17 e-Mediation

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1 Introduction: ODR and e-Mediation

Writing on e-mediation as one discrete element in the field of ODR is a sign of the field's maturing. The initial phases of the field's development saw much writing on ODR in general, with multiple processes lumped together under discussions of "technology for ODR" or "justifications for ODR".

Beyond allowing close-up examination of e-mediation, this opportunity to discern between general ODR concepts and e-mediation benefits ODR as a general field as well, as it serves to contrast the important advances this field is making *beyond* mediation.

Bernie Mayer[1] noted how closely the field of conflict resolution is identified with the role of the neutral, and most specifically with mediation. He suggested that while the field offers many other roles, services and areas of expertise, its identification with mediation has offered it numerous advantages – as well as significant constraints.

The particular sub-field of ODR, it would seem, is not quite as closely identified with e-mediation as ADR in general might be. This may be due to the multiple influences informing the rapid evolution of the ODR field. Additionally, the two best-known success stories of the field, cited in just about every paper written on ODR, involve online arbitration (ICANN's UDRP) and assisted negotiation (the primary process of eBay's dispute resolution process). Finally, it may be that there are things inherent to the online environment that are more conducive to other processes, and Fourth Party functions better suited for assisting processes other than mediation. For example, automation functions may be powerful tools in automated and assisted negotiation, allowing dealing with large volumes of similar-type cases/claims – but less helpful in e-mediation. It might be that the Fourth Party provides enough support or assistance on its own in some cases, allowing parties to work things out without involving a human mediator.

In 2005, Melissa Conley Tyler reported that mediation was indeed the most common individual service offered by ODR service providers (closely followed by arbitration). However, out of the 115 operating ODR service providers identified, mediation was offered only by about fifty providers (many of whom offered other services in addition to media-

tion).[2] Recent reviews of service providers seem to support this general observation: Online mediation is an important element in the array of ODR services offered, but the ODR field is not (and never was) synonymous with e-mediation.[3]

However, as ODR breaks its original boundaries and explores implementation of e-mediation in new contexts, e-mediation might regain the primacy in ODR that it enjoys in ADR in general.

To explore these issues, this chapter will open up with a brief discussion of the development of e-mediation within the wider context of ODR growth. Subsequently, a snapshot of the field's *status quo* with respect to stakeholders, modes of communication and technology utilized, as well as the prevailing trends shall be provided. Thereafter, the third section of this chapter will address substantive and process issues in e-mediation: mediation process models, stages and issues, practitioner skills, professional issues, ethics and practitioner standards.

2   HISTORICAL DEVELOPMENT AND EARLY EXPERIMENTS

Katsh and Rifkin[4] described several notable e-mediation projects undertaken during the ODR field's early, experimental phase such as: (a) the Online Ombuds project, which was a pilot ODR program established in 1996,[5] (b) The Maryland Family Mediation project, which was another early initiative funded by the National Center for Automated Information Research (NCAIR) in the United States,[6] (c) the Cybertribunal project at the University

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2   M. Conley Tyler & J. Bornstein, "Accreditation of Online Dispute Resolution Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.

3   See Pearlstein, Hanson & Ebner, see chapter 19.

4   E. Katsh & J. Rifkin & A. Gaitenby, "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of eBay Law", *Ohio St. J. on Disp. Resol.* (2000), 15.

5   In 1999, it conducted a pilot program for mediation of eBay disputes, an experiment which laid the groundwork for eBay's extensive employment of online negotiation and mediation which continues to this day. Over a two-week period, 225 buyers or sellers responded to an offer for free resolution of buyer-seller complaints. The complaints dealt with feedback, non-delivery of goods and other common eBay issues. Using e-mail for shuttle communication between the parties, due to parties' comfort with the medium, the mediator invited the other party to participate, asked to hear each side's stories, and proceeded to conduct a mediation process similar to face-to-face processes. See a sample transcript of one such process in E. Katsh & J. Rifkin, *Online Dispute Resolution*, San Francisco, Jossey-Bass 2001. 144 cases, or about 2/3 of the complaint cases, were actually mediated (others were unsuitable for mediation or resolved themselves). Out of these, 46% ended in agreement. See Katsh *et al.*, (2000); L. Ponte & T. Cavenagh, *Cyberjustice: Online Dispute Resolution (ODR) for E-Commerce*, New Jersey, Prentice Hall 2005.

6   In 1996, the Center for Law Practice Technology at the University of Maryland's School of Law initiated a mediation project for family and health care disputes. This project, however, never quite got off the ground. See R.S. Granat, "Creating an Environment for Mediating Disputes On the Internet", Center for Law Practice Technology at the University of Maryland School of Law. A working paper for the NCAIR Conference on On-Line Dispute Resolution, Washington, DC 1996; Katsh (2000); C. Getz, *Closing the Distance with Technology: Report on Phase I of the Technology-Assisted Family Mediation Project*, 2007.

of Montreal School of Law, which later developed into e-Resolution, a commercial service provider providing e-mediation as well as arbitration for domain name disputes,[7] and (d) SquareTrade, which picked up the eBay mediation project where the Online Ombuds left off, as a business venture.[8]

After these initial experiments and projects, the field developed towards offering e-mediation services to the general public. Among the early service providers were Internet Neutral,[9] e-Resolution (see above) and Online Resolution.[10] They dealt with a wide range of dispute types, including business-to-business and business-to-customers commercial disputes, workplace conflicts, and insurance issues. The number of cases that actually went to mediation in these early years was probably low,[11] and indeed, many of the early mediation service providers did not remain active for more than a few years. However, other service providers took their place, and the number of initiatives continues to grow.[12]

3   CURRENT STATE OF THE ART OF E-MEDIATION

E-mediation is now being provided all over the world, by both local and global providers. As envisioned, it is truly a process enabling dispute resolution across cultures, jurisdictions and borders. As early as 2003, Abernethy related that SquareTrade's processes had involved participants from over a 120 countries, and were conducted in five different languages. The geographical spread of service providers since then has resulted in e-mediation making headway in all regions of the world.[13]

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7   This commercial venture operated until 2002. See Katsh and Rifkin (2000).

8   Squaretrade offered a process in which parties to eBay feedback disputes began their contact with each other through automated negotiation, followed up by assisted negotiation. Only if agreement was not reached through these processes, were parties offered the use of a live mediator. Although most cases settled through the automated stages of the process, SquareTrade conducted many human-led mediations. (See C. Rule, *Online Dispute Resolution for Business: B2B, E-Commerce, Consumer, Employment, Insurance, and Other Commercial Conflicts*, San Francisco, Jossey-Bass Inc Pub 2002.) According to Steve Abernethy, president of SquareTrade, during the period between 1999-mid-2003, 80% of the cases involving e-mediation resulted in agreement. While there are no firm numbers available on the volume of cases actually mediated by SquareTrade, there were certainly many thousands. Their operations continued until 2008, after which eBay integrated the feedback dispute resolution process into its in-house dispute resolution operations. eBay continues to implement a hybrid processes beginning with automated negotiation and continuing on to optional human mediator intervention in the event of no agreement. See S. Abernethy, "The Square Trade Experience in Online and Offline Disputes", *Proceedings of the 2003 United Nations Forum on ODR* 2003.

9   See B.L. Beal, "Online Mediation: Has Its Time Come?", *Ohio St. J. on Disp. Resol.* (1999) 15.

10   Rule (2002).

11   See Beal (1999).

12   See Conley Tyler (2006); Pearlstein, Hanson and Ebner, chapter 19 in this book.

13   See Conley Tyler & Bornstein (2006), as well as the chapters on regional ODR development in this book.

3.1 Organizational Structures for E-Mediation Services

This section will focus on the prevailing trends and applications in offering e-mediation services.

3.1.1 Regional versus Global

Some service providers hold themselves out as global practitioners, not limiting themselves to any one region.[14] Others, while not explicitly limiting the scope of their operations, do so implicitly by including comments on their website referencing particular areas, organizations and legal issues, by the language/s services are offered in, by a country-specific domain name or by the language in which the website itself is in. Still other service providers limit themselves explicitly to specific countries or areas.[15]

3.1.2 Individual Practitioners versus Institutional "Service Providers"

From the start, examination and discussion of e-mediation (and ODR in general) has tended to focus on "service providers" and not on practitioners. This probably had multiple reasons, some of which are suggested below.

First, this was indeed the actual business model often employed; many of the early ventures in e-mediation were run by a service provider who kept a roster of mediators. OnlineResolution kept a roster of 600 mediators and arbitrators, and SquareTrade had about 300 mediators on their roster.[16] The sites themselves were operated as a business which performed intake of cases, collection of fees, assignment to mediators from the roster, provision of training and support to neutrals, etc.

Second, it is the nature of internet commerce that individuals set up a business and present it as a larger-scale business. This is not only in order to impress; on the web, your catchy name and web domain are part of your branding strategy. "InternetMediation-Team.com" will always be more effective than NoamtheMediator.com.

Third, the previous point is particularly true given the e-mediation targeted market and clients. Early service providers were attempting to engage with e-commerce entities and integrate themselves into their b2b and b2c operations. A corporate veneer and framework is much more likely to succeed in that.

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14 Examples would include Juripax and TheMediationRoom.

15 *E.g.*, Cybersettle (limiting comments), emediation.nl (language and domain name), and the British Columbia Family Mediation Roster (explicit geographical limitation). An interesting provider in this regard is ODR-World. This website does not limit the scope of its operations, but the same service provider also operates ODRChina, ODRMalaysia, ODRAustralia and ODRIndia, servicing these countries specifically. In essence, it contextualizes its services by offering services to diverse regions in South East Asia and Australia.

16 See Rule (2002).

Fourth, continuing on the previous points, much of the focus (particularly the early focus) of ODR was on *scale*. ODR was seen as particularly effective for handling large volumes of similar disputes; the service-provider model fits that niche.

Finally, with much of the focus on new technological platforms for delivering e-mediation, developers were more likely to be business organizations rather than individual practitioners due to issues of full scale management, cost and expertise.

As a result, in the early days of e-mediation, very few individual practitioners hung out their web-shingle announcing themselves as such. It is difficult to tell whether this precludes individual practitioners having been, behind the scenes the sole operator of an e-mediation service providing site. Most likely, there were some providers with whom this was the case. However, no visible presence of small-shop mediation practitioners was identified on the web in Conley Tyler's 2005 mapping out of the field.

Recently, it would seem that a new trend is developing, of individual practitioners offering e-mediation services without trying to cloak themselves in a larger organizational veneer. An English-language search conducted at the end of 2010 turned up ten such individual practitioners, nine based in the US and one in South Africa (see Pearlstein, Hanson & Ebner, chapter 19 in this book). What might account for this shifting trend? I suggest that three converging factors are at play. First, mediation is ever a competitive market, supply-driven rather than demand-driven,[17] in which every edge a mediator can gain in attracting cases is of great value. Second, mediators, just like the general population, are becoming increasingly adept and comfortable with technology; taking mediation processes online seems more of a logical next step and less of a huge, daunting leap. Finally, the past few years have seen an important increase in the availability of low-to-no cost platforms for communication. The lack of funding or expertise to develop a "real" ODR platform is much less of a hindrance now than it was just a few years ago.

Whether these or other reasons are driving the increase in smaller-scale operations and individual practitioners getting in on the e-mediation market, the practitioners identified so far are probably just the tip of the iceberg of the pool of mediators out there who have actually expanded their practice to incorporate conducting mediation by combinations of email, phone and videoconferencing, and we can expect to see this trend increase in years to come.

3.1.3   Alternative models: Licensing and Partnering

There are some developing models of practice bridging the previous two categories, of regional/global and of institutional service provider/individual practitioner. These would involve service providers who have invested in development of advanced platforms offering

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17   Mayer (2004); U. Velikonja, "Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice", *Alb. L. Rev.*(2009) 72.

their use to individual practitioners. This might be done by offering "rooms" to individual mediators on an ad hoc basis or ongoing basis, much in the way a face-to-face mediation center might rent out its meeting room to an individual practitioner (*e.g.*, TheMediation-Room, Juripax).[18] Another model involves a more robust connection between the institutional service provider and individual practitioners, in which the former sets the latter up with a dedicated "space" on their platform, branded according to the practitioner's preferences. There have also been instances of service providers selling country-specific or language-specific licenses or concessions, and other types of partnership.

3.2   *Contexts of E-Mediation Application: Mediatability*

It is necessary to shed light on specific case elements which might make the online venue a *particularly* suitable arena for mediation. As for areas of particular activity, or dispute areas which seem particularly targeted by service providers, the most common seem to be complaint handling, e-commerce and low-value cases between geographically distant parties. The rationale for targeting these fields in particular would seem to be inherent in the way the promise of ODR was framed by its early propounders. However, these thrusts are not as predominant as they used to be, and perhaps with good reason, given the low level of longevity among early service providers, many of whom targeted these contexts. Reviewing the websites of practitioners and service providers, it is clear that a much wider and more general net is now being cast regarding dispute type and context. Some providers do not limit customers' imaginations to any particular context at all, and others expand on the multiple contexts in which they intervene.

Two things should be kept in mind while considering the spread of e-mediation – in the past, and in the future. The first is that the use of e-mediation process has not developed in line with people's intuitive conceptions regarding types of disputes that can be mediated online. These limiting preconceptions were breached at a very early point in e-mediation's history, as people became accustomed to taking more and more of their lives online. The second thing to keep in mind is that many e-mediation processes take place after disputes have already entered a settlement-through-ODR process. As ODR in general casts a very wide net, different types of cases find themselves funneled through to e-mediation even though these might not have reached e-mediation as a first choice. I will expand on these two points.

3.2.1   E-Mediation: Not What You Would Expect
In a dynamic very reminiscent of the growth of mediation as an area of practice, it would now be difficult to isolate a dispute area in which e-mediation is *not* offered or would not

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18   See also Rule (2002).

be considered suitable by a mediator. These include areas in which one might intuitively question the e-channel's suitability. Furthermore, whereas original thinking on ODR envisioned it flourishing as a tool for resolving disputes-at-a-distance, settling online business and other transactional disputes, e-mediation has certainly jumped those conceptual fences and is being offered in other areas. ODR in general has long left behind the conception that it is only suitable for disputes originating in online activity.[19] In addition, it has been shown to be a powerful tool for resolving disputes where geography is not a factor limiting participants' ability to convene face-to-face, and disputes in which emotional, relational and social issues are at least as important as transactional elements.

Two areas demonstrating this last notion are online family mediation and workplace mediation. Somewhat counterintuitively, family mediation has always been an area of interest for e-mediation.[20] Two recent projects – one conducted by Juripax in 2008, and the other conducted by The British Columbia Mediator Roster Society between May 2009 and February 2010 – are both good indicators of the benefits of e-mediation for family cases. Both projects saw high settlement rates, which were complemented with high rates of party satisfaction and willingness to utilize online mediation in the future.[21] Similarly, workplace mediation, while long envisioned as suitable when involving organizations spread out across the globe, or between members of virtual teams working at a distance,[22] is receiving an increased amount of attention as a tool for settings involving close-quarters relationships.[23] A recent study conducted by Juripax has shown that adding an online element to workplace mediation processes contributes to their effectiveness by eliminating asymmetry in hierarchal workplace disputes (such as between subordinates and supervisors).[24] We note these two areas of practice as examples of cases which by nature deal with close-up, emotional and personal issues between parties who know each other well. While certainly not the cases for which ODR was originally envisioned, they (and other areas sharing similar characteristics, such as elder care mediation, health care mediation or others) might prove to be areas of significant growth for e-mediation practice.

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19   See Conley Tyler & Bornstein (2006); Rule (2002).

20   See Granat (1996); Rule (2002).

21   K. Bollen & M.C. Euwema, *Online Mediation in Divorce Cases*, Catholic University of Leuven 2010; C. Getz, *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*, Victoria, BC British Columbia Mediator Roster Society 2010.

22   See Rule (2002); N. Ebner, "Online Dispute Resolution: Applications for e-HRM", in T. Torres-Coronas & M. Arias-Oliva (eds.), *Encyclopedia of Human Resources Information Systems: Challenges in e-HRM*, Hershey, PA, Idea Group Reference Publishing 2008.

23   The topic of organizational and workplace topic received an impressive amount of attention at Cyberweek 2010. See <http://adrhub.com/forum/topics/odr-for-organizational>, last accessed 20 February 2011.

24   K. Bollen and M.C. Euwema, *Angry at Your Boss or Fearing Your Employee? Negative Affect in Hierarchical Conflicts and the Moderating Role of E-Supported Mediation*, Kyoto, IACM 2009.

3.2.2 E-Mediation: Not Always First Choice

Traditional ADR usually assumes a breakdown in communication or other negotiation difficulties between parties. Coupled with a general interest-based approach, this leads to a state-of the-art in which mediation – regarded as the best communication or negotiation fixer-upper – is viewed as the process of first choice.[25] In ODR, however, this is not the case. In many cases, negotiation difficulties are viewed as being a result of distance, of low dispute-value, or of parties not knowing how to contact each other. As a result, some ODR providers focus on using technology as a way of bringing parties into contact (and some-times, highly structured contact) without involving a live mediator. In these cases, technology as the Fourth Party functions without a human Third Party.

However, these service providers recognize that many cases fail to reach conclusion for other reasons, and that the presence or assistance of an e-mediator can be helpful. These service providers offer e-mediation, in one form or another, as an add-on process after the "primary" process of negotiation has failed. For example, eBay/PayPal's dispute resolution process includes live mediation for parties who do not reach agreement through the automated process. SmartSettle also offers third party assistance in different forms, and Cybersettle offers "telephone facilitation" in the event that parties to a blind-bidding process to not overlap, but are judged to be sufficiently close to one another that a final nudge might help them to settle the case.

It may be that a shift emphasizing technology as a communication medium more than as a dispute resolution tool in its own self may be inherent in the emergence of an online market of individual private practitioners. A ripple of this phenomenon might be a tipping of the balance back towards human intervention as default, as opposed to automated intervention as default and human intervention as a backup.

3.3 *E-Mediation: Advantages and Challenges, Suitability and Conditions*

Whilst many scholars have provided an overview of the advantages and disadvantages of e-mediation, it seems in order to shed light on these two lists at this juncture for practical considerations pertinent to the mediatability of certain disputes arising in diverse contexts.

3.3.1 Advantages of Online Mediation

3.3.1.1 *Advantages for Parties*
– E-mediation is convenient. Parties choose when to participate, at least when employing asynchronous communication; travel time and fuss is eliminated in any event.

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25 See F.E.A. Sander & L. Rozdeiczer, "Matching Cases and Dispute Resolution Procedures: Detailed Analysis Leading to a Mediation-Centered Approach", *Harv. Negot. L. Rev.* (2006) 11.

– Parties gain access to mediator expertise beyond that which might be available in any given geographical region.[26]
– The issue of cost remains unresolved. There are different models for pricing e-mediation services, and these are often no different than face-to-face services. However, there certainly is enhanced cost effectiveness, given that parties save on travel cost and perhaps do not dedicate costly work time to a mediation process.

3.3.1.2   Process Advantages

– In asynchronous processes, the slowed-down pace can allow the mediator a more intentional application of the mediator's toolbox. This is enhanced by enhanced opportunities for nuance and subtlety. Mediators might find it easier to tweak and reframe messages. They can create opportunities for, light, behind the scenes contact with each party to a greater degree than face-to-face processes allow, as private communication reduces threats to perceived neutrality. Working with asynchronous methods, mediators can conduct simultaneous caucusing, saving process-time. Further utility can be achieved due to the elimination of those caucuses which face-to-face mediators find they conduct for the sole purpose showing even-handedness.[27]
– Records are preserved and reviewable, allowing for more seamless processes and joint frames of reference.
– Text communication, as a vehicle for mediation has its pros and cons and this issue is oft-debated in the literature. However it is, in practice, the most prevalent form of communication in e-mediation. Some of the benefits associated with text communication for e-mediation are that it often minimizes the effects of "good talkers" gaining the upper hand or of dominant figures causing others to reduce their participation levels.[28] Additionally, the emotion-limiting nature of text communication has been suggested as an advantage in e-negotiation and e-mediation as reducing confrontational dynamics, although this is certainly issue for debate.[29]
– Parties and mediators can engage in discussion without the immediate time pressure and other dynamics associated with synchronous, face-to-face conversations.

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26 Katsh & Rifkin (2000), discuss the basic requirements of any ODR system as being convenience, trust and expertise. We have noted the first two as being inherent in many models of providing e-mediation services. The third, a different kettle of fish altogether, is discussed in Ebner, chapter 11 in this book.
27 C. Rule, *New Mediator Capabilities in Online Dispute Resolution*, 2000. Available at <www.mediate.com/articles/rule.cfm>, last accessed 22 May 2011.
28 L.L. Thompson, *The Mind and Heart of the Negotiator*, (2nd ed.) Prentice Hall 2001.
29 See R.M. Victorio, "Internet Dispute Resolution (IDR): Bringing ADR into the 21st Century", *Pepp. Disp. Resol. L. J.* (2000) 1; N. Ebner *et al.*, "You've Got Agreement: Negoti@ting Via Email", in C. Honeyman, J. Coben & G. De Palo (eds.), *Rethinking Negotiation Teaching: Innovations for Context and Culture*, St. Paul, MN, DRI Press 2009.

– External experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process' dynamics.

3.3.2 Disadvantages of E-Mediation

3.3.2.1 *Disadvantages for Parties*

In cases where parties file a case and are contacted by a mediator assigned by a service provider, it is challenging for parties to connect with mediators or to assess them. Parties cannot rely on local reputation, and there are few internet resources to assist them.[30]

– Good face-to-face negotiators, able to steer interactions (including mediated interactions) their way through communication techniques, conversation dominance, volume or body language, may be handicapped online;

– Archived materials – preserved as video or text – are always out there. Once a party posts something in a discussion forum or participates in a recorded videoconference, their words are out of their hands forever. While many service providers are explicit about their security procedures, there are no certain guarantees in internet security.

3.3.2.2 *Process Disadvantages*

– The most commonly discussed process disadvantages are the lack of warmth, empathy, immediacy, rapport and other attitudes and affects that make face-to-face mediation what it is. While efforts are made to explain how to compensate for these in online communication, and even to utilize certain characteristics of online communication to achieve gains on these elements beyond what face-to-face communication permits,[31] this is still, in many aspects and to many communicators, an uphill battle.

– Messages conveyed online, and particularly those conveyed through text, are prone to misinterpretation,[32] to misattribution[33] and to causing deterioration of trust.[34]

– The online venue challenges the function served by apology in mediation, given that party sincerity cannot be gauged without contextual cues.[35]

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30 For those seeking to translate this into a business opportunity, <ratemymediator.com> is presently available for sale.

31 See M. Morris *et al.*, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations", *Group Dynamics: Theory, Research, and Practice* (2002) 6, 1; N. Ebner, "Trust-Building in E-Negotiation", in L. Brennan & V. Johnson (eds.), *Computer-Mediation Relationships and Trust: Managerial and Organizational Effects*, Hershey, PA, Information Science Publishing 2007; Ebner *et al.* (2009).

32 Thompson (2001).

33 J. Nadler & D. Shestowsky, "Negotiation, Information Technology, and the Problem of the Faceless Other", in L.L. Thompson (ed.), *Negotiation Theory and Research*, New York, Psychology Press 2006.

34 Ebner (2007).

35 See, for example, the Cyberweek 2010 discussion forum led by Sam Edwards, Eileen Barker and Michael Cote. available at <http://adrhub.com/forum/topics/media-effects-online>, and the panel webinar on mediation styles and mediator moves in the online environment, available at

– Face-to-face mediation is transparent regarding the question of who is speaking with whom, at any given moment. As different forum dynamics play out, with all parties convened around a table, parties switching in and out of a mediation room as the mediator caucuses with each of them separately, or mediators conducting shuttle diplomacy between parties ensconced in separate meeting rooms, parties have a clear picture of where the mediator is, and who he or she is speaking to at any given moment. Asynchronous communication, along with mediators' ability to establish private communication with each party separately with the click of a button, increases potential for mediator manipulation and for worries about mediator neutrality. This uncertainty, particularly when left unaddressed, might cause suspicion and loss of trust.[36]

3.3.3   Suitability for E-Mediation

As we have seen, e-mediation has surpassed its own expectations in terms of practice contexts. Combining those initial expectations with what has been observed in practice, what can we learn about e-mediation's suitability for a particular case, or to a particular category of cases? What elements of a case make it suitable for e-mediation? In this case, we would suggest augmenting traditional mediation suitability-tests (such as that recommended by Macfarlane[37]) with the following considerations:

– Are disputants geographically distant from each other (such as is common in e-commerce), or from their preferred neutral?
– Did the dispute itself arise from an online transaction or interaction?
– Is travel to face-to-face mediation impossible, cost prohibitive, or a factor likely to rule out mediation for any other reason?
– Does the dispute include trans-jurisdictional issues, making choice of law or court-decision enforcement difficult?
– Are the parties unwilling, or unable, to meet with each other face-to-face?
– Do scheduling issues or party preferences make it difficult or impractical for parties to convene for face-to-face mediation?
– Is a party/mediator handicapped or disabled in a way challenging travel or convening?
– Are there concerns regarding inter-party violence or intimidation which make convening in the same room a risky prospect?[38]

<http://adrhub.com/forum/topics/live-webinar-online-mediation>. Both URLs were last accessed 19 February 2011.
36   The literature on ODR in general is rich with discussions of advantages and disadvantages of ODR, much of which is applicable to e-mediation. For further discussion focusing specifically on e-mediation, see, for example, Granat (1996); Ponte & Cavenagh (2005).
37   J. MacFarlane, *Dispute Resolution: Readings and Cases*, (2nd ed.), Emond Montgomery 2003.
38   See, regarding emotionally charged family situations, see C. Getz, "Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project,", 2010. Available at <www.mediator-roster.bc.ca/public/pdf/Distance%20Mediation%20Project%20-%20Evalua-

– Have parties participated in the past in e-mediation?

Even one positive answer to these questions is likely to tilt the scales in favor of e-mediation, providing mediation is a suitable process in the first place.[39]

3.3.4 Preconditions for E-Mediation

The previous section describes considerations likely to make choice of e-mediation beneficial. However, e-mediation cannot take place unless certain preconditions are met:

– Parties and mediator must have regular access to internet and computers. This may seem anachronistic to many readers who are so welded to their laptop that they are virtually cyborgs; however, this is not true in many areas in the world and other situations – such as weather conditions or travel – can affect anyone.
– Parties must be competent and comfortable with technology of the type the mediator proposes to employ. While the former issue can be directly affected by training, and this affects the latter, it is hard to directly affect a party's discomfort with an online medium; in some cases, this might rule out e-mediation.
– A shared language or adequate online translation services.
– A contextually suitable degree of privacy and security.[40]

3.3.5 Choice of Technology

As Colin Rule[41] put it, "Technology, like stage lighting for a play, should not be the focus. If people walk out of a play talking about the stage lighting then odds are either the play or the lighting was not a success." Behind the scenes of every play, though, hours can go into discussing the placing of every light bulb and fog machine, often trying to figure out how to render the sources invisible and natural, letting the viewers focus on the actors. Indeed, the ODR field has seen examples of entities getting lost in their technology and paying a price. It has also seen examples of constantly adapting technology to suit users' comfort zones and capabilities in a world setting all these in constant flux.

While one could fill an entire chapter describing the nuances of different technologies that could be used for ODR, this section will avoid that, heeding another of Rule's admonitions: anything written about technology is certain to look silly (or, at best, quaint) after two or three years. Many pages in the ODR literature, and the wider literature on computer-

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tion%20Report%20Final%20June%2030.pdf>, last accessed 11 January 2011. Also see S. Rogers, "Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence", *Ohio St. J. on Disp. Resol.* (2008) 24, regarding restorative-justice oriented processes in cases of gender-based violence.

39 For further discussion of this issue, see S. Summers Raines, "The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace", *The Third Annual Forum on Online Dispute Resolution*, Melbourne, Australia 2004; Ponte & Cavenagh (2005); Getz (2010).

40 Summers Raines (2004).

41 Rule (2002), p. 245.

mediated communication, have been filled with the advantages and disadvantages of text or video communication, or with commentary on email-based communication as opposed to dedicated platforms serving as the basis for communication. In this section, it seems sufficient to recall the original thinking regarding the role and nature of technology in ODR, and connecting that with comments on the current state of the art and developing trends with regards to technology.

One critical process-issue is the question of whether a platform for e-mediation should aim for synchronous or asynchronous communication. This conversation is often inter-twined with the question of whether the focus should be on text or on video. One can achieve near-synchronous processes through any text-based platform (including email) although some lend themselves to being fully synchronous (*e.g.*, chat, instant messaging) and others are more commonly encountered as asynchronous (forum discussion posts, email). Katsh and Rifkin[42] recommended against real-time, chat-type interactions. They found that mediators felt rushed, pressured to respond quickly and were less able to control the flow of information between disputants. In addition, this style of communication focuses parties on the text itself. This denies mediators the opportunity to use the on-screen opportunities offered by the Fourth Party. By combining text, images and design, mediators can better provide resolution-oriented surroundings.[43]

Although several service providers have advertised that they used synchronous methods such as IM and chat, it is safe to say that market practice, so far as text-based processes are concerned, have gravitated, or evolved, towards asynchronous methods. While some platforms (such as ODRWorld or RisolviOnline) still offer chat alongside asynchronous forums, these seem to be add-ons to the main venue – the asynchronous forums or rooms the platform provides. Often, the process is asynchronous on multiple levels – as many platforms provides each party with their own private room, allowing multiple people on each side (*e.g.*, a party, her lawyer, her business partner, her husband) to contribute their opinions at their convenience, before the lead party posts a message in the main conference area or forum, visible to the other party and the mediator (for variations on how these forums are set up, I suggest touring and comparing those offered by TheMediationRoom, Juripax and ODRWorld).

Katsh, Rifkin and Gaitenby[44] advised against reliance on email. Again, the rationale behind this was developing software that gives the sense of a shared space and provides opportunities for whole-screen usage. This recommendation necessitated a certain sacrifice from the "convenience" side of the trust-convenience-expertise triangle discussed by Katsh & Rifkin.[45] Parties would have to go to the mountain by accessing a platform, instead of

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42   Katsh & Rifkin (2001).
43   *Id.*, pp. 143-145.
44   Katsh, Rifkin & Gaitenby (2000).
45   Katsh & Rifkin (2001).

the mountain coming to their inbox. Some evolution was necessary on this point, in order to keep the mountains accessible. Some platforms worked around this by incorporating email into the platform: Every change on the platform (such as the other party submitting a document) results in each party being sent an automated email notification telling them what occurred; often this letter includes a link leading parties directly to the changed area in the resolution platform.

If the leading platforms use email as a notification method and a portal to the system, and still other service providers seem to use it as a backup method in the event of difficulties with the system, individual practitioners taking their business online tend to use it as a primary form of communication. They seem to be reading the triangle a different way: Convenience is paramount – and email is simplest. They have process expertise – not technological expertise – and process expertise is what they are offering. Finally, it would seem that they feel that the issue of security, long considered by service providers dealing with the corporate world to be of utmost concern (one good reason to avoid email) is simply not that much of an issue to the individual practitioners' target market of people with individual transactional or marital disputes. People trust their email with a great deal of personal information – why should their disputes be any different? This difference in approach saves the individual practitioner a great deal in terms of operating costs. It also allows them to enter a market which has traditionally been perceived to have a prohibitive technological entry-barrier. As we have already noted, small-scale practitioners wanting to go a middle route can rent "rooms" on dedicated platforms from larger providers such as Juripax or TheMediationRoom.

One clear trend emerging from a review of e-mediation service providers is that the age of video has not yet arrived. The state-of-the-art of e-mediation is very solidly text-based. Most of the service providers who advertised use of video conferencing have either removed these references from their websites, or have become inactive (*e.g.*, the now defunct MARS, which differentiated itself from the pack by advertising its unique video platform). ODR providers using video (such as the National Mediation Board) are the exception rather than the norm. If anything, it would seem that service providers are "moving backwards" and reinventing the use of the telephone. This is perhaps in order to appeal to tech-wary customers, or, quite possibly, as communication "packages" including teleconferencing for discussion and email for documents is a very intuitive, reliable and cheap way to do business. While the "online" element is diminished, replaced perhaps by "at-a-distance", we must remember that technology is only a tool, it should not define practice. British Columbia's Family Mediation Roster's recent distance mediation project is a good example of this: all the mediators participating in the project, after participating in training and conducting role-play, initially saw the most potential in using platforms with multiplatform videoconferencing (*i.e.*, more than one person are shown on the screen at once) which allowed for document sharing and editing. In practice, mainly due to parties'

access to, and comfort with, technology, most of the work was done through telephone, teleconference and email – and parties and mediators both expressed high satisfaction rates with the media.[46]

It is to be expected that video will reappear on the e-mediation scene over the next few years; however, this will probably not be the result of service providers incorporating expensive conferencing software into their platforms, but rather instigated by individual practitioners as a result of their lower inhibitions regarding use of low-tech, low-security forms of communication. These practitioners will probably be willing to experiment with readily available free videoconferencing software, such as Skype or dimdim, assuming that if parties are willing to use it to maintain their relationships with their kids and grandchildren, they will trust it for communication with mediators and opposite parties. Service providers working with large commercial entities and government agencies will find it necessary, at some point, to keep the pace by incorporating secure video channels into their platforms.

4   Substantive and Process Issues in E-Meditation

4.1   Process Model

All practice of ADR stems from practitioners' worldviews. This is epitomized by the debate regarding problem solving vs. transformative models of practice,[47] but also ripples through other process model discussions such as Riskin's[48] grid of mediator orientations, strategies and techniques. In considering ODR, the discussion regarding the "why?" and "what?" have been overtaken, to a large extent, by the "how?" This section will include a few brief comments in the hopes of reminding practitioners that with all due respect, technology only lights the stage.

Resolution, settlement and agreement are all terms forming the backbone of ODR terminology much as they do in ADR. However, terminology aside, worldview matters. Perhaps the shortest way to frame the question to be addressed in this section is how does the online environment affect process issues that we hold to be substantive? Is the Fourth Party tilted in favor of one process model over another, or towards one quadrant of Riskin's

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46   Getz (2010).
47   R.A. Bush & J.P. Folger, *The Promise of Mediation: The Transformative Approach to Conflict*, (2nd ed.), San Francisco, Jossey-Bass 2005.
48   L.L. Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed", *Harvard Negotiation Law Review* (1996) 1; L.L. Riskin, "Replacing the Mediator Orientation Grids, Again: Proposing a 'New New Grid System", *Alternatives to the High Cost of Litigation* (2005) 23, 8, pp. 127-132.

grid? These two issues are certainly not identical, but they are intertwined at the practical level, and the few research findings at our disposal have implications for both of them.

To approach these issues, we should first note a couple of comments related to the evolution of ODR and e-mediation. ODR was developed with an eye towards high-volume cases sourcing from e-commerce settings. These initial settings certainly lend themselves towards the boilerplating of disputes noted by Bush and Folger as a hallmark of the problem-solving approach, and may have had some effect on the way ODR terminology developed, and on the way its technology emerged.

As we have seen, e-mediation has oriented itself around text-based, primarily asynchronous platforms and processes. This might stem from practicalities or issues of comfort, however we must remember that the medium is never neutral; communicating through any medium has implications for how messages are transmitted, and how they are received.[49] This cannot help but affect the substance of a process.

Research suggests that the use of asynchronous text-based media leads to more task-oriented and depersonalized communication styles than in face-to-face interactions.[50] This connects to the research indicating that people have (at least) two distinct information-processing modes: an *analytical-rational mode* and an *intuitive-experiential mode*. The former type of people tends to rely more heavily on logic and deductive thinking and their associated tactics (*e.g.*, development of positions and limits, use of logical argumentation, and the presentation of facts). People who adopt an intuitive-experiential mode rely more heavily on intuition and experience and their associated tactics (*e.g.*, appeals to emotion, the presentation of concrete personal stories, and the use of metaphors).[51] Asynchronous, text-based communication does not lend itself equally to these contrasting information-processing styles. Not only does this create a somewhat uneven playing field, favoring individuals who tend towards analytical-rational expression, it leads the conversational dynamics into expression of positions, arguments and facts.

The implications of this for e-mediation might be that, left to its own devices, a conversation aimed at discussing a dispute conducted though asynchronous, text-based media might easily tend towards a problem-solving orientation, frame a narrowly defined problem to be solved, and be addressed by parties and mediator with an evaluative approach.

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49 N. Ebner, "Negotiating via E-Mail", in M. Benoliel (ed.), *Negotiation Excellence: Successful Deal Making*, World Scientific Publishing, Singapore, 2011.

50 N.J. Kemp and D.R. Rutter, "Duelessness and the Content and Style of Conversation", *British Journal of Social Psychology* (1982) 21.

51 M.J. Gelfand and N. Dyer, "A Cultural Perspective on Negotiation: Progress, Pitfalls, and Prospects," *Applied Psychology: An International Review* (2000) 49, 1.

Certainly this is just one reading of the flowchart connecting communication theory and mediation models and orientations, and empirical research is needed. However, the little research conducted tends to uphold this.

Anne-Marie Hammond[52] conducted an experiment based in a series of e-mediation simulations. Her findings were based on surveys and focus groups conducted with the mediators and with the parties. Some of her findings have important implications to the topic of worldview, orientation and media affects. In her study, most of the mediators, who typified their "normal" (*i.e.*, face-to-face) approach as a hybrid facilitative/evaluative approach, reported that they were able to maintain this style of mediation in the online setting. However, mediators who defined their "normal" approach as being of a more facilitative nature reported that in the online setting they were more directive and also tended to use more problem-solving techniques – hinting at their being more evaluative. Most explained these shifts as necessary to "maintain momentum". Others said they were more active in order to be heard in the non-reactive silence of online communication. Interestingly, some disputants commented that would have preferred even more proactive and directive mediator interventions.

These findings are telling indeed: something in the online environment is conducive to mediators becoming problem solving and directive, while at the same time conditioning parties to accept or desire this approach. This would seem to be a practical implication of the task-oriented mindset and the analytical-rational – favoring mode online communicators – mediators and parties alike – are subtly nudged into by the medium.

Another way in which the online environment leads mediators away, on a very practical level, from a transformative approach and towards a problem-solving approach is that the low degree of interactivity in asynchronous modes of communication[53] shifts focus away from the conversational dynamic and onto the issue at hand. This is the communication theory behind Hammond's description that:

> There was 100 percent agreement by mediators that the asynchronous nature of online communications helped them to focus on the broader picture of the conflict and not just the moment-to-moment interactions. For example, they did not have to concern themselves with interruptions from disputants. 100 percent (of the mediators) also agreed that having time to craft their responses enabled them to express their questions and comments effectively. All consid-

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52   A.M.G. Hammond, "How Do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution", *Conflict Resolution Quarterly* (2003) 20, 3.

53   See Ebner *et al.* (2009).

ered that this advantage led them to design more effective interventions. (at 275)

This unanimous description is very telling in terms of understanding which orientation the online environment is more conducive to. Transformative mediation processes are focused, to a large extent, on precisely those moment-to-moment interactions which mediators reported as being handily eliminated by the communication mode. Similarly, transformative mediation is *not* focused (or is even "anti-focused") on "well-crafted and effective mediator comments and questions" in the sense that I am assuming the respondents in the study intended comments and questions that channel disputants away from their conflict and towards resolution. Such comments and questions get in the way of the transformative process.

Given the boilerplating of disputes, and the nature of asynchronous text-based communication, it would hardly seem likely that an eBay feedback dispute could be handled with a transformative approach. And yet, Susan Summers Raines,[54] perhaps the most experienced eBay-cases mediator of them all, suggested that this was not necessarily the case. At least, transformative elements could be adopted in the online mediator's approach, as he or she is mindful of opportunities to highlight opportunities for empowerment and recognition along the road to resolution.

Taking the above into account, it would seem that the best summary is that technology is not neutral. Text based, asynchronous communication, the preferred mode at current in e-mediation, is conducive to mediators adopting problem-solving mindsets, and using increased degrees of evaluative and directive methods. I am in no way taking a stance against this mediator orientation or process approach; however, mediators need to consider that the medium might lead them into acting at odds with their worldview. Once aware of this, mediators should be able to realign themselves to use technology in such a manner so that is supports their worldview.

In addition to the "be aware" suggestion, I will add on another: "set your stage carefully." While it might be most practical to find a technological platform that "works" (in terms of comfort, convenience, etc.), and then to adopt a process model that compliments it or makes best use of it, mediators aiming to be consistent and congruent with their own worldview might be well advised to take the opposite tack: Beginning with a reflection on their approach, mediators then need to find a platform or communication medium that allows for maximum application of this approach, and continue by allowing their approach to inform the way they advertise their services, train parties in the use of their platform and conduct mediation processes.

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54 S. Summers Rains, "Can Online Mediation be Transformative? Tales from the Front", *Conflict Resolution Quarterly* (2005) 22(4), pp. 437-451.

4.2   *Process Issues*

4.2.1   Process Stages

Beyond the general worldview/approach discussion above, not all stages of any particular process-model a mediator is employing are substantially affected by the online medium. Reviewing the process, it would seem that the stages most affected are the early steps of the process, which we will discuss briefly in this section.

4.2.2   Preparation

The pre-process preparation phase requires more intentionality and investment than face-to-face interventions. In addition to any substantive preparation mediators might routinely conduct for any given mediation, there are particular medium-related preparatory actions e-mediators should not neglect. Mediators would do well to use this stage to build rapport with parties, which will translate into in-process trust.[55] They need to find ways to personalize themselves to the parties, eliminating distance and creating social presence – such as through means of introduction, sending a picture or a welcoming video, making an initial phone call to lend voice to the interaction, etc. They need to evaluate parties comfort and experience in the online environment, and the degree to which they are adept with the particular platform or communication method to be used in the actual process. This might include conducting a test run to make sure that everything functions well and that parties know which icons to click on. They need to prepare (and perhaps try out) a backup method for communication in the event that the primary channel fails for whatever reason.[56]

4.2.3   Agreement to Mediate

The usual language of a mediator's typical agreement to mediate must be adapted to incorporate issues pertaining to the online environment, which might include costs for video- or tele-conferencing, methods of accepted and binding signature of documents, etc.[57] In addition, keep in mind that in face-to-face mediation, signing the agreement to mediate is often preceded by an explanation of its content in simple language. In text-based e-mediation, it might seem redundant to write what is essentially the same thing twice. Mediators must find a way to verify that the agreement is understood and accepted. This might be a good reason for using simple-to-understand language in the agreement itself, or for sending the agreement to parties well in advance, with enough time to ask any questions they have before the process is due to begin.

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55   Morris *et al.* (2001).
56   For more on preparing for e-mediation, see S. Jani & C. Getz, *Mediating from a Distance: Suggested Practice Guidelines for Family*, Victoria, BC, British Columbia Mediator Roster Society 2010.
57   *Id.*

4.2.4   Introduction

Parties to online mediation not only need an introduction to the concept and nature of mediation, they also need to understand the nature and rules of the online venue they will be employing for the mediation process. Providing parties with a tour of the platform or some initial training in its operation increases their satisfaction and comfort levels. Parties' sense that their mediator is capable with the technological platform and has a clear road map for the process affects their degree of trust in the mediator.[58] Combined, these issues would suggest the need for a new process stage, in which parties are walked through the platform (individually or jointly), and given an introduction to the online environment as it is used for mediation. Elements of this might include a site tour and tutorial, communication ground rules, instructions for participation, comments regarding language, time zones, synchronous/asynchronous communication and expectations and technical support available to parties.

4.3   *Mediators' Skills*

What would constitute a full skill-set for online mediators? Raines[59] suggests that there is no need to re-invent the wheel: online mediators require the same general skill-set of a face-to-face mediator, with added twists made necessary by technology. By contrast, the report of the Distance Mediation Project stated very clearly that "Distance mediation employs different skills, and involves a different mediation 'style' rather than simply new tools in the mediation tool box",[60] and noted that mediators expressed desire for specialized training in skills unnecessary for face-to-face settings. It could be posited that by using the face-to-face mediator's skill-set as the baseline and considering what needs to be tweaked or added, we are setting mediators up for confusion and for misapplication of techniques. In the end, both of these approaches combined probably offer a better picture of what is needed: All tools in the traditional mediation need to be closely re-examined for suitability and application online.

There are skills deemed necessary for providing face-to-face services that are simply not necessary in some online venues. Text-based mediators do not need skill in communicating via their own body language, or in interpreting others (although videoconferencing certainly does require these skills). Teaching e-mediators to consciously rely on these cues, as face-to-face mediators are taught, might be burdening them with a handicap that they will feel

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58   See Hammond (2003).
59   S. Summers Raines, "Mediating in your Pajamas: The Benefits and Challenges for ODR Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.
60   Getz (2010), p. 3.

as they begin their online work and find themselves missing these cues. Similarly, skills associated with designing a face-to-face setting for the meeting, choosing suitable seating arrangements, etc. are only very loosely comparable to web-platform design.

Other skills will need to be "tweaked": Mediators skills in process and time – management will need to take different time dynamics into account. Speed and pace have different effects online.[61] Mediators understanding of what happened "during sessions" as opposed to "in-between sessions" will need to shift to incorporate an ongoing, asynchronous process which is always, to some extent, "in-session". They need to accommodate familiar communication skills such as active listening, reflecting and reframing, to the online environment.[62]

Still other skills are unique to the online setting: Mediators will not only require new skills with technology, they will need to be skillful at helping others find their way around technology, and at making them feel at ease with it.

In a previous paper focusing on online negotiation,[63] four skill-sets required for text-based e-negotiators, dealing with writing ability, message management, relationship management and content management were highlighted. While too detailed to summarize in this section, I will note that e-mediators, themselves e-negotiators in addition to being charged with facilitating the parties negotiation, would do well to acquire those skills, and they should certainly form an important part of e-mediator training curriculum.

Beyond skills required of e-negotiators, mediators need skills to serve them in process management and party management. Here are some examples:
– *Technological expertise*: A mediator must be adept with the videoconferencing equipment she conducts her sessions through. If she relies on text communication, typing skills, or adeptness with a talk-to-text conversion program are core capabilities.
– *Social norms*: Online mediators must be able to practice "netiquette" and to understand and cope with the effects of its infractions.
– *Psychology of the medium*: Mediators need to learn the psychological effects of communication at a distance.[64]
– *Trustbuilding*: Mediators need to have a solid understanding of trust dynamics and of how interparty and mediator-party trust is affected and challenged by the online media. This ranges from how to build it to how to maintain it. The devil, it seems, is in the

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61 J.M. Brett *et al.*, "Sticks and Stones: Language, Face, and Online Dispute Resolution", *Academy of Management Journal* (2007) 50, 1.
62 See Hammond (2003); Ebner (2007).
63 Ebner (2009).
64 See Jani & Getz (2010).

details. Rifkin[65] notes how trust can erode as a result of mediator response time being slower than parties' expectations. Hammond[66] reports that lack of mediator skill with the technological platform resulted in eroded trust. Katsh, Rifkin and Gaitenby[67] suggested a structural challenge: the one-shot interactions common to the internet make trust difficult to form and maintain. Given these challenges, mediators need to be proactive in building rapport and trust.[68]

–   *Dealing with increased anger*: Mediators need to understand the dynamics of online escalation, and how to deal with incidents of interparty flaming. These dynamics, combined with the ease of dropping out of a process necessitates a higher level of repeated validation and empathy, as well as empowerment. Angry words and flaming Escalation can ripple towards the mediator as well, requiring e-mediators to acquire thick skin: with social norms lower in online communication, expressions of anger, attacks and flaming are sometimes directed at the mediator.[69]

–   *Maintaining schedules and engagement*: Mediators should set, and adhere to, regular schedule for checking-in and participating.[70] By doing so, they avoid the ease of procrastination associated with online processes, or simply of party drop-out.[71] This also offers a partial remedy to the difficulty of showing mediator engagement. In Hammond's[72] discussion of e-mediation experiments, the desire for more mediator engagement showed up as an issue regarding trust, satisfaction with the process, disputants' ability to see the others' perspectives and empathize, and more. Limited in terms of their ability to use bodily cues, active listening, etc., mediators need new ways to show engagement. Braeutigam[73] suggests constant, regular communication initiated by the mediator to bring some sense of synchronicity to the asynchronous interaction, and a sense of presence and listening.

–   *Asynchronous communication*: Mediators need to understand the dynamics of asynchronous communication, and the pitfalls it presents in mediation processes. The anxiety and doubt that accompanies waiting for the other party to respond are a natural breeding ground for distrust and anger. Mediators should find ways to reflect this dynamic and explain it to parties when it seems to be affecting the process. Another

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65   J. Rifkin, "Online Dispute Resolution: Theory and Practice of The Fourth Party", *Conflict Resolution Quarterly* (2001) 19, 1.
66   Hammond (2003).
67   Katsh, Rifkin & Gaitenby (2000).
68   A.M. Braeutigam, "What I Hear You Writing Is… Issues in ODR: Building Trust and Rapport in the Text-Based Environment", *U.Tol.L.Rev.*(2006) 38. For an expanded discussion of trust in e-mediation, see Ebner in this book.
69   Summers Raines (2006).
70   Hammond (2003).
71   Ebner (2011); Summers Raines (2006).
72   Hammond (2003).
73   Braeutigam (2006).

problem with asynchronous communication is that as time passes, people forget things. Raines[74] recommends that mediators consciously use many summary statements, to overcome the effects of time passing in asynchronous communication.[75]

–   *Providing signposts*: Mediators are both more experienced with the platform than parties, and have the advantage of being able to tailor it to their preferences. Parties are likely to be a lot less comfortable and adept.[76] Mediators need to recognize points in the process and/or areas on the platform which tend to confuse people, and provide clear instructions regarding where parties need to go, what they need to do there and when they need to do it by.[77]

4.3.1   Communication and Language Skills

In the piece on e-negotiation mentioned above[78] many of the key communication skills necessary to negotiate effectively online were identified. In this section, several issues that have been raised in the e-mediation literature as particularly important from the third party perspective shall be addressed.

Active listening: Much of a mediator's active listening toolbox, so important for trust- and empathy- building, relies on contextual cues that are not part of text communication. Mirroring or reflecting parties' words back to them is another element that does not translate easily to the online environment. Hammond[79] noted that some mediators reported difficulty with mirroring. Elsewhere,[80] I have noted that reflecting is challenging primarily as it seems superfluous online: If a party's words appear in an email trail, what good will it do to repeat them back to him or her the way we do in face-to-face mediation? And yet, active listening and reflecting serve the same purposes online as they do in face-to-face settings, and mediators cannot afford to pass up these valuable tools for showing empathy and generating trust. A good way for a mediator to demonstrate online listening is to stress, in words, that they have read the party's message. For example, "I read your message carefully" or "Reading your letter last night, I realized…" might seem like casual opening lines, but they convey a powerful message: "you have been heard".

While demonstrating *listening* in e-negotiation may take some creativity, word processing can actually make *reflecting* relatively simple. Cutting, pasting and editing make creating a paraphrased summary of a party's statements an easy task.

Questions: When using questions to further understand a party's position and needs, we can utilize the benefits of word processing to connect our question to specific parts of

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74   Summers Raines (2006).
75   *Id*.
76   See Hammond (2003).
77   For other elements recommended for the mediator's skill-set, see Katsh and Rifkin (2001), pp. 147-162.
78   Ebner (2009).
79   Hammond (2003).
80   Ebner (2007).

another's message. This not only makes the question more to the point and part of the flow of conversation, it also incorporates elements of active listening and reflecting. Instead of writing "When do you need the money paid?" we might write "In your last email you wrote 'I am pressed for time and need the money ASAP'. I appreciate that you are in a real rush, however, I also heard your opposite say it will take her a little while to get money together, if indeed you both agree to payment being made. Can you tell me a bit more about our time frame?"

Reframing: Katsh, Rifkin and Gaitenby[81] suggest that reframing is particularly tricky online: it can be done only after the narrative has already unfolded (parties have already sent out, and read, the accusatory or escalatory email) the mediator cannot jump in in the middle with a reframing word or sentence. This is reinforced by written word's characteristic of being recorded and re-accessible; parties can read their opposites annoying email message, ruminate on it over time and enter consecutive, spiraling, anger cycles – all before forming a devastating reply of their own.[82] Parties might have ways to make their angry or toxic statements stand out and aggravate even more, for example by changing font size, writing with all caps or coloring a sentence in red. In asynchronous communication, mediators need to be on the ball in order to interject reframing messages before things fly out of hand. Summers Raines[83] noted that shuttle diplomacy, in which all messages are sent to the mediator rather than being exchanged between parties with the mediator looking on, is particularly helpful for dealing with angry messages. Depending on their approach, mediators might reframe one party's messages before moving them on to the other party, or discuss the message and its potential effects with the sender, reframing it together with them, before moving it on.[84]

Language issues are an immense challenge in online communication,[85] and skills with written language are a must-have in an online mediator's toolbox.[86] The lack of contextual cues such as body language and tone of voice leaves parties and mediators straining to infer meaning from any cue they can get[87] and in particular, attention returns to the actual wording of the text itself. This, as opposed to face-to-face communication in which we infer most of a messages meaning from non-verbal cues.[88] With the written word spotlighted, shades of meaning, subjective interpretation and cultural differences turn every

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81   Katsh, Rifkin & Gaitenby (2000).
82   See Nadler & Shestowsky (2006).
83   Summers Raines (2006).
84   Rule (2002).
85   C. Rule and C. Villamore, "The Importance of Language in Online Dispute Resolution", *ICC International Court of Arbitration Bulletin, Special Supplement* 2004.
86   Rifkin (2001).
87   Ebner (2007).
88   A. Mehrabian, "Nonverbal Betrayal of Feeling", *J. of Experimental Research in Personality* (1971) 5, 1, pp. 64-73.

sentence written into a powerful tool for dispute resolution – at the same time it becomes a potential process-wrecker. Accuracy becomes paramount. While pre-written language can be employed and helpful, overly generic language can lend the sense that the mediator is not really present, engaged and listening.[89] The emotional content of language, and the way it affects the framing of the dispute, has also been found to affect the likelihood of resolution.[90] All this, before issues of multiple languages and translation (likely to be encountered in transboundary processes) lend their own challenges.

4.3.2   Professional Issues

4.3.2.1   Training

It is safe to say that while there is wide agreement that e-mediators require specialized skillsets, as discussed in the previous section, and that these require special training, there are no widely accepted standards for training content or style, or indeed many training opportunities at all. Rule,[91] for example, suggested that ODR practitioners should go through a process of studying, participation in simulations, mentoring by an experienced practitioner, participation in discussions on ODR ethical issues with seasoned practitioners and sharing of standard, pre-formed language to be used in ODR processes, with other practitioners for feedback.

However, given the prevailing service provider structure, widespread training did not evolve (as it did, for example, with general ADR training). Any training of e-mediators was conducted by in-house service providers. For example, SquareTrade's mediators were trained in-house, and received coaching on individual cases from SquareTrade's dispute resolution specialist support team.[92] Other service providers engaging a roster of mediators, such as Online Resolution, trained their mediators in use of the online platform.

While NCTDR was the first entity to offer ODR education to the general public, this was more of an introductory course than a training package aimed at professionals. The-MediationRoom is probably the first (and perhaps still the only) entity to offer practical training courses in conducting e-mediation processes. The British Columbia Distance Mediation Project has suggested that its guidelines for distance mediation[93] might serve as the basis for any training program in online mediation. These guidelines – intended as

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89   See Rule & Villamore (2005).
90   R. Friedman *et al.*, "The Positive and Negative Effects of Anger on Dispute Resolution: Evidence from Electronically Mediated Disputes", *J, Appl, Psychol* (2004) 89, 2; J.M. Brett *et al.*, *Tortoise or Hare? A Study of the Speed to Resolution in Online Disputes*, 2005. Paper presented at the IACM 17th Annual Conference. Available at <http://ssrn.com/abstract=602021>, last accessed 28 April 2011.
91   Rule (2002).
92   S. Abernathy, "The Square Trade Experience in Online and Offline Disputes", *Proceedings of the 2003United Nations Forum on ODR.*
93   Jani & Getz (2010).

a supplement to basic mediation training – include considerations for suitability of e-mediation for specific cases, technology selection, managing confidentiality and security, online communication skills and more.

There is certainly much to explore in terms of content and methods for e-mediation training at the professional and pedagogical level. Practically speaking, experience with general ADR development has shown that regulation and accreditation of practice and of practitioners often spurs development of training programs. While this is not always a positive route to travel (as the incentives for training development become incentives to avoid further development of training programs), I will take the opportunity to segue into discussion of those two issues.

4.3.2.2   Regulation and Accreditation

The question of whether ODR regulation is desirable, or even possible, has been discussed with some particular attention being paid to e-mediation. As Sarah Cole and Kristen Blankley[94] summarized this somewhat prickly issue, "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."

However, note Cole and Blankley (correctly, in my view), that not only does this give rise to internal dissonance – as these goals are sometimes incompatible with each other – they are challenged by the formidable external consideration that the Internet, by its very nature, resists regulation. They suggest that regulators prioritize carefully, and aim for small gains and not sweeping regulation of the field.

The issue of regulation overlaps a connected issue, that of accreditation. One means of regulation is by setting up regulatory barriers for practicing in the field. Despite the relative novelty of the field, the question of practitioner accreditation has already been explored, likely due to the ongoing discussion of ADR accreditation. Indeed, Conley Tyler and Bornstein[95] begin their survey of accreditation models for ODR with an overview of accreditation models in the ADR field. While their discussion regards ODR in general and not mediation specifically, many of their suggestions are particularly relevant to practition-ers of this process. They surveyed six organizations and service providers conducting some form of accreditation or screening process for practitioners, including government entities and commercial bodies, examining them for entry hurdles to accreditation as well as for requirements posed to practitioners seeking to maintain their accreditation. Beyond regular

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94 S.R. Cole and K.M. Blankley, "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be", *U. Tol. L. Rev.* (2006) 38.

95 M. Conley Tyler & J. Bornstein, "Accreditation of Online Dispute Resolution Practitioners", *Conflict Resolution Quarterly* (2006) 23, 3.

ADR criteria, all of these entities stressed the need for a new knowledge-base and skill-set regarding online interactions.

Other questions regarding accreditation include who should be accrediting, and who should be accredited. Regarding the former, online mediation skills might be incorporated into the accrediting criteria for currently existing accrediting bodies, raising the bar for all mediators seeking accreditation. Alternatively, special bodies (private market or government entities) could accredit online mediators, confer status as an "ODR expert" as a specialty status within a general ADR accreditation or – zooming in even closer – testify that a particular mediator has studied one or more particular skills. Regarding the latter issue, the question of whether individuals should be accredited to practice, or agencies should be accredited to offer services, is an important question.[96] Most online mediation has so far been provided by agencies or service providers, with relatively few "private practitioners" in the field. This centralized model would make accreditation of service providers an important level of oversight. The question of whether individual mediators should undergo accreditation as well also deserves attention. Rule[97] noted how most of the early discussion regarding standards, regulation and accreditation focused on the organization rather than on individual practitioners. He explains how in ODR the organization is identifiable and find-able (through its website, address, management structure, etc.) whereas the individual filling the neutral role might be anywhere in the world, subject to different jurisdictions and legal obligations. Given the shifting trend I have noted in this chapter, regarding the rise of the individual-practitioner model, this might need to be revisited.

4.3.2.3   Ethics

The need for guidelines on ethics in ODR has been under discussion since an early stage in the field's evolution. Many organizations and institutions, professional and governmental, have gotten in on the action by setting up committees and drafting papers, as Conley Tyler[98] notes:

> The American Bar Association established a task force to look at ways of ensuring that ODR services remain effective and ethical (Rule 2002:116). The Online Sector of the Association for Conflict Management prepared Proposed Guidelines for Online Dispute Resolution (Wiener 2001:4). In Australia, NADRAC 2002 provides draft practitioner standards for ODR and the Department of Justice Victoria has commissioned a study into accreditation of ODR practitioners.

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96   *Id.*
97   Rule (2002).
98   Conley Tyler & Bomstein (2006).

This flurry of commissions and papers have been augmented by service providers who have drafted their own set of guidelines, whether presenting them as codes of practice or just as part of their "about us" section.

Much of the discussion of ethics pertains to the wider field of ODR, so I will not expand on it here. However, I will make a few comments regarding mediation-specific issues.

Most standards of practice for online mediation have been modeled on traditional mediation practice standards. The one area receiving attention outside of this model is that of technical standards. Service providers often included the quality of their platform and its robustness, as well as the technological proficiency of their mediators, as part of their standards of practice.[99] However, face-to-face standards need to be tweaked to accommodate the online environment and online practice methods. For example, the service provider model described in this chapter necessitates two layers of impartiality: The service provider must be impartial, not only the mediator. As an example of dealing with this issue, I will note that the now-defunct WebMediate clearly stated that not only was it an independent service, but that as a business it did not accept investments from insurance companies or other businesses using the company to resolve disputes.[100] Other service providers took this issue to heart, as well.[101]

While there is not, as of yet, any agreed-upon or institutionalized standards to speak of, recent thinking might be reflected in NCTDR's code of practice.[102] One important section of that code pertains to e-mediation as it voices preference to consensual processes:

> Online Dispute Resolution schemes should encourage parties, whenever appropriate, to resolve their disputes using consensual processes, particularly when the restoration of the social links amongst disputants is of paramount importance, such as in family disputes. Consensual processes however should not be imposed against the will of the parties.

A recent paper by Jo DeMars, Susan Naus Exxon, Kimberly Kovach and Colin Rule[103] reflects some of the areas requiring discussion regarding ODR ethics. One important issue relating to mediation in particular reflects a trend noticeable in the debate on ADR ethics in general: abandoning the primacy given to neutrality and impartiality as guiding professional and ethical beacons, and instead striving to maintain balance between parties.

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99 Ponte & Cavenagh (2005). See, for example, SquareTrade's standards of practice cited on p. 64.
100 *Id.*
101 Beal (1999).
102 NCTDR, Online Dispute Resolution Standards of Practice, 2009. Available at <http://sites.google.com/site/danielraineyorg/Home/organizations---associations/other-projects-1/odr-standards-of-practice>, last accessed 28 April 2011.
103 J. DeMars *et al.*, "Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice", *Dispute Resolution Magazine*, Fall 2010.

Another issue considered is the potential for system design, or platform choice, to result in biased outcomes. I anticipate that as e-mediation develops and a keener sense for practice develops, opportunities for mediator manipulation of parties will be noted as an area of importance for ethical discussion, and will examined in greater resolution.

4.3.2.4   *Co-Mediation*

As a final professional issue, I will note that co-mediation – so central to many traditional mediation practices and debates – has completely vanished online. While there might be instances of co-mediation in online practice, I have not identified a single service provider or individual practitioner who have mentioned this mode of practice on their website, nor found mention of this in the ODR literature.

This is not to say that anything in ODR automatically rules out co-mediation. For example, in a mediation simulation on TheMediationRoom's platform (publicly performed at Cyberweek 2010), the mediator, like each of the parties, had his own forum area where he could consult with a "mediator assistant' (in this case – the general public offering input). In real-life settings, that space could be utilized to consult with a coach or a peer. Additionally, there is nothing inherent in ODR that would eliminate the ability to have two mediators "up front", "at the table". Technically, group emails can accommodate another mediator, and suitable videoconferencing equipment can do the same. It certainly may be that issues of cost-efficiency might be at play here, along with a desire to keep the interaction-through-technology as simple as possible without compounding the challenges by having another address to add to the email, another computer capable of crashing, or another bad internet connection knocking out a video transmission. More substantive questions to explore would be whether the underlying theory behind the co-mediation approach is in any way affected by the online environment, or whether mediators' preferences in this regard change as they take their practice online.

5   CONCLUSION

e-Mediation, the most widely offered service in the ODR field, would seem to be facing a growth phase as small-scale practitioners take their traditional practice online, in part or altogether. Current trends indicate that traditionally accepted boundaries regarding areas of practice will cease to hinder mediators, and that mediation will develop in contexts triggering high emotions and involving meaningful relationships. As this expansion occurs, mediators would serve themselves well by reviewing the knowledge gained to-date regarding online communication and process management. They could also conduct their practice with an eye to contributing knowledge to this growing field of practice by docu-

menting their experiences, conducting experiments of their own and sharing these with the e-mediation community.

While e-mediation and face-to-face mediation are certainly closely related, this chapter has demonstrated a wide range of elements characterizing e-mediation as a distinctive field of practice. These distinctive elements might tend to blur in the future, as interactions-at-a-distance continue to become increasingly ubiquitous, and online communication becomes second nature. However, even as the salience of some of the elements described in this chapter recedes, future research might show more significant areas of distinction between the two processes. We might discover, for example, different types of practitioners choosing to engage in each type of mediation, as individuals who would not ordinarily consider practicing mediation face-to-face find themselves very comfortable doing so screen-to-screen, and vice versa. It would be interesting to compare measurements of success across both processes; we would anticipate that practitioners' success practicing one type will not necessarily predict their success practicing the other. Finally, we might discover that different types of people participate as parties in either process, taking advantage of the new type of venue shopping the two processes allow. All this, however, is subject to the caveat that predicting the future of anything technology-related is, at best, a shot in the dark. For the time being, we can enjoy watching the expansion of e-mediation into new dispute contexts, geographical areas and institutions.