TRUST AS A FACTOR IN DESIGNING EFFECTIVE MEDIATION PROCESSES

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Dispute Resolution professionals consider themselves designers of sorts. To do a good job, one must weigh the factors and people involved to build a custom process that will work best for the parties and increase the chances of resolution. To approach every process the same way, *i.e.*, each party is trotted off to caucus with the unlikely chance of seeing the opposing side for the rest of the day, is common but not always well suited for the cause. Much is written about factors that must be considered when designing the right process path to settlement, whether the location, timing, people involved and the list goes on. The concept of "trust" is necessarily embroidered into all aspects of what is called "Dispute System Design" ("DSD"). Trust is a critical de-escalator of conflict and dispute. Various opportunities for building trust are present in any mediation and must always be on the radar of the mediator. Opportunities include trust for the process, trust for the mediator, and trust among parties, each demanding different design elements depending on the type of dispute.

This paper will examine the concept of trust and its role in DSD, specifically in the context of mediation. The first step of analysis is to define the term "trust". Diverse disciplines are surveyed to find a common, working definition. Next, the importance of the concept of trust in dispute resolution will be explored through the eyes of experienced dispute resolution design professionals. As the last step of preliminary, background analysis, the following two questions will be asked: 1) "Can one mediate in the absence of trust?", and drawing on other disciplines and scientific study, 2) "Can trust be manufactured?"

Armed with this first-tier analysis, the second part of this paper explores mediation design, bearing in mind the key design opportunities for building trust, looking specifically at: i) the process; ii) the mediator; and iii) the parties. Each one will be teased out with examples of the changing considerations necessary in the varying types of processes described above, from large-scale to small and interpersonal.

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What is Trust?

Trust is a concept routinely analyzed across a broad range of disciplines, including law, political science, business, psychology and sociology. While definitions are bespoke to each discipline, there are key similarities. Primarily, the concept of trust involves one party having positive expectations about the intentions and actions of another party. There is usually some element of risk, vulnerability, and interdependence involved.[1] An early contributor to the theory of trust, Deutsch, noted trust tends to breed *cooperation*, while suspicion tends to breed *competition*. When a person is perceived as having nothing to gain from untrustworthy behaviour, he is more likely to be trusted.[2]

In business, law, and often in international politics, a calculative model is most common. Contracts, deterrence and sanctions are key ingredients. Building trust among parties is said to foster economic efficiency.[3] Some theorists argue that this cannot be the purest form of trust. They contend that true trust levels can hardly be high if parties are relying solely on other parties refraining from undesirable behaviour for fear of sanction or reprisal.[4]

From a sociological perspective, trust is measured on a continuum over time, rising and falling depending on relationship dynamics. This type of trust is referred to as relational trust. History of the relationship and intervening events shape the depth of trust.[5]

Psychologists tend to look at individual personalities and attribution issues. In his book *The Conflict Resolution Toolbox*, mediator Gary Furlong provides a simple, but useful definition of trust as "having positive expectations about another's motives and intentions toward us where potential risk is involved". He then drills down into the concepts of "risk", "motives and intentions", and "attribution" of blame, explaining that people tend to hold themselves in the most positive light, attributing blame to others. We tend to have a "self-serving or egocentric bias", which in turn has a "profound effect on trust".[6]

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1. D. Rousseau, S. Sitkin, R. Burt et al., "Not So Different After All: A Cross-Discipline View of Trust" (1998), 23 *Academy of Management Review* 393-404 ("*Not So Different After All*").
2. M. Deutsch, "Trust and Suspicion" (1958), 2 Journal of Conflict Resolution 265-279.
3. Kenneth J. Arrow, *The Limits of Organization* (New York: Norton, 1964) at 23.
4. *Not So Different After All*, *supra*, footnote 1.
5. *Ibid.*

Furlong gives the example of an employer firing an employee and the employee relying on "Situational Attribution", perceiving the termination as a need to reduce staff because the company is close to bankruptcy. Low levels of blame and higher levels of trust remain in those situations because the blame is less on the individual and more on the situation.[7]

"Intrinsic Nature Attribution" is another common justification model for conflict, which is also not extremely disruptive to trust in a relationship because a person is holding another person's intrinsic nature responsible for the problem. Furlong gives the example of when a manager is stepping on people's toes simply because she is a workaholic. People may be angered by the situation, but trust is maintained throughout this conflict because the issue is attributed to the manager's personal nature rather than a breakdown of trust.[8]

Finally, he names "Intentional/Hostile Attribution" as the most destructive to trust where, for example, a manager degrades employees in front of a team to "teach them a lesson" or fires an employee to make himself look good and ensure his own promotion.[9]

Lewicki and Wiethoff use a hybrid of the different meanings and separate trust into two types, "Calculus Based Trust" (CBT) and "Individual Based Trust" (IBT). CBT is based on the premise that people are trustworthy only when there are factors of deterrence present. This is a clinical approach that would be used in a business setting (as described above), *i.e.*, if one company or employer acted in one way, the other party would act as expected to avoid negative fallout. IBT, on the other hand, is present when a individual tries to understand another's interests and bind together around a common theme or principle, instilling a feeling of accountability. The employment relationship seems to foster both types of trust. Managers tend to trust subordinates more when IBT exists. Given IBT is more personal in nature, it requires intentional work of individuals in a business relationship to build in that extra dimension.[10]

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6.   G.T. Furlong, *The Conflict Resolution Toolbox* (Mississauga: John Wiley & Sons Canada Ltd., 2005) at 135-136 ("*The Conflict Resolution Toolbox*").

7.   *Ibid.*, at 133.

8.   *Ibid.*, at 133.

9.   *Ibid.*, at 135-136.

10. R. Lewicki and C. Wiethoff, "Trust, Trust Development, and Trust Repair" in M. Deutsch and P. Coleman eds., *The Handbook of Conflict Resolution* (San Francisco: Jossey-Bass, 2000), at 88-90 and 96-99.

All theorists tend to agree that relational trust may be more resilient than CBT because exchanges are likely to be terminated in CBT once a breach has occurred.

The Importance of Trust in Mediation

Why does trust matter? Salem notes that no other factor is more important in most types of mediation than the ability to build trust. In referring to collective bargaining negotiations, Alan Gold stated, "The key word is 'trust.' Without it, you're dead. Without it, stay home!"[11]

> When trust levels are high, parties are less defensive and more willing to share information with other parties at the mediation table and in private sessions with the mediator – information that may be crucial to finding a mutually acceptable solution.[12]

Dispute resolution scholars and practitioners report that acts of reciprocity and kindness spawn feelings of trust and that the most effective negotiators are cooperative in an effort to build trust.[13]

Schneider points out that a communicative, accommodating, flexible and caring attitude can promote similar behaviour. Conversely, adversarial behaviour is actually of greater risk and less effective.[14]

To de-escalate conflict, mediators try to build trust among parties. Honest communication among parties fosters trust. Kelman notes that distrust is self-perpetuating and important to stem in order to get parties to the table. To start to rebuild relationships, he like other theorists highlights the importance of symbolic gestures to demonstrate a new resolve and a willingness toward change and peace.[15] Some theories refer to this initiative as a "Confidence Building Measure" or "CBM".[16] Kelman suggests the role of mediator as a "third party repository of trust", and explains how the

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11. R. Salem, "Trust in Mediation", *ADR Times* (2011), at www.adrtimes.com/library/2011/7/22/trust-in-mediation.html ("*Trust in Mediation*").
12. *Ibid.*
13. H. Raiffa, *The Art and Science of Negotiation* (Massachusetts: Harvard University Press, 1982) at 344; and G.R. Williams, *Legal Negotiation & Settlement* (St. Paul: West Publishing Co., 1983) at 91.
14. A.K. Schneider, "Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style" (2002), 7 Harv. Negot. L. Rev. 143 at 167, 175, 185.
15. H. C. Kelman, "Overcoming the Psychological Barrier: An Analysis of the Egyptian–Israeli Peace Process" (1985), 1 Negotiation J. 213 at 217.
16. D. Landau and S. Landau, "Confidence-Building Measures in Mediation" (1997), 15 Mediation Q. 97 at 99.

mediator must first foster trust of herself among parties, then the process, and then each other. To that end, he suggests exploratory discussion with a low level of commitment can build enough trust to have parties interested in moving to the next step of resolution.[17]

Also along these same lines of layering processes toward building a foundation of trust, Furlong further draws the distinction between "Interpersonal Trust" among individuals and "Procedural Trust". Procedural trust denotes a clinical trust of the process rather than that of the other people *i.e.*, court supervised visits of children after a divorce when parents cannot agree to access. He encourages mediators to employ the building of procedural trust first as a stepping stone in the process to return to a deeper interpersonal trust.[18]

Mediating when Trust Is Lacking

Can mediators function when they lack the trust of one or more parties? The mediation may not be as effective but it is certainly possible. Sometimes a party will agree to come to the table in the hopes that the mediator will educate, influence or control the other party's behaviour or perhaps just buy time.[19]

George Adams notes that there are times when parties simply must mediate as their best alternative to adjudication. However, they are *not* willing or able to share all of their information. He suggests creative solutions, like working around conscious dishonesty or omission of truth, otherwise corrosive to trust building, with financial incentives. For example, if the value of the claim is X but one party cannot provide information to prove amounts necessary, it can be mutually decided that the omitting party's bottom line expectation will be lessened slightly to accommodate for that missing information.[20] The net result of this strategy is that factors necessary for trust are acknowledged to be lacking, blame is owned, and out of this type of honesty a new form of trust is built, albeit procedural and perhaps not interpersonal.[21]

A mediator can also build in features to the ongoing process to promote the evolution of trust. For example, divorcing partners may

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17. H.C. Kelman, "Building Trust Among Enemies: The Central Challenge for International Conflict Resolution" (2005), 29 *International Journal of Intercultural Relations* 639 at 644-646 ("*Building Trust Among Enemies*").
18. *The Conflict Resolution Tool Box*, *supra*, footnote 6 at 144.
19. *Trust in Mediation*, *supra*, footnote 11.
20. G.W. Adams Q.C., *Mediating Justice: Legal Dispute Negotiations* 2nd ed. (Toronto: CCH Canadian Limited, 2011) at 14.
21. *Ibid.* at 91-95.

be required to exchange T4s after the first negotiation, which will help frame a true financial picture and save guesswork, skepticism and mistrust. In a situation lacking in any trust, perhaps an agreement can be signed or a court order issued. This way, the parties are given marching orders in ink. Over time, the performance of the terms of agreement build up a new bank of reputational capital and trust among the parties.[22]

The Science: Can You Synthetically Manufacture Trust?

Acknowledging the true benefits of trust and accepting that distrust can be self-perpetuating, the natural progression is to explore the ability to manufacture trust. Here we can look to scientific research ranging from game theory, neuroscience, the animal kingdom and beyond.

A study by Kiyonari et al. analyzed a series of simulations and experiments on American and Japanese negotiators. Research was conducted through negotiation games, concluding that "trust does not beget trust". Specifically, they found that when a game participant knew that he was trusted, this did not necessarily result in that person exuding more trustworthy behaviour.[23]

One might go further still and try to synthetically manufacture trust. Neuroscience is an area given noteworthy attention in the world of conflict resolution. Factors like the softness of the chair and visual factors in the room are said to have an effect on a person's mind, emotions, and willingness to concede and be generous. Soft chairs and a warm environment are said to produce better results.

The presence of oxytocin in the room is purported to create feelings of trust. "Oxytocin is widely believed to be responsible for prompting empathy, compassion, trust, generosity, altruism, parent-child bonding, and monogamy in many species, including human beings."[24] Of course, providing chemical enhancements like oxytocin to participants of a mediation would be an interesting logistical and ethical challenge.

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22. N.H. Rogers *et al.*, *Designing Systems and Processes For Managing Disputes* (New York: Wolters Kluwer Law & Business New York, 2013) at 242 ("*Designing Systems*").
23. T. Kiyonari et al., "Does Trust Beget Trustworthiness? Trust and Trustworthiness in Two Games and Two Cultures: A Research Note" (2006), 69 Social Psychology Q. 270 at 278-280.
24. K. Cloke, "Bringing Oxytocin into the Room: Notes on the Neurophysiology of Conflict" in *The Dance of Opposites: Explorations in Mediation, Dialogue, and Conflict Resolution Systems Design* (Dallas: Goodmedia, 2013).

In the animal kingdom, we learn that animals who gaze directly at each other are said to have a higher degree of trust. Lessons may be drawn, like the importance of having parties face each other at some point during the mediation rather than relying too heavily on caucusing. It also speaks to seating design and begs the question whether it is harmful or effective to have parties sit directly across from each other to have the chance to look into the other's eyes. Perhaps, seating can be changed at certain points. In some situations, parties may benefit from having distrusting parties sit side by side to lessen the adversarial vibe. Later, they may be repositioned for a meal or coffee break, for example, to allow eye contact.[25]

Trust in the Mediation Process-Common Dimensions

In contrasting a number of varying evaluations for dispute design processes, Bussin highlights that the key is to start by asking what the *raison d'être* was for the mediation and then work backwards to figure out if the design was effective.[26] This idea of context is critical when understanding how trust fits into mediation design process.

In fashioning a conflict resolution model for a particular dispute, a designer must first consider the reason for the process. Is the matter highly sensitive and personal? Is it seemingly more clinical and economic based, if even on the surface? Perhaps, it is an institutional issue required to service a large number of people in an organization and necessitates a one-size-fits-all standardized set of procedures.[27] In all of these situations, there will be unique reasons for the process, a unique design, and a unique set of stakeholders.

Knowing that differences will always exist, commonalities for design should be understood as the underpinning to any process. Trust, itself, as a concept, is multi-dimensional in its applicability to the design of a mediation. Designers and stakeholders must have trust for at least three critical elements in any mediation process:

1) *The Mediator* - Are the parties trusting of the mediator? Do they come with pre-conceived notions or expectations of the mediator's knowledge or role? Are these expectations perhaps culturally based (culture including ethnicity

25. A. Bayliss and S. Tipper, "Predictive Gaze Cues and Personality Judgments: Should Eye Trust You?" (2006), 17 *Psychological Science* at 514-520.
26. N. Bussin, "Evaluating ADR Programs: The Ends Determine the Means" (2000), 22 Adv. Q. 460.
27. D.B. Lipsky, R.L. Seeber and R. Fincher, *Emerging Systems For Managing Workplace Conflict: Lessons From American Corporations For Managers and Dispute Resolution Professionals* (San Francisco: Jossey-Bass, 2003).

or industry)? Is the mediator able to build trust? How long will it take? Do the parties trust the mediator to be the designer and facilitator of the process?

2) *The Process* - Do parties understand the reason for the process, the steps, and potential outcomes? Are they comfortable with the inherent expectations of the process, be they emotional, informational (confidentiality concerns), or physical (how parties are situated *i.e.*, together in one space or in caucus rooms, seating when together, breaks, food etc.)?

3) *The Parties* - Are the parties trusting of each other or is a breakdown of trust the core reason for the conflict? Are some of the stakeholder parties less critical to the trust building process than others? For example, whether the plaintiff's lawyer is trusting of the defendant's lawyer could be less critical than if the plaintiff and defendant trust each other. This may not be the case if the lawyers' egos overtake the situation, and perhaps hijack the process.

If trust was present among the parties and then lost, is it possible to rebuild a level of lost trust? How much time will it take? If it is not possible, can a process be built around accepting lack of trust among the parties, focusing on procedural trust? Are there cultural issues at play? Are there third parties (or "ghosts at the table"[28]) tangential to the core problem that have helped spin the core issue out of control? If so, can they be managed as stakeholders?[29]

As an expansion of these ideas, opportunities and challenges specific to each element are fleshed out below, working through the three example types of processes mentioned: large-scale; litigation (commercial or largely financial in nature); and interpersonal dispute (litigation or otherwise):

Trust for the Mediator

Reputation of the mediator is key to earning trust. The mediator may be associated with an organization or association that has reputational capital, as an excellent starting point. Even more important, a mediator's individual reputation is key. Culture plays a

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28. An expression to denote the influence of others not present in the mediation room but potentially powerful to the outcome.
29. R.S. Burt and M. Knez, "Kinds of Third-Party Effects on Trust" (1997), 7 *Rationality and Society* 255-292.

role in this piece. In North America, the preference tends to be to have a neutral mediator, fair, not conflicted, effective at facilitating the mediation and then terminating the relationship at the end of the mediation. This person is valued as an objective outsider.

Conversely, in other parts of the world or within certain cultures, people prefer mediators to be someone historically connected to both sides. This person can help smooth feelings and build bridges between the parties, leveraging off an innate trust that pre-dates the mediation process. The relationship is enduring, not ending when the mediation session is terminated. Moore refers to this as "social network mediators".[30]

Reputation is also related to the mediator's experience. What brought the mediator to the table? It may be one's experience and technical knowledge of the issue that help to build credibility and trust, if the parties are seeking an advisory or evaluative mediation. Conversely, perception of impartiality from lack of specific knowledge may be important to the parties fostering a sense of equal treatment. The mediator's credentials can be declared at the outset to ensure full information to all involved and avoid future misunderstandings.

Behaviour of the mediator is also critical. Effective mediators tread very carefully, gauging what seems to be working and which tactics seem counterproductive. Once a mediator loses the trust of the parties, it is hard to recover.[31] A best practices guide written as an instructive source for training court-connected mediators in Florida suggests that a combination of candour, creativity, flexibility, calm, humour and use of "soft language" can help a mediator build trust. These traits are noted as the hallmark signs of a successful mediator, whether or not, as the authors note, this is truly something able to be taught or somewhat innate to the individual.[32]

The mediator should position herself as a "third-party repository of trust", building that trust slowly by pursuing light exploratory discussion with a low level of commitment until the parties comfort level increases.[33]

There are some instances when people meet and instantly feel a sense of trust, through feeling respected and sharing common values

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30. C. Moore, *The Mediation Process* (San Francisco: Jossey-Bass, 1996) at 42.
31. *Trust in Mediation*, *supra*, footnote 11.
32. S. Raines, T. Hedeen and A.B. Barton, "Best Practices for Mediation Training and Regulation: Preliminary Findings" (2010), 48 Family Ct. Rev. 541 at 542.
33. *Building Trust Among Enemies*, *supra*, footnote 17 at 644-646; *The Conflict Resolution Toolbox*, *supra*, footnote 6 at 144.

with the other. Generally, deep trust is best built over time. As such, I would expand upon the definitions of trust above by adding the element of "time".

$$\underline{\text{Positive Expectations} + \text{Risk} + \text{Interdependence } x \; \textit{TIME} =}\;\; \text{T R U S T}$$

To overcome a lack of long durations of time, Martin Teplitsky describes the "burning bush" strategy for mediators. A mediator/arbitrator once explained to him that just as the Israelites were persuaded that Moses was a true prophet based on the biblical story of the burning bush, so too do stakeholders need to believe in the magic of the mediator. Teplitsky recommends speaking with each party before the mediation, at which point at least one low-lying fruit or easy access point will often reveal itself. Specifically, this might be a misunderstanding or something both sides would concede. He suggests working hard and immediately to resolve that issue. By showing the parties at the outset that you have already found a solution to a seemingly intractable issue, some level of instant trust can often be built.[34]

For different types of processes, the *modus operendi* and demeanor of the mediator will naturally be different. In a large-scale, institutional-type process, the mediator may have the goals of the organization as a factor to balance with a set of personal and legally binding ethics. The mediator will have to take special care to guard against conflict in this regard. For example, working for an organization overrun with a high volume of complaints, the mediator may be mandated to operate in the interests of time. She must then strike a balance between her integrity to mediate properly and to complete assignments expeditiously.

In a mediation struck as part of a litigation process, the mediator may or may not have particular experience in that area of law. A mediator is free to choose a facilitative or directive style. If already trained in an area of law, there may be a propensity toward being too directive and steering the parties towards her view of "justice". On the other hand, not having experience in the area of the law in question may make the mediator's job more difficult in terms of building trust among the lawyers.

In a highly sensitive interpersonal dispute, a mediator will need to pay close attention to minding personal feelings of the parties, without appearing to be selecting one over the other. Small changes in tone or choice of wording can be disruptive to the flow of the trust building process. For example, parties may mistakenly perceive bias

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34. M. Teplitsky, *Making a Deal: The Art of Negotiating* (Toronto: Lancaster House, 1992) at 72-73.

if the mediator goes around the table in a plenary session exploring ideas and responds with "Okay" to most people's comments and "Excellent!" to others. Each party must be given sufficient "air time" to speak.[35]

All of this said, Stimec and Poitras[36] point out that trust for the mediator is only one element of DSD and it is possible that too much time can be spent on this consideration. Their empirical research concludes that building trust for the mediator is key to success at the outset of the mediation process. However, there is a threshold, at which point a basic level of trust has been reached and the mediator can shift focus back to the key issues of the dispute. The correlation between success of the mediation and trust for the mediator plateaus or becomes less relevant.

i) Trust for the Process

More often than not, the mediator will be both the designer and facilitator of the process. To effectively build trust for the process, the mediator must ask herself why the process was created and how to effectively communicate that mandate to the parties. She must contemplate sensitivities, potential gaps in knowledge, and even appropriate tone of voice to deliver the message effectively.

Consideration starts with the issue in dispute, the possible stakeholders and the history of the relationship among the stakeholders. The agenda and flow of the day must be set out, contemplating emotional and physical comfort. The situation may necessitate shuttle diplomacy, face-to-face negotiations or a hybrid of both. Breakout rooms may be needed. Food and drink, timing, rules of engagement, and breaks are all factors. As noted above, science tells us that soft chairs and a warm environment may be helpful to trust building, but the individual personalities of the stakeholders and issue at hand will inform the extent to which certain settings would be appropriate.[37]

Structurally, the process may demand more than just mediation, as in the case of med-arb. It may be a mediation that begins as facilitative and ends evaluative. As another possibility, it may begin as a direct negotiation with a silent mediator sitting in the corner of the room before facilitation occurs. The possibilities are endless.

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35. *Designing Systems*, *supra*, footnote 22 at 371.
36. J. Poitras and A. Stimec, "Building Trust With Parties: Are Mediators Overdoing It?" (2009), 26 Conflict Resolution Q. 317-331.
37. D. Gollan, "Variations in Mediation: How-and Why-Legal Mediators Change Styles in the Course of a Case" (2000), *Journal of Dispute Resolution* 41 at 41; *Designing Systems*, *supra*, footnote 22 at 373.

The *raison d'etre* comes into play again. For example, building trust for a large-scale institutional process has a long list of implications. The cookie-cutter methods used are often intended to build trust and consistency but can also backfire and have the opposite effect. By creating a transparent process there should be more certainty for the way that events will unfold. However, the impersonal nature of any large-scale model often robs the parties of a sense of personal investment by the other stakeholders involved.

Building trust for this model will entail explaining the rationale behind the system. The mediator may give generic examples of situations in which positive results were achieved through the process, own the disadvantages, and explain how the mediator will manage around the challenges. For example, a stakeholder's concern about becoming "a number in the system" can be managed by taking time to build a personal rapport, and keeping notes of personal conversations to reflect back to at the next touch point in the process.

A fairly standard litigation, with a primarily financial focus, poses its own set of challenges in building trust for the process. Mediators may have had numerous experiences dealing with a similar type of dispute, *i.e.*, dealing with any one of Canada's large investment dealers in wrongful dismissal claims or mediating between insured parties and claims adjusters in personal injury matters. Naturally, the mediator and perhaps the lawyers may go into the mediation with an expectation of the process. All of the 100-plus mediations they attended prior to that one may have settled at around the same place and they may know that one of the stakeholders usually walks in and announces the bottom line or tends to go three rounds before settling, for example. The design is somewhat predetermined through habitual behaviour.

The plaintiff may be new to the process and hope for feelings and interests to be shared in caucus, plenary sessions, etc. To meet this interest, the mediator may choose to start afresh and fashion a new process to be communicated to all parties. Alternatively, she may have to educate the plaintiff on the historical patterns, *i.e.*, at some point the defendant will get instructions for a final number, at which point the defendant might leave as they historically have. Strategies can be designed to expect and/or manage around that possibility. The mediator will need to explain the process and build trust in the events that are likely to unfold without tainting the explanation or opportunity with biases from prior experience. At the same time, sharing as much experiential knowledge as possible to manage the

parties' expectations can positively advance the process of building trust.

In the case of a sensitive interpersonal dispute, the mediator must pay careful attention to explaining the process as voluntary, neutral and confidential. Of course, these are essential ingredients to any mediation but ones that may need to be repeated a number of times in a personal litigation where strong emotions are at play. A set of rules, whether explicit or implied, will need to be adhered to throughout the process so that neither party feels the other is favoured in any way.

ii) Trust Among the Parties

The greatest design challenge is to build trust between or among the parties, the reason being that the task is actually to *re-build* trust. Chances are that some level of trust brought the parties together in the first place and that trust was corroded, or perhaps destroyed, causing or as a result of the dispute. The optimist's view of this conundrum is that some level of trust was there and built over time, so if the mediator can strike the right chord she may be able to convince the parties that they are deserving of each other's trust again. Once trust exists, a huge part of the dispute is unlocked and resolution may be within reach.[38]

The pessimist's view is that, once lost, trust is very hard to regain. When designing a process, the mediator would have to consider the history very carefully and consider the best way to tease out the first delicate layer of trust and build on that. Mediators can influence parties positively or negatively about each other, often using the caucus process as an effective tool.[39]

Looking at the process, the mediator may decide to caucus or meet all parties together but consciously keep discussion light and away from stressful or conflictual topics. Deciding to seat parties adverse in interest side-by-side or face-to-face may be a good strategy in some situations, while inappropriate in others. The mediator will have to consider the specific dynamics in a more personal situation to assess whether having people sit in another room or "safe zone" for introductions might work best.

In most designs, caucus will be essential in building trust; the mediator is able to show empathy while also maintaining impartiality and the perception of impartiality.[40] The mediator

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38. *Trust in Mediation, supra*, footnote 11.
39. M. Khachaturova and D. Poimanova, "The Role of Mediation Strategies in Solving Interpersonal Conflicts" (2015), 33 Conflict Resolution Q. 35 at 48.

will first need to spend time ensuring trust for her and the process and then slowly tease out the underlying tension and cause of mistrust between the two parties. She may want to deliberately try to encourage at least one positive sentiment about the other party and ask for permission to take that one message back to the other side. This would be in line with Kelman's suggestion of a symbolic gesture. It may be unrelated to the contentious issue. It might be a gesture rather than a sentiment, like agreeing to eat in the same room.

Salem outlines helpful ideas for mediators to build trust among parties:

> In considering how to gain the trust of the parties, it may help to reflect upon the qualities and behaviors of the people you trust the most. For example, I find it easiest to trust people who (a) treat me with dignity and respect; (b) are like me; (c) behave as though they like and care about me; (d) don't hurt me and protect me from being hurt by myself or others; (e) have no interests that conflict with mine; (f) listen to and understand me; (g) help me solve my problems when I ask them to do so and (j) are reliable and do what they promise to do in a timely manner. Applying some of these principles to mediation, some mediators can earn trust in several key ways:
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> - Treat the parties equally, with respect and dignity at all times.
> - Create an environment that makes the parties feel comfortable and safe.
> - Let each party know the mediator is listening to them, understands their problem and how they feel about it, cares about their problem, and can serve as a resource to help them resolve that problem.
> - Show that the mediator has no stake in the outcome of the dispute that will prevent the parties from reaching an agreement that serves each of their interests.
> - Never fix blame, put down, or judge the parties, or tell them what they must do.
> - Ask non-threatening, open-ended questions.[41]

Again, looking at the different design models, there will be variances in how these ideas are carried out. Large-scale institutional type mediation and most litigation mediation will require attention to professionalism, fairness and even-handed dealing with parties and *perception* of fairness. Administratively, the job will include ensuring a clear understanding of both parties' interests and perhaps record keeping, especially in a large-scale situation. Careful

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40. J. Poitras, "The strategic use of caucus to facilitate parties' trust in mediators" (2013), 24 *International Journal of Conflict Management* at 23-39.
41. *Trust in Mediation*, *supra*, footnote 11.

attention must be paid to true stakeholders and people tangential or perhaps disruptive to the process.

In the instance of interpersonal mediation, all of the above factors apply, with a layering of extra sensitivity for the raw emotions involved at a depth much greater than most. Particular attention must be paid to history, relationship breakdown and any threads of consensus or common goals. Truthful sentiments, though hurtful, may need to be exchanged among the parties to allow them to build back trust.[42]

Of course, with all of this in mind, there is also the element of culture. Ting-Toomey suggest that some cultures (*i.e.*, some Asian and Arab cultures) value hierarchy and family status to build trust, whereas others view people as equal and are more influenced by charisma and personal credibility (*i.e.*, Australian and Danish cultures). The former tend to be less conversational and find the latter too wordy.[43] Of course, these are generalizations and, it must be remembered, communication styles and preferences vary by individual across cultural lines as well. My own contention is that culture is not at all restricted to ethnic diversity or place of origin but rather equally, if not more, informed by upbringing and life circumstance.

Nevertheless, the mediator will need to consider these variables and the interplay of culture among the parties. It may be that the parties are from different cultural backgrounds and a key to building back trust is to teach each side to respect the other's differences. On the other hand, the mediator may have a different culture to the parties and will need to tread carefully in managing the people in the room in accordance with their cultural norms.

Conclusion

In designing an effective mediation process, mediators must make a conscious effort to build trust for the mediator, the process and amongst the parties. This task necessitates an understanding of the meaning of trust being related to positive expectations, a level of risk, and interdependence, strengthened over time. Trust may be able to be manufactured, whether scientifically or through sensitive attention to the issues in conflict, stakeholders and personalities. If building trust proves difficult, mediation is possible in its absence

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42.   M. Minow, "Between Vengeance and Forgiveness: South Africa's Truth and Reconciliation Commission" (1998), 14 Negotiation J. 319 at 334.
43.   S. Ting-Tooney, *Communicating Across Cultures* (New York: Guilford Press, 1999) at 223.

with the goal of slowly building trust through clinical, procedural strategies, not expecting interpersonal trust prematurely.

Designers must carefully assess the parties' needs and histories, looking for a fitting process, and the right mediator for the role. Process demands will be different depending on the size and shape of mediation, ranging from large scale to the other end of the spectrum being a small interpersonal dispute. Each mediation is like a snowflake having a different shape, size and requiring a delicate touch in its handling. The designer's role is to remain cognizant of de-escalation strategies while ensuring each process is designed bespoke to the user's needs and desired outcomes. Building trust helps to de-escalate conflict and must be carefully considered in any design.