ONLINE MEDIATION: WHERE WE HAVE BEEN, WHERE WE ARE NOW, AND WHERE WE SHOULD BE

Sarah Rudolph Cole and Kristen M. Blankley***

I. INTRODUCTION

THE increased use of online mediation to resolve disputes arising in commercial transactions is challenging our traditional notions about both litigation and alternative dispute resolution ("ADR"). Historically, most commercial transactions occurred face-to-face between people who generally shared a relatively well-defined set of background norms. Typically, the methods for handling these disputes were marked by two characteristics: (1) face-to-face meetings (whether arbitration, mediation, or in the courtroom), and (2) explicit or implicit reliance on the shared norms as a tool to inform the dispute resolution process.

The Internet challenges these assumptions in two ways. First, the market has become much less "local." This characteristic is already present in today's commercial transactions because of the increased use of mail, faxing, and telephone. For example, the Internet has opened up the ability of buyers in Singapore to talk to and transact with sellers in Des Moines or vice versa. When disputes arise in such contexts, however, sitting down together and working out a mutually beneficial solution is difficult. Because of the distances involved, the costs associated with filing a legal action in a foreign country, and the difficulty in establishing a jurisdiction to hear the case or enforce a judgment, an online, informal dispute resolution mechanism may be the only way to resolve this new set of commercial disputes.

At its most basic level, online dispute resolution ("ODR") is any method by which parties attempt to resolve disputes online. These parties may decide to send each other e-mail messages and negotiate from a distance, or they may enlist the help of an intermediary or mediator to facilitate the negotiations. For some parties, however, the use of the ODR process alone is not enough. These parties enhance ODR with a "virtual presence," such as teleconferencing or videoconferencing to achieve a setting similar to a face-to-face chat. Additional investigation is necessary to determine whether these substitutes work, to what

---

* Squire, Sanders & Dempsey Designated Professor of Law, Moritz College of Law, The Ohio State University. B.A., University of Puget Sound; J.D., University of Chicago Law School. I would like to thank Sabrina Riggs for her excellent research assistance.

** Associate, Squire, Sanders & Dempsey. B.A., Hiram College; J.D., Moritz College of Law, The Ohio State University.

extent they work, and what changes are essential for dispute resolution processes, especially mediation, to take advantage of these new technologies.

This article proposes to explore these questions. Part II examines the mediation process and, more specifically, how mediation is currently used to resolve commercial transactions. Part III traces the development of online dispute resolution with a focus on online mediation. Part IV considers the benefits and limitations of both online and traditional mediation. Part V focuses on whether online mediation, as currently utilized, should be modified to comport more closely with the underlying goals of mediation.

II. TRADITIONAL MEDIATION

In the most general sense, mediation is negotiation with the assistance of a third party known as the mediator.[1] The mediator's primary duties include identifying the matters at issue, creating dialogue between the parties, and helping the parties arrive at a mutually agreeable solution.[2] In helping the parties resolve their dispute, the mediator should seek to empower the parties and help the parties realize their goals and satisfy their needs.[3] Empowered parties reach a mediated agreement that is a natural consequence of party self-determination. Because the law does not circumscribe mediation, parties can agree to creative settlement solutions otherwise not available in a court.[4] If an agreement is reached, the parties may choose to memorialize their joint understanding in a

---

1. Harold Abramson, *Problem-Solving Advocacy in Mediations: A Model of Client Representation*, 10 HARV. NEGOT. L. REV. 103, 106 (2005) ("Mediation is simply a negotiation conducted with the assistance of a third party. This generic definition should fit any process that can be legitimately classified as mediation."). *See also* Donna Shestowsky, *Procedural Preferences in Alternative Dispute Resolution: A Closer, Modern Look at an Old Idea*, 10 PSYCHOL. PUB. POL'Y & L. 211, 214 (2004) ("Mediation is a structured process in which a neutral third party assists disputants to reach a negotiated settlement of their differences."); Linda Brannack, *Resolving Disputes Between Physicians & Nurses: How to Get the Most from ADR in the Health Care Industry*, 56-JUL DISP. RESOL. J. 46, 48 (2001) ("[M]ediation is an extension and elaboration of the negotiation process. Mediation involves the intervention of an impartial, neutral third party that has no authoritative decision-making power."); Gerald R. Williams, *Negotiation as a Healing Process*, 1996 J. DISP. RESOL. 1, 10 ("Mediation is best understood as 'assisted negotiation.'"); Joseph Shade, *The Oil & Gas Lease and ADR: A Marriage in Heaven Waiting to Happen*, 30 TULSA L.J. 599, 615 (1995) ("Mediation is most simply defined as facilitated negotiations. The disputing parties attempt to negotiate a voluntary settlement of their dispute with the help of a third-party (the mediator).").

2. Joseph B. Stulberg, *Mediation, Democracy, & Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 619, 622 (2000) ("Mediation is a dispute resolution procedure in which a neutral intervenor assists negotiating parties to identify matters in dispute and, through dialogue and analysis, to develop resolutions to those matters that are acceptable to each negotiating party.").

3. John Lande, *Toward More Sophisticated Mediation Theory*, 2000 J. DISP. RESOL. 321, 323 ("I think of empowerment and settlement as goals for mediation . . . .").

4. Leonard L. Riskin, *Mediation and Lawyers*, 43 OHIO ST. L.J. 29, 34 (1982) (noting mediation can help the parties "work together and to see that through cooperation both can make positive gains").

mediated settlement agreement. In other words, they sign a binding contract outlining the rights and responsibilities of the parties.[5]

Traditional mediation is conducted in person with all affected parties "at the table." Many describe in person or face-to-face mediation as "the sine qua non of mediation."[6] Even when the parties are physically present for the mediation, the mediator will meet frequently with the parties individually in a process known as "caucusing."[7] In traditional mediation, the mediator controls the direction of the proceedings through techniques as subtle as non-verbal cues, to techniques as overt as removing one party from the mediation room.[8] Experienced mediators develop a "toolbox" of techniques used to facilitate conversation, generate offers, explore possibilities, build trust between the parties, and ultimately help the parties reach a mutually acceptable resolution of their dispute. Through the use of different mediation tools, the mediator may act in a purely facilitative manner such as an intermediary who does not offer any advice. A mediator may also act as an evaluator, a third-party who will consider the merits of dispute and alert the parties as to their chances of success. Last, a mediator may act in a transformative manner, by working to enhance the parties' communication so that they appreciate and better understand each other's perspective.[9]

Mediation currently helps resolve a wide variety of disputes including commercial disputes. In the commercial context, the mediator takes special note of possible power imbalances between buyers and sellers and determines if "one shot" parties are sitting across the table from "repeat players." In the typical commercial dispute, the buyers are more likely to be "one shot" players. Consequently, the mediator uses various "tools" in his or her "toolbox" to empower the "one shot" player while remaining fair and unbiased toward the "repeat player," usually the seller. While the comparison may perhaps be unfair, this article explores online mediation against this backdrop.

---

5. Susan Nauss Exon, *California's Opportunity to Create Historical Precedent Regarding a Mediated Settlement Agreement's Effect on Mediation Confidentiality and Arbitrability*, 5 PEPP. DISP. RESOL. L.J. 215, 244 (2005) ("When parties sign a settlement agreement at the end of a mediation, they are knowingly entering into a contract. If one party seeks to repudiate the contract, then the aggrieved party should have the right to enforce the agreement based on general contract law principles.").

6. Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 28 (2002) (noting "some mediators" believe "physical presence ... is the sine qua non of mediation").

7. Edwin H. Greenbaum, *On Teaching Mediation*, 1999 J. DISP. RESOL. 115, 131 (noting some mediations take place entirely through the use of caucus, a process known as "shuttle diplomacy").

8. Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Process Through Code*, 49 N.Y.L. SCH. L. REV. 271, 282 (2004-2005) (noting ways for mediators to control the proceedings, even though they often do not have the power to recommend potential solutions to the parties).

9. *See* ROBERT BARUCH BUSH & JOSEPH P. FOLGER, THE PROMISE OF MEDIATION: THE TRANSFORMATIVE APPROACH TO CONFLICT 66 (rev. ed. 2005).

III. ONLINE MEDIATION

ODR involves the use of dispute resolution techniques over the Internet.[10] Although ODR most commonly resolves e-commerce or other Internet-related disputes,[11] it also resolves traditional off-line disputes.[12] ODR includes formal judicial proceedings as well as arbitration, mediation, and negotiation, provided they occur over the Internet.[13]

---

10. *See* LUCILLE M. PONTE & THOMAS D. CAVENAGH, CYBERJUSTICE: ONLINE DISPUTE RESOLUTION (ODR) FOR E-COMMERCE 18 (2005); ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 10 (2001) (noting that the Internet "extends what we can do, where we can do it, and when we can do it"); A.B.A. Task Force on Elec. Commerce & Alternative Dispute Resolution, *Addressing Disputes in Electronic Commerce: Final Recommendations and Report*, 58 BUS. LAW. 415, 434 (2002) [hereinafter A.B.A. Task Force] (defining ODR as "includ[ing] the use of the Internet and other Web and computer-based technologies for facilitating ADR"); Louise Ellen Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution*, 70 FORDHAM L. REV. 985, 986 (2001) ("The Internet merely accelerated the acceptance of alternative dispute resolution while making it available to the masses . . . .").

11. *See* Robert J. Ambrogi, *Virtual Justice: Resolving Disputes Online*, BENCH & B. OF MINN., Feb. 2005, at 13 (noting the range of online disputes is as great as in the tangible world). *See generally* COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002). "E-commerce" or "electronic commerce" has been defined as the "sale or purchase of goods or services, whether between businesses, households, individuals, governments, and other public or private organizations, conducted over computer-mediated networks." A.B.A. Task Force, *supra* note 10, at 425.

12. Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 300 (2005) ("There is no reason why offline disputes could not be resolved online."); A.B.A. Task Force, *supra* note 10, at 434; Teitz, *supra* note 10, at 991; Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, 32-33 (2004) (arguing that online mediation is best suited for basic contract disputes, e-commerce disputes, domain name disputes, and intellectual property disputes); Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4, ¶ 1 ("Online dispute resolution can take place either entirely or partly online and concerns two types of disputes: those that arise in cyberspace and those that arise offline."). *But see* Mary Shannon Martin, Note, *Keep It Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 150, 153 (2002) (arguing ODR is most effective when used to resolve online e-commerce disputes).

13. *See generally* PONTE & CAVENAGH, *supra* note 10. *See also* Richard Magnus, *The Confluence of Law and Policy in Leveraging Technology: Singapore's Judiciary's Experience*, 12 WM. & MARY BILL RTS. J. 661 (2004) (discussing the use of technology in Singapore's judicial processes, including the creation of a virtual court); Jagruti Chauhan, *Online Dispute Resolution Systems: Exploring E-Commerce and E-Securities*, 15 WINDSOR R. LEGAL & SOC. ISSUES 99, 103-08 (2003) (comparing the use of blind-bidding, mediation, and med-arb programs in resolving securities disputes); Lucille M. Ponte, *The Michigan Cyber Court: A Bold Experiment in the Development of the First Public Virtual Courthouse*, 4 N.C. J.L. & TECH. 51 (2002) (discussing Michigan's plan to create a virtual courthouse); Teitz, *supra* note 10, at 998-1009 (discussing arbitration, mediation, and fully-automated systems where a computer program compares settlement offers); Nicolas de Witt, *Online International Arbitration: Nine Issues Crucial to Its Success*, 12 AM. REV. INT'L ARB. 441 (2001).

One of the most well-known ODR systems is the Internet Corporation of Assigned Names and Numbers' [ICANN] Uniform Dispute Resolution Process, which established an online system to resolve domain name disputes. William Krause, *Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution*, 19 J. MARSHALL J. COMPUTER & INFO. L. 457, 465 (2001). The process is similar to non-binding arbitration because the decisions do not become binding unless a lawsuit is filed in federal courts. Yet even if a suit is filed, the courts are not bound to the previous decision. *See* Katherine Meyers, *Domain Name Dispute Resolution in U.S. Courts: Should ICANN Be Given Deference?*, 43 B.C. L. REV. 1177, 1193 (2002). While the ICANN has successfully resolved a large number of disputes, it has been heavily criticized. *See* Lodder & Zeleznikow, *supra* note 12, at 299 (noting it has handed over 6000 disputes in five years); Zohar Efroni, *The Anticybersquatting Consumer Protection Act and the Uniform Dispute Resolution Policy: New Opportunities for International Forum Shopping?*, 26 COLUM. J.L. & ARTS 335, 351 (2003) (noting ICANN has been successful if measured by the number of resolved cases); A. Michael Froomkin, *ICAAN's "Uniform Dispute Resolution Policy"—Causes and (Partial) Cures*, 67 BROOK. L. REV. 605, 670-711 (2002) (describing the criticisms of the UDRP policy and proposing substantial reforms).

Currently, there has only been one case in the United States in which ODR was raised as an issue, excluding cases involving domain name disputes. Stenzel v. Dell, Inc., No. Civ.A. CV-03-323, 2004 WL 1433657 (Me. Super. Mar. 11, 2004). In *Stenzel*, the plaintiff claimed that the defendant's arbitration clause was substantively unconscionable, in part, because it did not meet the BBBOnline Dispute Resolution Standards. *Id.* at *5. The arbitration clause provided:

> ANY CLAIM, DISPUTE, OR CONTROVERSY (WHETHER IN CONTRACT, TORT, OR OTHERWISE, WHETHER PREEXISTING, PRESENT OR FUTURE, AND INCLUDING STATUTORY, COMMON LAW, INTENTIONAL TORT AND EQUITABLE CLAIMS) BETWEEN CUSTOMER AND DELL, its agents, employees, principals, successors, assigns, affiliates (collectively for purposes of this paragraph, "Dell") arising from or relating to this Agreement, its interpretation, or the breach, termination or validity thereof, the relationships which result from this Agreement (including, to the full extent permitted by applicable law, relationships with third parties who are not signatories to this Agreement), Dell's advertising, or any related purchase SHALL BE RESOLVED EXCLUSIVELY AND FINALLY BY BINDING ARBITRATION ADMINISTERED BY THE NATIONAL ARBITRATION FORUM (NAF) under its Code of Procedure then in effect (available via the Internet at http://www.arb-forum.com or via telephone at 1-800-474-2371). The arbitration will be limited solely to the dispute or controversy between customer and Dell. NEITHER CUSTOMER NOR DELL SHALL BE ENTITLED TO JOIN OR CONSOLIDATE CLAIMS BY OR AGAINST OTHER CUSTOMERS, OR ARBITRATE ANY CLAIM AS A REPRESENTATIVE OR CLASS ACTION OR IN A PRIVATE ATTORNEY GENERAL CAPACITY. This transaction involves interstate commerce, and this provision shall be governed by the Federal Arbitration Act 9 U.S.C. sec. 1-16 (FAA). Any award of the arbitrator(s) shall be final and binding on each of the parties, and may be entered as a judgment in any court of competent jurisdiction. Dell will be responsible for paying any arbitration filing fees and fees required to obtain a hearing to the extent such fees exceed the amount of the filing fee for initiating a claim in the court of general jurisdiction in the state in which you reside. Each party shall pay for its own costs and attorneys' fees, if any. However, if any party prevails on a statutory claim that affords the prevailing party attorneys' fees, or if there is a written agreement providing for fees, the Arbitrator may award reasonable fees to the prevailing party, under the standards for fee shifting provided by law.

Dell, Inc., Dell's Online Policies, http://www.dell.com/termsandconditions (last visited June 18, 2006). Plaintiff claimed that Dell was required to meet the Standards because it had posted the BBBOnline Reliability Seal on its website. *Stenzel*, 2004 WL 1433657, at *5. However, the court rejected this argument finding the Standards were aspirational, rather than binding. *Id.*

Online mediation, in particular, involves the use of traditional mediation techniques in an online environment.[14] Like traditional mediation, online mediation may be conducted using facilitative, evaluative, or transformative techniques.[15] Unlike traditional mediation, however, the technology used to conduct the mediation may have a tremendous impact on its success at settling the dispute.[16] In many instances, access to technology to conduct an online mediation may be the difference between attempting to resolve the dispute and simply allowing the perceived wrong to go uncorrected.[17]

Before 1995, ODR was largely unnecessary because military and academic institutions were the primary users of the Internet.[18] As the Internet gained

---

A few other cases have indirectly involved online dispute resolution. For instance, in *Carmel v. Fleischman*, No. B168437, 2005 WL 2143542, at *7 (Cal. Ct. App. Sept. 7, 2005), the parties to a real estate transaction agreed that a prevailing party in an adversarial proceeding (either arbitration or litigation) could recover attorney's fees from the non-prevailing party. This clause, however, would not be triggered unless the parties first "agree to mediate any dispute or claim arising between them out of this Agreement, or any resulting transaction, before resorting to arbitration or court." *Id.* To satisfy the mediation requirement, one of the parties instituted proceedings on SquareTrade, an online mediation provider. *Id.* The other party, however, never responded to the e-mail sent by SquareTrade notifying the other party of the proceedings. The parties never did mediate online, although the parties did agree to mediate in person at a later date. *Id.* at *8. Because no mediation proceedings occurred, the non-prevailing party resisted the motion for attorney's fees. *Id.* The district court awarded attorney's fees on the basis that the non-prevailing party never *refused to mediate*, but only procrastinated sufficiently long to institute and complete legal proceedings. *See id.* at *9. On appeal, the California Court of Appeals determined the district court did not abuse its discretion in so holding. *Id.*

In *Alexander v. U.S. Credit Mgmt. Management, Inc.*, 384 F. Supp. 2d 1003 (N.D. Tex. 2005), the court was required to determine whether an agreement to arbitrate was valid under state and federal law. *Id.* at 1006. If enforced, the agreement would have required the parties to participate in online mediation followed by binding arbitration. *Id.* at 1004-05. However, because the court determined the contract was unenforceable, the plaintiffs were permitted to file their claim in court rather than undergoing the mediation-arbitration procedure. *Id.* at 1016.

14. PONTE & CAVENAGH, *supra* note 10, at 63; 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, 75-79 (2001) [hereinafter Ponte, *Throwing Bad Money*].

15. *See* Gibbons et al., *supra* note 6, at 32-35 (describing how each form of mediation may be conducted online and their limitations); Ponte, *Throwing Bad Money*, *supra* note 14, at 75-78 (discussing the use of facilitative mediation).

16. *See* KATSH & RIFKIN, *supra* note 10, at 93-116 (describing technology as the "fourth party" in online mediation); Gibbons et al., *supra* note 6, at 35 (noting technology can be used to "distance parties psychologically, to bring the parties together, to speed the process up, or slow the process down"); Katsh, *supra* note 8, at 285 ("While the goal of the 'fourth party' is to make information processing and information management resources available, this does not minimize the importance of any improvements that may occur in the future as to how efficiently data moves online from one party to another.").

17. This may be especially true if the parties live a great distance apart. *See* Goodman, *supra* note 12, ¶ 14 ("In fact, cyber-mediation may be the only feasible option for individuals who are unable to afford traveling long distances, or for those involved in e-commerce disputes for low dollar amounts.").

18. *See* KATSH & RIFKIN, *supra* note 10, at 48-54 (noting, however, the rules imposed on e-mail and the early disputes over spamming).

popularity and became commercialized, online disputes began to occur. As a result, the demand for an efficient dispute resolution forum emerged.[19] In response, governments, universities, and private organizations encouraged and supported ODR's development.[20]

Villanova University used a grant from the National Center for Automated Information Research and the Cyberspace Law Institute to establish one of the first two ODR mechanisms, which was called the Virtual Magistrate.[21] The program provided online arbitration for disputes with Internet service providers and had an underlying goal of assessing ODR's feasibility.[22] Unfortunately, the Virtual Magistrate issued only one opinion, an unenforceable default judgment against a non-participating party.[23]

The University of Massachusetts created another early online mediation program called the Online Ombuds Office ("OOO").[24] The OOO used online conference rooms where parties could virtually chat with a neutral ombudsperson.[25] An ombudsperson is a neutral third party, usually an official, responsible for resolving a wide variety of disputes in a number of different ways.[26] This project was more successful at attracting parties than the Virtual

---

19. *See id.* at 54-57; Katsh, *supra* note 8, at 276-77 (explaining that once commercial activities began to take place on the Internet, disputes began to arise and an efficient way to resolve those disputes was needed).

20. *See* A.B.A. Task Force, *supra* note 10, at 434-35 (noting the European Union and United States issued statements committing themselves to the use of fair and effective ODR and the Federal Trade Commission's development of an online forum for consumers to file complaints about e-commerce transactions); KATSH & RIFKIN, *supra* note 10, at 58-61; Katsh, *supra* note 8, at 277 ("[T]he Internet was part of the problem, in that it generated disputes, but it was also part of the solution in that resources might be found online to respond to disputes.").

21. KATSH & RIFKIN, *supra* note 10, at 55.

22. *Id.*; Krause, *supra* note 13, at 458-59; Ponte, *Throwing Bad Money*, *supra* note 14, at 61-62. Complaints were electronically filed detailing the claims and desired remedy. The American Arbitration Association ("AAA") screened the complaint to ensure it was appropriate for ODR and attempted to get the opposing party's agreement to use the process. If the parties agreed to participate, AAA would appoint a magistrate to resolve the dispute. Ponte, *Throwing Bad Money*, *supra* note 14, at 61-62.

23. Ambrogi, *supra* note 11; Ponte, *Throwing Bad Money*, *supra* note 14, at 63-64. *Tierney v. America Online* involved a dispute over an advertisement in which AOL offered to sell its users' e-mail addresses. The arbitrator ordered AOL to remove the advertisement. *Id.*; Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal*, 7 J. TECH. L. & POL'Y 2, 13 (2002). Despite its early inability to attract customers and its current inactivity, the Virtual Magistrate continues to exist and is hosted by the Chicago-Kent College of Law. Ambrogi, *supra* note 11; Chicago-Kent College of Law, Virtual Magistrate, http://www.vmag.org/ (last visited Nov. 30, 2006).

24. Zavaletta, *supra* note 23, at 13. Other early attempts at ODR included the Online Mediation Project, CyberTribunal, and Maryland Family Law Mediation. KATSH & RIFKIN, *supra* note 10, at 56-57. The CyberTribunal was established by the University of Montreal and was designed to establish a cross-border ODR venue that provided facilitative mediation and arbitration. *Id.*

25. Zavaletta, *supra* note 23, at 13.

26. William Y. Chin, *Multiple Cultures, One Criminal Justice System: The Need for a "Cultural Ombudsman" in the Courtroom*, 53 DRAKE L. REV. 651, 654 (2005) (defining an ombudsman as a "complaint resolver").

Magistrate.[27] Eventually, eBay partnered with the OOO to create a pilot program to resolve disputes arising from online auctions.[28] The success of the pilot program prompted the establishment of SquareTrade.[29]

Although the number of ODR providers has decreased since 2002, many remain interested in ODR's potential.[30] For example, several companies have created guidelines calling for online companies to offer online mediation to increase customer confidence in e-commerce.[31] Additionally, SquareTrade continues to successfully mediate disputes for eBay and other companies.

Companies that provide online mediation may be divided into three categories. Some companies use computer communication to facilitate the administration of traditional mediation.[32] These programs use the Internet to advertise mediation services, provide information, or complete administrative tasks. These programs, however, do not conduct mediation online.[33] Other companies use computer communication as part of the traditional mediation process. In these programs, the mediator may use both online and in-person mediation to resolve the dispute.[34] A third group of companies, known for virtual mediation, mediate disputes entirely online or use a computer program as the mediator.[35]

Some of the virtual online mediation programs use computer platforms such as the blind-bidding or software-as-mediator programs that are unique to the Internet.[36] Cybersettle is one example of a blind-bidding mediator.[37] Cybersettle

---

27. KATSH & RIFKIN, *supra* note 10, at 56; Victoria C. Crawford, *A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model*, 25 HASTINGS INT'L & COMP. L. REV. 383, 392-93 (2002) (noting its success was probably due to the referral of a large number of complaints by the university, good marketing, and a possible preference for mediation over arbitration).

28. KATSH & RIFKIN, *supra* note 10, at 1; Ponte, *Throwing Bad Money*, *supra* note 14, at 75-76.

29. Ponte, *Throwing Bad Money*, *supra* note 14, at 75-76. In 1999, OOO mediated nearly 200 disputes arising out of eBay auctions. Ethan Katsh, *The New Frontier: ADR Becoming a Global Priority*, DISP. RESOL. MAG., Winter 2000, at 7. For more information on SquareTrade, see *infra* notes 41-45 and accompanying text.

30. A.B.A. Task Force, *supra* note 10, at 436 ("In 2002, the number of ODR providers has contracted, with some companies ceasing to do business, some offering their domain names for sale, and other retaining Web site [sic] that appear to be inactive."). The decline in the number of providers may be attributed to the sudden collapse of the dot.com bubble in 2001-2002.

31. *See, e.g.*, Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 735 (2002).

32. Gibbons et al., *supra* note 6, at 62-63.

33. *Id.* at 63; Amy S. Moeves & Scott C. Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. & MARY BILL RTS. J. 843, 865 (2004) (noting the "Web ... provide[s] disputants with an informational starting point—a source for reading about what [ODR] sites offer and, at the very least, a source for finding more information about non-technology-augmented ADR").

34. Gibbons et al., *supra* note 6, at 62-63.

35. *Id.*

36. *Id.* at 65. It is questionable as to whether the blind-bidding systems actually constitute a form of mediation. However, at least one commentator has classified them as mediation because a

permits attorneys or insurance claims adjusters to file an online claim and make three private offers of settlement. The opposing party then receives an e-mail notice of the claim and may log into the system to file three counter-offers. The software compares the offers and if the two parties' offers are within twenty percent of each other, the program settles the case for the average of the two offers.[38] If the parties' offers are not within twenty percent of each other, then the parties may use the company's telephone facilitation process.[39]

Alternatively, online mediation may be conducted like traditional mediation in which a neutral human third party facilitates discussions between the parties and helps them reach a voluntary settlement. The mediation communications may occur through e-mail or other web-based forms of communication.[40] For example, SquareTrade offers online mediation for disputes that do not settle through direct negotiation.[41] One party files a complaint with SquareTrade that includes basic information and possible settlement offers. The company then notifies the other side of the complaint with instructions about how to respond. If the opposing party responds, SquareTrade automatically refers the dispute to direct negotiation.[42] However, the party filing the complaint may choose mediation in the alternative. Once in mediation, a webpage is created to enable the parties to communicate with the mediator.[43] During this period, the parties do not directly communicate with each other; rather, they communicate through the mediator. All communications between the mediator and a party are confidential and cannot be viewed by the other party.[44] After receiving all of the information, the mediator suggests a non-binding resolution.[45]

Although the number of these ODR providers has not expanded much, existing ODR providers have improved the quality and the variety of technology

---

neutral third-party (i.e., the software) privately caucuses with each party by receiving the confidential offers of settlement to determine if there is an agreement. *Id.* at 62-63.

37. Cybersettle, http://www.cybersettle.com/info/about/company/overview.aspx (lasted visited June 11, 2006). Cybersettle has been named the settlement tool for the American Trial Lawyers Association. *Id.* at http://www.cybersettle.com/info/news/pressreleases/aspx?id=10; Gibbons et al., *supra* note 6, at 65.

38. Cybersettle, *supra* note 37. *See also* KATSH & RIFKIN, *supra* note 10, at 61-63.

39. Cybersettle, *supra* note 37.

40. In addition to e-mail, the mediation may be conducted through chat rooms, instant messaging, or online video conferences. Joel B. Eisen, *Are We Ready For Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1313-14 (arguing that online mediation must be conducted through easy-to-use technology, like e-mail); Gibbons et al., *supra* note 6, at 32-35 (discussing the advantages and limitations of using e-mail, instant messaging, videoconferencing, and tele-immersion).

41. SquareTrade, www.squaretrade.com (last visited June 11, 2006). SquareTrade's process is used as an example of how most online mediation programs operate. *See* PONTE & CAVENAGH, *supra* note 10, at 72-76 (discussing the WebMediate process).

42. SquareTrade estimates that 60% of cases are resolved during direct negotiation. *See* Krause, *supra* note 13, at 462.

43. The comments may be posted on the case page or exchanged through e-mail. Ponte, *Throwing Bad Money*, *supra* note 14, at 77.

44. Krause, *supra* note 13, at 462.

45. *Id.*

available. The variety of dispute resolution procedures allow the parties to determine the type of ODR desired and, as advances in technology become available, the market will likely demand the use of these new products. The following section discusses how these providers have met the needs of disputants and where the providers could stand to improve their services.

IV. BENEFITS AND LIMITATIONS OF ONLINE MEDIATION

Regulation of traditional mediation focuses on balancing four factors: access, quality, effectiveness, and fairness.[46] Regulators of online mediation also face these issues, but in somewhat different ways. For example, rather than focusing solely on access to justice, regulators must also consider a party's access to technology. In addition to ensuring the effectiveness of ODR compared to litigation, regulators must also concern themselves with online mediation's effectiveness as compared to traditional mediation. Critics fear that the absence of face-to-face communication and the lack of a clear method for enforcing mediated settlement agreements render online mediation ineffective at least for some kinds of disputes. Quality and fairness issues, by contrast, are largely the same. For instance, ensuring ethical mediator behavior is an issue in traditional as well as online mediation. Moreover, both traditional and online mediation policy makers attempt to ensure that any mediation provides a level playing field for all parties. This section focuses on the unique fairness, access, quality, and effectiveness issues online mediation raises.

A. Effectiveness

Critics of online mediation focus on whether the online mediation process is as effective as traditional mediation. The primary concern is that the use of technology undermines the therapeutic benefits the traditional mediation process offers.[47] For example, critics worry that because technology transforms

46. 1 SARAH R. COLE ET AL., MEDIATION: LAW, POLICY AND PRACTICE §§ 2:2-2:5 (2d ed. 1994 & Supp. 2006).

47. *See, e.g.*, Rachel I. Turner, *Alternative Dispute Resolution in Cyberspace: There is More On the Line, Than Just Getting "Online,"* 7 ILSA J. INT'L & COMP. L. 133, 147-48 (2000) ("The predominant criticism is that the technology will detract from the human aspect needed in ADR...."). *But see* Lodder & Zeleznikow, *supra* note 12, at 302 ("ODR's lack of in-person interaction can actually be an advantage . . . ."). In part, the criticisms relate to the availability of technology to parties to a dispute. *See* Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 467-72 (2002) [hereinafter Ponte, *Boosting Consumer Confidence*] (arguing lack of availability of technology to all parties may limit a party's ability to be heard and access the process). However, these concerns are less persuasive when the dispute arises over an e-commerce transaction, because both parties must have had basic technology skills to complete the original transaction. Additionally, because the process is voluntary, if one party does not participate due to the lack of access to technology, they are no worse off. Finally, the barriers to entering the technological world are relatively low, only requiring a "computer, modem, Internet connection, and e-mail account" to start the process. Zavaletta, *supra* note 23, at 19. *But see* Eisen, *supra* note 40, at 1335-36 (noting equipment is not

mediation into an impersonal process, party miscommunication will occur and, as a result, parties will be less likely to trust either each other or the mediator.[48] Faceless communication over the Internet means the loss of non-verbal communication.[49] Because the non-verbal communication is absent, the likelihood of miscommunication increases. The risk of miscommunication is aggravated further if the parties are located in different countries with different cultures or languages.[50] It should be noted, however, that these differences present a concern in traditional mediation as well.

In addition, increased use of technology creates the risk that the mediation process will not be confidential.[51] Because the parties' communications exist in a written format (i.e., e-mail, chat room transcript), a complete record of the mediation exists and may be made public.[52] Moreover, authenticating the

---

enough; the ability to use the equipment is also required); Shah, *supra* note 12, at 32-33 (noting sophistication may be required to accurately participate in the dispute resolution process with clarity).

48. Shah, *supra* note 12, at 31; Teitz, *supra* note 10, at 1002 (noting mediation is often recommended for parties with an ongoing relationship that may not exist in the e-commerce setting); Zavaletta, *supra* note 23, at 22 ("online communications could be misinterpreted, thus driving parties further apart"); Ganeles, *supra* note 31, at 739 (noting "[w]ithout having full faith and confidence in the mediator, mediation may be doomed from the start").

49. Moeves & Moeves, *supra* note 33, at 865-66 (noting "[ODR] removes the face-to-face aspect of alternative dispute resolution that many disputants may find satisfying, or even healing"); Teitz, *supra* note 10, at 1002; Zavaletta, *supra* note 23, at 19 (questioning whether mouse-to-mouse ADR is effective as face-to-face ADR); Ganeles, *supra* note 31, at 738 (noting the mediation of emotional cases, such as family disputes, may be less effective online). However, this face-less nature of the Internet could be resolved by using videoconferencing, rather than e-mail or chat rooms to facilitate the communication. *See* Zavaletta, *supra* note 23, at 22 (noting that some commentators believe online mediation will not succeed until videoconferencing is more commonplace and economically feasible); Moeves & Moeves, *supra* note 33, at 866 (noting "ADR by videoconference is the least practical solution at this time"); Gibbons et al., *supra* note 6, at 33-34. At least one commentator has argued that the values of mediation are lost over the Internet. *See* Eisen, *supra* note 40, at 1322. Because mediation may be successful even if a dispute is not resolved, participants to online mediation are likely to lose the process values, which include the transformative and reconciliatory potential. *Id.* (noting "healing, educating, informing, and persuading" may be lost). Technology does not adequately express human emotions and therefore the therapeutic nature of mediation may be lost. *Id.* at 1323-24. *See also* Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-Mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223 (2004) (finding that the use of small talk between negotiating parties increases the likelihood that the online negotiation will be successful).

50. Shah, *supra* note 12, at 31; Zavaletta, *supra* note 23, at 20; Gibbons et al., *supra* note 6, at 45-47.

51. Turner, *supra* note 47, at 145. Likewise, computer glitches could undermine online mediation's effectiveness. Ganeles, *supra* note 31, at 739. Online mediation, however, may be beneficial in community disputes if the mediator creates a message board accessible to the entire affected community. *See* Stulberg, *supra* note 2, at 638 (imagining a situation involving a school dispute). Although the entire community would not be able to physically participate in a face-to-face mediation, the use of the Internet could encourage participation from a greater number of members of the community.

52. *See* Ganeles, *supra* note 31, at 738 (noting "online mediation offers a complete record of the proceedings"); Zavaletta, *supra* note 23, at 23 (noting encrypted e-mail software and password protected website, chat rooms, and discussion boards may address these concerns).

identity of the parties may be difficult; thus, the mediation could theoretically occur with an impostor sending messages on behalf of one of the parties.[53]

Of course, technology is also the reason online mediation is successful.[54] Online mediation is less expensive, more flexible, and faster than traditional mediation or litigation.[55] The parties can be located anywhere and participate in the mediation at their convenience, eliminating travel and scheduling issues.[56] The Internet is also a neutral platform for negotiation because, unlike an attorney's office or other setting, neither party controls it. As a result, this neutral platform reduces potential power imbalances.[57] In addition, the Internet's impersonal process may actually lessen tensions associated with highly emotional disputes.[58] For example, parties who are not in close proximity to each other may avoid hostile interactions.[59] Additionally, parties have a greater opportunity to reflect on the discussion by re-reading e-mails or chat room transcripts, which may lead to more thoughtful responses and possibly a more beneficial resolution.[60]

Nevertheless, the question for regulators is whether the increased speed in dispute resolution that characterizes online mediation is worth the sacrifices in terms of effectiveness of the process. The fundamental conflict between policies directed at protecting effectiveness and those aimed at improving efficiency cannot easily be resolved. As with traditional mediation, regulators will likely compromise. In the context of online mediation, that compromise may result in the limitation of the use of online mediation to disputes involving fewer personal issues or where the parties cannot easily meet, such as consumer purchase disputes. In fact, the free market may have already acknowledged this trade-off. SquareTrade, arguably the Internet's most successful online mediation service, focuses entirely on resolving consumer disputes among consumers who live far apart.

---

53. Eisen, *supra* note 40, at 1330.

54. *See* RULE, *supra* note 11, at 62-85 (discussing the advantages of ODR for disputants, neutrals, and businesses).

55. *Id.* at 63; PONTE & CAVENAGH, *supra* note 10, at 26-27. Like traditional ADR, ODR developed as an alternative to the expensive and time consuming litigation process. *See, e.g.*, Bob Pimm & Teri Kirk, *New Web-Based Alternative Dispute Resolution Systems*, 21 ENT. & SPORTS LAW 29 (2003) (noting the tremendous cost and time associated with litigation and the benefits of ODR).

56. Turner, *supra* note 47, at 143; Ganeles, *supra* note 31, at 738; Zavaletta, *supra* note 23, at 19; Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach-Potential Problems, and a Proposal*, 3 HARV. NEGOT. L. REV. 175, 191-92 (1998); Shah, *supra* note 12, at 29.

57. RULE, *supra* note 11, at 64; Shah, *supra* note 12, at 30.

58. Zavaletta, *supra* note 23, at 19; Lodder & Zeleznikow, *supra* note 12, at 302.

59. PONTE & CAVENAGH, *supra* note 10, at 25; RULE, *supra* note 11, at 67; Zavaletta, *supra* note 23, at 20.

60. Zavaletta, *supra* note 23, at 20; Shah, *supra* note 12, at 30. However, the ability for parties to reflect on past statements may slow the mediation or allow parties to become entrenched in their positions. Ganeles, *supra* note 31, at 739. Additionally, the parties may stop communicating with each other by simply ignoring e-mail or chat requests. Shah, *supra* note 12, at 31.

B. *Effectiveness: Mediation Without Boundaries*

As previously noted, online mediation may be less expensive; therefore, it may be more efficient than traditional mediation. But online mediation offers a further efficiency benefit; it permits parties to resolve issues raised by the international and borderless nature of the Internet.[61] Because few international Internet laws exist, parties with online disputes face complex legal issues.[62] Where, for example, does a consumer in the United States sue an online company whose physical presence is in China? Whose law applies? The use of online mediation may avoid the need to resolve these problems, because it allows the parties to create their own solutions without the need for substantive law.[63]

Although online mediation may be more efficient, it is not yet clear whether it is as fair as traditional mediation, at least with regard to the enforceability of international e-commerce mediation agreements.[64] One of the strongest criticisms of online mediation has been that online mediation settlement agreements are not clearly enforceable.[65] Without a mechanism to enforce these agreements, consumers may be unwilling to use the process. The issues of enforceability are greatest in international e-commerce disputes where courts may be unwilling to enforce private settlements.[66]

C. *Access to Technology*

Although increased technology may potentially advance the field of mediation, these advances will not be available to those who do not have access to a computer and the Internet. This may be especially true for online resolution of disputes occurring in the physical—rather than the virtual—world.[67] These types

---

61. Crawford, *supra* note 27, at 385; Shah, *supra* note 12, at 30 (noting ODR is a flexible, open medium that is an attractive way to avoid jurisdictional issues); Lodder & Zeleznikow, *supra* note 12, at 298 ("[U]nlike litigation, there are no legal obstacles to providing mediation online.").

62. Bordone, *supra* note 56, at 178, 183 (noting customs, rules, and norms have developed on the Internet and a dispute resolution system must consider its implications for the regulation, governance, and enforceability).

63. Crawford, *supra* note 27, at 389-90; Martin, *supra* note 12, at 156 (noting that mediation does not always require a choice of substantive law to decide the dispute).

64. *Cf.* Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 490 (discussing the necessity of enforceable awards to the effectiveness of online dispute resolution).

65. *See* Teitz, *supra* note 10, at 1010. The issue of enforceability could be resolved with an international treaty requiring national courts to enforce mediation agreements, like the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), which enforces international arbitral awards.

66. Shah, *supra* note 12, at 34. The resort to a court to enforce a mediation settlement will also be extremely costly and undermine the benefits of online mediation. Krause, *supra* note 13, at 476.

67. Amy J. Schmitz, *Mobile-Home Mania? Protecting Fair Arbitration in a Consumer Microcosm*, 20 OHIO ST. J. ON DISP. RESOL. 291, 370 & n.435 (2005) (noting consumers may not possess the available technology to take advantage of online dispute resolution processes); Goodman, *supra* note 12, ¶ 25 ("Access to online computers may pose a problem for some individuals, especially those involved in disputes that result from off-line transactions."); Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 470-71 (recognizing the potential for "disparity

of "access issues" potentially span a number of scenarios. For instance, a party involved in a dispute as a result of an online purchase made using a library computer will clearly have difficulty conducting a lengthy, real-time mediation.[68] Even those who have access to the Internet at home may still lack the ability to scan and send documents to the other party or engage in videoconferencing.[69] For some parties, the instant dispute may be the first time they ever used these technologies. For example, many computer owners have the ability to send and receive instant messages over the Internet, but not all of these computer owners are familiar with the process or feel comfortable using the technology.[70] Therefore, in an online mediation such parties may be at a significant disadvantage. Perhaps one way to alleviate this concern is for the mediator to ensure that all parties have sufficient resources and skills to participate in a meaningful dispute resolution procedure.[71] Even this solution may be

---

in technological tools available to the parties and the skills to use them effectively"); Richard Birke & Louise Ellen Teitz, *U.S. Mediation in 2001: The Path Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 211 (2002) (noting consumers in particular may have difficulty keeping up with the technology needed to conduct an effective online mediation). Additionally, access may be more limited in some parts of the world if the parties are involved in an international online mediation. Of course, the access issues will be different in almost every online mediation, so the parties should be aware of potential problems concerning either access to computers or software and familiarity with software already available to a participant.

68. Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 470-71 (noting people without home computers could find themselves in e-commerce disputes if they have access to work computers, library computers, community center computers, computers at Internet cafés, or even computers owned by friends or family). At least one commentator explicitly recommends those using work Internet connections to be sure they have access to the resources and the websites conducting the online mediation. Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735, 739 (2000) ("Most business networks limit access to Internet features other than e-mail for security reasons. If you are to engage in online mediation, it is crucial that you contact your network administrator in advance to enable your network connection.").

69. Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 471 (recognizing consumers may "lack the technological tools that might be readily available to larger firms, such as access to a scanner to send documents or the use of expensive videoconferencing software and equipment to appear before an online mediator or arbitration panel").

70. *See* Lan Q. Hang, Comment, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 859 (2001) ("Additionally, [a consumer] may know how to access the Internet, but [the consumer] may not know how to communicate effectively online, and thus, . . . be at a disadvantage with online mediation or arbitration."). *See also* Stulberg, *supra* note 2, at 640 (recognizing participants who struggle with basic literacy concerns may find their problems confounded when trying to communicate over the Internet).

71. Gibbons et al., *supra* note 6, at 68 (suggesting the mediator has an ethical duty to ensure the parties have sufficient access to the mediation procedure as whole). The following demonstrates some inquiries in which the mediator may wish to engage before proceeding:

> Mediators should assure themselves that parties have access to the technology. Access is more than availability. Access, for the purposes of mediation integrity, is the capable or proficient use of the technology. An efficient method of assuring access is to verify independently the parties' use of the technology. For example, the best way to assure that parties can use email is to send them email. Mediators should not assume the ability to use email includes the ability to send attachments. Mediators must consider the impact of the

insufficient in some situations as online dispute resolution programs anticipate that the parties have advanced technological abilities.[72]

Even if the parties have physical access to a computer and a sufficient Internet connection, online mediation may still be "inaccessible" where the monetary costs of participating in an online mediation outweigh any potential settlement.[73] While resources are a potential issue in any dispute resolution process, the added cost of technology may simply put dispute resolution out of reach for some segments of the population. For example, the cost of engaging in a dispute resolution procedure may outweigh the gains in certain disputes.[74] As technology becomes more prevalent, of course, the cost to acquire and use it should decrease and online mediation may soon provide a viable option to resolve disputes involving smaller amounts of money.[75]

D. Quality Concerns

Critics of ODR also worry about quality issues and focus particular attention on ODR's lack of standards of conduct for mediators.[76] One possible reason for the absence of such standards is the online community's initial attempt to be free

---

technology on the process. Technology is not neutral. Technology emphasizes some aspects of communication and minimizes or eliminates others. The mediator must be aware of what aspects of communication are important at each point in the mediation process. The mediator must be able and willing to manipulate the technology in furtherance of the mediation process.

Id. See also Eisen, *supra* note 40, at 1335 ("Online mediation shifts power to those who understand computers.").

72. *See* Ponte, *Throwing Bad Money*, *supra* note 14, at 77-78 (noting the provider InternetNeutral "expects to offer the parties the opportunity to use instant messaging, chat conference rooms, and videoconferencing to handle online mediation sessions").

73. Goodman, *supra* note 12, ¶ 26 ("In addition, even though cyber-mediation can be one of the least expensive alternatives for resolving disputes, the relatively modest fees that it does require may still be out of reach for many individuals involved in e-commerce disputes.").

74. At least one commentator is concerned online mediation may actually be more expensive than conventional mediation. Eisen, *supra* note 40, at 1339-40. These costs are generated because the parties will be required to either find or gain access to computers and the applicable software. Thus, the parties could incur higher transaction costs in conducting extra research and formulating text-based communications. Additionally, because the pace is slower and because text-based communications can be difficult to understand and internalize, the cost of the online mediator could be higher than a conventional mediator.

75. Of course, community centers, ADR providers, and other types of institutions could wish to provide free or low-cost ODR centers at which participants could be assured of access to computers and supporting programming and software. However, placing the onus on these types of providers may be nothing more than wishful thinking. *See* Eisen, *supra* note 40, at 1337-38 (referring to relying on libraries, ADR providers, and local bar associations to provide free or low-cost ODR centers as a "dubious assumption" at best).

76. *See, e.g.*, PONTE & CAVENAGH, *supra* note 10, at 32-34; Turner, *supra* note 47, at 146; Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 474-81. The ABA Task Force on Electronic Commerce and Alternative Dispute Resolution recognized these problems and proposed best practices for the qualifications of neutrals and rules for handling disputes. A.B.A. Task Force, *supra* note 10, at 458-68.

of traditional rules and regulations.[77] The lack of regulation may also stem from initial market demands, or the lack of demand, for rules and regulations to govern online mediation.[78] ODR providers may also be hesitant to provide overarching rules and regulations because they wish to preserve ODR's well-known flexibility.[79] If the ODR community truly is concerned with flexibility, it may hesitate to institute any rules, much less detailed ones. However, ODR providers may decide that creating rules would be best for business if the market begins to demand quality control assurances.

If ODR continues to expand without governing regulations, consumers may have a difficult time finding quality ODR services.[80] Although other quality concerns are important, one of the major issues in online mediation is ensuring consumers can identify quality mediators. While there is no uniform law governing mediator behavior, many traditional mediators belong to organizations that require mediators to follow the organization's ethical guidelines when they mediate on behalf of that organization.[81] Because online mediation is largely unregulated, ODR providers have been slow to develop ethical rules for mediators. The lack of uniform ethical guidelines raises concerns about the mediator's ability to resolve disputes fairly in the unique online forum.[82] As a result, consumers may be reluctant to try online mediation.[83]

---

77. *See* Rafal Morek, *The Regulatory Framework for Online Dispute Resolution: A Critical View*, 38 TOL. L. REV. 163, 164 (2006) ("At the onset of cyberspace, many idealists in the online community viewed the Internet as a separate world without government intervention or traditional laws.").

78. The rise of ODR has been quick. With the speed and increasing use of ODR, the creation of rules and regulations has lagged behind the demand. Consumers have been using ODR despite the lack of rules and regulations, so the market may not be demanding these traditional types of quality control in order for ODR providers to be profitable. However, now that the procedures are becoming more popular and the ODR providers are beginning to establish themselves, the providers may wish to institute these types of controls in order to increase demand or to attract new customers. *See* Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should Be Regulated*, 39 AM. BUS. L.J. 575, 628 (2002) (noting most ODR providers "are no more than a few years old, and are, for the most part, for-profit enterprises").

79. Ponte, *Throwing Bad Money*, *supra* note 14, at 65 ("There is general agreement that ODR processes should remain flexible, and that no one form of ODR will work best in all online dispute situations. However, there is less agreement on how ODR methods and standards should be developed and implemented.").

80. Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 474-82; Zavaletta, *supra* note 23, at 22-24 (noting national standards may lead to faster acceptance by consumers).

81. *See, e.g.*, Association of Attorney-Mediators, Ethical Guidelines for Mediators, http://www.attorney-mediators.org/ethics.html (last visited Sept. 17, 2006).

82. Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 474-82; Eisen, *supra* note 40, at 1333-34 (noting cybermediators may be less accountable). At least one commentator has expressed concern over the ethical problems of bias caused when ODR providers financially benefit from repeat online retailers. Ponte, *Boosting Consumer Confidence*, *supra* note 47, at 478. *See also* Teitz, *supra* note 10, at 1010 (noting need for certification or licensing as ODR increases in popularity); Martin, *supra* note 12, at 158 (urging the creation of a supervisory board or agency). *See generally* A.B.A. Task Force, *supra* note 10.

83. Eisen, *supra* note 40, at 1331-34 (noting parties unfamiliar with online mediation may feel uncomfortable because the participants either may not believe the mediator is truly listening to the

In response, some of the major ODR providers have started to formulate ethical standards and require their mediators to act in accordance with them. SquareTrade, for instance, adopted ethical guidelines for its mediators derived from those of the Society for Professionals in Dispute Resolution ("SPIDR").[84] The current SquareTrade rules are not particularly complex or detailed, but they do require the mediator to remain impartial, maintain the confidentiality of the proceedings, disclose any potential conflicts of interest, mediate the case in an expeditious manner, and uphold the integrity of the process.[85] Likewise, although the Cybersettle website does not contain a definitive code of ethics, the answers to various Frequently Asked Questions assure parties that the mediator will behave in a neutral manner and maintain the confidentiality of the process.[86] The ethical rules and considerations found on these websites are preliminary; however, even these cursory statements are likely better than no ethical standards at all.

In addition, ethical codes of conduct may already bind mediators who work for major dispute resolution providers. For instance, a mediator who is a member of the American Arbitration Association ("AAA") may be bound by the Model Standards of Conduct for Mediators even when the mediator is conducting ODR rather than in-person ADR.[87] The same may be true for other mediators employed by different ADR providers.[88] Additionally, some state laws and court rules require mediators within a jurisdiction to abide by certain codes of conduct.[89] Mediators in these jurisdictions are likely bound to abide by the codes

---

parties' text communications or may not be accountable to the parties because the parties will never meet the mediator face-to-face).

84. *See* SquareTrade, Ethical Standards for Dispute Resolution, http://www.squaretrade.com/cnt/jsp/abt/ethics.jsp;jsessionid=nkajtbm341?vhostid=tomcat4&stmp=squaretrade&cntid=nkajtbm341 (last visited Sept. 1, 2006).

85. *Id.*

86. *See* Cybersettle FAQ, http://www.cybersettle.com/info/support/faq.aspx?type=atty#EKA (last visited July 7, 2006).

87. AM. ARBITRATION ASS'N ET AL., MODEL CODE OF STANDARDS FOR MEDIATORS, Preamble at 2 (2005), http://www.adr.org/si.asp?id=2095. According to the Preamble, "[m]ediation is used to resolve a broad range of conflicts within a variety of settings." Although ODR is not specifically listed as one of those settings, the code of conduct was specifically written broadly to cover mediation in myriad forms.

88. For instance, mediators associated with JAMS are bound by "necessarily general" ethical considerations in addition to any applicable state or local rules. *See* JAMS, MEDIATORS ETHICS GUIDELINES, http://www.jamsadr.com/mediation/ethics.asp (last visited Sept. 1, 2006). Any number of professional ADR service providers have instituted codes of ethics for the mediators, and these mediators may be bound to abide by these codes of ethics when acting as an online mediator. Thus, depending on who is mediating a particular case, the parties may be working with a mediator who is already bound by certain ethical rules, even if the ODR provider has not specifically set forth a code of ethics.

89. Michigan Supreme Court Standards of Conduct for Mediators, http://courts.michigan.gov/scao/resources/standards/odr/conduct.pdf (last visited Nov. 30, 2006); Iowa Supreme Court Rules Governing Standards of Practice for Lawyer Mediators in Family Disputes (1986), *available at* http://www.legis.state.ia.us/Rules/2000/court/media/mediaors.pdf; Rules and Procedures for Dispute Resolution Act, OKLA. STAT. tit. 12, ch. 37, § app. A (1986); CAL. EDUC. CODE § 56503(d) (West 2006) (mediators must ensure that mediated agreements are "consistent with the law").

of ethics even if the ODR provider organization has yet to craft its own set of ethical standards.

In order to ensure a quality process, ethical guidelines should be implemented where gaps in ethical code coverage exist. Such regulations will tend to boost customer confidence in the service and create increased demand for ODR services. Perhaps the easiest way to create these types of regulations is for each ODR provider to institute its own code of ethics for its mediators. If each ODR provider implements its own code of ethics, the location of the mediator and whether the mediator was already bound by another code of ethics would no longer be an issue.[90] Many ODR providers recognize the importance of developing ethical standards for online mediation. Hopefully this trend will continue so that parties to an online mediation can be confident that their mediator will act in a manner that comports with ethical norms.

V. WHAT IS THE FUTURE OF ONLINE MEDIATION?

Policymakers who regulate traditional mediation attempt to balance four general goals: fairness, effectiveness, quality, and access. To the extent that regulation of online mediation is necessary, potential regulators of online mediation should add to that list: access to technology, effectiveness of process as compared to traditional mediation, and quality of mediator services. Unfortunately for regulators, these goals tend to be incompatible with each other. Thus, in the context of online mediation, regulators must identify priorities among these goals. Since potential regulators are working with a relatively blank slate, this may initially appear to be an easy task. However, identifying priorities may be a difficult and continuing effort that results in both successes and failures.

Because the Internet resists regulation, our recommendations for changes are small. To the extent that access to technology creates a barrier to entry for some individuals, we suggest that potential regulators focus on making necessary technology more readily available at a low cost. For instance, service providers could offer parties the use of video technology to supplement online mediations.[91] Perhaps the mediation community could also devote time to

---

90. On the other hand, if the regulations were legislated, they would carry a "stamp of approval" of greater significance than a simple ODR provider's code of ethics. *See* Thomas Shultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71, 89-90 (2004) ("To a large extent, government is the ideal host for dispute resolution, because government has a strong incentive to resolve disputes to keep society functioning smoothly. Government is also a good host for dispute resolution because it usually has no vested interest in the outcome of most of the matters it is in charge of deciding."). However, the problem with governmental control of ODR regulations is that governments have boundaries. An ODR provider may have some mediators who are bound to some rules, while other mediators are bound to another set of rules, while others still may be bound to no rules at all.

91. Gibbons et al., *supra* note 6, at 31-35 (describing e-mail, instant messaging, videoconferencing, tele-immersion, and communication-enhancing software as "basic tools" of the online mediator). As time passes, these types of mediation tools will likely become more familiar and perhaps even common. Additionally, as the public begins to use these types of technologies in other aspects of their lives—such as to conduct business meetings by either tele- or

educate prospective users so that they become more familiar with these technological advances.

Making technology more accessible and providing information to prospective users are but two small steps. Another regulatory focus should be enhancing the existing online process to alleviate the potential problems created by the lack of face-to-face communications. While there may be advantages to a lack of face-to-face communication, efforts to enhance the online dispute resolution process with video conferencing technology may remove this impediment to resolving many disputes that are mediated online. Of course, using additional technology raises the costs of online mediation; however, the offsetting improvements in effectiveness make the tradeoff worthwhile. Because the additional costs excessively burden access, rethinking the kinds of disputes appropriate for online mediation may be in order. The success of online mediation in resolving consumer disputes suggests that online mediation is more suitable for impersonal disputes than for ones in which non-verbal cues are relevant, such as in a child custody or divorce dispute.[92]

Other issues do not loom quite as large as the access and effectiveness issues discussed above. Nevertheless, in order to encourage prospective consumers to use online mediation, it is necessary to increase their confidence in the process. While other mechanisms may also be worth trying, ODR providers should immediately adopt standards of conduct for mediators. The existence of such standards would assure prospective users that their disputes will be handled in a neutral manner and that their conversations will be maintained (at least by the mediator) as confidential.

Finally, it is unquestionable that the online mediation process enables parties who live countries apart to resolve relatively low-level disputes. In that sense, online mediation is more effective and efficient than traditional mediation. Unfortunately, however, these resolutions may not be as final as the parties would hope since the mediated agreements may be difficult to enforce. Although parties sometimes do not abide by their mediated settlement agreements, most do.[93] While policymakers should try to find ways to ensure enforceability of online settlement agreements, the additional costs of ensuring enforcement of a small number of cases are not clearly worth expending. While fairness dictates that those agreements be enforced, when balanced against the ability of online

---

videoconferencing—individual parties may feel more comfortable using these types of programs in the context of online mediation. Until the parties are comfortable using these tools online, however, the mediator may have to act as both a neutral and an educator.

92. It is not uncommon for regulators to subordinate efficiency when necessary to protect fairness or effectiveness in mediation. For example, most jurisdictions have rejected California's effort to increase child custody settlements by requiring the mediator to make recommendations regarding custody to the trier of fact. Instead, most legislatures choose procedures that result in fewer settlements but also less pressure on the parties during the mediation process. 1 COLE ET AL., *supra* note 46, § 2:6.

93. *See* Exon, *supra* note 5, at 244 (most people abide by their mediated settlement agreements because "the aggrieved party should have the right to enforce the agreement based on general contract law principles").

mediation to resolve disputes that would otherwise go unremedied, fairness should give way to efficiency.