding of the factors and human characteristics that impinge on individuals' behavior in their use of communication modes.⁴⁵⁹ Some potentially significant factors include communication style, personality type, characteristics of the negotiation task, partner similarity, and familiarity with the medium.⁴⁶⁰ Future insights on salient factors moderating the impact of communication media on mediation and negotiation outcomes will assist mediators in making more informed decisions with the disputants on the preferred mode of communication.

Secondly, in light of the changes to negotiators' communication preferences over the last few decades, it is plausible that earlier research findings may not be valid. The availability and use of different communication media have dramatically increased over six decades; therefore, it is questionable whether earlier studies reproduced later would yield similar results.⁴⁶¹ The same question also arises with respect to the validity of pre-pandemic research on communication media.⁴⁶² The widespread use of videoconferencing and other remote modes of communication during the pandemic is unprecedented.⁴⁶³ Have the preferences and familiarity with negotiators' virtual modes of communication been so radically modified so that the earlier research findings are rendered invalid? Have individuals learned to adapt to leaner forms of communication to establish rapport without necessarily needing more time? The most recent studies concerning Zoom fatigue appear to contradict conventional media richness theories suggesting videoconferencing

⁴⁵⁷ See generally Sander & Goldberg, *supra* note 5.

⁴⁵⁸ See Walther, *supra* note 57.

⁴⁵⁹ See Pesendorfer & Koeszegi, *supra* note 117.

⁴⁶⁰ See Geiger, *supra* note 45, at 50.

⁴⁶¹ *Id.*

⁴⁶² See Bramsen & Hagemann, *supra* note 100.

⁴⁶³ *Id.*

is a richer medium than using the audio medium.⁴⁶⁴ On the contrary, videoconferencing appears to cause more challenges in focus and may not enhance rapport.⁴⁶⁵ Such research strongly suggests the acceleration in the use of remote communication modes precipitated by the pandemic casts grave doubt on the continuing relevance of conventional communication theories.⁴⁶⁶ Therefore, further research is needed to verify the relevance of conventional theories on communication media.

Lastly, the conclusions in this article are largely drawn from research concerning negotiation because of the greater availability of such studies compared to relevant research on mediation. Some scholars argue the former findings are instructive for mediators as they provide insights into how disputants' behavior may vary across communication media.⁴⁶⁷ However, the absence of the third person—the mediator—in many of these studies may call into question the exact relevance of these findings to the mediation process, as negotiators may behave differently in the presence of a neutral mediator than when negotiating their dispute without assistance. As such, there is a need to verify the findings in this article specifically in the mediation context.

VII. THE PRESSING NEED FOR MEDIATION PRACTICE AND THEORY TO TAKE INTO ACCOUNT EVOLVING INSIGHTS ON COMMUNICATION MODES

A mediator facilitates negotiation by enabling communication, encouraging problem-solving, and developing an agreement by consensus among the disputants.⁴⁶⁸ The former task of enabling communication is arguably a formidable one in light of the increasing diversity of communication modes and individual responses to different media.⁴⁶⁹ It is also challenging because of its multi-disciplinary nature as these communication skills are informed by a wide range of topics such as psychology, computer

⁴⁶⁴ See Bailenson, *supra* note 79.

⁴⁶⁵ *Id.*; see also Fowler, *supra* note 451.

⁴⁶⁶ See Bailenson, *supra* note 79.

⁴⁶⁷ See Ebner, *supra* note 46 (relying principally on negotiation research to discuss the impact of communication mode on trust in both mediation and negotiation and relying principally on negotiation research); Sternlight & Robbennolt, *supra* note 1 (relying on negotiation and communication studies research studies to suggest the impact of communication mode on several dispute resolution methods including mediation, negotiation and trial adjudication).

⁴⁶⁸ MENKEL-MEADOW ET AL., *supra* note 10, at 91.

⁴⁶⁹ See Geiger, *supra* note 50.

science, and negotiation.⁴⁷⁰ The studies in these different contexts show significant variations in individual interactions across different modes of communication.⁴⁷¹ Yet most mediation theory and practice are historically and largely premised on face-to-face interactions; it was the pandemic that precipitated the addition of “online” mediation skills to many mediation curriculum.⁴⁷² The mediation process, which depends heavily on facilitating optimal communication, must be thoughtfully designed and adapted to take into account these findings.⁴⁷³

This article sought to contribute to this need for innovation in communication forum design and selection by underscoring the fundamental goals of interest-based mediation including establishing rapport and trust; facilitating mutual understanding of perspectives and interests; ensuring procedural justice; managing power imbalances and safety concerns; and encouraging joint problem-solving behavior. This article distilled the salient research on communication media and discussed how the use of different media impacts these mediator goals. Finally, it proposed a framework informed by the latest research to fit the communication forum to the fuss within mediation. This framework aims to encourage mediators to consider in consultation with parties the most appropriate communication mode to convene mediation for the particular dispute, and to thoughtfully modify their mediation techniques and tools to suit the relevant communication mode. Hopefully this discussion will generate more conversations leading to the evolution of mediation theories that are well-informed by evolving insights on communication media.

⁴⁷⁰ *Id.*

⁴⁷¹ *Id.*

⁴⁷² See Bramsen & Hagemann, *supra* note 100.

⁴⁷³ See generally Sander & Goldberg, *supra* note 5.