

The Potential for Mediating Disputes Online

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Alternative Dispute Resolution

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Introduction

Anthropological and sociological studies of societies around the globe reveal a multitude of dispute resolution techniques. It is a sociological marvel how these systems were introduced, honed and perfected over time. From trial by ordeal to appellate advocacy experts analyze the factors that guided small communities and large societies to accept their respective resolution processes. The 21st century is witnessing the emergence of a new society, one that defies traditional definitions, boundaries and limitations. This new society is cyberspace.

It is fortuitous that the growth of Internet has come at a time when the developed world is searching for alternative dispute resolution (ADR) mechanisms. Here in Canada, family law cases and lesser criminal charges are being directed to mediation services. Civil litigation disputes in different provinces are being forced into mandatory mediation sessions depending on the case. The reasons for the growth of ADR generally range from creating "win-win" situations to relieving the burden of overworked courts. However, this is not the scope of this paper.

In this paper we will be looking at the possibilities for mediating settlements online. Mediation offers a greater challenge than less consensual methods of resolution like online arbitration because of the stress on developing rapport and trust between the parties and facilitators. Of course, cyberspace does not exist in a vacuum. The vast majority of websites and commercial activity come from western society,

particularly the United States. Not surprisingly, the natural response is to place online conflicts into traditional categories and processes. The result is that even online, mediation is seen as an "alternative". The goal of this paper is to assess if it can be a viable one. At a time when there is still resistance to turn to traditional mediation to resolve disputes, the paper will try to attempt to answer two questions: Is mediation capable of being effective online? and secondly; Will people utilize it?

Is ADR more suited to cyberspace?

Mediation is seen as part of the bundle of alternative dispute resolution mechanisms. It will help this analysis to consider ADR generally before dealing with the context of disputes arising online that are almost always of a commercial nature. This is not altogether surprising given the nature of the Internet itself. It facilitates impersonal interaction. Familial, employment and abuse matters for example are almost exclusively in personum B the world of cyberspace was not originally involved. While use of the Internet to help settle "real-world" based disputes is the subject of some discussion here, the development of resolution mechanisms has been driven by e-commerce.

Henry Perritt, Dean of the Chicago-Kent College of Law, Illinois Institute of Technology stated the reasons for the "heightened interest" in ADR online. The first reason is that there are smaller entities doing business on the Internet and consequently they cannot afford traditional mechanisms. One of the founding reasons for the success of e-commerce is the low-barriers to entrance. Essentially anyone with access to the Internet can set up a website to sell goods and services. The majority of merchants and customers are unwilling to sacrifice the time and expense in traditional mechanisms. The Second reason cited by Perritt is that geographic openness makes stranger-to-stranger transactions more likely. In the real world, trust becomes an important factor on both sides of a transaction. The continued success of e-commerce will involve merchants and consumers having confidence in a resolution system that is reliable and enforceable. The third reason, and the most obvious is that the Internet is inherently global. Traditional dispute resolution machinery depends on localization to determine jurisdiction. This creates problems in victims wishing to determine where the other party is located where a claim must be pursued and conversely where a party is acting illegally. A website is globally accessible and potentially subject to the laws of many jurisdictions. For these reasons, people interacting over the internet may wish to submit to alternative resolution mechanisms.

ADR is considered to exist in the shadow of the law. The advantages and disadvantages are determined based on comparisons with the existing law. However, as authors have pointed out, the problem with cyberspace is that we really don't know what law applies. Jurisdiction and cyberspace has been the fruit of many articles and court cases, with no clear answers. Some like Jack Goldsmith believe that traditional mechanisms are sufficient since the Internet still depends on physical facilities like web servers and routers. He believes that traditional conflict of laws mechanisms will suffice. Other authors believe that the Internet requires a fundamental rethinking of how jurisdiction works. For example David R. Johnson argues that new rules must be gleaned from the Internet itself, he proposes private net-based adjudication and enforcement institutions. Courts have not been much better. One line of cases holds that posting an informational Internet site on the Web in and of itself can create jurisdiction in another state. A second line of cases has taken a "sliding scale" approach, analyzing each site's commercial nature and interactivity level. Although the sliding scale test is gaining dominance in the latest cases, the discretion and possible arbitrariness leaves the result in any individual case uncertain. Without knowing exactly which law applies it is difficult to adequately assess the pros and cons of ADR. However, this confusion and unpredictability in traditional institutions works in favour of ADR since those are one of the reasons why disputants should seek alternative mechanisms.

An important point of difference between many of the online initiatives in mediation is the approach to the technology. Should online mediation seek to recreate the traditional context or utilize the technology

for different purposes? Ethan Katsh founder of the Online Ombudsman and co-organizer of eBay mediation posits that the focus should be on maximizing the power of technology itself, not just duplication. This point of view runs in sharp contrast to Bruce Leonard Beal, founder of Internet Neutral Mediation Services who believes that the success of online mediation is directly dependant on technological advances, particularly videoconferencing. While Joel Eison recognizes the advantages in replicating face to face interactions, he argues that use of technology should be limited in that it does not influence the outcome. While there is no consensus on the affect that video-conferencing will have, it plays an important role in determining what types of mediation, and other types of ADR, can be effective online.

There are those who believe that "online dispute resolution is an oxymoron because dispute resolution, by definition must be face to face." This is the founding argument for those that believe that online mediation is severely limited by its textual base. There is little disagreement between authors and practitioners that written expressions don't always convey the complete meaning of an argument or that the loss of non-verbal cues poses difficulties to traditional methods. The difference of opinion is whether what is lost outweighs what is gained through online processes.

It was important to consider why mediation is even being considered online. The lack of clear resolution systems online presents a window of opportunity for mediation and other forms of ADR to demonstrate their advantages. If mediation is successful online, then the ability for the internet to develop into a forum for real world disputes is possible as well. This could be attractive where the parties refuse to meet or the expertise of someone in another part of the world is sought. For example, a multiparty dispute involving different companies around the world or employment disputes involving different employees across the country can be resolved online. Now we will turn to mediation and some of tools of mediation that are being used online.

Mediation

Mediation is an informal process, whereby two parties, with or without their lawyers, join with an independent third person, the mediator. The mediators role is to help both parties focus on the issues and provide reasonable solutions that are acceptable to both. This process is the most controversial area in dispute resolution. The reason for this is somewhat obvious: meaningful interpersonal development and interaction are more pronounced than in arbitration or negotiation. In arbitration the process is less consensual. Helping the parties to mend relational difficulties is not seen as a necessary or even important part of the process. With negotiation, even principled negotiation, while the goal is to create a win-win situation by creating value, the techniques are still more adversarial and based on power. Mediation however, is based on finding out if the parties' interests can be expanded so that there is a basis for agreement. The central features of mediation are: (1) to increase understanding among the parties to the nature of the process and the issues; (2) using the increased understanding to facilitate a mutually acceptable settlement of issues, and; (3) to accomplish these goals with assistance from the neutral intervenor.

No matter what the context of the dispute, the job of mediation is to help the parties talk. The process has traditionally involved techniques such as active listening, impartiality, summarizing, reframing and agreement writing. The meditative process is broken down into units such as introductions, joint sessions, caucuses, and private sessions. Taken as a whole, mediation is extremely sensitive to communication. The communication must be effective enough to facilitate understanding, and this understanding is essential to a mutually acceptable resolution. Whether communicating online constitutes communication for mediation purposes is the issue.

Many authors believe that only videoconferencing will permit effective mediation to occur online. They

argue that at this point of the Internet's development, it is too soon to mediate online because of the inability to deal with the complex issues that arise. Using electronic communication in the place of face-to-face meetings results in something appreciably less than traditional mediation, and ultimately unsatisfactory.

One of the arguments against online mediation is that written expressions don't always convey the complete meaning of the argument attempted. Not every individual can effectively explain or justify their beliefs and ideas in writing. For certain disputes there may be something in the physical presence of the parties that allows the mediator to understand one's position; that is there may be significant meaning in nonverbal communication. Certain cues such as body language, smiling, and hesitating all become part of the conversation. As Joel Eisen puts it "cyberspace currently comes without all five senses attached." For many people it is important to know just who they are interacting with. They may want to know their age, gender and ethnicity. Face to face settings provide meaningful contexts and allow you to see the full picture. Yet proponents of ADR online would argue that electronic distance can in fact be a virtue rather than a vice. Keeping parties physically separated allows them to focus on the substantive issues rather than letting one's presence interfere.

While physical separation in some cases may be a good thing, other disputants can benefit from face-to-face mediation because of its "therapeutic" nature. The ability to "vent" their feelings and emotions, something that the participants can't do in a courtroom, can be especially appealing. With online mediation your textual messages may be edited so that only certain information reaches the other party. Again, this is something that proponents of online mediation would argue is a good thing. Reframing communication is viewed as one of the most advantageous aspects of online mediation.

The lack of physical interaction can also work against building trust with the mediator. Trust is an essential component in reaching a successful agreement. Online, the process of developing trust and rapport becomes more difficult when all the party has is textual communication to rely on. Joel Eisen sees this process of trying to establish trust online, as preposterous as a therapist trying to treat a patient by reading her journal rather than engaging in face to face discussions.

Mediators derive their authority from the parties through their charisma, personal presentation and sense of humour. Mediators will often use humour and some light jokes to keep discussions smooth and too alleviate frustration. This strategy, however, may be difficult to employ online because of its potential for misinterpretation. For example, a mediator's use of humour to ease the tension may be construed as sarcastic when viewed in textual form. Also, a remark made for the purposes of calming the disputants could be interpreted to be condescending or insulting.

Critics also argue, that mediators are incapable of finding meaning in textual communication. As mentioned earlier certain body cues, gestures and the tone of one's voice can carry a lot of meaning. Online, where these familiar cues are non-existent, mediators are forced to evaluate written information on its own. For example, it would be difficult to determine how to interpret silence. In mediation it can mean confusion or event assent. How about the gaps in the responses? How long should the mediator wait before assuming the party has left the proceeding?

Proponents of online mediation believe that a mediator's skills to interpret communication offline can be just as good online. But critics finds this assumption to be naïve for various reasons. They argue that mediators don't have the ability to "listen" actively online. This is because an online mediator would be bombarded with numerous choices to make simultaneously. Such as deciding which messages get read first, which ones are "relevant", while at the same time keeping the parties focused on their goals. Listening is a vital ingredient in conducting a productive mediation. In addition to having to read the textual information, online mediation requires too many tasks that could thwart the process of effective

listening. While there is still debate as to what skills and qualifications a mediator should possess, mediating a family dispute online would thus require the mediator to possess skills not only in mediation and family law, but be proficient with the use of computers as well.

Although one of the arguments in support of online mediation is its ability to provide for a more equal playing field, power imbalances can still occur online. An imbalance can occur in online mediation by shifting power to those who understand computers. Not everyone is equally skilled or comfortable in using computers and online resources. Those who are educated have greater access and will become frequent users. Therefore regular computer users have the potential of dominating mediations through their expertise. Studies indicate that men are the dominant group of internet users; 77 percent male and 33 percent female. Thus, to the extent that men are more comfortable in using online resources and working with computer technology over women, gender imbalance in a family mediation can become even greater if conducted online. As Professor Christine Boyer of Princeton University stated "*The World Wide Web is nothing less than a gated community, open almost exclusively to those who speak English and who have enough money to buy a computer and a modem*".

Colin Rule, founder of the "Online Resolution" website, countered some of the criticisms against online mediation in his article "New Mediator Capabilities in Online Dispute Resolution". He put forward the possible advantages of mediating online other than cost, convenience and accessibility. Instead he aimed at core values and techniques of traditional mediation and how some can even be enhanced online.

Asynchronous Interaction B face-to-face mediation occurs in 'real time', thus parties are required to make on the spot judgment calls and decisions. However, online parties can opt for a delay. This delay can be used for consultation with others, research or just to contemplate the situation. Parties can be at their 'best' instead of reaching emotionally to new developments. The mediators themselves can also benefit by being able to give more consideration to the submission of the parties B perhaps better assessing their positions and needs.

Pre-communication Framing B in face-to-face interaction, reframing must be done in front of the parties. Thus name calling or accusation can not really be taken back. Online mediation allows for flexibility in this regard. Mediators can either talk to the parties about reframing their arguments before the other party receives the communication, or the parties can arrange that all communications must be approved by the mediator. This allows for the parties to vent some anger or frustration to the mediator, without causing permanent damage to the discussions.

Concurrent Caucusing B this can be a "crude" tool in traditional mediation. The discussion must be stopped and one party is spoken to in private while the other must wait their turn. Because this can delay the process, this technique is usually only employed when necessary; to discuss monetary positions in private, or when the mediator believes the talks are breaking down and there is a stalemate. This exercise can be completely different online. The mediator can caucus with each party simultaneously while the mediation is happening. Essentially the joint session is one side of the screen, while the mediator can have private communications with parties on the other side of the screen. The session is not disrupted and stalemates can be avoided. While this process could be confusing, it is one of those new skills that could be added to the mediator's skill set.

Text based Communication B using text makes the drafting of documents easier. When the time comes to draft an agreement, the mediator can lift the language used from the database to ensure that the parties will approve of the phrasing.

Ongoing Consensus Evaluation B at certain points in face to face mediation the facilitator may take a poll of the parties to check where they stand. This causes delay and more importantly can be frustrating. The process is usually public and consequently one party may be upset that another party has not moved or they may resent having to state their position while the other side is still struggling with the issues. However, in online mediation, evaluations can be done without pausing the process and can be kept private. The mediator can take polls for themselves, or make the numbers public (not the parties) so that the parties can see where the mediation stands.

Perhaps the most prominent example of mediation online was the mediation project at *eBay*. Where other mediation initiatives have been unsuccessful due to low referrals and high costs, *eBay* mediation has offered a more attractive alternative. *Ebay* itself is an online auction site where users can place objects on the worldwide web for auction. With millions of transactions happening between parties all over the world, it is not surprising that disputes arise. Fraud, deceitful conduct and misunderstandings all lead to disputes with no clear forum to resolve them. The size of the majority of transactions is small and the parties are all over the world, rendering the dispute inappropriate for court action. *E-bay* does not itself offer a resolution service, but uses two other devices to protect users. The first is a user feedback/evaluation posting where buyers and sellers can make comments based on their experiences with each other. By posting support or grievances, new users can do research into the history of the buyer or seller before completing a transaction with them. The second service offered by the auction site is escrow. Essentially this allows the money to be placed in escrow until the buyer receives it and is satisfied or returns the goods. It is important to know what is available for users to understand why mediation is, or is not, attractive. What is mediation an alternative to? In this case: unclear jurisdiction, difficult enforcement, and destroying business reputations online.

The mediation project began on the site *up4sale.com* in January 1999 and then moved to the parent site, *eBay*, one month later. It was headed by Ethan Katsh, an industry expert who had experienced some success with online mediation. In two weeks the service received 225 complaints even though the link was located three pages deep into the customer service site. Mediation was chosen in large part because the founders believed that users would be more willing to participate. One mediator was chosen to maintain consistency in the decision making and email was the chosen mode of communication. Although the founders did not believe that email was the most prudent choice for mediation, they felt it was appropriate given how comfortable and popular it was among the average computer user. Here is how the process worked:

1. When a complaint was received the mediator emailed the other disputant and inquired about willingness to participate after giving the appropriate information
2. Each party then had an opportunity to present his narratives and make claims, demands and desires known
3. The mediator attempted to distill basic issues and problems of the dispute. This sometimes required repeated communication exchanges with disputants, generally with the purpose of allowing the mediator to refine the stories and posit certain facts and conditions
4. For most disputed there came a point when one party had to give in or both had to compromise. Sometimes this required numerous exchanges; at other times the decisional point presented itself at the outset. The mediator facilitated the information exchanges by providing a buffer, solitcitiing discussions and responses, and reformulating not only the dispute but also claims of each party in search of that ground where a deal might be constructed.

5. At the decision point, if there was not the necessary movement for determinative resolution, the disputes were considered at an impasse and left dormant.

The project was seen as a success by the organizers because they received approximately 50% resolution even with the utilization of email, rather than more directly interactive software. Of the 225 complaints, 144 went to mediation, many of these were settled prior to mediation or the parties did not understand the nature of mediation and were looking for something less consensual, like arbitration. Only 37 of the 225 respondents refused to participate.

The project coordinators also considered how the techniques of traditional mediation adapted to the online context. Establishing and maintaining trust is an important part of mediation, both in the session and as a long term goal. They found that because the interactions on *e-Bay* were almost exclusively "one-shot" deals, there was no background context or future to base the mediation on. This may not be a valid criticism. Using *e-Bay* is interaction in a larger community where reputation becomes an important asset. Without resolving the disputes there was likely a concern of ruining one of the parties' good name. There may have been long term considerations.

Other techniques considered in this project were reframing, facilitating the will to settle, and agreement. They found that traditional reframing did not work as well because the mediator could not break into the narrative of the party. It was received, in a completed form in the beginning of the process. Facilitating the will to settle was more difficult online because the mediator was unable to check for visual cues of approval or disapproval along the way. While in traditional settings, agreement is a ceremonial moment in the process, it was significantly lacking online. Without handshakes and patting on the back there was a lack of satisfaction from the parties. This could affect willingness to participate or promote the process in the future. One of the most amazing figures in the result is that only 37 respondents refused to participate in the mediation. The organizers attribute this to the fact that *e-Bay* had the *mediation* link within its site. They believe that in the absence of certainty of which law applies online, "eBay" law prevailed on the users. They write,

Awe were increasingly persuaded that the most relevant and powerful law probably was eBay's law and the power it exercised as a result of users agreeing to the terms and conditions for participation that eBay presents to them . . . There may have been other law casting shadows on our process, but federal law or recourse to any court was rarely mentioned."

The project received these responses from the users even after it was clearly explained to them that the project was completely voluntary and would not affect their ability to participate on the site. This high level of response lies in stark contrast to other mediation sites that have arisen.

The Virtual Magistrate (*VMAG*) began in 1996. It was created to deal with disputes arising between Internet Service Providers (ISPs) and users. Specifically, ISPs wanted a resolution system that could resolve situations where they had removed websites that they believed were infringing copyright or were offensive. At that time, they believed that they might incur liability for allowing the continuing existence of the offending websites on their server. The approach was to be strictly electronic, and fully interactive with email as backup only. Complaints would be forwarded to a staff member who would determine if the dispute fell within *VMAG* jurisdiction. If accepted, the matter would be forwarded to a virtual magistrate. In the first two years of existence only one matter was decided, a few were settled prior to mediation and others were outside jurisdiction of the program.

The failure of *VMAG* may be attributed to three reasons. The first, and perhaps most important, was that shortly after *VMAG's* creation, the US enacted the Copyright Infringement Liability Act which provided a

"safe harbor" for ISPs who implemented acceptable procedures for removing material from their servers. With no longer having this concern, ISPs did not need to refer matters to VMAG. The second reason was that ISPs were reluctant to lose control of the situation. Companies like AOL, who was originally a large supporter of the program, used internal mechanisms to settle these disputes. What "proponents of online ADR must realize is that whoever has superior economic power in a dispute is unlikely to be eager to surrender that power to a third party decision maker." The third reason was that complainants were unaware of the process. They had no easy way to file grievances with VMAG. Without direct links on ISP home websites, users believed that internal mechanisms were the only available option. It is clear how the experience of VMAG lies in direct contrast to the eBay experience. The crucial difference is that users believe that the mechanism brought to their attention is the resolution system that is being sanctioned by the "host". The mediation project at eBay was located on the eBay site, with a direct link to the mediation program.

Bruce Leonard Beal founded the first wholly online mediation service, "Internet Neutral." He argues that "the world was not ready in 1998, and is still not quite ready in 2000 for pure online mediation." He believes that business people are still not comfortable enough with computers. The *Internet Neutral* service places the services of qualified and experienced traditional mediators online. Using email, instant messaging, chat rooms and/or videoconferencing, the service seeks to complete the entire session online. Fees start at a minimum of \$250.00 for 2 day and then \$125 per hour after that. The cost is supposed to be split between the parties. There are cheaper prices available at per minute rates where the matter is dealt with exclusively by email.

As of December 2000, there had been no cases actually progressing to mediation. Although there had been approximately 15,000 visits to the site, only a few dozen cases were submitted. The cases that were submitted did not progress because: (1) one or more of the parties would not consent to the mediation, (2) they would not consent to the internet technology for the mediation, (3) the amount of money involved in the controversy did not make the service feasible, and/or (4) the parties mistook mediation for another type of resolution method.

Beal believes that there would need to be three developments to make online mediation successful. He states that to get parties to consent to mediation, especially online mediation, there needs to be a "supplemental contract provision" included in contracts that states that the parties will engage in mediation before the matter is sent to arbitration or litigation. The homepage of *Internet Neutral* provides examples of possible provisions that may be included in contracts. This recommendation falls inline with the one reason for eBay success; availability and the belief that the mechanism is required. Secondly, Beal believes that when advances in technology improve the quality of videoconferencing, there will be greater success in online mediation because of its resemblance to actual physical meetings. Again the face-to-face factor is seen as a requirement. However, e-commerce has grown exponentially over the last few years and the absence of any physical presence is pronounced. Does resolution of a dispute that arose online, require physical interaction to be resolved? Lastly, the cost factor involved is an obstacle. This is so for two reasons. Firstly, Internet users have come to expect services to be free or very cheap over the internet. This is likely the result of years of free promotions to promote usage. Secondly, the majority of online transactions are for little value, making services such as this inappropriate.

Even critics who believe that online mediation must imitate traditional, physical models to be successful believe that every dispute can benefit from technology B particularly with the right software. Software determines what we interact with, what we see on the screen and what options we have. It can bring an increased sense of sharing and understanding to the process. An example of promising new software is One Accord.

The idea behind One Accord is that technology has the ability to simultaneously deal with a myriad of

complex issues. The program utilizes the speed and efficiency of computers to perform the tasks that mediators and facilitators find extremely difficult. There are many mediations that consist of multiple parties with numerous choices and figures. One Accord was designed with powerful algorithms to provide infinite alternatives and manipulation of variables. The software can reduce the overall negotiating time and cost for decision makers by putting them in control of a process that quickly clarifies tradeoffs by analyzing what solutions provide optimal satisfaction to both parties.

When making a difficult choice, decision makers generally used to employ the Benjamin Franklin method. This simple method involved lining up all the pros and cons side by side. Each pro would be paired with a con of equal or approximately equal importance. Then the decision maker would cancel out all equivalents until there were either pros or cons left. In a mediation setting where the choice is whether or not to accept a proposal. A decision maker would take all the positives and compare them to negatives in the same elimination method to determine a result. The One Accord software takes this crude idea and instead creates a hypothetical set of equivalent alternative packages using all the positives and the negatives at the same time.

The software considers all the pros and cons at once rather than individually. This is invaluable in mediation since there are, *at least*, two decision makers B who may not consider trade-offs the same way. For example management in a labour dispute may consider a 4% raise per year as equal to being able to reduce the work force by 5%. The union however, may not agree with this trade-off and consider a 4% raise only as equal as a reduction in pension benefits. The software is able to consider all the variables at once to generate a series of packages that recognize the priorities of both parties by giving equal satisfaction level. For example, option (a) a 3% reduction in work force, 6% annual raise and 30% reduction in pension benefits or option (b) no reduction in work force, 1% annual raise and 5% reduction in pension benefits. These are just examples, with very simple criteria and only two parties. One can imagine how much more complex this scenario could be and how difficult these packages would be to conceive by the mediator.

Satisfaction levels are created through the use of the system by each party. After the parties have narrowed down the issues with the help of the mediator, they are entered into the database as variables. Each party is granted access to an encrypted server where they can start to generate packages that would be acceptable to them, from the most minimum level to the their highest possible level. They can consider each package in confidence and accept or reject them in turn. At any time in this preliminary process parties can publish packages which are available for viewing to the other side. These packages can become offers and counter-offers leading to a tentative agreement. The more packages that are generated, the more the system learns which issues are more important to each party and can generate packages that are more attractive to them.

For example, in our labour example, if the union is never willing to accept less than a 3% raise in any package, the system recognizes this as being of the highest priority. Conversely, if management is never willing to reduce less than 4% of the workforce the system recognizes this as their priority. It is important to remember that the process is always confidential and the parties only see their own work, or what the other party wants them to see. If a tentative agreement is reached, the system then "optimizes" the package by presenting packages that give the highest satisfaction levels to each party using the package agreed to as a reference point.

The benefits of the software are that it can conceive of combinations of variables in new ways, in unheard of speed. It is likely superior because "research shows that there are so many combinations that parties rarely find an optimal one . . . [that is] fair, efficient and acceptable to the parties." Ernest Thiessen and Joseph McMahon, authors of "Beyond Win-Win in Cyberspace", believe that time saved dealing with complex substantive issues can be utilized by the mediator to handle any relational issues between the

parties. This can reduce overall cost to the parties. However, this point of view could be open to criticism since the relational and substantive issues are often inexorably linked. The idea that one can simply separate the two areas of the dispute neatly is probably an oversimplification. This may involve a new technique by the mediator to clearly define the two areas of the dispute. This would not be easy.

There have been few detractors to One Accord software because it compliments rather than threatens traditional mediation. The software works best when a mediator is able to help parties narrow down the issue and prioritize their concerns. When parties fully understand all the substantive issues involved and how they affect their interests, the various packages have more meaning. The system calls for a combination of human interaction and objective technology that optimizes the process.

Another clear benefit is that the process is clearly intended for use in disputes arising in the real world or cyberspace. It allows parties to take the matter into cyberspace to receive all the benefits of online resolution e.g. time and expense in traveling and confidentiality. Theoretically, the process is not limited to commercial disputes either. Any matter involving substantive issues B figures or choices, can utilize the system. For example, mediating a divorce settlement can involve placing all the marital property and support payments in the system to create packages, while the mediator deals with relational issues involving the children. However, where the context is more personal, mediators will find it increasingly difficult to separate substantive and relational issues. Separating family property is not merely a "numbers game" but involves nostalgia and sentiment in a degree generally absent in commercial disputes.

Another tool being used as both a tool of mediation and negotiation is blind bidding. Although it can be considered a resolution system in and of itself, it is also a tool available when the parties have settled on what all the issues are, and only a dollar amount remains. The success of websites based on this technique is not surprising. The idea behind them is comparable to traditional techniques. Judges or mediators check possibility for settlement by asking the parties to reveal their monetary position in private. Based on the figures given the facilitator determines whether the parties are at an equal value or at least within a specified range of agreement. Online entrepreneurs have taken this process into cyberspace.

The most positive response has been in the area of insurance claim settlements. The need for improved efficiency in the area is well documented. A leading Canadian insurance company recently indicated that its average closure rate of casualty losses was 4.42 years, with 70% of loss assigned to defence counsel. Cybersettle has capitalized on this need by providing an around the clock, real time, fully secure settlement system. As of December 2000 they had settled over 400 out of 1000 cases submitted, with over 20 insurance companies utilizing the system.

The Cybersettle process is simplistic. Participants are allowed to submit three "rounds" of settlement offers. If the offer and the demand in any round are within a specified range (usually 30% or \$5,000), the claim is instantly settled for the median amount. If the offers do not fall within the range there is no settlement. The difference between using online technology and real persons is that bids are completely confidential. The system utilizes a secure website where all participants submit their information. Passwords and private identifications are given to the parties to access the encrypted system. The confidentiality aspect may in fact make the process preferable to real world blind bidding. One author writes:

"Blind bidding processes work even better on the Internet than they do face-to-face. In a courtroom mediation, the mediator can give information away by their facial expressions, or even a meaningful sigh. On the Internet, once the process is automated in a software program, there is no opportunity for that type of secondary communication. Parties can submit bids and get outcomes without tipping their hand at all; if no resolution is reached, each side has no more information than before the process began"

Other than confidentiality the systems continuous accessibility and low cost make the process attractive. The parties can be virtually anywhere in the world and access the program for a \$25 flat submission charge from the insurance company. If the plaintiff attorney agrees to participate, a further \$75 is charged to the insurance company. If the case is settled, then each party is charged an additional \$200. The maximum total cost for a successful settlement is \$500.

There is very little criticism attributed to this type of procedure because its limitations are clear. The system is effective where "the vast majority of cases boil down to the one universal issue: How much is this claim worth? The resolution of such cases does not always require the personal touch." Most experts agree that to the extent lawyers, agents and claim personnel can be removed from the matter, the easier the process. The limitation to the process then, is where relational or personal matters are not at issue in the dispute.

The only real obstacle to increased success in these ventures is trust for the technology. Many plaintiff attorneys were unwilling to participate in this procedure. Daniel Eidsmoe, author and claim attorney for Country Mutual Insurance in the US believes that if plaintiff attorneys can start to trust the technology and accept this new process "maybe the courtrooms can once again resemble places where lawsuits are actually litigated rather than mediated. Unfortunately, it seems that the civil courts of America have merely become the next step after a negotiation impasse." Eidsmoe's point is well taken but it ignores the larger problem. Lawyers are reluctant to give up the authority previously granted to them. Taking the matter out of their hands (and pocketbooks) places them in a precarious position. It may decrease the aura of expertise in the eyes of their clients. Unless representation is required in resolving the more "complex" cases online, lawyers may be hesitant to direct their clients to the internet to deal with their disputes. If Cybersettle, and other websites offering this service and insurance companies want greater usage, they may have to pass this information to their clients. If they are made aware of the possible cost savings, they may direct their attorneys to attempt settlement in this fashion.

Conclusion:

There are numerous advantages to resolving disputes online. Mediation online provides for not only cost effectiveness, but the ability to engage in carefully thought out discussions in an atmosphere that attempts to create equality. However, it is difficult to determine which disputes will be appropriate for mediation online, especially at a time where practitioners are still weary about the effectiveness of traditional mediation. It is apparent from experimentation that as it stands now, mediation online can work for those disputes that arise online; disputes where parties have never met each other, or intend to, and where the only issue is the dollar figure. When we attempt to resolve 'real world' conflicts online we are faced with many obstacles that need to be overcome. The loss of valuable bodily cues and lack of physical interaction call for specialized training in mediation. The potential for online mediation to be effective where mediation is already commonplace, is there, but can only flourish as most critics even recognize, with the use of video-conferencing. Until face-to face interaction can be reliably duplicated through advanced technology, at a reasonable expense, the fundamental question will continue to be raised: *Is text-based, online mediation really mediation at all?* Perhaps it has moved so far from the objectives and techniques of real world mediation that what we are witnesses is a novel approach to facilitating disputes online. It remains to be seen whether analysts choose to consider this a distinct form of mediation or a separate category of dispute resolution altogether.

Endnotes

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20. Eison, Joel, "Are We Ready for Mediation in Cyberspace" *supra*
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