

Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking

Janice Nadler[†]

ABSTRACT

E-mail has recently become a popular mode of communication for lawyers negotiating deals and conducting settlement discussions. But the obvious conveniences of e-mail as a negotiation medium can blind users to its pitfalls. The impoverished nature of the e-mail medium can lead to misunderstandings, sinister attributions, and ultimately, negotiation impasse. How can lawyers make use of the advantages of e-mail for negotiation while overcoming its disadvantages? One solution consists of a very simple insurance measure: small talk. In the empirical demonstration described in this Article, law students each negotiated a commercial transaction with another law student at a different university using e-mail as the mode of communication. Negotiators who engaged in a brief, getting-to-know-you phone conversation built substantial rapport that resulted in positive social and economic benefits for both parties. This initial small talk by telephone made subsequent e-mail interaction proceed more smoothly because the early creation of rapport helped the negotiators approach the negotiation with a more cooperative mental model, thereby trusting in each other's good intentions. This, in turn, led to a successful negotiation that concluded with a contract, and engendered positive feelings about one another as well as expectations of successful dealings in the future. By contrast, negotiators who did not engage in small talk were over four times more likely to reach an impasse, and ended up feeling resentful and angry about the negotiation.

[†] Associate Professor, Northwestern University School of Law; Research Fellow, American Bar Foundation. For advice and comments, I thank Chris Guthrie, Russell Korobkin, and participants at the 2002 Annual Meeting of the Law & Society Association in Vancouver. I am grateful to Amanda Dykema-Engblade and Cristina Lane who provided excellent research assistance. I thank the American Bar Foundation and the Dispute Resolution Research Center at Northwestern University for financial support.

The Article concludes by discussing implications and recommendations for lawyers who use e-mail to negotiate.

Would an Oral or written communication be best?
If the first what mode is to be adopted to effect it?

George Washington¹

INTRODUCTION

When George Washington sought James Madison's advice about the best mode of communication to use when negotiating with the Senate, his array of options was quite limited by today's standards. Yet the import of Washington's query has grown over time, because we now have a larger number of communication options available. E-mail, in particular, is a dominant mode of communication for lawyers who are negotiating deals and settlements.² But there is growing concern among lawyers and legal scholars that there are potential pitfalls associated with the use of e-mail for important communications like negotiations. Until now, these concerns have focused on issues such as confidentiality,³ privacy,⁴ and lack of formality.⁵ This Article highlights and discusses a very different issue regarding the widespread use of e-mail in negotiations: the possibility that the use

1. Letter from George Washington to James Madison, August 5, 1789, *quoted in* Adam Nagourney, *My Dear Sir: Letters by a Reluctant Commander*, N.Y. TIMES, Dec. 1, 1999, at E1. Nagourney reports that Washington was seeking Madison's advice regarding the Constitutional provision that "[the President] shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided two thirds of the Senators present concur. . ." U.S. CONST. art. II, § 2, cl. 2. Washington sought to make a treaty with the southern Creek Indians, but needed the advice and consent of the Senate to do so. Washington's query to Madison, therefore, sought Madison's opinion on the best mode of communication for Washington to use in his negotiations with the Senate.

2. *E.g.*, Daniel C. Eidsmoe, *On-Line Dispute Resolution*, in 2 ALTERNATIVE DISPUTE RESOLUTION 30, 30.4 (Anne V. Swanson & Susan M. Yates eds., 2001). This chapter was specifically designed to instruct practicing lawyers on on-line dispute resolution, signaling the legal profession's increasing use of the Internet as a medium for negotiation.

3. *See, e.g.*, RONALD D. ROTUNDA, *LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY* § 7-2.4 (2002-2003 ed. 2002) (ethics opinions regarding lawyers' use of unencrypted e-mail to communicate with clients are split, although most opinions have concluded that use of e-mail does not waive the attorney-client privilege).

4. *See* Leonard T. Nuara et al., *How the Internet Applies to Your Practice*, in WHAT LAWYERS NEED TO KNOW ABOUT THE INTERNET: POWERFUL STRATEGIES AND PRACTICAL USES 7, 32-39, 92-99 (PLI INTELLECTUAL PROP. COURSE, HANDBOOK SERIES No. G-685, 2001) (advising lawyers of the privacy concerns raised by transmitting sensitive client information via e-mail).

of e-mail inhibits negotiation or compromises the quality of agreements themselves.

This Article reports findings from an empirical study that addressed the question of whether the use of e-mail can hinder negotiators' abilities to craft mutually-beneficial negotiated agreements. Based on these findings, I argue that there is indeed reason for worry when lawyers — especially lawyers who have not worked together in the past — use e-mail to try to close an important deal or settle a contentious dispute. As I discuss in detail below, the absence of social cues in e-mail communication can lead to unwarranted suspicion, blame, and ultimately, negotiation impasse. Does this mean that lawyers should avoid e-mail at all costs when engaging in negotiations? In this Article, I demonstrate empirically that there is a simple way to avert the escalation of negative emotion, miscommunication, and eventual impasse that can characterize e-mail negotiations. Indeed, the study discussed here confirms what every Persian rug merchant knows when he insists that his customer sit down for a cup of tea prior to talking business: engaging in small talk prior to negotiating can set the stage for an atmosphere of trust and communication that can ultimately create value for both parties in the negotiation. This Article begins by discussing research regarding how e-mail and face-to-face communication differ, highlighting various advantages and disadvantages of e-mail. I then discuss the role of rapport in negotiation. I argue that because negotiation often involves interpersonal conflict, rapport between negotiators acts as a social tranquilizer, preventing negotiators from becoming agitated. Next, I report the results of an empirical study, which tested whether a rapport-enhancing intervention could alleviate the miscommunication and social friction associated with e-mail. I conclude by discussing implications of the research and offering recommendations for lawyers who use e-mail to negotiate.

I. E-MAIL V. FACE-TO-FACE COMMUNICATION

E-mail is now an integral part of law practice. Legal news sources regularly publish columns advising lawyers how to use e-mail

5. See William F. Swiggart, *Enemy by E-Mail*, BUS. L. TODAY, May/June 2002, at 32, 34 (arguing that problems arise when “parties allow a lack of formality encouraged by the immediacy of e-mail to blur the distinctions among the roles of client, lawyer, opposing party and opposing counsel”).

most effectively and warning of various pitfalls in e-mail communication.⁶ Indeed, a single e-mail message written by an in-house Arthur Andersen attorney reportedly was the basis for the criminal liability of the company for obstruction of justice in the Enron investigation.⁷ Despite these potential drawbacks, at least one commentator has asserted that e-mail is now the dominant mode of communication for lawyers.⁸ Some pro bono organizations view e-mail as an important new tool for encouraging lawyers to perform pro bono work.⁹ Courts have begun to send notices and orders to attorneys via e-mail instead of U.S. mail.¹⁰ There is a growing body of case law regarding the legal status of e-mail messages in the statute of frauds,¹¹ the role of e-mail communications in establishing personal jurisdiction,¹² and whether e-mail communications between lawyers in a single firm are considered published material for the purpose of stating a claim for libel.¹³ On-line mediation is becoming an increasingly common

6. See, e.g., Jay Sullivan, *Lawyers and Technology: A Crash Course in Writing Effective E-Mails*, 229 N.Y.L.J. 5 (Feb. 4, 2003) (describing lawyers' "love-hate" relationship with e-mail); Frederick Hertz, *Don't Let Your Case Get Lost in the E-Mail*, 23 LEGAL TIMES, Aug. 19, 2002, at 20 (warning that e-mails between lawyer and client can fall into the hands of opposing counsel); Swiggart, *supra* note 5.

7. Tom Fowler & Lauren Bayne Anderson, Business, *Lawyers Fear Legal Impact of Andersen*, HOUSTON CHRON., June 25, 2002, at 1. Andersen in-house counsel wrote an e-mail message to an Andersen partner advising her client about how to word an internal memo regarding the Enron investigation. It is tempting to speculate about the fate of Arthur Andersen had the in-house attorney decided to pick up the telephone rather than memorializing her advice in an e-mail message.

8. Hertz, *supra* note 6.

9. William J. Dean, *Pro Bono Net: Technology and Sharing Ideas, Materials, Strategies*, 228 N.Y.L.J. 3 (Nov. 4, 2002) (describing how e-mail helps to coordinate distribution of pro bono cases to volunteer attorneys).

10. See Charles Toutant, *U.S. Court to Start Faxing Notices; Next Step Is Electronic Case Filing*, 170 N.J.L.J. 833 (Dec. 9, 2002).

11. See, e.g., *Shattuck v. Klotzbach*, No. 011109A, 2001 WL 1839720, at *2-3 (Mass. Super. Dec. 11, 2001) (holding that the typed name at the end of an e-mail message is indicative of the party's intent to authenticate, and e-mail messages are thus capable of satisfying the statute of frauds).

12. See *Hall v. LaRonde*, 66 Cal. Rptr. 2d 399, 400 (Cal. Ct. App. 1997). "[T]he long arm of the Internet reaches from California to New York. . . . [T]he use of electronic mail and the telephone . . . may establish sufficient minimum contacts . . . to support personal jurisdiction." Cf. *CompuServe, Inc. v. Patterson*, 89 F.3d 1257, 1266 (6th Cir. 1996) (defendant's electronic business relationship, and subsequent threatening e-mail and web postings created sufficient contacts with the state for establishing personal jurisdiction). See generally, David D. Tyler, *Personal Jurisdiction via E-mail: Has Personal Jurisdiction Changed in the Wake of Compuserve, Inc. v. Patterson?*, 51 ARK. L. REV. 429 (1998).

13. See Julia D. Gray, *E-Mail's No Conduit for Libel, Firm Says*, FULTON COUNTY DAILY REP., Oct. 29, 2002.

method for resolution of disputes that arise in e-commerce.¹⁴ The prevalence of e-mail in legal practice is in some sense predictable, given its clear advantages: the ability to use e-mail to communicate with clients, co-counsel, opposing counsel, and even colleagues within the same office eliminates the need for people with hectic schedules to coordinate a time and place to meet or to coordinate a time to speak on the phone.

The benefits of e-mail for lawyers are especially evident in negotiation. Whereas in the past lawyers were forced to arrange a series of face-to-face meetings with opposing counsel to conduct settlement discussions or to discuss the terms of a deal, the availability of communication technology such as e-mail allows lawyers to negotiate “on the fly” without the need to set aside special days and times to talk with other lawyers involved in the deal or dispute. Because many negotiations between lawyers take place over a period of days, weeks, or months, e-mail affords the advantage of allowing each negotiator to reply to proposals at his or her own convenience, rather than coordinating availability with the counterpart.

Beyond convenience, e-mail affords certain strategic advantages. The lag time inherent in e-mail enables negotiators to take time to plan their next negotiating move, and to carefully craft their communications before sending them. E-mail also has the capacity to transmit complex, precise, quantitative information, which can be crucial in complex negotiations. One study of electronically mediated negotiations reports that e-mail discussions generate more complex, integrative proposals compared to face-to-face negotiations.¹⁵

To create an agreement that efficiently captures value for both parties, there must be sufficient exchange of information to identify potential tradeoffs among the available issues.¹⁶ Exchanging offers involving many issues has proven to be a more effective method for generating integrative agreements than resolving issues one-by-one. The ability to transmit complex offers and integrative proposals is

14. See generally, ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION* 19 (2001). See Janice Nadler, *Electronically-Mediated Dispute Resolution and E-Commerce*, 17 NEGOT. J. 333, 346 (2001) (discussing various dispute resolution systems that operate in cyberspace, such as Squaretrade (partnered with eBay), ClickNsettle.com (insurance claims), Cybersettle.com (insurance claims), Mediate-net (family law), and Internet Neutral (commercial contracts)); Eidsmoe, *supra* note 2; Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55 (2001).

15. See Michael Morris et al., *Schmooze or Lose: Social Friction and Lubrication in E-mail Negotiations*, 6 GROUP DYNAMICS 89, 91 (2002).

16. See HOWARD RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 148-65 (1982).

especially important in the context of transactional negotiations, in which the issues often are numerous and intricate. Despite the importance of discussing issues simultaneously, face-to-face negotiations tend to progress on an issue-by-issue basis¹⁷ due to the limited “baud rate” of face-to-face conversation and conversational norms of brevity.¹⁸ In contrast, e-mail negotiators can and do make complex offers involving packages with multiple issues.¹⁹ E-mail communications also offer negotiators a chance to convey complex messages without the threat of being interrupted or the need to squeeze one’s message into the cadence of the conversation.

At the same time, however, e-mail can be a hazardous form of communication. Statements made in e-mails often come across as abrasive or negative simply because they are not embedded in the shared context that face-to-face communicators experience.²⁰ Face-to-face contact contributes to smooth communications because, although seldom consciously recognized, people rely heavily on nonverbal signals to help them conduct social interactions. Important behavioral, cognitive, and emotional processes are set into motion when people interact in person. Face-to-face negotiation allows people to develop rapport — the feeling of being “in sync” or “on the same wavelength” with another person.

In negotiation, rapport is a powerful determinant of whether people develop the trust necessary to engage in the kind of information exchange needed to reach integrative agreements.²¹ Nonverbal (body orientation, gestures, eye contact, head nodding) and paraverbal (speech fluency, the use of “uh-huhs,” etc.) behaviors are key to building rapport.²² When the person with whom we are negotiating sits at a greater distance, with an indirect body orientation, backward lean, crossed arms, and little eye contact, we feel less rapport than when the same person sits with a forward lean, an open body posture, and

17. See Morris et al., *supra* note 15, at 91.

18. See HERBERT P. GRICE, *STUDIES IN THE WAY OF WORDS* 22-41 (1989).

19. See Morris et al., *supra* note 15, at 91.

20. Sara Keisler & Lee Sproull, *Group Decision Making and Communication Technology*, 52 *ORGANIZATIONAL BEHAV. AND HUM. DECISION PROCESSES* 96-123 (1992). On the other hand, some commentators have posited that e-mail communication has the benefit of reducing the feasibility of counter-productive posturing in negotiation, such as feigned anger or boredom, or storming out of the room. See, e.g., Lynn A. Epstein, *Cyber E-Mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?*, 36 *TULSA L.J.* 839, 842 (2001).

21. See Morris et al., *supra* note 15, at 91.

22. See Jon E. Grahe & Frank J. Bernieri, *The Importance of Nonverbal Cues in Judging Rapport*, 23 *J. NONVERBAL BEHAV.*, 253, 255 (1999).

maintains steady eye contact. Without realizing it, people involved in face-to-face interaction tend to mirror one another in posture, facial expression, tone of voice, and mannerisms. This phenomenon, known as social contagion, is the basis for the development of rapport between people.²³ On the surface, it might seem that mimicking would be extremely annoying — almost like a form of mockery. The type of mimicry that is involved in everyday social encounters, however, is quite subtle — people do not usually recognize when it is happening. At the same time, the effects of social contagion are very powerful. When two people are mirroring one another, their movements become a choreographed dance. To the extent that our behaviors are synchronized with those of others, we feel more rapport, and this increases our trust in those with whom we communicate.

As a communication mode, e-mail effectively silences the music that drives the social contagion dance. E-mail negotiators are deprived of cues from the other person's body language (e.g., "She is frowning, so I know she doesn't like my offer"), as well as cues from the other person's voice (e.g., "He is laughing so that remark was clearly meant sarcastically"). Other social cues that we routinely use in face-to-face communication but are missing from e-mail communication include tone of voice, facial expression, head nodding, and mimicry of facial, vocal and postural movements. In a bargaining context, the impoverished nature of the e-mail medium makes it difficult to establish a feeling of interpersonal connection with the other person, which in turn can lead to misunderstandings, sinister attributions, and ultimately, negotiation impasse.²⁴

II. THE ROLE OF RECIPROCITY IN NEGOTIATION

The choice of communication medium is largely a contextual one: e-mail is better suited to some negotiations than to others. Negotiations between people who already know one another might be particularly well-suited for e-mail. When people know each other they tend to be more cooperative generally and in negotiations specifically.²⁵

23. See, e.g., Aimee L. Drolet & Michael W. Morris, *Rapport in Conflict Resolution: Accounting for How Nonverbal Exchange Fosters Cooperation on Mutually Beneficial Settlements to Mixed-Motive Conflicts*, 36 J. EXPERIMENTAL SOC. PSYCHOL. 26 (2000) (where face-to-face negotiators created more joint gain than side-by-side negotiators in a simulated strike negotiation).

24. See Morris et al., *supra* note 15, at 90.

25. See generally ROBERT B. CIALDINI, *INFLUENCE: SCIENCE AND PRACTICE* 136-70 (3d ed. 1993) (we are more likely to grant requests to others whom we like); George F. Loewenstein et al., *Social Utility and Decision Making in Interpersonal Contexts*, 57

For example, in the context of legal settlement negotiations, Johnston and Waldfogel examined whether the existence of a prior relationship between opposing counsel would affect the likelihood of settlement in civil lawsuits.²⁶ After examining thousands of cases, they found that cases were resolved more quickly and were less likely to go to trial when opposing counsel had faced each other in the past than when the attorneys did not know each other.²⁷ The authors concluded that when attorneys have repeated interactions, they learn how to communicate more accurately with one another, which promotes the sharing of crucial information.²⁸ The elimination of information asymmetries allows attorneys who know each other to converge on a settlement that is perceived as acceptable to both sides.

The Johnston and Waldfogel study does not resolve the question of why attorneys who have faced one another in the past would be more willing to share private information, especially in light of the adversarial context of their prior interactions. Instead of cooperatively sharing information, we might predict instead that frequent adversaries would become even more adversarial over time, leading them to hide information. One explanation for Johnston & Waldfogel's findings is the power of reciprocity. The idea that reciprocity flows from relationships — even adversarial relationships — is an important one for understanding e-mail negotiation dynamics, where social cues are scarce and rapport is difficult to establish. In *Bowling Alone*, Robert Putnam argues that social networks have value because they incline people to engage in reciprocity, or mutual aid.²⁹ For example, talking to other parents involved in a youth soccer league can lead to the learning of valuable information, such as the existence of a job opening or a proposal before the city council regarding historic preservation. Neighbors who talk to each other may engage in mutually beneficial arrangements such as keeping an eye on each others' houses or trading dog-sitting duties. Gem traders who are part of a tight social network are better able to trade diamonds

J. PERSONALITY & SOC. PSYCHOL. 426, 432-33 (1989) (when negotiators like one another, they prefer that the other person receive an equal share of the bargaining surplus).

26. Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence From Federal Civil Litigation*, 31 J. LEGAL STUD. 39 (2002).

27. *Id.* at 59.

28. *Id.*

29. ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 134-37 (2000).

without incurring transaction costs such as testing purity.³⁰ Relationships among members of social networks (variously defined) create opportunities for information exchange, reciprocity, and cooperation. These opportunities are quite apart from the nature of the relationships in the networks. As Putnam points out, it is not necessary that the people in these networks be friends or even like one another. The important point is that people are connected.

The reciprocity that flows from relationships helps to explain Johnston & Waldfogel's findings that lawyers who frequently face one another are better at settling cases together than lawyers who are complete strangers. In the context of negotiation, interacting with someone who is within a social network to which you belong has potential advantages over negotiating with a complete stranger.³¹ There is an expectation of reciprocity present within a social network that is not present when interacting with someone outside our network.³² One obvious reason is that often we care more about people within the network — in a social network where people are friendly and like each other, each person is concerned about the well-being of other members of the network.³³ Concern for the other, however, seems an unlikely explanation for why litigation adversaries — who often interact in the context of highly contentious and decidedly unfriendly relationships — are more successful negotiators.³⁴ Fortunately, feelings of friendliness toward and liking of the other person are not necessary for developing reciprocity expectations. Quite apart from altruistic concerns, sharing a social network improves the flow of information.³⁵ Achieving information flow in negotiation is a key step in finding the right combination of issues, and options within those issues, to achieve an outcome that is profitable for both sides.³⁶ In the absence of information flow, negotiators are likely to fail to capture the entire cooperative surplus available.³⁷ Information flow allows negotiators to put a set of options on the table that maximizes the joint value of the agreement.³⁸

30. Lisa Bernstein, *Opting Out of the Legal System: Extralegal Contractual Relations in the Diamond Industry*, 21 J. LEGAL STUD. 115 (1992).

31. See Loewenstein et al., *supra* note 25.

32. See PUTNAM, *supra* note 29.

33. See Loewenstein et al., *supra* note 25.

34. Johnston & Waldfogel, *supra* note 26.

35. See PUTNAM, *supra* note 29.

36. See LEIGH THOMPSON, *THE MIND AND HEART OF THE NEGOTIATOR* 68-69 (2nd ed. 2001).

37. *Id.*

38. *Id.*

Information flow in negotiation is rarely easy to establish, owing to what has been called the “negotiator’s dilemma.”³⁹ If you share too much private information, or the wrong kind of information, the other negotiator can take advantage by claiming virtually the entire surplus, and leaving you with the prospect of an agreement that is only slightly better than no agreement at all. To be cautious and to make sure the other party does not gain an unfair advantage, a negotiator must hold her cards close to her vest.⁴⁰ But if both parties play it “safe” in this manner then information does not flow, surplus is not captured, and options on the table remain unsatisfying, resulting in a low quality agreement or no agreement at all.⁴¹ Meanwhile, revealing to the other party one’s own preferences and priorities could allow for profitable tradeoffs to be made.⁴²

Some familiarity with one another can help both parties feel more comfortable with the kind of information exchange that promotes an optimal agreement.⁴³ Knowing the other person increases

39. See generally, DAVID A. LAX & JAMES K. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* (1986).

40. In addition, lawyers are also torn between the competing interests of establishing a reputation as a tough bargainer (and impressing their clients) while trying to develop beneficial relationships with professionals in their field. *E.g.*, Gary Mendelsohn, *Lawyers as Negotiators*, 1 HARV. NEGOT. L. REV. 139, 141-43, 154 (1996). Similarly, concern regarding informational inequality also poses a dilemma in the litigation discovery process. See Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 516 (1994) (asserting that one party’s cooperative approach to discovery can lead to exploitation by the other party).

41. Carrie Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754, 780, 789-92 (1984) (challenging the assumption that negotiators should hide information because that approach may foreclose better outcomes). Menkel-Meadow proposes that competitive behavior arises in legal negotiation because it takes place “in the shadow of the courts,” and thus negotiators tailor their negotiation to the litigation model and their solutions to those that a court could award. See also Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789, 1806 (2000) (arguing that withholding information increases transaction costs by lengthening the negotiations and raises the risk of impasse by giving the impression that there is no bargaining zone within which the parties can reach agreement); Robert H. Mnookin, *Why Negotiations Fail: An Exploration of Barriers to the Resolution of Conflict*, 8 OHIO ST. J. ON DISP. RESOL. 235, 241 (1993) (noting that the increased costs of adversarial behavior shrinks the size of the pie that the parties have to divide between themselves).

42. ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* 9 (2000).

43. Indeed, studies of business students negotiating via e-mail have found that negotiators exchange more information and are more likely to reach agreement when they have taken steps to get acquainted. See Don A. Moore et al., *Long and Short Routes to Success in Electronically-Mediated Negotiations: Group Affiliations and Good Vibrations*, 77 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 22 (1999); Morris et al., *supra* note 15.

feelings of accountability and reciprocity, even if their acquaintance is extremely minimal. For example, social psychologists Bibb Latane and John Darley tested the idea that a person who has brief verbal contact with another person is more likely to later help when he overhears that person having a seizure.⁴⁴ They set up a situation in the laboratory where the experimental subject interacted briefly with another “subject” (actually a confederate of the experimenter) for less than one minute — engaging in small talk while waiting to participate in the experiment. The subject was under the impression that five other subjects were participating in separate rooms, connected by an intercom system. During the experiment, the subject overhears on the intercom another “subject” (actually the confederate) having a seizure in another room. Subjects who engaged in one minute of small talk with the seizure victim prior to the experiment responded twice as quickly and were twice as likely to respond as subjects who had not engaged in small talk. The precise reasons for this striking difference are not entirely clear. Darley and Latane hypothesized that subjects who met the victim (even though it was just through small talk) felt more accountable to the victim.⁴⁵ The connection that is established between people who engage in brief small talk may be the spark that initiates expectations of reciprocity.

Extending this finding to the e-mail negotiation context, we would expect that engaging in a brief, getting-to-know you chat prior to conducting e-mail negotiations would generate better information flow (as demonstrated by Johnston & Waldfogel) and greater expectations of reciprocity (as suggested by Darley & Latane) than not engaging in prior small talk. Thus, one could infer that engaging in small talk prior to negotiating leads to a greater likelihood of reaching a negotiated agreement. However, this hypothesized result is at odds with the predictions of standard game theory, which would predict that negotiators’ outcomes would not differ on the basis of polite chit-chat prior to negotiating, because such communication constitutes cheap talk — i.e., costless, non-binding, non-verifiable communication.⁴⁶ The hypothesis of non-influence of cheap talk is especially plausible in the case of a brief, getting-to-know you chat conducted prior to negotiating, where the conversation has nothing whatsoever

44. JOHN M. DARLEY & BIBB LATANE, *THE UNRESPONSIVE BYSTANDER: WHY DOESN'T HE HELP?* 107 (1970).

45. *Id.* at 107-109.

46. V. Crawford & J. Sobel, *Strategic Information Transmission*, 50 *ECONOMETRICA* 1431 (1982).

to do with the negotiation, because signaling of private information is absent.

On the other hand, theories of rational choice do not always form the basis for accurate predictions about human behavior. Indeed, from a rational choice perspective, one would also predict the non-influence of a host of other factors that, in fact, have been demonstrated to influence the economic outcomes of negotiation. For example, from the perspective of rational choice, a negotiator's aspiration level should not have any effect on the value of the outcome to that negotiator. Yet, in fact, higher aspiration levels do lead to negotiated outcomes that are more favorable to the party with high aspirations.⁴⁷ In addition, from a rational choice perspective we would predict that revealing one's own reservation price would result in a worse economic outcome for oneself, because the opponent would offer just slightly more than that amount, and the offer would be accepted. Yet, in fact, quite the opposite occurs — when negotiators truthfully (and verifiably) revealed their alternative (information strongly suggestive of reservation price) in a purely distributive negotiation, their opponents gave in more quickly and conceded more than when negotiators did not reveal their alternative. Contrary to rational choice theory, revealing one's own alternative resulted in negotiated outcomes more favorable to oneself than when negotiators did not reveal their alternative.⁴⁸ This result occurs because revealing information can trigger feelings of obligation to be cooperative, resulting in a better deal for the disclosing party.⁴⁹ In other words,

47. See Sally B. White & Margaret A. Neale, *The Role of Negotiator Aspirations and Settlement Expectancies in Bargaining Outcomes*, 57 ORGANIZATIONAL BEHAV. & HUM. DECISION PROCESSES 303, 303 (1994). See also Adam D. Galinsky et al., *Disconnecting Outcomes and Evaluations: The Role of Negotiator Focus*, 85 J. PERSONALITY & SOC. PSYCHOL. 1131, 1134 (2002); Russell Korobkin, *Aspirations and Settlement*, 88 CORNELL L. REV. 1, 3 (2002).

48. Paul W. Paese et al., *Caught Telling the Truth: Effects of Honesty and Communication Media in Distributive Negotiation*, 12 GROUP DECISION NEGOTIATION 537 (2003).

49. *Id.* at 554. The behavioral norm of reciprocity commonly emerges in negotiation. A negotiator will make a concession expecting to receive one in return. Failure to follow the behavioral norm of offering a concession after having just received one increases the likelihood of impasse. See White & Neale, *supra* note 47, at 303 (finding impasses occurred more often when one negotiator had to make larger concessions than the other negotiator in order to reach a deal). See also Jonathan R. Cohen, *When People are the Means: Negotiating with Respect*, 14 GEO. J. LEGAL ETHICS 739, 747, 761 (2001) (advocating respectful treatment in negotiation to create feelings of indebtedness and encourage cooperation). Unfortunately, negotiators who view negotiation as a zero-sum game will likely view these concessions as losses and choose not to engage in such reciprocity. See Mendelsohn, *supra* note 40, at 147. In reality, true zero-sum games are quite rare since generally multiple issues will be in dispute and

revealing information is perceived as an act of good faith, and leads to trust. The trusting party then makes a less extreme demand than she would have in the absence of good faith, leading to a better economic outcome for the disclosing party.⁵⁰ Even more relevant for our purposes, Paese, et al.'s study found that trust was especially important for negotiation via e-mail, compared to face-to-face negotiation,⁵¹ perhaps because trust levels are relatively low in e-mail negotiation in the first place.

To test the idea that in legal e-mail negotiations, substantial rapport can be built through a quick, simple chat, resulting in positive economic and social benefits, I designed and conducted an experiment, which I discuss in detail below. In the experiment, law students who were strangers to one another engaged in a negotiation exercise via e-mail involving the purchase of a new car. Members of half of the negotiation dyads engaged in small talk via telephone prior to beginning negotiations via e-mail. The remaining participants communicated entirely via e-mail. Because of the absence of non-verbal and paraverbal cues in e-mail communication, rapport is difficult to establish and maintain in the absence of an intervention. I hypothesized that the telephone small talk intervention introduced in this experiment would encourage negotiators to establish a small degree of rapport at the outset, and to encourage the reciprocity necessary for information exchange and a higher likelihood of negotiated agreement.

III. THE EXPERIMENT

A. Procedure

The negotiation exercise used in the experiment involved the purchase of a new car. Participants consisted of 146 law students, half of whom were students at Northwestern University School of Law and half of whom were students at Duke Law School. The students participated as part of a class assignment in a Negotiation course. Thirty-five randomly selected Northwestern students were paired with thirty-five randomly selected Duke students and were assigned to the "Small Talk" condition. The remaining thirty-seven Northwestern students were randomly paired with the remaining

parties will value each issue differently, leaving room for trade-offs to be made. See Menkel-Meadow, *supra* note 41, at 784-85.

50. Paese et al., *supra* note 48, at 537. In more precise social psychological terms, trust partially mediated the relationship between information disclosure and economic outcomes.

51. *Id.*

thirty-seven Duke students and were assigned to the "No Small Talk" control condition.

Participants were given confidential role instructions which specified that they were to conduct a two-party negotiation exclusively via electronic mail. Each student received a packet of materials that contained a page of general confidential instructions and guidelines, an e-mail address for their counterpart, and pre- and post- negotiation questionnaires. Participants were given one week to complete the negotiation and questionnaires, and were specifically instructed to not discuss the negotiation or procedures with their classmates.

Unbeknownst to participants in the "No Small Talk" control condition, the participants in the "Small Talk" condition received an additional special instruction: they were to have an initial "getting to know you" telephone conversation lasting five to ten minutes with their partner before they began negotiating.⁵² Directions specified that participants should not talk about business (i.e., the negotiation) in this initial conversation, ensuring that it was a strictly social conversation.⁵³ The goal was to have negotiators "break the ice." Regardless of group assignment, all negotiations took place exclusively via e-mail.

The negotiation itself involved the purchase of a new company car by a manager at a software company. The negotiation contained both distributive and integrative elements. Whereas both parties were motivated to claim as much value for themselves as possible, parties had different priorities; hence concessions by Party A on a given issue could be traded for gains on another issue which Party A values more but Party B values less. This type of logrolling increases the joint value of the agreement, creating more profit that can be allocated between the two parties.

The parties' priorities were quantified in payoff schedules provided in the exercise and are reproduced in the Appendix. The

52. These instructions were labeled "confidential" and participants were specifically cautioned not to discuss their role instructions with anyone else. Thus, participants were not aware that some of them were instructed to conduct a telephone call and some were not.

53. After the telephone call participants recorded the date, time, and duration of the phone call. After all negotiations were completed, participants engaged in classroom discussion of the results. These discussions confirmed that all phone calls were brief and strictly social.

Pareto-optimal agreement (one that yields the maximum joint outcome) yielded 30,000 points jointly.⁵⁴ If negotiators failed to integrate their interests, and also did not realize their compatible interests, they divided a total of 21,600 points. There were many other possible solutions negotiators could reach. Both parties also had explicitly defined best alternatives to a negotiated agreement (i.e., the value of the outside option they would take should they fail to come to an agreement in the negotiation). In case of such a negotiation impasse, each party would obtain 12,000 points, for a joint outcome of 24,000.

B. Results

“Small Talk” negotiators who had a brief “getting-to-know-you” telephone conversation prior to negotiating via e-mail reached superior economic outcomes and markedly better social outcomes than negotiators who did not talk on the phone. Differences between the “Small Talk” and “No Small Talk” conditions in economic and social outcomes are described below.

1. Economic Outcomes — Small Talk Led to More Negotiated Agreements

“Small Talk” negotiators were over **four times** as likely to reach an agreement as “No Small Talk” negotiators. Only three out of thirty-five “Small Talk” pairs (less than 9%) failed to reach an agreement, whereas fourteen out of thirty-seven “No Small Talk” pairs (nearly 40%) failed to reach agreement.⁵⁵ The high percentage of “No Small Talk” pairs that were unable to reach agreement is especially noteworthy in light of the fact that a positive bargaining zone existed, making it economically desirable for each party to reach a negotiated agreement.⁵⁶ Interestingly, the value of the outcome (measured both in terms of joint outcome and individual outcome) for the pairs that did reach agreement appears to be unaffected by small talk, as indicated in Table 1.

54. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 14-15 (5th ed. 1998) (defining a Pareto-superior allocation as one that “makes at least one person better off and no one worse off”). A Pareto-optimal agreement is an agreement such that any other agreement that makes one party better off would also make at least one party worse off. RAIFFA, *supra* note 16, at 139.

55. This difference is statistically significant. See *infra* Table 1, p. 240.

56. When a positive bargaining zone exists, any deal is Pareto superior to no deal. See Korobkin, *supra* note 41, at 1816-17.

TABLE 1:
ECONOMIC PERCEPTIONS AND OUTCOMES AS A FUNCTION OF
SMALL TALK

	Small Talk			No Small Talk			df	T
	Mean	N	SD	Mean	N	SD		
<i>Economic Outcomes</i>								
Impasse Rate**	8.6%			37.8%				
Mean Joint Score (agreements only)	28312	32	1124	28348	23	1378	53	-0.10
Buyer Score (agreements only)	14578	32	1496	15061	23	1771	53	-1.10
Seller Score (agreements only)	13734	32	1014	13287	23	1492	53	1.32
<i>Economic Perceptions</i>								
Mean Reservation Price	12594	35	843	12604	36	704	69	-0.06
Mean Aspiration	16294	35	1783	16354	35	2206	68	-0.12

** $\chi^2(1) = 9.36$; $p < .01$

An examination of precisely what occurred between negotiators who reached impasse is revealing. Because parties negotiated via e-mail, the transcripts of unsuccessful negotiations indicate the last offer on the table prior to the point at which impasse was declared.⁵⁷ For all three "Small Talk" negotiators that failed to reach agreement, the last offer on the table had a value below the reservation price of one of the parties. In other words, none (0%) of the "Small Talk" pairs walked away from an offer that was more profitable than their outside option. For all three pairs, given the value of the last offer, it is understandable that one of the parties would refuse to agree to it. But the story for the "No Small Talk" pairs was quite different: the value of the last offer on the table exceeded both parties' reservation price for nine out of the fourteen pairs (64%).⁵⁸ Thus, these eighteen negotiators (none of whom engaged in small talk) failed to reach agreement despite the fact that the last available offer would have made all of them better off than impasse.

The success of "Small Talk" negotiators cannot be explained by differences in motivation and ambition. Talking to the other negotiator on the telephone did not result in "Small Talk" negotiators setting higher reservation prices or more ambitious aspirations for themselves as measured prior to the negotiation, compared to negotiators

57. Negotiators were given a strict deadline. Typically, negotiators did not declare impasse until time had run out.

58. It is difficult to assess the statistical significance of the difference between the rate of walking away from a profitable deal in the "Small Talk" (0%) and "No Small Talk" (64%) conditions because the sample size of pairs who reached impasse in the "Small Talk" group (N=3) is low.

who did not engage in small talk.⁵⁹ The striking superiority of negotiation outcomes where negotiators chatted briefly about personal matters on the telephone prior to talking business via e-mail must be attributable to other mechanisms, which I explore in the next section.

2. Social Outcomes

What accounts for the huge differences between the “Small Talk” and “No Small Talk” negotiators in their propensity to reach a mutually beneficial agreement? Prior to negotiating (but after the phone call, if there was one) negotiators indicated on a scale from one to seven (1 = Not at all; 7 = Quite a bit) how “competitive” they were feeling toward their counterpart as they entered into the negotiation. They also indicated how “cooperative” they were feeling toward their counterpart. Negotiators who did not engage in small talk with their counterpart prior to negotiating reported feeling more competitive and less cooperative toward their counterpart than negotiators who did engage in small talk. These differences are illustrated in Table 2.

TABLE 2
SOCIAL PERCEPTIONS PRIOR TO NEGOTIATING AS A FUNCTION OF
SMALL TALK

	Small Talk		No Small Talk		t(69)
	Mean	SD	Mean	SD	
Orientation Prior to Negotiation					
Cooperative**	4.77	1.06	3.88	1.06	3.57
Competitive**	3.84	1.25	4.94	1.26	-3.70

** p < .001

3. Negotiation Processes

Why would negotiators who adopt more cooperative, less competitive attitudes toward the negotiation achieve greater success economically than negotiators who adopt the opposite attitudes? After all, one might expect a negotiator who is too nice and unwilling to be tough to do poorly in a negotiation. By contrast, in this simulation, the cooperative attitude adopted by negotiators who engaged in small talk led them to come away from the negotiation in a position that was substantially more favorable economically than those who did not engage in small talk.

59. See *supra* Table 1, p. 238.

a) *Small Talk Negotiators Shared More Information*

One possible reason for why more cooperative, less competitive attitudes were associated with more successful negotiations is that negotiators who engaged in small talk were better able to exchange the kind of information necessary to reach a mutually beneficial agreement. To test whether this process of mutual information exchange was actually occurring in the "Small Talk" condition, two coders examined the e-mail negotiation transcripts to identify information exchange processes. The coders were blind to the experimental manipulation (i.e., that some negotiators had talked on the phone), and their rate of agreement with each other was within a conventionally acceptable range.⁶⁰ The coders noted each instance that a party shared information about his or her own relative priorities for different issues (e.g., "the radio is more important to me than the power extras"). Consistent with their cooperative mental model of the negotiation process, negotiators who engaged in telephone small talk prior to negotiating exchanged significantly more information relating to their relative priorities on multiple issues compared to negotiators who did not engage in small talk.⁶¹ Thus, negotiators who established initial rapport with a brief telephone chat felt more cooperative in the negotiation and trusted the other negotiator enough to share the kind of information necessary to reach an efficient solution.

b) *Small Talk Negotiators Engaged in More Reciprocity*

In addition to offering more freely their own information about relative priorities, information sharing was reciprocated more often for negotiators in the "Small Talk" condition than for negotiators in the "No Small Talk" condition. That is, compared to negotiators who did not engage in small talk, negotiators who chatted with their counterpart prior to negotiating were more likely to receive multiple issue priority information from their counterpart immediately following

60. Cohen's Kappa = .74. Cohen's Kappa is a measure of inter-rater agreement. See, e.g., Jacob Cohen, *Weighted Kappa: Nominal Scale Agreement with Provision for Scale Disagreement or Partial Credit*, 70 PSYCHOL. BULL. 213 (1968).

61. "Small Talk" condition negotiators exchanged multiple issue information in 17.9% of their messages while "No Small Talk" condition negotiators did so in only 10.2% of their messages. This is a statistically significant difference; $\chi^2(1) = 12.53$; $p < .001$.

their own provision of such information.⁶² Negotiators who engaged in small talk expected more strongly to cooperate, did cooperate by sharing more relevant multiple-issue information, and received more cooperation in return from their counterpart. This pattern of multiple-issue information sharing is necessary for negotiators to avoid impasse by recognizing numerous, mutually beneficial solutions in the negotiation.⁶³ In this mixed motive negotiation, failing to exchange information resulted in negotiators failing to integrate their interests, leaving little or no joint surplus to share.

c) *Small Talk Negotiators Made Fewer Threats*

The negotiation transcripts were also analyzed to examine whether negotiators provided information that related to one's own alternative, because such a reference can be akin to a threat to walk away from the table (e.g., "I can buy a similarly equipped car much more cheaply at another dealership"). Compared to negotiators whose initial contact was strictly business-like, negotiators who engaged in small talk before negotiating were less likely to reference their own alternative.⁶⁴ Thus, in the absence of an initial getting-to-know-you telephone conversation, negotiators assumed a competitive mental model and behaved competitively during the negotiation by making subtle (or not so subtle) threats to walk away from the table.⁶⁵ In sum, negotiators who did not engage in small talk both felt more competitive (as evidenced by their social perceptions prior to the negotiation described in Section 2a) and acted on these competitive inclinations by behaving more competitively in the negotiation.

Recall that threats to walk away from the negotiation table in fact materialized for nearly 40% of the pairs whose members did not have the opportunity to engage in small talk, compared to only 9% of pairs who did chat before negotiating. Table 3 depicts a few excerpts

62. "Small Talk" condition negotiators engaged in immediate reciprocation of multiple issue information in 6.7% of their messages whereas "No Small Talk" condition negotiators did so in only 2.4% of their messages. This is a statistically significant difference; $\chi^2(1) = 10.53$; $p < .001$.

63. See RAIFFA, *supra* note 16, at 148-65; LAX & SEBENIUS, *supra* note 39, at 30-32; Korobkin, *supra* note 41, at 1806; Menkel-Meadow, *supra* note 41, at 812.

64. "Small Talk" condition negotiators referenced their Best Alternative to a Negotiated Agreement (BATNA) in only 12.3% of their messages whereas "No Small Talk" condition negotiators did so in 18.1% of their messages. This is a statistically significant difference; $\chi^2(1) = 6.5$; $p < .01$.

65. Given that there was a positive bargaining zone in this negotiation exercise, walking away from the table would have been an economically inferior outcome to reaching an agreement (within the bargaining zone). See, e.g., Korobkin, *supra* note 41, at 1808-10.

from negotiations in both the "Small Talk" and "No Small Talk" conditions. These quotations illustrate the extent to which negotiators who had an initial brief telephone conversation prior to negotiating continued to engage in small talk as part of the negotiation process itself. By contrast, many of the negotiations that took place in the absence of an initial telephone chat were plagued with misunderstandings that negotiators attributed to the sinister motives of the other party.

TABLE 3
SELECTED QUOTATIONS FROM E-MAIL TRANSCRIPTS

Negotiation #	Small Talk Condition
1	Buyer: "Thanks for your prompt response. . . Thanks for being such a pleasant person to work with."
2	Seller: "Well, deadline time is fast approaching, so I come to you now with what looks like will be my last, full, [sic] offer? and I feel is a fair offer. I pray you can take it, but otherwise, it was nice conducting business with you, and I hope we can still work together at some point in the future, whatever situation that may be."
3	Seller: ". . . sorry to hear that you haven't been feeling well. Did you end up running the last leg of the marathon? Anyway, as I sit here watching the Duke-St. John's game, contemplating your current offer, I have decided to propose the following. . ."
4	Buyer: "Finally, I would like to thank you that we got this deal done so smoothly and quickly. Regarding the occasional misunderstandings which happened on both sides, I think this has to be attributed to the medium that we were dealing with."
	No Small Talk Condition
1	Seller: "I think you misunderstood part of my prior e-mail. . ."
2	Buyer: "I am surprised you are still getting back to me, especially if you do it only to complain about me and not to offer us an alternative. . . So far the only thing I have heard from you are assumptions, complaints and blaming us (your clients) for everything. I am aware that you might have many clients, good for you, just remember that you are here selling something and the competition is furious so you should treat your clients better. Otherwise there are some other options for us." Seller: "From your last e-mail, it sounds to me as if you believe I am trying to take advantage of you and am not taking you seriously. Please let me assure you that is not the situation." Buyer: "OK now I think we at least are talking in the same language, I have been waiting to hear from you."
3	Buyer: "Unfortunately there are some misunderstandings here. It seems that I did not make myself clear the way I should have. Therefore I shall try to clarify the situation. . ." Seller: "Let's not waste anymore time here. My interests have not changed since the beginning of this negotiation. . ."

d) *Small Talk Negotiators Developed More Respect and Trust*

Negotiators who did not chat beforehand ended the negotiation with a substantially different attitude toward both the process and their counterpart than the negotiators who did chat initially. These attitudes are illustrated in Table 4.⁶⁶ Negotiators who did not chat found the process of e-mail communication more difficult. They ended up feeling significantly more angry, annoyed, and cold toward their opponent, as well as less friendly and pleasant, compared to negotiators who had the opportunity to chat with their opponent. These feelings are consistent with the competitive mindset and inferior economic outcomes of negotiators in the “No Small Talk” condition.⁶⁷ The increased cooperation and trust that the telephone chat engendered led to smoother interactions and a friendlier attitude toward the opponent after the negotiation concluded.⁶⁸ This attitude was also associated with respect — negotiators who engaged in small talk formed an impression of their counterpart as significantly more accomplished, skilled, effective, and perceptive than the impression formed by negotiators who did not engage in small talk, as illustrated in Table 4.

Finally, this experiment also measured the extent to which negotiators came away trusting their counterparts. One of the many ways to define trust is the expectation that the other person will cooperate with you when you are in a vulnerable position.⁶⁹ In legal communities, lawyers who face each other in one negotiation often can expect

66. In the interests of brevity, this table omits certain measures in which no significant differences between groups were found. These results are available from the author upon request.

67. Parties' feelings after a competitive, adversarial negotiation are important to consider because “even a ‘win’ will be a loss if the other side is so beaten down or regretful that it will resist complying with a negotiated agreement.” Carrie Menkel-Meadow, *When Winning Isn't Everything: The Lawyer as Problem Solver*, 28 HOFSTRA L. REV. 905, 907 (2000) (advocating that negotiators begin analyzing a dispute by answering the basic journalism questions of who, what, why, when, where, and how).

68. When a relationship between parties has been established, albeit the minor one formed in this experiment, the parties will likely take this relationship into account when negotiating and seek a solution both sides will consider just, resulting in a more positive attitude toward both the outcome and the negotiator. See, e.g., Menkel-Meadow, *supra* note 41, at 817. Alternatively, without this relationship, parties may take a defensive posture and be more distrustful of the opposing side's offers. *Id.* at 775 (labeling this type of behavior “unproductive competition”). This assumption that the opposing side's offers are unfair explains why the negotiators in the No Small Talk condition would choose to walk away from the negotiation even though any deal would have been Pareto superior to no deal. See Korobkin, *supra* note 41, at 1830 and accompanying text.

69. See, e.g., Denise M. Rousseau et al., *Not So Different After All: A Cross-Discipline View of Trust*, 23 ACAD. OF MGMT. REV. 393, 395 (1998) (defining trust as “the

TABLE 4
SOCIAL PERCEPTIONS AFTER NEGOTIATING AS A FUNCTION
OF SMALL TALK

	Small Talk		No Small Talk		t(70)
	Mean	SD	Mean	SD	
<i>Feelings Toward Counterpart</i>					
<i>After Negotiation</i>					
Angry**	1.83	1.10	2.95	1.65	-3.36
Annoyed**	2.76	1.48	4.22	1.93	-3.59
Cold**	2.21	0.99	3.28	1.40	-3.72
Friendly**	4.76	0.99	3.69	1.25	4.01
Pleasant*	4.53	1.04	3.80	1.12	2.86
<i>Perceptions of Counterpart</i>					
<i>After Negotiation</i>					
Accomplished**	4.34	0.55	3.57	1.06	3.85
Skilled**	4.51	0.75	3.65	1.15	3.76
Effective**	4.60	0.77	3.73	1.23	3.45
Perceptive**	4.39	0.88	3.58	1.23	3.19
<i>Communication</i>					
Easy to Communicate**	4.70	1.26	3.45	1.67	3.57
Working Trust* ($\alpha = .85$)	5.17	1.19	4.36	1.53	2.49
Smooth Future Project*	5.40	1.03	4.53	1.48	3.90
Choose Same Partner+	4.94	1.53	4.20	1.77	1.89

* $p < .01$

** $p < .001$

+ $p < .10$

to cross paths again in the future. If trust is eroded during negotiation in one matter, this is likely to affect the way the lawyers approach the negotiation in the next matter when they meet again. To explore the question of whether engaging in small talk prior to negotiating would increase trust, negotiators in this experiment answered two questions relating to trust. First, they were asked to suppose that they and their counterparts were in the position of working together on a future project and to rate how smoothly such a project would go (1 = Not at all; 7 = Very much so). Second, negotiators were asked to imagine that sometime in the future, they were in a vulnerable position in a dispute with their counterpart's firm. Would they prefer to negotiate with the same counterpart, or some other unknown attorney (1 = Prefer unknown; 7 = Prefer same)? Responses on these two items were highly correlated⁷⁰ and were averaged to form a summary variable⁷¹ called Working Trust. As Table 4 illustrates, negotiators who had an initial chat with their opponents left

intention to accept vulnerability based upon positive expectations of the intentions or behavior of another.”).

70. $r = .76$; $p < .01$.

71. $\alpha = .85$.

the negotiation with significantly more trust in their counterparts than did negotiators who did not chat initially.⁷²

C. Discussion

In the negotiation simulation involved in this experiment, a seemingly trivial intervention — a preliminary, brief, and informal chat on the telephone — increased the likelihood that the e-mail negotiations that followed would be characterized by cooperation, information exchange, reciprocity, liking, trust, and ultimately, agreement. These negotiators had the opportunity to establish common ground with the other negotiator through small talk, even if the basis for common ground was exceedingly trivial (e.g., “The weather is nice here in Chicago.” “Yes, it is nice here, too.”). Engaging in small talk enabled negotiators who were strangers to get to know one another and to connect in a fashion that did not spontaneously occur during the process of e-mail exchange. The seemingly inert act of small talk encouraged negotiators to adopt a cooperative mental model in the negotiation, leading to the sharing of crucial information with the other party. Negotiators who engaged in small talk were more willing to take the chance that the other negotiator would reciprocate and share their own private information, which is precisely what happened. This resulted in favorable impressions of the counterpart after the negotiation. Negotiators who engaged in small talk placed their trust in the ability of their counterpart to recognize the mutual benefit of information exchange. When the counterpart successfully recognized these benefits and shared crucial information, their abilities and skills were respected, and they were generally held in high regard.

By contrast, negotiators who did not have an opportunity to chat with their counterpart prior to e-mail negotiation approached the negotiation with a competitive mental model, and either failed to exchange the kind of information that would lead to identification of mutually beneficial solutions, or failed to recognize as beneficial the solutions which arose, leading to greater likelihood of impasse. In the absence of the phone call, the two negotiation counterparts were

72. Similarly, a survey of practicing lawyers found that problem-solving behavior during a negotiation was viewed as highly effective, whereas stubborn, arrogant, or unethical behavior was deemed ineffective, confirming the results of Gerald Williams' parallel 1976 study. Andrea Kupfer Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143, 147 (2002).

complete strangers, never having seen one another or heard one another's voice. Because the other person was, in this sense, an unknown quantity, negotiators could not be sure of the other person's motives. These circumstances were associated with negative impressions of the other person, as evidenced by negotiators' ratings of their opponents as less accomplished, skilled, effective, and perceptive than negotiators who engaged in small talk. In short, negotiators in the "No Small Talk" condition were less likely to reach agreement, which made them angry and annoyed and for which they blamed the other negotiator. By failing to reach agreement, pairs that reached an impasse achieved an outcome that was economically worse than any of the myriad of possible agreements that would have resulted in a profitable outcome for each party. The failure to reach an economically advantageous outcome is even more remarkable when one considers the circumstances under which this occurred — a substantial portion of the "No Small Talk" negotiators who reached an impasse did so despite an offer on the table that would have made both negotiators better off than impasse.

One reason that a cooperative mental model served negotiators well in this simulation (while an overly competitive mental model served negotiators poorly) is that cooperation helped participants solve the "negotiator's dilemma."⁷³ This getting-to-know-you telephone call made e-mail interaction proceed more smoothly by creating rapport before the negotiation began. This rapport helped negotiators approach the negotiation with a more cooperative mental model, thereby trusting in each others' good intentions.⁷⁴ This

73. See *supra* text accompanying note 41. Menkel-Meadow has argued that a collaborative approach to negotiation facilitates the sharing of information by encouraging negotiators to unearth each party's underlying needs, rather than simply assuming the parties' interests are in direct opposition to each other. Menkel-Meadow, *supra* note 41, at 801-09. See also Menkel-Meadow, *supra* note 67, at 916 (advocating that negotiators begin analyzing a dispute by answering the basic journalism questions of who, what, why, when, where, and how); Carrie Menkel-Meadow, *AHA? Is Creativity Possible in Legal Problem Solving and Teachable in Legal Education?*, 6 HARV. NEGOT. L. REV. 97, 109-11 (2001) (emphasizing the importance of creativity in legal problem solving).

74. In addition to increased trust in the other party's intentions during the experiment, the cooperative mental model of the negotiators in the "Small Talk" condition may have been shaped by reputational concerns. Although the negotiators in each dyad attended different law schools, they were undoubtedly aware that there was a chance (albeit small) that they would both end up practicing law in the same city, or even at the same law firm. It is possible that they had some concern about the potential for future interaction, and this concern was undoubtedly highlighted when negotiators had a telephone call which had the express purpose of getting to know the other person. As in the Darley & Latane study on helping, *supra* note 44, at 107, negotiators who engaged in small talk may have adopted a more cooperative negotiation

mental model, in turn, led to a successful negotiation that concluded with a contract and engendered positive feelings about one another. The negotiators who engaged in small talk solved the “negotiator’s dilemma” by agreeing (albeit tacitly) to share enough information to determine what kind of agreement would satisfy their needs simultaneously.

Sharing information was crucial in the negotiation simulation used in this experiment because of the mixed motive nature of the exercise. While some issues were purely distributive, others could be profitably logrolled in a manner that inured to the benefit of both parties simultaneously. To successfully expand the pie of available resources (as opposed to simply compromising and “splitting the difference”), it was crucial for negotiators in this experiment to exchange enough information to allow them to determine, for example, that both parties preferred all airbags and yellow color, that financing was an especially important issue for the seller, but warranty was especially important for the buyer, etc. Without communicating this information in some form, negotiators were unable to maximize the joint value of the agreement. Adopting an attitude that was more cooperative than competitive allowed negotiators to trust the other party enough to share with them relevant private information, and to expect the other party to reciprocate by sharing their own relevant private information, which in turn resulted in identification of and agreement to efficient solutions.⁷⁵ Because lawyers are repeat players within a legal community, and often expect to interact with each other again in the future,⁷⁶ it is important to observe here that one deal that sours because of misunderstandings in the course of e-mail

strategy to guard against awkward future interactions. See Gilson & Mnookin, *supra* note 40, at 521 (arguing that the prospect of future dealings fosters cooperative behavior on the part of litigators, analogous to a prisoner’s dilemma in which participants know that a high probability of future rounds exists, due to the mutual benefits derived from establishing a cooperative reputation); Cohen, *supra* note 49, at 797 (arguing that a reputation for fairness is a valuable asset, providing a strong incentive to act ethically while negotiating).

75. Menkel-Meadow argues that the adversarial approach to negotiation limits the amount and type of information that will be shared because the discussion will proceed in a debate-like (attack and defend) format, rather than an open discussion where each side proceeds in an information-seeking manner. Menkel-Meadow, *supra* note 41, at 776-78. As a result, negotiators will fail to discover the full range of issues involved and the value each party assigns to those issues, thereby restricting the range of possible solutions and leaving needs unmet. *Id.* at 793. See also Mendelsohn, *supra* note 40, at 146 (stating that “a competitive mindset effectively chills creativity by discouraging the framing of negotiations as joint problem-solving sessions”); *supra* text accompanying note 41.

76. See Gilson & Mnookin, *supra* note 40.

negotiations can affect the tenor of future negotiations — whether conducted via e-mail or more traditional means.

It is also interesting to note the similarity between the results of this study and a phenomenon identified by decision theorists and social psychologists called the “self-others discrepancy.”⁷⁷ In general, when we are asked to make predictions about the abilities or preferences of others, our predictions are strongly influenced by the extent to which we feel a personal connection with those others.⁷⁸ For example, if I am asked to judge how dependable, intelligent, considerate, etc. I am compared to others, my answer is likely to depend on the abstractness of the others. If the other is “the average person” then my comparison tends to be more favorable toward myself than if the other is an individual stranger sitting next to me.⁷⁹ In other words, the less abstract the other person about whom I make a judgment, the more likely I am to judge that person as more similar to me. In addition to the abstractness of the other person, the degree of personal contact also encourages feelings of similarity: I judge myself more favorably in reference to a stranger on a videotape than I do in reference to a stranger who is in the same room.⁸⁰ The “self-others discrepancy” extends to other judgments besides estimating personality traits. For example, people estimate that “an average person” making a decision will choose a riskier option than themselves, but the stranger sitting next to them will choose a similar option to the one chosen themselves.⁸¹ Finally, in Stanley Milgram’s famous experiments in which the experimenter instructs a “teacher” to administer painful electric shocks to a “learner,” the “teacher” is more likely to refuse to do so if the “learner” is visible and in the same room as the “teacher,” compared to when the “learner” is not visible and in an adjoining room.⁸²

The “self-others discrepancy” has important implications for negotiating via e-mail. It suggests that conceptualizing one’s negotiation counterpart as a concrete, identifiable individual person reduces the perceived difference between the counterpart and oneself. The anonymous character of e-mail leaves negotiators imagining a vague

77. Christopher K. Hsee & Elke U. Weber, *A Fundamental Prediction Error: Self-Others Discrepancies in Risk Preference*, 126 J. EXPERIMENTAL PSYCHOL. GEN. 45, 52 (1997).

78. See *id.*; see also Mark D. Alicke et al., *Personal Contact, Individuation, and the Better-Than-Average Effect*, 68 J. PERSONALITY & SOC. PSYCHOL. 804, 805 (1995).

79. Alicke et al., *supra* note 78, at 805.

80. *Id.*

81. Hsee & Weber, *supra* note 77, at 49.

82. STANLEY MILGRAM, *OBEDIENCE TO AUTHORITY* 35 (1974).

and abstract opponent whom they have never seen or met, making it more likely that negotiators will succumb to the self-others bias. Yet, the simple act of making personal telephone contact with the opponent prior to negotiating via e-mail enabled negotiators to substitute perceptions of an invisible, abstract opponent with a concrete human being who shares one's own characteristics. As a result, negotiators who engaged in small talk prior to negotiating via e-mail were more successful at exchanging the right kind of information necessary to reach agreement, and at recognizing a beneficial agreement when the opportunity for such an agreement presented itself.

IV. E-MAIL NEGOTIATION: OBSTACLES AND SOLUTIONS

Often in negotiation, reaching an agreement may be difficult because it is unclear whether a mutually beneficial solution is possible; negotiators must exchange enough information to ascertain that a positive bargaining zone exists. If negotiators perceive little basis to trust the other party, they are unlikely to successfully exchange the information necessary to reach an agreement.

E-mail negotiations are, by nature, impersonal in the sense that non-verbal behavioral expressions, such as laughter, smiles, head nods, shoulder shrugs, yawns, and facial expressions cannot easily be perceived. As a result, e-mail negotiations are often strained and awkward. It is perhaps not surprising, then, that many of the participants in this study were unable to reach a negotiated agreement.

At the same time, the likelihood of impasse was reduced when negotiators performed a very simple preliminary act — a short telephone conversation with the sole purpose of getting to know the other person. The simple act of chatting and exchanging personal information helped to build rapport and overcome some of the communication difficulties associated with the impoverished medium of e-mail. As a result, negotiators' attitudes toward their opponents changed; negotiators who had chatted with their opponent felt less competitive and more cooperative before the negotiation began than did negotiators who had not chatted with their opponent. In the end, negotiators who had made personal contact with their opponent felt more confident that future interaction with the same person would go smoothly. Thus, a relationship of trust was developed through the building of rapport via the personalizing phone call prior to the negotiation. By contrast, many negotiators who did not initially chat had a good chance of ending up without a deal, and often left the virtual negotiating table feeling angry and resentful about the entire process.

This study documents the importance for lawyers of establishing rapport when negotiating with another lawyer who is an “unknown quantity.” When face-to-face contact between negotiators is not possible, it is important to find an alternative method of building rapport. This study demonstrates that a social, personalizing communication via telephone is one way to restore some rapport that may be missing from electronically mediated negotiations.

Even if it is not possible for lawyers engaged in negotiations to connect via telephone, there are many other ways to establish rapport and an attitude of cooperation prior to negotiating. Even having an initial, non-business, getting-to-know-you chat over e-mail prior to beginning e-mail negotiations has been shown to increase the likelihood of reaching a mutually beneficial agreement.⁸³ Moreover, outside of the negotiation context, social psychologists have shown that using flattery (even when people suspect the flatterer has ulterior motives) and humor, and mentioning points of similarity, can facilitate good feelings and relationship building, thereby engendering the kind of cooperation and trust that leads to discovery of mutually profitable negotiated solutions.⁸⁴

83. See Moore et al., *supra* note 43.

84. See, e.g., THOMPSON, *supra* note 36, at 129, 146-47.

APPENDIX

PAYOFF SCHEDULES

Excellent-Files, Inc. [Buyer]

Price		Warranty		Power Extras*		Air bags	
\$ 38,000	(0)	6 months	(0)	1	(0)	None	(0)
\$ 36,000	(1500)	12 months	(1000)	2	(200)	Wheel only	(600)
\$ 34,000	(3000)	18 months	(2000)	3	(400)	Pssngr side, full	(1200)
\$ 32,000	(4500)	24 months	(3000)	4	(600)	Front seats, full	(1800)
\$ 30,000	(6000)	30 months	(4000)	5	(800)	All seats	(2400)

Financing		Color		Radio		Delivery Date	
10%	(0)	Black	(0)	None	(0)	4 weeks	(0)
8%	(400)	Red	(300)	AM	(800)	3 weeks	(600)
6%	(800)	Blue	(600)	AM/FM	(1600)	2 weeks	(1200)
4%	(1200)	Green	(900)	AM/FM/Tape	(2400)	1 weeks	(1800)
2%	(1600)	Yellow	(1200)	AM/FM/Tape/CD	(3200)	0 weeks	(2400)

*Power extras can include windows, locks, seat, wheel, and mirrors. Option 1 has one of these extras, while option 5 includes them all.

Mt. View Motors [Seller]

Price		Warranty		Power Extras*		Air bag	
\$ 38,000	(6000)	6 months	(1600)	1	(3200)	None	(0)
\$ 36,000	(4500)	12 months	(1200)	2	(2400)	Wheel only	(600)
\$ 34,000	(3000)	18 months	(800)	3	(1600)	Pssngr side, full	(1200)
\$ 32,000	(1500)	24 months	(400)	4	(800)	Front seats, full	(1800)
\$ 30,000	(0)	30 months	(0)	5	(0)	All seats	(2400)

Financing		Color		Radio		Delivery Date	
10%	(4000)	Black	(0)	None	(800)	4 weeks	(2400)
8%	(3000)	Red	(300)	AM	(600)	3 weeks	(1800)
6%	(2000)	Blue	(600)	AM/FM	(400)	2 weeks	(1200)
4%	(1000)	Green	(900)	AM/FM/Tape	(200)	1 weeks	(600)
2%	(0)	Yellow	(1200)	AM/FM/Tape/CD	(0)	0 weeks	(0)

*Power extras can include windows, locks, seat, wheel, and mirrors. Option 1 has one of these extras, while option 5 includes them all.

