

## THE PROS AND CONS OF ONLINE DISPUTE RESOLUTION: AN ASSESSMENT OF CYBER-MEDIATION WEBSITES

*Due to increasing use of the Internet worldwide, the number of disputes arising from Internet commerce is on the rise. Numerous websites have been established to help resolve these Internet disputes, as well as to facilitate the resolution of disputes that occur offline. This iBrief examines and evaluates these websites. It argues that cyber-mediation is in its early stages of development and that it will likely become an increasingly effective mechanism for resolving disputes as technology advances.*

### Introduction

Online dispute resolution (“ODR”) can take place either entirely or partly online and concerns two types of disputes: those that arise in cyberspace and those that arise offline.<sup>1</sup> As Internet usage continues to expand,<sup>2</sup> it has become increasingly necessary to design efficient mechanisms for resolving Internet disputes because traditional mechanisms, such as litigation, can be time-consuming, expensive and raise jurisdictional problems.<sup>3</sup> Offline disputes, on the other hand, can be addressed with traditional dispute resolution mechanisms supplemented with

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<sup>1</sup> For a general discussion of the types of disputes that ODR encompasses, see Richard Birke, Louise Ellen Teitz, *American Law in a Time of Global Interdependence: National Reports to the XVITH International Congress of Comparative Law: Section II U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, at 206-07 (2002); 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, 990-95 (2001).

<sup>2</sup> According to estimates for the month of September 2002, there is a global active Internet universe of 220,444,008 individuals based on home Internet access compared with 218,038,452 for August 2002. See Nielsen Net Ratings at [http://www.Nielsen-netratings.com/hot\\_off\\_the\\_net.jsp](http://www.Nielsen-netratings.com/hot_off_the_net.jsp) (last visited November 24, 2002). This means an estimated increase in global Internet usage of 1.1% from September to August 2002. *Id.*

<sup>3</sup> 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, 442-44 (2002) (“In cyberspace, e-consumers with purchasing problems have no clear means of redress for their concerns because cyberspace has no uniform laws and no unified court system. The global nature of the Web challenges national sovereignty and traditional court authority and amplifies concerns about choice of law and the enforceability of court judgments. The lack of well-established and credible online conflict resolution mechanisms dampens consumer confidence in the online marketplace and hurts e-tailers involved in cross-border transactions.”) *Id.* (citations omitted); Teitz, *Providing Legal Services*, *supra* note 1, at 990-95; and Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach – Potential Problems and a Proposal*, 3 HARV. NEGOTIATION L. REV. 175, 176 (1998).

online technologies.<sup>4</sup> Although the methods of ODR available range from negotiation and mediation to modified arbitration to modified jury proceedings,<sup>5</sup> the focus of this iBrief is on negotiation and mediation in the online environment.<sup>6</sup> In particular, it examines and evaluates websites that use mediation techniques to help resolve disputes.

This first part of this iBrief discusses various websites that provide mediation services.<sup>7</sup> The most salient difference between these websites is in their level of automation.<sup>8</sup> As the discussion below indicates, some websites are fully automated and require little human intervention, while others involve a neutral third party as a facilitator. The second section argues that undertaking mediation over the Internet (“cyber-negotiation” and “cyber-mediation”) has advantages and disadvantages when compared with traditional, face-to-face mediation. The advantages include cost savings and convenience, while the disadvantages include that it is impersonal and potentially inaccessible to some individuals. The final section concludes that some of the disadvantages of cyber-mediation may be overcome as technology advances and high-speed Internet connections allow for video-conferencing.

## **Cyber-Mediation Websites**

### *Fully Automated Cyber-Negotiation*

Websites such as Cybersettle,<sup>9</sup> SettlementOnline<sup>10</sup> and clickNsettle<sup>11</sup> offer services that are entirely online and focus primarily on negotiating monetary settlements. These websites serve as a neutral arena to exchange settlement offers. Offers of what? Typically, an aggrieved individual (or, in most cases, his or her insurer), initiates a claim by logging onto the service’s secure website and setting a deadline for resolution, which is typically 30 to 60 days. The service then emails the other party to let him or her know that a settlement offer has been proposed and also gives them access to the website. The party can either accept or decline to participate. If

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<sup>4</sup> See Birke *et al.*, *supra* note 1, at 206-07.

<sup>5</sup> See 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, 66-87 (2001) for a discussion of the various forms of mediation services, arbitration services and jury proceedings that are available online.

<sup>6</sup> Although online adjudicatory mechanisms (such as arbitration and jury proceedings) also merit attention, they pose a unique set of issues (e.g. reaching and enforcing decisions and verdicts) that are beyond the scope of this iBrief.

<sup>7</sup> See Ponte, *supra* note 3, at 66-79 for a discussion of the various forms of mediation services, arbitration services and jury proceedings that are available online.

<sup>8</sup> See Teitz, *Providing Legal Services*, *supra* note 1, at 999.

<sup>9</sup> See Cybersettle, at <http://www.cybersettle.com> (last visited Feb. 11, 2003).

<sup>10</sup> See SettlementOnline, at <http://www.settlementonline.com> (last visited Feb. 11, 2003).

they decide to participate, he or she logs onto the website and submits a demand. Computer software automatically compares the demand with the settlement offer and emails both parties to let them know whether they are within the “range” of settlement or whether there has been any movement towards settlement.

Cybersettle and SettlementOnline both allow three rounds of bidding.<sup>12</sup> The cyber-negotiation starts off with the initiating party entering settlement offers ranked for the first, second, and third rounds and expiration dates for those rounds.<sup>13</sup> Computer software then emails the other party explaining that a settlement offer has been made and requests the other party to put forth counteroffers for the first, second, and third rounds.<sup>14</sup> Computer software then compares the offers and counteroffers for each round to ascertain whether the parties have reached a settlement.<sup>15</sup> If the software determines that a settlement has not been reached, then their offers remain confidential and future bargaining positions are unaffected.<sup>16</sup>

ClickNsettle, on the other hand, allows many rounds of offers and counteroffers within a specified period of time.<sup>17</sup> To ensure that the negotiations take place in good faith, parties are required to increase (or decrease) their offer (or counteroffer) by a specified percentage over their previous offer (or counteroffer).<sup>18</sup> If a settlement is not reached within the specified time period, then the offers expire and the cyber-negotiation fails.<sup>19</sup> The parties are, of course, free to resubmit their claim or move forward with another dispute resolution mechanism, such as arbitration or litigation.

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<sup>11</sup> See clickNsettle, at <http://www.clicknsettle.com> (last visited Feb. 11, 2003).

<sup>12</sup> See Cybersettle, *Cybersettle Demonstration*, at [http://www.cybersettle.com/demo/demo\\_pf.asp](http://www.cybersettle.com/demo/demo_pf.asp) (last visited Nov. 27, 2002); and Settlement Online, *Settlement Online Pilot Program Proposal*, at <http://settlementonline.com/Proposal.html> (last visited Nov. 27, 2002).

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> On Cybersettle, a settlement is reached if there is less than 20% between the offers in any of the rounds, and then the claim will settle for the average of the two amounts. See Cybersettle, *Cybersettle Demonstration*, at [http://www.cybersettle.com/demo/demo\\_pf.asp](http://www.cybersettle.com/demo/demo_pf.asp) (last visited Nov. 27, 2002). SettlementOnline, on the other hand, allows the parties to set their own settlement range for each individual case. See SettlementOnline, *Product Analysis*, at <http://settlementonline.com/Proposal2.html> (last visited Nov. 27, 2002).

<sup>16</sup> See Cybersettle, *Claim Resolution Services*, at <http://www.cybersettle.com/products/claimresolution.asp> (last visited Nov. 27, 2002); and SettlementOnline, *Illustrating the Automated Negotiation*, at <http://settlementonline.com/Proposal3.html> (last visited Nov. 27, 2002).

<sup>17</sup> See Ponte, *supra* note 3, at 67.

<sup>18</sup> See *id.* at 67, n. 56.

<sup>19</sup> See *id.*

### *Cyber-Mediation Using Sophisticated Software and a Neutral Third Party Facilitator*

OneAccord<sup>20</sup> uses an innovative negotiation process and a powerful computer software program that enables multiple parties to participate in interest-based negotiation.<sup>21</sup> The process has several phases and “uses optimization . . . to transform conflicting objectives into fair and efficient solutions.”<sup>22</sup> Initially, a third party facilitator works with the parties either in person or over the Internet to help them express their interests and identify issues.<sup>23</sup> The facilitator is an attorney who has completed a special 30-hour online training course.<sup>24</sup> He or she helps the parties model a negotiation problem and complete a "Single Negotiation Form," which outlines the underlying agreement and leaves blanks for unresolved issues.<sup>25</sup> The facilitator then works with each party individually to elicit their own initial confidential preferences among each of the issues and possible outcomes.<sup>26</sup>

Once the parties' data is entered into the website, the OneAccord software uses it to develop settlement packages for the parties to consider.<sup>27</sup> The facilitator continues to work with the parties to evaluate settlement packages and to refine preferences.<sup>28</sup> If the parties choose the same settlement package or “solution,” the software attempts to generate improvements in order to maximize the benefits to both parties.<sup>29</sup> Once a party wishes to terminate the negotiation, a final written agreement is drafted with the current solution and signed by all of the parties.<sup>30</sup>

### *Traditional Mediation Using Online Technologies*

Mediation firms have established websites such as Internet Neutral,<sup>31</sup> SquareTrade<sup>32</sup> and WebMediate<sup>33</sup> to facilitate the resolution of disputes. Although these websites rely primarily on

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<sup>20</sup> See OneAccord, at <http://www.oneaccordinc.com> (last visited Feb. 11, 2003).

<sup>21</sup> See Ernest M. Thiessen & Joseph McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643 (2000) (describing OneAccord negotiation process and then applying it to a hypothetical negotiation problem); and <http://www.oneaccordinc.com/html/process.html> (last visited Nov. 27, 2002) (outlining the six phases of the OneAccord negotiation process).

<sup>22</sup> Thiessen & McMahon, Jr., *supra* note 17, at 647.

<sup>23</sup> See SmartSettle, *SmartSettle Process*, at <http://www.oneaccordinc.com/html/process.html> (last visited Nov. 27, 2002).

<sup>24</sup> See SmartSettle, *Professional Development and Training*, at <http://www.smartsettle.com/more/content.php?training.html> (last visited Jan. 26, 2003).

<sup>25</sup> See Thiessen & McMahon, Jr., *supra* note 17, at 647.

<sup>26</sup> See *id.* at 647-48.

<sup>27</sup> See SmartSettle, *SmartSettle Process*, at <http://www.oneaccordinc.com/html/process.html> (last visited Nov. 27, 2002).

<sup>28</sup> See *id.*

<sup>29</sup> See SmartSettle, *SmartSettle Process*, at <http://www.oneaccordinc.com/html/process.html> (last visited Nov. 27, 2002).; See also Thiessen & McMahon, Jr., *supra* note 17, at 648.

<sup>30</sup> See *id.*

<sup>31</sup> See Internet Neutral, at <http://www.internetneutral.com> (last visited Feb. 11, 2003).

online technologies such as e-mail, listservs, chat rooms, and instant messaging, they also incorporate more traditional communication methods into the negotiation process. Typically, a party contacts the service and fills out an online form that identifies the problem and possible resolutions. A mediator then reviews the form and contacts the other party to see if they will participate in the mediation. If the other party agrees to participate, they can fill out their own form or respond to the initial form through e-mail. This initial exchange of views may help the parties to understand the dispute better and possibly to reach an agreement. If the dispute remains unresolved, the mediator will work with the parties to help determine issues, articulate interests, and evaluate potential solutions.

Internet Neutral allows the parties to choose from several online mediation alternatives, including e-mail, instant messaging, chat conference rooms, and/or video conferencing.<sup>34</sup> The costs, however, vary depending on the online technology used and the length of the mediation sessions.<sup>35</sup> For mediations relying on technologies other than e-mail (e.g. chat conference rooms or videoconferencing), the parties are charged a half-day fee of \$250 (and then \$125 per hour after the half-day), which is split equally between the parties.<sup>36</sup> Disputes with simple facts that rely entirely on e-mail are charged for the time that the mediator spends preparing, sending and reviewing emails.<sup>37</sup> The fee varies from \$1 to \$6 per minute, depending on the disputed amount.<sup>38</sup> Internet Neutral uses conferencing software that enables the mediator to communicate with the parties in designated channels or “rooms” accessed by passwords.<sup>39</sup> During the mediation, the software enables the parties to communicate through two channels: one channel is for a private dialogue between one party and the mediator, while the other channel is an open dialogue with all participants, including the mediator.<sup>40</sup>

SquareTrade does not charge fees to the parties in the initial stage of its dispute resolution process.<sup>41</sup> During this initial stage, the parties try to reach an agreement by communicating

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<sup>32</sup> See SquareTrade, at <http://www.squaretrade.com> (last visited Feb. 11, 2003).

<sup>33</sup> See WebMediate, at <http://www.webmediate.com> (last visited Feb. 11, 2003).

<sup>34</sup> See Internet Neutral, *Internet Neutral – Online Mediation Specialists*, at <http://www.internetneutral.com/nutshell.htm> (last visited Nov. 27, 2002).

<sup>35</sup> See Internet Neutral, *How Much will this Cost?* at <http://www.internetneutral.com/fees.htm> (last visited Nov. 27, 2002).

<sup>36</sup> See *id.*

<sup>37</sup> See *id.*

<sup>38</sup> See *id.*

<sup>39</sup> See Internet Neutral, *The Forum for Online Mediation*, at <http://www.internetneutral.com/forum.htm> (last visited Nov. 27, 2002).

<sup>40</sup> See *id.*

<sup>41</sup> See SquareTrade, *A Simple, 4 Step Process to Resolve Disputes*, at [http://www.squaretrade.com/cnt/jsp/odr/learn\\_odr.jsp](http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp) (last visited Nov. 27, 2002).

directly with each other through SquareTrade's Direct Negotiation tool, which is a completely automated web-based communications tool.<sup>42</sup> If the parties are unable resolve the case through direct negotiation, then they have the option of requesting assistance from a mediator.<sup>43</sup> SquareTrade is careful to explain that the mediator is not a judge or arbitrator, but merely seeks "to facilitate positive solution-oriented discussion between the parties... The mediator will only recommend a resolution if the parties request it."<sup>44</sup> Even then, the mediator's recommendation is not binding on the parties.

WebMediate provides a range of cyber-mediation services along with other dispute resolution systems, including arbitration.<sup>45</sup> It claims to be the "only company to provide a fully-integrated range of ADR processes online – alternatively, simultaneously, or sequentially."<sup>46</sup> WebMediate offers parties an opportunity to begin with less powerful dispute resolution mechanisms and, if those fail to reach a settlement, to move onto more powerful dispute resolution mechanisms.<sup>47</sup> Almost all of WebMediate's cases enter into their system through a fully automated cyber-mediation process, WebSettlement, which is similar to the fully automated processes discussed above.<sup>48</sup> If the dispute is not resolved through WebSettlement, then "parties may choose to involve an experienced online WebMediator, to facilitate the discussion of their dispute and assist in identifying and assessing options for resolution."<sup>49</sup> After exhausting the WebSettlement and WebMediator options, the parties may then choose WebArbitration and "submit their dispute for resolution by a third-party sitting in the role of a private judge."<sup>50</sup>

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<sup>42</sup> *See id.*

<sup>43</sup> *See id.*

<sup>44</sup> *see id.*

<sup>45</sup> *See* WebMediate, *Welcome to the Dispute Resolution Revolution*, at <http://www.webmediate.com/intro.html> (last visited Nov. 27, 2002); *see also* Ryan Baker, WebMediate, Inc. submission to the Department of Commerce and Federal Trade Commission Joint Workshop on Alternative Dispute Resolution for Online Consumer Transactions, *available at* <http://www.ftc.gov/bcp/altdisresolution/comments/> (last visited Nov. 27, 2002).

<sup>46</sup> *See* David Baron, WebMediate, Inc., presentation to the American Bar Association Task Force on E-commerce and Alternative Dispute Resolution in San Diego, CA on Feb. 17, 2001, *available at* <http://www.law.washington.edu/ABA-eADR/documentation/2001.02.17doc.html> (last visited Nov. 27, 2002).

<sup>47</sup> *See* Baron, *supra* note 42; *see also* Baker submission to the Department of Commerce, *supra* note 36; *see also* WebMediate, *Welcome to the Dispute Resolution Revolution*, at <http://www.webmediate.com/intro.html> (last visited Nov. 27, 2002).

<sup>48</sup> *See* WebMediate, *Welcome to the Dispute Resolution Revolution*, at <http://www.webmediate.com/intro.html> (last visited Nov. 27, 2002).

<sup>49</sup> *Id.* The parties may, of course, skip WebSettlement and begin with or rely solely on WebMediator or WebArbitration. *See id.*

<sup>50</sup> *See id.* The cyber-arbitration process ends with an arbitrator rendering a binding decision. "In a somewhat more formal process than WebMediation, parties are encouraged to make their 'case'

## Advantages of Cyber-Mediation

As with traditional mediation, online mediation allows the mediator to adapt the process to address the particular needs of the disputants.<sup>51</sup> In addition to enhancing some of the benefits of traditional mediation, there are also advantages to resolving disputes over the Internet: “The process will allow for greater flexibility, more creative solutions and quicker decisions.”<sup>52</sup> In particular, the benefits of cyber-mediation discussed below include cost savings, convenience and the avoidance of complicated jurisdictional issues.

### *Cost Savings and Convenience*

As with traditional mediation, a benefit of mediation over the Internet is that it can provide substantial savings when compared with traditional litigation, which can be extremely costly.<sup>53</sup> 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.<sup>54</sup>

With attorney’s fees being perhaps the greatest expense in traditional litigation, or even sometimes traditional mediation, parties may be able to save a lot of money in cyber-mediation, where hiring an attorney is often unnecessary.<sup>55</sup> For example, if the parties have determined liability and their dispute is solely over the amount of a monetary settlement, then the fully automated cyber-mediation websites discussed above may be sufficient to resolve their dispute.<sup>56</sup> In addition, substantial cost savings may also result because online mediation does not require parties to pay for long-distance phone calls or teleconferencing.<sup>57</sup>

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in a secure resolution forum to a WebArbitrator selected from WebMediate’s network of experienced online arbitrators. Each party is given ample opportunity to present arguments and to rebut positions taken by the other side. At the conclusion of these presentations, the WebArbitrator issues a decision to the parties in written form.” *Id.*

<sup>51</sup> See E. Casey Lide, *ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation*, 12 OHIO ST. J. ON DISP. RESOL. 193, at 208 (1996).

<sup>52</sup> *Id.* at 219.

<sup>53</sup> See George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 712 (1997).

<sup>54</sup> See Llewellyn Joseph Gibbons, Robin M. Kennedy, and Jon Michael Gibbs, *Frontiers of Law: The Internet and Cyberspace: Cyber-mediation communications Medium Massaging the Message*, 32 N.M.L. REV. 27, 42 (2002)

<sup>55</sup> See Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 855 (2001).

<sup>56</sup> *See id.*

<sup>57</sup> Friedman, *supra* note 44, at 712.

Perhaps the most recognized benefit of online mediation is that the disputants do not have to travel lengthy distances to negotiate.<sup>58</sup> Since online disputes can arise between individuals from great distances, and even different countries, at least one of the parties will be required to travel far if they decide to rely on a traditional dispute resolution procedure.<sup>59</sup> Since parties can participate in cyber-mediation from their respective business locations or residences, this may lead to reduced costs and the expenditure of less time.<sup>60</sup> There is no need to rent a neutral facility to conduct the mediation and relevant documents and materials are readily available and do not have to be transported great distances.<sup>61</sup>

There are also several benefits that stem from the asynchronous nature of e-mail communications. Messages are not transmitted live, but can be written and then later sent.<sup>62</sup> Since e-mail, listservs, and web postings can be written, posted and responded to at any time, participating in cyber-mediation is substantially more convenient.<sup>63</sup> There are few of the scheduling difficulties that can arise in traditional mediation, where it is necessary to arrange times and places for meetings.<sup>64</sup> Parties are able to participate in the negotiation when they are ready and at convenient times.<sup>65</sup> The mediator can caucus with either or both of the parties privately, without affecting the flow of the mediation.<sup>66</sup> The amount of idle time that disputants experience is similarly reduced because, in contrast to traditional mediation, the mediator can devote time to one party without wasting the time of the other party, who would traditionally sit around waiting for the next mediation stage.<sup>67</sup> As Jim Melamed has explained:

Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators ‘caucus’ (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a professional fee meter clicking. When the

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<sup>58</sup> See Bordone, *supra* note 3, at 176.

<sup>59</sup> See Hang, *supra* note 46, at 855.

<sup>60</sup> See *id.*

<sup>61</sup> Gibbons *et al.*, *supra* note 45, at 42.

<sup>62</sup> See Jim Melamed, *The Internet and Divorce Mediation*, available at <http://www.mediate.com/articles/melamed9.cfm> (last visited Nov. 25, 2002).

<sup>63</sup> See Friedman, *supra* note 44, at 712.

<sup>64</sup> See Gibbons *et al.*, *supra* note 45, at 42; see also Friedman, *supra* note 44, at 712.

<sup>65</sup> See Jim Melamed & John Helie, *The World Wide Web Main Street of the Future is Here Today*, available at <http://www.mediate.com/articles/jimmjohn.cfm#> (last visited Nov. 26, 2002).

<sup>66</sup> See Gibbons *et al.*, *supra* note 45, at 42.

<sup>67</sup> See *id.*



Internet is utilized for caucus, the ‘non-caucusing participant’ does not need to sit in the waiting room or library reading *Time* magazine or growing resentful at being ignored.<sup>68</sup>

It may also be argued that more thoughtful, well-crafted contributions result from the ability of the parties to edit messages prior to sending them: “Asynchronous Internet communications have the advantage of being edited ‘best’ communications in sometimes contrast to ‘first’ (often impulsive) responses that can take place in real time face-to-face mediation discussions.”<sup>69</sup> In addition, many of the cyber-mediation mechanisms, such as the fully automated cyber-mediation websites discussed above, are available all day long, every day of the year.<sup>70</sup> Disputants can therefore proceed to negotiate the settlement of disputes immediately, rather than waiting lengthy periods to go to trial.<sup>71</sup>

#### *Avoidance of Complex Jurisdiction Issues*

A key advantage of resolving disputes through the use of cyber-mediation is that it avoids the issue of whether a particular court has jurisdiction over the dispute.<sup>72</sup> Since disputants can bind themselves to resolution through an agreement, jurisdictional issues can be avoided altogether.<sup>73</sup>

#### **Disadvantages of Cyber-Mediation**

“Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation.”<sup>74</sup> Notwithstanding the advantages discussed above, cyber-mediation also creates has several disadvantages when compared with traditional mediation. As Joel Eisen observes, the practice of mediation cannot easily be reproduced in the online environment because “cyberspace is not a ‘mirror image’ of the physical world.”<sup>75</sup>

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<sup>68</sup> Jim Melamed, *The Internet and Divorce Mediation*, available at <http://www.mediate.com/articles/melamed9.cfm> (last visited Nov. 25, 2002).

<sup>69</sup> *Id.*

<sup>70</sup> See Gibbons *et al.*, *supra* note 45, at 42; see also Friedman, *supra* note 44, at 711.

<sup>71</sup> See Hang, *supra* note 46, at 856.

<sup>72</sup> *See id.*

<sup>73</sup> Lide, *supra* note 42, at 200.

<sup>74</sup> Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1308 (1998).

<sup>75</sup> Eisen, *supra* note 65, at 1310.

### *Limited Range of Disputes*

Some disadvantages are specific to the method of cyber-mediation chosen. For example, fully automated cyber-mediation can only be used to resolve specific types of disputes and, even then, can only handle disputes where the amount of the settlement is the only unresolved issue. In fact, for fully automated cyber-mediation to work properly, it would seem that the parties would need to have undertaken initial discussions, agreed to the basic facts surrounding the dispute and have determined that one of the parties is responsible for damages. The parties would then seemingly have to have agreed to limit further discussions to the single issue of an appropriate amount of monetary compensation. Limiting the final stage of negotiations to determining a dollar figure for compensation seemingly leaves out the possibility for innovative, interest-oriented, out-of-the-box negotiating that is the hallmark of many successful negotiations.

### *Impersonal*

“There is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator.”<sup>76</sup> As Joel Eisen argues, “the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact.”<sup>77</sup> Mediation is normally based on an informal, face-to-face discussion of the issues between participants.<sup>78</sup> “Creating an atmosphere in which the parties trust the mediator to help them reach a resolution of their dispute is considered vital, if not indispensable, by most mediators.”<sup>79</sup> Negotiations are certainly more effective when the parties are able to communicate with one another freely. For example, helping parties to listen and understand concerns, empathize with each other, vent feelings and confront emotions is considered to be an important part of mediation.<sup>80</sup> “For many participants, mediation is about the ‘venting’ of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to tell one’s version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants.”<sup>81</sup>

Cyber-mediation, on the other hand, loses the dynamics of traditional mediation because it takes place at a distance and in front of computer screens, rather than with face-to-face

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<sup>76</sup> William T. D’Zurilla, *Alternative Dispute Resolution*, 45 LA. B.J. 352 (1997).

<sup>77</sup> Eisen, *supra* note 65, at 1310.

<sup>78</sup> *See id.* at 1312-13.

<sup>79</sup> *See id.* at 1325.

<sup>80</sup> *See id.* at 1323, 1325.

<sup>81</sup> *See id.* at 1323.

communication.<sup>82</sup> “The substitution of e-mail for dialogue, for example, makes it difficult to give any weight to emotion in mediation.”<sup>83</sup> In Internet disputes, there are great distances between the parties psychologically and large barriers to creating an open dialogue: there is typically no prior connection or any personal contact between the parties, they generally do not have an ongoing relationship (in fact, they often know little about one another), nor is there any hope of a future relationship (most often, cyber-disputes involve a “one-shot transaction.”) Thus, the effectiveness of cyber-mediation is challenged directly by the lack of an established relationship or personal connection. Additionally, communications online do not express the variable tone, pitch and volume of the participants and cannot transmit personalities or physical cues. “Oral expressions of feelings in a face-to-face setting have a richer and more meaningful context than written expressions of feelings in an e-mail exchange.”<sup>84</sup> In this way, it is more difficult to evaluate the flexibility of a particular party, or the strength of a party’s feelings or confidence on particular issues.<sup>85</sup>

Some authors have argued that the lack of personal presence in cyber-mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties.

The online medium, at least the e-mail environment, makes it difficult for the mediator to manage or temper the tone of the interactions without sounding controlling and judgmental. The mediator, at least in the beginning, is a disembodied voice and cannot use her own physical ‘personhood’ to set the parties at ease and create an environment for sustained problem-solving. Similarly, absent the physical presence of the disputants, the mediator has difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes.<sup>86</sup>

Beal has also explained that it constrains the mediator’s ability to express “serious demeanor, professional presentation, occasional humor, and just plain charisma.”<sup>87</sup> Eisen concludes that, “[g]iven the profession’s current orientation to listening and processing oral

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<sup>82</sup> *See id.*

<sup>83</sup> *See id.*

<sup>84</sup> *See id.* at 1311.

<sup>85</sup> *See id.*

<sup>86</sup> Ethan Katsh, Janet Rifkin and Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law,”* 15 OHIO ST. J. ON DISP. RESOL. 705, 714 (2000).

<sup>87</sup> Bruce Leonard Beal, *Online Mediation: Has Its Time Come?* 15 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000).

information, mediators would find it largely impossible to translate their skills to the online setting.”<sup>88</sup>

### *Potentially Inaccessible*

Access to online computers may pose a problem for some individuals, especially those involved in disputes that result from off-line transactions.<sup>89</sup> Continuous Internet access for the length of time it takes to resolve a dispute (which may vary from hours, to days, to weeks) may also pose a problem for those with limited access or those who would find doing so uncomfortable or inconvenient. It may also disadvantage those who are less familiar with computers and their use or those who are incapable of undertaking detailed written communications.

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. Since online disputes typically concern small sums of money, the cost of cyber-mediation is an important consideration.<sup>90</sup> SettlementOnline, for example, requires payment of \$300 for each settlement reached (\$150 fee for each claim resolved, with an additional \$150 coming out of the settlement amount).<sup>91</sup> CyberSettle offer flat fees based that vary based on the amount of the settlement with a payment of \$100 being required for any settlement under \$5000.<sup>92</sup> Fees for CyberSettle’s services are generally taken out of the settlement amount, although insurance carriers are obligated to pay an additional \$150 in submission and engagement fees.<sup>93</sup> Thus, for disputes of a few hundred dollars, a party may be unwilling to pay one-third of a potential settlement to a service to help settle the dispute. As a result, the effectiveness of such mechanisms for resolving online disputes has to be questioned, unless there is little, if any, fee.<sup>94</sup> With the current fees that these websites are charging, it is likely that cyber-negotiation is out of reach for many Internet disputes.

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<sup>88</sup> Eisen, *supra* note 65, at 1308.

<sup>89</sup> *See id.* at 1336.

<sup>90</sup> *See* Ponte, *supra* note 3, at 69.

<sup>91</sup> *See* SettlementOnline, *Settlement Online Pilot Program Proposal*, at <http://settlementonline.com/Proposal.html> (last visited Nov. 27, 2002).

<sup>92</sup> *See* Cybersettle, *Attorney Pricing*, at [http://www.cybersettle.com/products/atty\\_pricing.asp](http://www.cybersettle.com/products/atty_pricing.asp) (last visited Nov. 27, 2002).

<sup>93</sup> *See* Cybersettle, *Claim Professional Pricing*, at [http://www.cybersettle.com/products/ins\\_pricing.asp](http://www.cybersettle.com/products/ins_pricing.asp) (last visited Jan. 26, 2003).

<sup>94</sup> *See* Ponte, *supra* note 3, at 74.

### *Confidentiality Concern*

Katsch has discussed the concern over the protection of confidential material in ODR.<sup>95</sup> Whereas traditional mediation does not create a physical record, online mediation creates an electronic record.<sup>96</sup> This could potentially enable a party to print out and distribute e-mail communications easily and without the knowledge of the other party.<sup>97</sup> This may hinder the development of open and honest exchanges in cyber-mediation.<sup>98</sup>

### **Conclusion: The Promise of Cyber-Mediation**

Based on its commercial success thus far, it would appear that the fully automated cyber-mediation mechanisms are proving to be an advantageous forum for a number of disputants. In fact, Cybersettle claims to have handled more than 60,000 transactions since it went online in 1998, facilitating settlements for more than \$350 million.<sup>99</sup> Cyber-mediation using sophisticated software and traditional mediation using online technologies, on the other hand, appear to have had more limited success thus far. Ponte, for example, notes that the OneAccord software is relatively new and that cyber-mediation experts feel that greater experimentation and research needs to take place in order to improve it.<sup>100</sup> The potential of the more traditional negotiation methods supplemented by online technologies appears to remain untapped. As the founder and owner of Internet Neutral, Bruce Leonard Beal, explains, “[a]lthough dozens of ‘cases’ have been submitted to Internet Neutral for possible resolution, not one case has yet progressed to actual mediation using the online mediation system.”<sup>101</sup> Beal lists several reasons that Internet Neutral’s online mediation system is not being utilized, including: 1) the lack of consent of at least one party either to mediation or the use of a particular technology (e.g. e-mail, instant messaging, etc.)<sup>102</sup>; 2) the amount in dispute is not sufficient to warrant costs of mediation; 3) at least one of the parties “misapprehends the nature of mediation and desires arbitration or even litigation instead.”<sup>103</sup> Thus, before making a determination that cyber-mediation is an “effective” or “ineffective” mechanism for resolving disputes, it is necessary to recognize that it is in its early

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<sup>95</sup> See M. Ethan Katsch, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953, 971 (1996).

<sup>96</sup> See *id.*

<sup>97</sup> See *id.* at 971-72.

<sup>98</sup> See *id.* at 971.

<sup>99</sup> See Cybersettle, *Cybersettle Fact Sheet*, at <http://www.cybersettle.com/about/factsheet.asp> (last visited Nov. 27, 2002)

<sup>100</sup> See Ponte, *supra* note 3, at 69-70.

<sup>101</sup> Beal, *supra* note 78, at 741.

<sup>102</sup> Beal explains that, “even where all of the parties consent to online mediation in general, it is rare that they mutually will agree to implement a specific Internet technology, either e-mail, chat room, instant messaging, or videoconferencing. E-mail never has been agreed to.” *Id.* at 742.

stages of development. Cyber-mediation services will likely continue to be refined and continue to improve along with developments in technology.

In addition, some of the disadvantages of cyber-mediation discussed above may not have much merit when applied to disputes that arise online. For example, in defending cyber-mediation against attacks that it is “impersonal,” Hang argues that “[t]he problem with face-to-face contact is that it does not take into account the fact that anonymity is highly valued over the Internet. If there must be face-to-face contact for each dispute resolution, [ODR] is more likely to fail because anonymity is part of the Internet culture. The advantage of [ODR] is that [it] may preserve anonymity and resolve the dispute at the same time.”<sup>104</sup> It may also be that there is not a significant problem with a lack of access, particularly those with disputes stemming from Internet activity. Friedman points out that most people who engage in online activities either own their own computer or have good access to an online computer.<sup>105</sup> Hang further points out that “those sophisticated enough to engage in online commerce are presumably sophisticated enough to communicate effectively online, especially since making an online purchase usually requires an e-mail account and some internet skills.”<sup>106</sup>

Although cyber-mediation has been criticized due to its impersonal nature, it will likely become more like traditional mediation, increasingly popular and better suited to resolving disputes as technology advances. Beal argues that “online mediation will not manifest fully until videoconferencing becomes commonplace and the following apply: (1) video cameras and microphones are built into computers; (2) videoconferencing software is bundled with computers; and (3) modems are fast enough (i.e., ‘broadband’ or 412 kilobytes per second and greater) to accommodate videoconferencing.”<sup>107</sup> Katsh, Rifkin and Gaitenby similarly argue that videoconferencing is an “obvious solution to the lack of face-to-face encounters” in cyber-mediation.<sup>108</sup>

In conclusion, cyber-mediation is a recent phenomenon and will likely become an increasingly effective mechanism for resolving disputes as technology advances. In the future, as online video conferencing becomes increasingly available, it will become easier for disputants to undertake face-to-face negotiations. This will address the major claimed disadvantage of cyber-mediation: that it is impersonal. Nevertheless, until video-conferencing technology becomes

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<sup>103</sup> *Id.* at 741.

<sup>104</sup> *See* Hang, *supra* note 46, at 858.

<sup>105</sup> *See* Friedman, *supra* note 44, at 708.

<sup>106</sup> *See* Hang, *supra* note 46, at 859.

<sup>107</sup> Beal, *supra* note 78, at 736.

<sup>108</sup> Katsh, *et al.*, *supra* note 77, at 718.

commonplace, it may be a good idea for parties that intend to participate in cyber-mediation to develop some rapport by having a face-to-face meeting, if feasible, or at least a telephone conference call.

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