Plenary 2

Sharpening our Communication Skills in the Online World: Strategies and Tips for Mediators, Arbitrators, and Advocates

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CLE MATERIALS

Julio César Betancourt and Elina Zlatansa, "Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?," *Int'l J. of Arbitration, Mediation and Dispute Mgmt.*, Vol. 79, Issue 3 (2013)

Noam Ebner and Jeff Thompson, "@Face Value? Nonverbal Communication & Trust Development in Online Video-based Mediation," *Int'l J. of Online Dispute Resolution* (forthcoming)

Noam Ebner and John Zeleznikow, "Fairness, Trust and Security in Online Dispute Resolution," *Hamline Univ.'s Sch. of L.'s J. of Public L. and Policy*, Vol. 36, Issue 2, Art. 6 (2015), available at http://digitalcommons.hamline.edu/jplp/vol36/iss2/6

David A. Hoffman, "Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Dispute Resolvers about Email," reprinted from *Collaborative L. J.* (Fall 2007)

Ethan Katsh and Colin Rule, "What We Know and Need to Know About Online Dispute Resolution," South Carolina L. Rev., Vol. 67, at 329 (2016)

OTHER RESOURCES

Noam Ebner, "E-Mediation," in M.S. Abdel Wahab, E. Katsh & D. Rainey (eds.), "Online Dispute Resolution: Theory and Practice," at 357 (Eleven International Publishing 2012), available at SSRN: https://ssrn.com/abstract=2161451

Noam Ebner, "Negotiating via Email," in Honeyman, C. & Schneider, A.K. (eds.), "The Negotiator's Desk Reference," at 115 (St. Paul: DRI Press 2017), available at SSRN: https://ssrn.com/abstract=2348111

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Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Dispute Resolvers about Email

By David A. Hoffman

Mediators and Collaborative Practice ("CP") professionals receive training in communication skills, but that training typically involves in-person communications. In a world where email is beginning to replace much of our face-to-face and telephonic communication, there is a need for training that addresses email communications. The purpose of this article is to begin to fill that void in training by examining some of the ways in which e-mail communication differs from other types of communication. In addition, the article will explore the lessons we can learn from mental health professionals about how to communicate more effectively using electronic media.

Although email is unlikely to replace in-person, face-to-face communications entirely, it has become increasingly useful as an adjunct to direct in-person communication in CP, mediation, or other forms of dispute resolution. In some cases, particularly those in which in-person meetings are impractical or prohibitively expensive, email has become virtually indispensable. And even in cases where four-way meetings are used extensively, email plays an important role as a medium in which the parties and counsel exchange information and proposals between meetings.

There is a growing literature on what has come to be called "netiquette" – the set of rules that guide e-mail users who wish to avoid inflaming anger and otherwise offending people through their electronic communications. For example, even occasional email users quickly learn that the use of CAPITAL LETTERS is interpreted in cyberspace as "shouting" and therefore should be used cautiously, if at all.[1]

The purpose of this article is not to summarize the principles of netiquette.[2] Instead, the focus here will be applying research about relationships to computer-based communications. One of the foundation stones of the CP movement is the recognition that attorneys and other professionals develop reputations for collaboration or competition, and that those reputations have value in a marketplace in which clients are seeking services that will meet their objectives.[3] In the world of CP, practitioners generally seek to cultivate a

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[1] Despite this admonition, it seems that shouting a positive message might be a good thing – e.g., "I think your proposal is TERRIFIC!!"

[2] For a good summary of those rules, see the guidelines published by the Yale University Library at http://www.library.yale.edu/training/netiquette/index.html.

[3] For an excellent discussion of this principle, *see* R. Mnookin & R. Gilson, "Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation," 94 *Colum. L. Rev.* 509 (1994).

reputation for collaboration, and therefore the quality of their professional relationships matters a great deal. It has been my experience that some CP practitioners who value their reputations for collaboration nevertheless sometimes send emails that do not communicate that collaborative intention as effectively as the practitioners do in person.

Why should that be the case? The discussion below addresses some of the reasons why email, despite its advantages, can be so easily misinterpreted. The article then provides some guidelines, based on social science research, for overcoming the problem of misinterpretation.

1. Advantages and Disadvantages of Email

Before addressing the question of what mental health professionals can teach us about email, it is worth consider some of the salient characteristics of email communications.

a. Revisable. One of the main virtues of e-mail communication is that the messages are revisable – i.e., the author has the ability to edit the message before sending it (not possible, of course, in direct, face-to-face or telephonic communications). Experience shows that liberal use of the "save draft" button on our email programs when we are in doubt about sending a message is a sound practice.

b. Enduring. A second important feature of email – both an advantage and a disadvantage – is that the message leaves an enduring record. Email messages can be saved electronically or in printed form, and therefore are in some ways more useful than oral communications because they can be reviewed long after they are received. This is also a disadvantage because mistakes and miscommunications sometimes assume an unintended importance and can acquire a life of their own. Email messages can be forwarded to other people, and this feature underscores the wisdom of never sending an email that one would not wish to see published in a newspaper.

c. Asynchronous. Another advantage and disadvantage of email communications is that they are asynchronous. In other words, there is often a significant time lapse between sending, receiving, and responding to messages. More time can mean more potential for misunderstanding, and more time for negative reactions to a message to fester, but it can also mean more time for reflection and for crafting a more thoughtful response.

d. Narrow Bandwidth. The most significant disadvantage of e-mail communication is its limited ability to communicate meaning and emotion. The research of UCLA psychology professor Albert Mehrabian on the communication of emotion shows that:

- 7% of the meaning that people derive from communication comes from the choice of words that the speaker chooses;
- 38% percent of the meaning comes from the speaker's tone of voice and inflection, and

- 55% of the meaning comes from facial expressions and body language.[4]

Email and other text-only messages force word choice to do much more work than it ordinarily would. In the absence of intonation, facial expression and body language, word choice must be very careful indeed.

It is, of course, possible to create a more varied lexicon of emotion in an e-mail communication by using variations of typeface, type size, color, and even images or other attachments. For the most part, however, the haste with which e-mail messages are exchanged impedes our efforts to shade meaning in that way.

One of the problems with a communication medium in which there is little data about the emotional state of the person sending the message is that there is a tendency on the part of the recipient to fill that void with a projection about the intent behind the message. Accordingly, there is often a disparity between intention (which may be positive) and impact (which may be more ambiguous or even negative).[5] Especially when a communication is between two people who have an existing cordial professional relationship, it can sometimes cause concern for the recipient of a message that is devoid of the pleasantries and positive non-verbal communications that come with in-person communication. Consider, for example, the following exchange:

> Message:
>
> *"Hi Sam: Thanks for your email with your client's proposal. I think it will be very helpful in moving the case along. Are you available next week to discuss it? If so, please let me know what would be a good time. I look forward to talking with you. Thanks, Sarah"*
>
> Response:
>
> *"Not available next week"*

In this exchange, there is no mistaking the positive emotion behind the first message, but what about the curt response? Was it a rebuff or simply a rushed reply intended to keep the flow of information moving quickly? Is this professional relationship so strong that an occasional hasty reply or inartful response will have no effect, or is this a new professional relationship in which the expression of positive emotion is needed to foster collaboration?

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[4] *See* A. Mehrabian, *Silent Messages* (1971).

[5] I am indebted to Kyle Glover for this observation.

2. Research about Couples

Couples counselors have identified a number of communication guidelines that foster strong relationships, and many of these are useful in the realm of email – for example:[6]

- Avoid personal attacks (focus on actions, not personal characteristics).
- Use "I" statements instead of "you" statements (focus on impact of the other person's actions instead of claiming to know the other person's intentions).
- Avoid "I" statements that are really "you" statements (such as "I feel betrayed" or "I feel abused"), which are judgments more than they are statements about feelings.
- Avoid absolute statements (such "never" or "always").
- Focus on interests instead of positions (the basic teaching of the book *Getting to "Yes"*[7]).
- Avoid invective and inflammatory expressions (such as profanities).
- Ask clarifying questions to foster understanding (i.e., don't make assumptions).
- Ask questions as an expression of curiosity not cross-examination (which is a form of argument not inquiry) – e.g., using open-ended questions.
- Refrain from problem-solving (unless it is requested).
- Do not psychoanalyze the speaker (save that for licensed professionals).
- Stop the discussion if either party starts yelling – e.g., taking a break or switching to another mode of communication if the discussion gets heated.
- Focus on the present.

Anecdotal evidence suggests that these guidelines are useful not only for couples counseling but also for negotiations in the setting of a CP case or a

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[6] I am indebted to Beth Andrews, LICSW, for contributing to and refining this list, which is based on her experience as a couples counselor and her educational programs on communication for couples.

[7] *See* R. Fisher, W. Ury & B. Patton, *Getting to "Yes": Negotiating Agreement Without Giving In* (2d. ed. 1991), in which the authors describe interests as the reasons for the positions that people take. For example, if a divorced wife takes the position that her ex-husband "must pay a portion of Junior's college tuition," the underlying interest might be either that she lacks the money to pay all of the tuition, or that she thinks it would better for Junior if both parents demonstrate their involvement in his upbringing. Inquiry enables people to determine the specific interest underlying a position.

mediation. In addition to such anecdotal evidence, there are now scientific findings that identify a small group of especially robust predictors of success and failure in relationships, and those findings suggest guidelines for email and other modes of communication where the preservation and enhancement of relationships is a goal.

a. The Four Horsemen of the Apocalypse. One of the leading experts in the area of couples research, Professor John Gottman at the University of Washington, has found that the four most reliable predictors of difficulty in marital relationships are (1) criticism, (2) defensiveness, (3) stonewalling, and (4) contempt. He calls these the "Four Horsemen of the Apocalypse."[8] Gottman and his fellow researchers use video tape recordings to study the nuances of facial expression and intonation that suggest the presence of these elements, as well as paying attention to the words spoken by the couple. He and his colleagues have studied the longevity of the couples' relationships and correlated that data with their initial observations of the couples' communications, and based on that correlation, they have found that they can predict with 95% certainty whether the marriage will endure for 15 years.[9]

When one applies these communication principles to email – i.e., avoiding criticism, defensiveness, stonewalling, and contempt – there is an inherent difficulty because (a) email is a medium of communication in which intonation and facial expression are absent, and therefore (b) there is a potential for ambiguity regarding the intentions and emotions of the author of an email message. Thus, in structuring an email message, one should consider even more carefully whether the communication could be interpreted as indicating criticism, defensiveness, stonewalling, or contempt. Consider the following examples:

- *"Please don't send me any more proposals that are riddled with errors."* (Criticism)
- *"Please don't use such hyper-technical complaints about typos in the documents to divert attention from your client's delays in responding."* (Defensiveness)
- *"My client's delays? As far as I am concerned, the ball is still in your court, and I am not going to spend any more time on this file until we get a reasonable proposal."* (Stonewalling)
- *"This so typical of how you have been handling this case – the impasse here is just what my client warned me would happen."* (A two-fer: contempt for both the lawyer *and* the client)

Of course, criticism of an idea, a proposal, or a party's action or inaction in a case may be needed and perfectly appropriate. And, as we all know, criticism

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[8] *See* J. Gottman, *Why Marriages Succeed or Fail: And How You Can Make Yours Last* 72 (1994).

[9] *See* M. Gladwell, *Blink: The Power of Thinking without Thinking* 21 (2005).

lands more gently when the criticism is clearly focused on an action or a statement, rather than the person or the person's mental state. (For example, "your asset-split proposal was lower than what you previously proposed" as opposed to "what kind of lawyer makes a bad proposal and then counters with one that's even worse?")

Experience suggests that even when a critical message is narrowly focused and avoids personal attack, it is probably best delivered by a more direct means of communication such as a phone call or in-person meeting. By communicating such a message in that way, the speaker can add the reassuring elements of communication that will indicate a desire to maintain a cordial, collaborative professional relationship.

In some instances, it may be impractical to rely on more direct means (such as a phone call or a meeting) because the message has to be delivered quickly. Thus, consider how the messages above could have been more skillfully expressed:

- *"Could you please take another look at your proposal – I think there might be some typos, and I want to make sure that I understand all the elements of what you are proposing. Thanks!!"* (Criticism blunted)
- *"Sorry about the typos – I will take a look at it and get back to you as soon as I can. Thanks for being so careful about getting things right – it helps the process."* (Apology and appreciation replace defensiveness)
- *"OK, I will hold off on the case til I hear from you – we all want to do this case as efficiently as possible."* (Statement of common interest replaces stonewalling)
- *"Is a week soon enough for me to get back you? I'm quite busy right now (and I know you are too), but I also want to honor our clients' interest in moving things forward."* (Respect replaces contempt)

The common element in the messages above is the injection of an unambiguously positive emotion or intention. The impact of such elements can be seen in one of the remarkable findings by Professor Gottman with regard to his quantitative analysis of interactions in a relationship. Gottman and his researchers discovered what they call a "critical ratio" of positive to negative interactions in the communications between husbands and wives, and they found that this ratio is a robust predictor of success or failure of marriage. Their research showed that if the positive interactions in a relationship outnumber the negative interactions by a ratio of 5 to 1 or more, the relationship is very likely to endure. But if the ratio is below 5 to 1 – or, worse yet, a negative ratio – the relationship is headed for trouble.[10]

[10] *See* J. Gottman, *Why Marriages Succeed or Fail: And How You Can Make Yours Last* 57 (1994).

The positive interactions that the researchers looked for were often simply minor affirmations, validations, humor, pleasantries, or appreciation. The negative interactions involved such elements as anger, complaints, and fault-finding.

If one "unpacks" the content of an e-mail message, one can see the elements that may contribute, even when a critical message needs to be delivered, to an overall positive communication. For example, imagine the following message being sent with no salutation and no signature other than the sender's identifying information:

"Your most recent proposal is a non-starter."

It is difficult to tell from that message whether the sender is angry or simply rushed, or perhaps so disgusted by the proposal, the process, and/or the sender that s/he does not wish to devote the energy it might take to explain the reasons why the proposal is unacceptable. The author of this message may want the negotiations to continue or to end – the meaning and intention are unclear. Consider the following alternative version of the message:

> *"Dear Sam: Thank you for sending me your proposal. I have reviewed it with my client, and she has a number of concerns about it that I would like to discuss with you. I'm wondering if you'll have any time this week – I know your calendar has been quite full this month. When you have a chance, would you please call me or send me an e-mail so that we can arrange a time to talk. I'm encouraged that our clients are continuing to work toward a collaborative resolution of this matter, and I know that both of us share their strong intention in that regard. I look forward to talking to you sometime soon. Best regards, Sarah Smith."*

In this version of the message, the ratio of positive elements to negative elements is far in excess of 5 to 1. Apart from the comment about "a number of concerns" (negative), there are the following additional (positive) elements:

- A salutation, using the person's name – everyone likes the sound of their name, and it is a signal of respect.
- Appreciation – always welcome, as long as the "thank you" is sincere and not sarcastic.
- Taking the recipient's prior message seriously – "I reviewed it with my client"
- Openness – a request for discussion
- Question about schedule – instead of insisting on a particular time
- Acknowledgement -- "I know you're busy"
- Request – "please call"
- Flexibility – "when you have a chance"
- Validation of the parties' endeavor – "I'm encouraged"

- Optimism – "continuing to work toward collaborative resolution"
- Common commitment – we "share their strong intention"
- Affiliation[11] – "looking forward to talking to you"
- Good feelings – "best regards"
- Personal touch – signing one's name rather than just ending the message with a name-and-address block

It may seem like a lot of effort to include all of these elements, but in a medium such as email in which there is such a narrow bandwidth for emotion to be expressed, communication of positive emotion must be intentional and robust in order to be unambiguous. And, after all, a short paragraph like the one above can be dashed off in about a minute or so, and therefore the cost/benefit ratio associated with making the extra effort is likely to be positive.

3. Non-adversarial Communications

Wholly apart from the ratio of positive to negative elements in an email message, there are structural elements that one should consider including. In his book, *Non-violent Communication,* Marshall Rosenberg articulates four elements for non-adversarial communication:[12]

- Observation – based on facts or perceptions instead of judgments
- Sensitivity to emotion – looking for the feelings that lie behind the words
- Focus on interests – identifying the person's unmet needs
- Request – the other person is free to honor or decline the request (i.e., it is not a demand)

Applying these principles to the realm of email, one might structure a message to include all of these elements as follows:

> *"Dear Sarah: It was good talking with you today. As we prepare for our next four-way meeting about the parties' business, I have been thinking about the tensions that developed during our last meeting.* (Observation) *My client told me afterward that both of the parties were expressing strongly-felt emotions that have been part of their business relationship for a long time.* (Emotion) *What my client wants, more than anything else right now, is a speedy resolution – even if he does not get every dollar that he thinks his interest in the business is worth.* (Interests) *Would you*

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[11] The term "affiliation" – meaning the sense of connectedness between people – is described in the recent book, *Beyond Reason: Using Emotions as You Negotiate* (2005), by Roger Fisher and Daniel Shapiro, as one of five core concerns that stimulate emotion: affiliation, appreciation, autonomy, role and status.

[12] *See* M. Rosenberg, *Non-Violent Communication: A Language of Life – Create Your Life, Your Relationships, and Your World in Harmony with Your Values* (2003).

please ask your client if she is willing to set as a goal for our next four-way meeting the drafting of a term sheet that both parties can live with? (Request) *Thanks very much. – Sam Jones*

4. Conclusion. We are all familiar with the distorting effects on communication illustrated by the children's game called "telephone," in which a message is passed from one person to the next until it comes back to the original speaker in a form that is not recognizable. In CP, four-way meetings overcome these distorting effects. The increasing use of email communications in CP cases, however, creates a new set of potentially distorting communication effects because, even if all of the links in the communication "chain" can be seen, the sender's meaning, emotions, and intentions may be less clear. Research from the field of couples counseling suggests that using guidelines of the kind described in this article can help make email communications more transparent and thus a positive adjunct to four-way meetings. Because email is such a new medium, however, the techniques for successful communication via computer may be less intuitive and require more conscious attention. Experience suggests that there is considerable potential in email communications for both misunderstanding and enhanced understanding. As Collaborative Practitioners, we have the added benefit of working on cases with colleagues who join forces with us in trying to achieve higher levels of understanding in all of our communications – in person as well as in cyberspace. By adding more effective email communication to our toolbox, we can achieve higher level of collaboration and thus better results for our clients.

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@ Face Value? Nonverbal Communication & Trust Development in Online Video-based Mediation

Noam Ebner & Jeff Thompson

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Abstract:
Mediation is a process wherein a third party, or mediator, attempts to assist two conflicting parties in dealing with their dispute. Research has identified party trust in the mediator as a key element required for mediator effectiveness. In online video-based mediation, the addition of technology to the mix poses both challenges and opportunities to the capacity of the mediator to build trust with the parties through nonverbal communication. While authors researching the field of Online Dispute Resolution (ODR) have often focused on trust, their work has typically targeted text-based processes. As ODR embraces video-based processes, nonverbal communication becomes more salient. Nonverbal communication research has identified examples of specific actions that can contribute to trust. This paper combines that research with current scholarship on trust in mediation and on nonverbal communication in mediation, to map out the landscape mediators face while seeking to build trust through nonverbal communication in online video-based mediation. Suggestions for future research and implications for practice are noted, holding relevance to researchers and practitioners in any field in which trust, nonverbal communication and technology converge.

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Introduction

Mediation refers to a process for dispute resolution or joint decision making, in which two disputing parties voluntarily request the assistance of an uninvolved third party to help them work through their differences. The mainstream practice of professional mediation in western countries emphasizes two elements: Parties are free to leave the process at any time; and the third party, or mediator, does not have authority to impose a binding decision on them. Any outcome arrived at through the mediation process is that of an agreement reached between the parties themselves.

Given the non-coercive and voluntary nature of the process, it should come as no surprise that studies on mediator effectiveness have demonstrated the significant value assigned - both by mediators and by parties to mediation - to mediators' capacity to capture the parties' trust. How is this trust formed? The literature points out many individual elements of party-mediator trust (Ebner, 2012B). This includes the mediator's reputation and expertise as well as the skills possessed by the mediator. Reviewing the literature, however, leaves one with the sense that this search for a complete understanding of the mechanisms of trust in mediation is a work in progress.

Studies show the critical role nonverbal communication plays in creating trust between individuals. Generally, nonverbal communication has been described as being vital to having a successful interaction with others (Feldman, 1991) while more specifically, body congruence can create trust (Andersen, 2008), and eye contact has been

demonstrated to contribute to a person being perceived as trustworthy (Beebe, 1980; Zeigler-Kratz, 1990) and to creating "liking" (Mehrabian, 1967). Conversely, lack of eye contact, or gaze aversion, has been associated with a person being perceived as not being trustworthy (Andersen, 2008).

Given the potential for nonverbal communication tactics to directly affect trust, we find the relative scarcity of studies on nonverbal communication in mediation somewhat surprising, as we do the dearth of prescription towards specific nonverbal actions in mediation training and literature. The necessity of increased focus on the topic is supported by despite recent data showing that mediators overwhelmingly describe nonverbal communication in regards to mediation being "very important" (Thompson, 2013).

Mediation is currently facing a period of great change – evolution, if you will – as it increasingly embraces online communication. Online mediation offers a wide range of benefits over its face-to-face counterpart, ranging from saved costs, convenience and flexibility (Katsh & Rifkin, 2000; Rule 2002) to environmental protection (Ebner & Getz, 2012). As the feasibility of online dispute resolution gains acceptance in general, a rising number of individual practitioners offer to bring disputing parties together online to resolve their differences through mediation (Ebner, 2012A)

In online mediation processes, trust remains an important mediator attribute. The online environment poses a particularly rough playing ground to a mediator attempting to build trust. The literature on negotiation and dispute resolution, as along with the literature on other aspects of online communication, has noted many specific challenges

to trust -creation and -maintenance in the online environment (Ebner 2007; Ebner 2012B).

However, much of this literature has focused on text-based communication, primarily asynchronous - such as email –based communication – seeing such 'lean media' as the most challenging landscape to navigate (e.g., Barsness & Bhappu 2004; Ebner 2007; Ebner et al.; 2009, Exon, 2011). There seems to be an assumption, voiced or not, that in video-based communication the challenges to trust would diminish to their proportions in face-to-face communication. Indeed, while research has found video interactions to be generally more conducive to trust emergence than other media other than face-to-face interactions (Bos, Olson, Gergle, Olson & Wright, 2002), it does not follow that video communication does not pose its own, unique, challenges to trust.

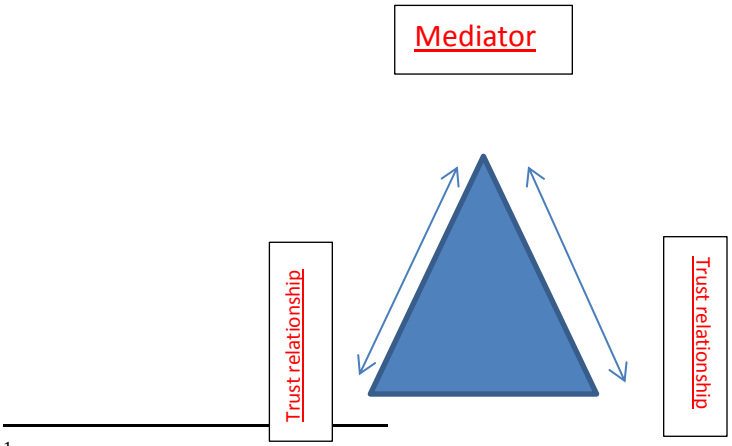
The aim of this article is, therefore, to establish and reinforce the range of techniques for trust building that mediators can bring to the virtual table through the channels provided by nonverbal communication in online video-based mediation. After establishing the role trust plays at the heart of mediators' efficacy, and the important role of nonverbal communication in engendering or diminishing this trust, we will explore the ways in which these roles play out in the online environment. Through specific examples of non-verbal transmission and reception of cues, we will demonstrate how trust in e-mediation processes – and indeed, the processes themselves - can be derailed or supported by close attention to nonverbal communication. We will then offer recommendations for further explorations the mediation field and the nonverbal communication field need to conduct in order to further develop our understanding of the juxtaposition of trust, the online environment and nonverbal communication. Finally, we

discussion implications of these suggestions for people operating in fields other than e-mediation, in which building trust is necessary for conducting successful interactions.

Mediation Explained

Mediation refers to a spectrum of process in which two disputing parties voluntarily accept the assistance of an uninvolved third party to help them work through their differences (for a simplified portrayal of mediation[1], see Figure 1). While there are many process-shades along this spectrum, two elements remain constant: the disputing parties' maintain their autonomy and are free to leave the process at any time; and the third party, or mediator, does not have authority to impose a binding decision on the disputants. Any outcome arrived at through mediation process is the result of an agreement reached between the parties themselves.

Figure 1: Mediation Triangle



[1]While a great many mediations do run along the lines indicated in Figure 1, two other factors often intervene to make mediation a more complex interaction. First, some professionals strongly advocate for 'co-mediation', in which two mediators team up to work with disputing parties. Second, disputes often involve multiple parties. As a result, it is not unusual to encounter mediation processes in which the lines of communication and trust-relationships form a web of great complexity.

Party A

Party B

While many schools of thought exist with regards to the purpose of mediation, the scope of issues to be covered in a process and the role of the mediator (Bush & Folger, 1994; Riskin, 1994; Moore, 2003) the limitations on mediator authority implicit in the two commonalities noted above require mediators to ground their ability to assist parties in areas other than in formal authority. Indeed, lacking the authority to impose participation in the process or any final outcome on parties, the fundamental attribute that mediators can bring to the table (or develop at the table) is parties' trust in them.[2]

These attributes of mediation are at the root of the transferability of the discussion in this paper to other areas in which professionals cannot dictate results during an interaction, but requires their engagement. Trust is key, and non-verbal communication is at the heart of trust building.

Trust In Mediation

It is well accepted a mediator needs to develop trust with the parties they are helping in a dispute in order for a successful outcome to be possible (Poitras, 2009). In

[2] A third trust relationship exists, of course – the trust relationship between the parties themselves. While certainly an important topic with regards to the mediator role, it is not the focus of this paper, which deals solely with affecting the degree of trust parties place in the mediator.

fact, surveys of mediators and of parties to mediation have clearly showed that the ability to gain a party's trust is held to be *the* most valuable skill of the effective mediator (Goldberg, 2005, Goldberg & Shaw, 2007). However, the current scholarship offers limited micro-tools a mediator might use with the specific aim of building trust with the parties. Instead, big-picture considerations are discussed in the context of trust; the effects of trust on mediation, rather than the effects of specific actions on trust. One such macro-finding is that parties' trust in their mediator is an important factor not only in the important question of whether parties actually reach settlement – but also in the preliminary question of whether they agree to participate in mediation at all (Carnevale & Pruitt, 1992).

The sparse discussion of micro-tools might be connected to a challenge of macro-definition. Without knowing what one is trying to achieve in a general sense, it is hard to point concrete steps he or she should take. Simply, trust is a tricky thing to define. It is often pointed out that there is no one universal way to define it, and that all suggestions made on this count are affected by the particular perspective of the definer (Boyd, 2003; Koehn, 2003; Wang & Emurian, 2005). Ebner has suggested, as a working definition of trust in the context of dispute resolution, that it is "an expectation that one's cooperation will be reciprocated, in a situation where one stands to lose if the other chooses not to cooperate" (Ebner, 2007, p. 141). In other words, the act of trusting someone involves accepting an element of risk, of betting on an unguaranteed occurrence. Applying this to party-mediator dynamics within the relation process, Ebner explains how mediators depend on parties to accept risk and, in essence, bet on the mediator:

> "As mediators, we also ask parties to trust *us* and to trust the mediation *process*, despite the risk and uncertainty involved and despite the fact that their expectations cannot, ultimately, be fully satisfied by us, but rather by the other party. We ask them to desist, delay, or act in parallel to other alternative processes for solving their problems, while at the same time explaining that there is no certainty regarding the outcome of the mediation process. We invite them to divulge information to us, to explore their interests with us, and to reconsider their assessments and offers – even when they are uncomfortable doing this together with the other party – and their agreeing to do so is predicated on their trust in the mediator." (Ebner, 2012B, p. 206)

Such a working definition might make it easier to address trust in an empirical and practical sense, rather than philosophic discussion. Indeed, it provides a lens through which mediators can address what may be their most important question: With so much riding on the mediator successfully engendering trust in parties, what, practically speaking, should a mediator do in order to develop this trust? How does trust 'happen', and how can it be nurtured? Or, simply what mediator actions might make parties more likely to bet on the mediator?

Formation of trust can be related to different elements inherent in a particular mediation process. Some of these elements might be structural or social in their nature: mediators often rely on their reputation or on their status in a particular community or network (Moore, 2003). Other elements relate to the mediator's personal in-the-room skill-set: in addition to their general competence at process-management, parties have

reported that effective mediators are those with good communication abilities, who are skilled at forming rapport with each party and who are able to engender trust in parties (Goldberg, 2005).

With regards to those last traits of communication, trust and rapport, we must ask: What, precisely, is it that good mediators do? 'Engendering trust', for example, is a very general concept. How does a mediator go about doing this in practice? Given the complex and hostile atmosphere mediation often provides, what can mediators do to form bonds of trust and rapport and how can their actions be applied to other professionals who need to build trust to be effective?

In order to draw together findings on trust building in mediation, one must cast a net wide enough to draw in other related notions and terms. The literature on mediation often relates to trust obliquely, or spotlights traits and dynamics that are closely connected to trust. Most notable is the term *rapport*. The ability of a mediator to form rapport with parties has been found to be the most important ability or skill a mediator can possess (Goldberg 2005; Goldberg & Shaw, 2007); a primary element of this rapport, as the term was used in this study, was parties' trust in the mediator, also discussed as the mediator gaining the *confidence* of the parties. Their negative counterparts support these findings: a lack of *integrity* (including trust-breaking behavior) has been found to be widely viewed as a cause of mediator failure (Goldberg 2005).

Reading the above though, one might remain frustrated by the generalities. Rapport, good communication and trust are all clearly interrelated and of critical importance for mediation, yet how does one go about creating and improving them?

Indeed, despite the clear links established between rapport-building and trust (see Braeutigam, 2006; Nadler, 2004; Poitras, 2009), and rapport's stated importance to being an effective mediator (Noone, 1997), one finds very little advice as to specific actions a mediator might take with the goal of developing it. This might be due to the mediation literature's tendency to focus primarily on verbal communication. However, as we shall see, nonverbal communication plays a major role in a mediator's ability to navigate these complex webs and help parties in their endeavor to work out their differences out – and the field of nonverbal communication contains specific and implementable findings related to improving communication, increasing rapport and building trust. We will focus on this in the next two sections.

First, however, we will note the few suggestions that have been made in the literature to operationalize trust, by pinning it down to specific phases of mediation, as well as to particular mediator actions and moves.

A mediator's positive reputation can garner him or her some measure of trust before parties even enter the room (Goldberg, 2005), as can displaying or detailing their credentials at the beginning of the process (Exon, 2011). A mediator being observant, showing the parties respect and identifying the issues of central importance to them (Yiu, 2009) have also been described as facilitating trust-development.

Trust has been described as developing at particular points throughout the course of mediation. In other words, temporally speaking, trust fluctuates; some stages in the process are particularly important for trust development. For example, some mediators pinpoint the opening stages of a mediation – the mediator's greeting of the parties, and his or her introduction of the mediation process itself – as being critical moments for trust

development. Others pinpoint mediator's private sessions with parties, or caucuses, to be laden with potential for trust building.

In one survey, mediators suggested that trust was most effectively built though the mediator's empathic listening, and to a lesser extent by the mediator displaying honesty and adherence to ethical considerations (Goldberg, 2005). *Parties* to mediation surveyed on this same question stressed other mechanisms and traits as affecting the degree of trust that mediators evoked in parties, highlighting mediators' friendliness, likability, integrity, neutrality, maintaining of confidentiality and level of preparedness for the process (Goldberg & Shaw, 2007).

One way or another, these findings close a circle of trust, or as Ebner (2012B, p. 210) put it: "…not only do many mediator moves *depend* on trust… many (or most) mediator moves *affect* trust as well."

However, this is only the tip of the iceberg, in terms of actions a mediator can take in order to affect trust-dynamics. In moving from generalities to specific actions, the role of nonverbal communication in mediation must be revisited. This revisiting is particularly important, in light of the trend, discussed below, towards video-based mediation - in which nonverbal communication plays an important role.

Nonverbal Communication in Mediation

In this paper, our exploration of nonverbal communication in e-mediation will relate to a wide range of cues (or actions) and elements (such as clothing or the environment) divided into five categories as part of the METTA (Movement, Environment, Touch, Tone, and Appearance) model (Thompson, 2011). The METTA

model was designed to raise awareness of each of the nonverbal elements potentially present in a mediation session by separating nonverbal elements and cues into five categories as described in the table below. Identifying each of the potential nonverbal elements and cues through METTA helps ensure that each is not overlooked. Additionally, it allows for mapping out each attribute in relation to all of the others. This is particularly important when exploring a macro trait such as trust. Trust is created through a cluster of nonverbal cues and elements that contribute to it being established in a gestalt-like manner in contrast to a single action. Another example of such a cluster-formed element is rapport building, which, as already discussed, is closely linked with trust.

Table 1: METTA Model of Nonverbal Communication

Movement	Gestures, posture, body orientation, eyes, facial expressions, and head nodding
Environment	Location, distance between people, time, and layout of the room
Touch	Hand shaking, adaptors, and object adaptors
Tone	Clarity, pauses, "ums", and "ahs"
Appearance	Clothing, accessories, and adornments

When compared to verbal communication, nonverbal communication can have a greater impact on social interactions (Patterson, 2011) and when incongruence exists between the two, it is the nonverbal cues people will rely on as being more truthful (Burgoon, Guerrero, & Floyd, 2010; Guerrero & Hecht, 2008).

While often mentioned in passing, nonverbal communication is rarely explored in-depth in the context of negotiation and dispute resolution. Most discussions in the literature on the subject of communication in mediation have focused on verbal elements of communication. In instances when nonverbal communication is described, it is often

limited to macro-level explanations. This includes rapport being described as contributing to generating understanding and mutually beneficial solutions (Goldberg & Shaw, 2007; Goldberg, 2005; Harmon, 2006) yet specific micro examples are not provided (Louis, 2008; New York Peace Institute Manual, 2008; Slocum & van Langenhove, 2003).

When nonverbal micro cues are spotlighted, they have often been linked with examples that seem to be accepted as common knowledge even though they have not been validated by research (as noted by Remland, 2009). Some works do reference the importance of nonverbal communication (e.g. Kolb, 1997) and others specifically explore the role of nonverbal communication in negotiation however the examples provided in the interpretation and application section is not specific to conflict resolution limiting its potential for guidance (Wheeler, 2009).

Wheeler (2009), Kestner and Ray (2002), Mondonik (2001), and Kolb's (1997) work do offer examples and tips that can be beneficial to mediators but also can be viewed as either introductory or limited in data pinpointing nonverbal actions that have been validated. What few validated suggestions have been made tend to focus on recommendations for incorporating nonverbal communication cues and elements in the use of active listening as a communication tool (Macfarlane, 2003). While each of these works offers a contribution to a greater understanding of nonverbal communication and its application in conflict resolution, there is obviously yet much to be uncovered in this area.

That fact notwithstanding, a few recent studies have offered initial substantiated findings in this area. Poitra's (2009) study, offers seven macro skills wherein specific mediator actions can be attributed with trust building by the mediators. The seven are: impartiality, mastery, explanation of the process, warmth and consideration, understanding, settlement focus, advice, and legal expertise. When reviewing the list provided by Poitras, multiple skills have clear nonverbal communication aspects to them. For example, mediator warmth is most likely not only an outcome of the mediator's verbal words but also a result of the nonverbal aspects of the mediator's actions.

Thompson's (2013) research expands on Poitras and Goldberg's work by specifically exploring nonverbal communication and mediators. His work provides quantitative and qualitative data of micro and macro nonverbal cues used by mediators specific to trust and rapport building.

The tendency to focus on verbal rather than nonverbal communication is reflected in the content of mediation training courses, which serve, for many professionals, as the mediation field's entry-level qualification. The communicative skills stressed tend towards verbal communication: listening, using questions, reframing messages and so on. Non-verbal communication exploration is usually limited to very perfunctory discussions of body language or facial expressions. While other issues we categorize as nonverbal communication sometimes also receive mention (such as the question of how to design a mediation room, or arrange seating at a table), they are not usually discussed through the lens of communication.

Nonverbal communication elements of trust

The role of a mediator is to guide and assist the parties during the mediation session (Harmon, 2006). Overt aspects of this guidance might include, for example, the mediator utilizing skills to directly help parties explore options and evaluate possible solutions. However, an underlying layer of guidance exists in the mediator's ability to demonstrate positive and productive actions that each party might pick up on, and use, during the mediation session. Therefore, key mediator skills have their roots in nonverbal communication - developing rapport, immediacy, mirroring, and mimicry. These skills are all related to party-mediator trust.

Research on rapport, which has been identified as being directly connected with mediators building trust with the parties (Harmon, 2006; Poitras, 2009; Thompson, 2011) is defined as containing three elements between interactants: positivity, coordination, and mutual attention (Tickle-Degnen & Rosenthal, 1990). Specific micro examples of rapport are linked with nonverbal actions (Nadler, 2004). This includes smiling, directional gaze, head nodding, forward trunk, postural mirroring, direct body orientation, uncrossed arms, and uncrossed legs (Tickle-Degnen & Rosenthal, 1990). Through intentional manipulation of the frequency and intensity of these cues, mediators can directly influence the degree of rapport with parties. And, with rapport comes trust.

Rapport builds trust and confidence in the mediator and has been described as being achieved when the mediator is "connected" with the parties (Honeyman, 2004). *Connectedness* occurs when the mediator is "one of us" with the parties. That rapport must be built skillfully, in order to co-exist with *authority*, another source of party trust. Authority is engendered when the sensation that the mediator is "one of us" does not limit the sense that the mediator is also "beyond being one of us", by virtue of his or her

being experienced and professional in working in conflict. This tricky juggling act is supported largely by nonverbal communication.

Immediacy – messages that signal warmth, closeness, and involvement - is another concept closely linked with trust. Immediacy has been shown to increase credibility, competence, and trustworthiness (Andersen, 2008). When looking at the research on the nonverbal actions that create immediacy (see Andersen, 2008, p. 221) one might not be surprised to see actions similar to those that have been listed as contributing to rapport and trust as well (including, e.g., direct body orientation, smiling, nodding, direct eye contact, and facially expressive). Robinson (2008) cautions us that with immediacy, as with trust building cues, it is a *cluster* of nonverbal actions that *collectively* contribute to creating immediacy; thus looking solely at one specific action, in isolation, is unlikely to give a dependable assessment of immediacy.

Mirroring and mimicry are actions, both verbal and nonverbal, that are described as being congruent between persons (Thompson, 2011). Congruent nonverbal movements, even when purposely acted out, result in that person being perceived as being more competent, trustworthy, and sociable (Woodhall & Burgoon, 1981).

Unconscious mimicry, or the repeating another's nonverbal behavior (Knapp, Hall, & Horgan, 2012), is more likely to occur when there is a mutual goal (Lakin & Chartrand, 2003). Mimicry has also been linked with politeness (Trees & Manusov, 1998) and is described as being able to increase rapport with people (Tickle-Degnen, 2006).

Postural mirroring has been linked to creating rapport (Hall, 2008; Tickle-Degnen & Rosenthal, 1990), empathy (Curhan &Pentland, 2007) and immediacy. Therefore, it

would wise for a mediator to incorporate mirroring and mimicry, into their ongoing mediator moves such as re-framing and summarizing parties' statements. Remland (2009) offers a note of caution however, stating that engaging intentionally in mimicry in a manner that is perceived as disingenuous may have a detrimental effect on your attempts at building rapport.

Each of these attributes is a basic building block of parties' trust in their mediator. As a guide, the parties look to the mediator, often subconsciously, for examples of how to act during their negotiation. This opens the door for the mediator to continually prime parties. "Priming", in this regard, involves one person engaging in subtle nonverbal actions performed with the intention of influencing the actions of others (Thaler & Sunstein, 2008).

In our context, mediators can prime parties towards initiating or responding to rapport building with the mediator or with each other, through the power inherent in their own nonverbal actions to change the thoughts, feelings, and behaviors of others (Patterson, 2011). In this context, we note parties' capacity to build rapport with each other, given that this occurring not only creates a generally more trust-conducive atmosphere; it also validates and reinforces the trust the party initially placed in the mediator-guide, which led the party to implement the rapport-building strategy in the first place.[3]

[3] The examples and research noted in this paper with regards to nonverbal communication are primarily grounded in findings referencing western-based culture. Some elements of nonverbal communication have been shown to transcend cultures and trigger universal understanding, such as seven basic facial expressions (Matsumoto, Frank, & Hwang, 2013). However, culture certainly has an impact on the use and understanding of nonverbal communication (See, e.g., Semnani-Azad & Adair's (2011) study exploring different nonverbal expressions of dominance

Taking mediation into the digital age:

Returning to mediation, with the aim applying the findings above to video-based mediation, we must first understand the roots of mediation's transition to the online venue.

Given the ever-increasing trend of people transferring of their activities online, and the growth of business and transactions at a distance, it should perhaps come as no surprise that Internet-based communication spurred the development of a subfield of the alternative dispute resolution (ADR) field focused on conducting dispute resolution processes online; this area of inquiry and mode of practice has been dubbed Online Dispute Resolution (ODR). ODR's origins begin in the mid-1990s as an area of exploration for academics and a challenging area for hobbyists. Successes in applying ODR to eBay's large-volume commercial caseload (Abernathy, 2003), as well as The Internet Corporation for Assigned Names and Numbers' decision to institutionalize ODR for resolving domain name disputes (ICAAN 1999; ICANN 2003), fueled ODR's growth, and ODR evolved through an entrepreneurial stage in which dozens of service providers offered a variety of models and processes for profit (for more on ODR's evolution and scope, see Katsh and Rifkin (2000); Rule (2001); Ebner, 2008; for a recent discussion of ODR development, see Farkas, (2012)).

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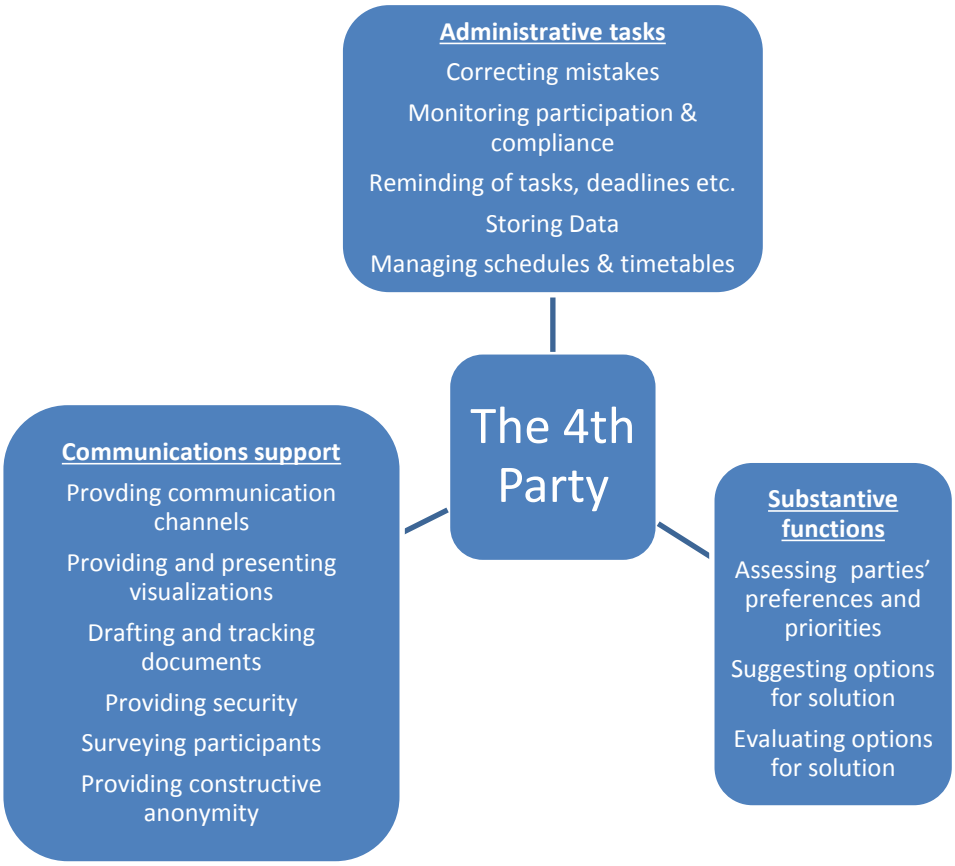
or submission, which suggests that Canadian and Chinese negotiators display different nonverbal actions).

The number and spread of ODR providers has fluctuated over the past fifteen years (for general global surveys, see Conley Tyler & Bretherton, 2003; Conley Tyler, 2004; Suquet, Poblet, Noriega & Gabarró, 2010; for recent regional surveys see Pearlstein, Hanson & Ebner, 2012 (North America); Abdel Wahab 2012 (Africa); Yun, Zhe, Li & Nagarajan, 2012 (Asia); Szlak (2012) (Latin America); Poblet & Ross, 2012 (Europe)).[4] However, ODR is clearly on the rise, and is making headways in multiple arenas: private sector, government, court systems and more (see Abdel Wahab, Katsh and Rainey, 2012).

Perhaps the best conceptualization of the potential of ODR for improving dispute resolution service delivery lies in Ethan Katsh and Janet Rifkin's (2001) dubbing of technology as "The Fourth Party", which can be utilized in many ways by third-party neutrals to help them with dispute resolution. The Fourth Party can facilitate performance of a wide variety of tasks, as demonstrated in Figure 2 below.

[4] In truth, probably no fully accurate and comprehensive count of ODR services, sites and providers has been conducted, despite researcher's best intentions. This is due to differences in the definition of what constitutes an ODR-related site, as well as to the natures of internet-based ventures and Internet searches. Some studies provided very specific discussion regarding their definitional approach and search parameters, e.g., Pearlstein, Hanson & Ebner, 2012; other studies, less so. In this sense, ODR's spread and growth is somewhat of a moving target.

Figure 2: The "Fourth Party"



In the case of e-mediation (mediation conducted online through a medium provided by information technology) which is the most commonly offered ODR service (at least in the US; see Pearlstein, Hanson, & Ebner 2012), the human third party mediator can view the technological fourth party as an ally, assistant and partner. The

fourth party can perform some mediation- related tasks on its own, simplify others and help human mediators perform still others in a more structured, organized and timely manner. In this paper we focus on technology's role in *providing communication channels* – and the challenges deriving from this.

In e-mediation, two current trends call the role of nonverbal communication to center stage. First, the primary model of tech-savvy companies with proprietary software branding themselves as e-mediation service providers seems to be in decline – giving way, instead, to a model in which individual practitioners of face-to-face mediation expand their market by offering their services online, relying on low- or no- cost technology. Another converging trend regards a developing shift in communications media. Most ODR service providers have, thus far, focused their efforts on text-based processes, with few service providers utilizing real-time video conferencing for resolving disputes. It would seem, however, that improvements in technology, changes in the nature and identity of ODR providers, and shifts in the public's comfort with technological platforms are on the cusp of reversing this tendency towards text (Ebner, 2012A). Indeed, we note that most of the new individual practitioners noted above do so using common videoconferencing platforms such as Adobe Connect or Skype. Given that video-conferencing has become a familiar and comfortable mode of communication for many in their business and personal life,[5] we suggest that increasingly, more mediators

[5] Recent data on the usage of such platforms leads us to believe this trend continues to grow. For example, one common platform, Skype has recently reached 250 million monthly users (Murph, 2012). Another, Google Hangouts is a part of Google+, a wide suite of communication and networking tools, which has more than 400 million users (Schroder, 2012).

and their potential parties are likely to feel comfortable with this medium for conducting mediation.[6]

Believing that this tendency towards online video-based mediation is indeed the wave of the future – even given the folly of trying to predict anything the future holds with regard to technology[7] – we find ourselves writing this article with a sense of urgency. Already in spin from being transitioned online, mediation practice once again needs to adapt to a new environment – the near-yet-distant environment of video-based communication. In this somewhat unfamiliar environment, nonverbal communication – of diminished importance in text-based communication - once again plays a major role. However, before we explore nonverbal communication in the online environment, we will explore a more basic issue challenging the feasibility of online mediation - the negative effects of online communication media on trust.

Trust in ODR

In e-mediation processes, the role of trust as a mediator's greatest asset does not diminish; indeed – it may be compounded. However, the online environment poses significant threats to the formation and maintenance of trust. Colin Rule, one of the

[6] In this regard, we note the work of Giuseppe Leon who, together with the Hawaii chapter of the Association for Conflict Resolution, is spearheading a project using Skype for conducting mediation simulations between parties situated at a distance, in order to train mediators. See, e.g., http://www.adrhub.com/profiles/blogs/mediators-around-the-world-improve-their-mediation-skills-with. Last accessed Feb 28th 2-13.

[7] Indeed, some authors are already looking beyond video and suggesting the benefits of holography for ODR (see Exon, 2002).

earliest advocates for ODR, suggested that trust might very well be the Internet's scarcest resource in a wide sense: "Transactions require trust, and the Internet is woefully lacking in trust" (Rule, 2002, p. 98). The literature on negotiation and dispute resolution, as well as the literature on other aspects of online communication, has noted many specific challenges to trust -creation and -maintenance in the online environment (Ebner 2007; Ebner 2012B).

Much of the literature on e-mediation, and on trust in computer mediated communication in general, has focused on text-based communication, primarily asynchronous, such as email –based communication. This lean media, providing few contextual cues for assessing trust seemed to present the greatest challenge to trust-investigators and warranted the most attention (Barsness and Bhappu 2004, Ebner et al., 2009). This has led to detailed mapping out of the topic, such as Ebner' s (2007) list of eight discrete challenges to trust and Exon's (2011) six building blocks for enhancing trust. However, while certain of these findings carry over to video communication, the lion's share of insight on this topic does not. Indeed, reading through the literature one gets the sense that there is an assumption, spoken or unspoken, that in video-based communication trust would not pose any more of a challenge than it does in face-to-face communication.

Indeed, research has found video interactions to be almost as good as face-to-face interactions for trust emergence. However, even if trust can emerge to the same degree through video interactions, in a quantitative sense, qualitative differences with regards to trust development and resiliency persist (Bos, Olson, Gergle, Olson, & Wright, 2002). We suggest that video presents new challenges to trust formation precisely owing to this

intuitive assumption that video and face-to-face communication are largely the same. In reality, video-based communication does not fill in the full range of cues and psychological impacts lacking in text-based communication. It only fills them in partially, and alters others – while giving the *impression* of providing them in full. Communicators' expectations that video would be the same as in-person may lead them to forgo conscious filtering of the unique set of contextual cues provided by online video communication. These could pose even greater challenges to mediators aiming to build trust, given the opportunities for misreading these cues by all communicators involved.

Developing Trust in video-based e-Mediation

Bringing the discussion above into mediators' attempts to develop trust with parties in the online, video-based environment, we first suggest that mediators are not venturing into wholly uncharted territory. Indeed, when using most commonly encountered videoconferencing platforms, a mediator will find that the attributes and actions conducive to building trust in in-person, face-to-face interactions carry over to the e-mediation setting to a large extent. Reviewing each of the previous mentioned nonverbal cues that contribute to trust, including those of rapport, mirroring, and mimicry, a mediator can apply each similarly in their e-mediation sessions.

However, this review and application must include care and adaptation, as characteristics of the online environment and the videoconferencing channel, do affect nonverbal communication. Awareness to some of the major effects can go a long way in facilitating simple adaptations - physical or technological. Such characteristics might include the potential for the Internet connection creating delay or disruptions in voice or

video, for poor lighting preventing people from being visible or shadowing them in particular ways; for noisy backgrounds and other audio issues, and for the camera's positioning not showing everyone who in the room.

Approaching these issues through the lens of nonverbal communication and utilizing the METTA model, some of the challenges to trust in video-based mediation, related to these characteristics of videoconferencing, are depicted in Table 2.

Table 2: METTA Model of Nonverbal Communication and nonverbal challenges in e-mediation

Movement	Are the movements of the mediator building rapport and creating trust? Are the movements of both the parties and the mediator visible? Is the mediator's eye contact with the screen or the webcam?
Environment	Is the location of the mediator and each party conducive to confidentiality? Is it too noisy? Are there distractions in the background such as people walking to and fro, or motion behind the mediator?
Touch	Is the mediator aware of movements that can be representative of anxiety or stress? Might the angle/frame of the camera restrict the mediator's ability to perceive such movements?
Tone	The tone of the mediator needs to be clear with limited "ums" and "ahs" while the technology has to not disrupt the fluency of the speakers by interrupting the audio channel.
Appearance	The mediator's clothing needs to display a professional presence while also ensuring the context is accounted for. Using earphones or some other type of headset might be perceived as inappropriate.

These concerns are formidable, not only to mediators but to other professionals in early stages of transitioning from face-to-face meetings, or from text communication, to video-based interactions. However, these characteristics are not inherently negative. On

the contrary, we suggest that through familiarity with their effects on nonverbal communication, and through approaching them with intentionality, mediators avoid trust pitfalls, but also harness these characteristics for enhancing trust-building.

In Table 3, we provide examples of how creating more opportunities for nonverbal channels to be used in video-based mediation increase the mediator's capacity to build trust with the parties.

Table 3: Using METTA to build trust

Movement	Make eye contact with the webcam, use open-handed gestures, orient your body towards the computer, head nod occasionally while listening, sit up right while occasionally lean forward.
Environment	Ensure each party participates from a quiet location to limits distractions.
Touch	Avoid fidgeting, playing with jewelry or your hair, avoid frequent touching of your face and your clothing.
Tone	Be prepared and confident – this helps ensure tone and paralanguage is positive.
Appearance	Dress suitably, the same as one would for conducting a face-to-face mediation process.

To demonstrate the particular characteristics of nonverbal communication through video, we will briefly expound on two issues: user-webcam proximity and the frame of vision, and eye contact and screen management.

Current videoconferencing technology allows for parties' and mediators' nonverbal actions to be visible to each other, reinstating the nonverbal communication cues that are absent in text based mediation. However, discussants' grasp of each other is not all-encompassing, and is more limited than it would probably be in a truly face-to-face, in-presence interaction. First, sensory information is limited to sight and sound.

Odor and touch are still missing. Second, even sight and sound are affected, and limited by the definition of webcams, the sensitivity of microphones, and the quality of internet connection. In addition to these limitations, one significant limitation exists with regard to the scope of vision. Parties and mediators do not see each other in their entirety. They see each other, on screen, in a window. The size of the window and how much of the user's body and background is visible might be affected by the choice of videoconferencing software and the hardware specifications of the webcam. However, one issue relating to the way each actor is viewed on-screen, which can be manipulated to serve trustbuilding, regards party-webcam proximity. Distance between the user and the webcam, as shown in the three examples below, can affect the process by contributing to, or hindering, trust building, based on the visibility of the nonverbal actions of the actor - parties or mediator.

Image 1

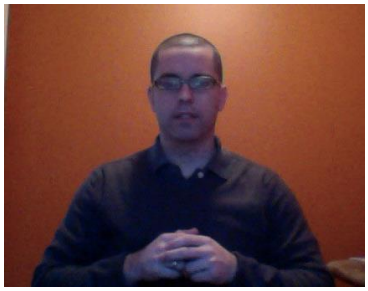


Image 2

Image 3

Image One demonstrates how one setting might limit the visibility of nonverbal cues, due to the actor being too close to the webcam. Due to this proximity, the screen is filled with his face – a somewhat artificial view in its own self – leaving his hands and body, as well as his background, invisible.

Image Two shows how another setting might serve to limit the visibility of nonverbal cues due to an excessive degree of distance between the actor and the webcam. While hands and body are now visible, micro expressions of the face and hands might easily go unnoticed or be misconstrued. In addition, external motion or actions in the background are easily visible and might distract or confuse.

Image Three demonstrates what we suggest as a "just right" balance for webcam-actor proximity in mediation settings. This distance allows for actor's facial expressions to be clearly visible as well as their hand gestures, posture, and body orientation; some background is visible for providing cues but attention is still directed towards the actor.

As noted above, making or maintaining eye contact is associated with trust, trustworthiness and liking (and by implication, rapport) (see Andersen, 2008; Beebe, 1980; Mehrabian, 1967; Zeigler-Kratz, 1990;); indeed this point is often made in mediation training. In the online video-based mediation setting, this important cue remains a bit elusive and contrived, due to the characteristics of most videoconferencing

platforms and the way computers are constructed. A mediator looking at a party's image on the screen, even if looking directly into the party's eyes, will appear to be looking elsewhere to the party. This is due to the fact that the mediator's computer webcam is not located behind the screen, but elsewhere - usually, although not always, at the top of the screen.[8] Looking at parties' eyes on the screen, in such a case, the mediator will appear to the party not to be focused on him or her, but rather to be looking downwards at something else, and not meeting their gaze. In this case, following the instinct to aim eyes towards eyes, and practicing training to the letter, would backfire due to the mediator adapting for media characteristics.

One solution is for mediators to retrain themselves from maintaining contact with parties' eyes, and instead to practice looking directly into the webcam, giving the impression that they are gazing directly at parties. This, however, hinders the mediator's own ability to view parties' nonverbal cues. Another simple solution to alleviate this issue, which works with many types of videoconferencing platforms (including, e.g., Skype, G-talk, Google Hangouts, and ooVoo), is to move - or "drag" - the video window showing the party to a point on the screen as close to the webcam as possible. This way, when looking at the party, the mediator's eyes are angled towards the party, giving the impression of eye contact. Of course given that in reality no *real* eye contact is made, mediators' actions in this regard will certainly feel artificial – however, they should enhance their ability to build trust and rapport with the parties.

[8] For example, parties using computers without integrated webcams might have the camera set up on their table, below the screen and to the side, pointing upwards.

These examples demonstrate how nonverbal communication through video, while sharing much in common with its off-camera, face-to-face counterpart, has unique characteristics that must be taken into consideration. Attention to the characteristics of video communication and how they affect the elements identified in the METTA model is likely to eliminate pitfalls and create uncover new opportunities for trust building.

Future research and implementation

Considering that online video-based mediation - and video-based interaction in general - is fairly new, there are many opportunities for research to be conducted measuring different aspects of the engagement process, the role of technology, and the impact nonverbal communication has on the session. Research can explore the initial expectations as well as post-process feedback from both mediators and parties offering for a multi-perspective view of video-based mediation.

Granted that mixed or combined methodologies offer unique perspectives into conflict resolution research (Druckman, 2005), both qualitative and quantitative means of research can be applied to this area of exploration. Surveys measuring various mediator skills and scale-based party feedback are current measures often employed in community mediation centers for measuring mediator effectiveness and process quality. These can be adapted and implemented for assessing nonverbal communication elements of online video- based mediation. These can be complemented by ethnographic interviewing of mediators and parties.

Research on video-based online mediation holds great promise for online as well as for traditional face-to-face mediation, owing to the capacity to record and review entire interactions in their original form. For example, a future study can explore the role of nonverbal communication during the mediator's introduction to the process. Having the mediator record his or her introduction and it being reviewed by expert raters allows many potential raters to be used regardless of their location as the file can be shared electronically. Additionally, because reviewing the process is conducted by means of the raters using the same technology and viewpoint encountered by parties in the actual mediation, it is arguably more accurate compared to people rating a mediator's introduction recording of an in-person mediation session. Simply, a recording of an online video-based mediation process contains all the information and cues that were experienced by parties in the actual recording. This, as opposed to reviewing a video-recording made of a face-to-face mediation session, in which case the reviewer is viewing a recording on a screen or monitor which was shot from a somewhat arbitrary point of view (not that of the actual parties), and which leaves out all the environmental and some of the nonverbal cues (e.g., the reviewer does not see a window in the corner which was not captured by the camera's frame, even though the actual parties did; the reviewer sees parties shaking hands with the mediator, but does not experience the sense of touch). Taking this into account, as further research emerges online video-based mediation will contribute to a greater understanding how mediators – online and in a traditional setting, can be effective and develop trust.

We suggest that our own suggestions, and any further research outcomes, are not limited to assisting mediators. Establishing interpersonal trust is always a challenge,

context notwithstanding. Findings on how to do it better will benefit other professionals whose efficacy depends on their ability to work with others at a distance in a collaborative manner based on establishing trust and rapport. Examples of such professionals might be team members engaged in projects spread across a large geographic area; corporate employees based in different locations; interviewers of any sort, such as academic researchers or journalists; diplomats engaged in international diplomacy; negotiators conducting their business online, online teachers and online counselors. Trust, so essential to mediators, has a market ranging far beyond mediation – and the ripples of research into trust in the context of mediation is likely to spread far.

Conclusion

Trust building is a necessary skill for mediators to be effective. Previous research has uncovered how mediators and parties believe trust can be created, while research in nonverbal communication has demonstrated the micro cues that correspond with trustbuilding. Similarly, other traits have been identified, which are based primarily on nonverbal cues - such as rapport, immediacy, mirroring and mimicry - that are associated with trust and support its development.

As Internet-based video technology proliferates as a communication channel for professional and private uses, mediators and other professionals whose practice relies on trust building must learn to operate in the video environment in a trust-promoting manner. Intentionality regarding nonverbal communication is an important component of this emerging new skillset. Mastering these skills will allow professionals to overcome trust-degrading media effects and conduct their business successfully at a distance.

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Fairness, Trust and Security in Online Dispute Resolution

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FAIRNESS, TRUST AND SECURITY IN ONLINE DISPUTE RESOLUTION

Noam Ebner & John Zeleznikow [1]

I. INTRODUCTION

The past fifteen years have witnessed immense growth in the application of technology in the field of conflict resolution. One area of particular interest is the growth of the practice and study of Online Dispute Resolution (ODR), which has its roots in the worlds of technology and of Alternative Dispute Resolution. As the field of ODR develops, its terminology and conceptual frameworks require exploration and clarification, with special care taken to convey shared meaning between participants coming from the two contributing worlds noted above.

In this article, we introduce three conceptual areas – key concepts in ODR – that would benefit from such clarification, showing the need for suitable terminology and demonstrating the value of refined conceptual frameworks. Part II of this article will provide a brief background of the history and development of ODR, will discuss many of the benefits of using ODR in the modern dispute resolution process, and will address the confusion regarding ODR terminology. Part III will focus upon three core elements of ODR: trust, fairness, and security. This section will pay particular attention to the unique benefits and risks of the ODR process through the lens of each element. Finally, Part IV concludes the article and presents the opportunity for further research.

II. BACKGROUND

A. What Is Online Dispute Resolution?

While there is no generally-accepted definition of Online Dispute Resolution (ODR), practitioners can think of ODR as using

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the Internet to perform Alternative Dispute Resolution (ADR).[2] While this is a helpful working definition, it is important to note that one difficulty in providing a more precise and widely accepted definition is that ODR is many things, to many people.

Generally speaking, ODR describes a field of activity that has developed since the mid-1990s. The e-commerce boom brought with it a wave of disputes resulting from online activity; resolving these disputes online seemed to be a logical act of "fitting the forum to the fuss,"[3] a long-held principle in the ADR field. Since this time, however, ODR has crossed many boundaries assumed by its early innovators, and is practiced across a wide range of contexts, regardless of whether the disputes it services originated online or in traditional settings.[4]

One perspective on ODR is, as we shall see, that ODR is not merely a tool helpful to e-commerce, but, instead, a natural evolution of the trend towards using alternative approaches to litigation across a wide range of civil, commercial, and family disputes.

One reason for this phenomenon is that average trials are getting longer and more complex, and the cost of pursuing traditional legal recourse is rising. Focusing on traditional disputes, researchers explain that the potential transaction costs of litigation provide an incentive for nearly *all* legal suits to settle.[5]

ODR provides solutions for cases that do not justify long, complex trials – such as in the case of low-value transactional disputes, in cross-border and cross-jurisdictional contexts. The unsatisfied purchaser of an item on eBay is more likely to prefer an

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2 ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY (1st ed. 2010).

3 Frank E. Sanders & Stephan B. Goldberg, *Fitting the Forum to the Fuss: A User Friendly Guide to Selecting ADR Procedure*, 10 NEGOTIATION J. 49 (1994).

4 Noam Ebner, *E-Mediation*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

5 George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

online process for achieving redress rather than pursuing litigation with the seller, who may be based in another country.[6]

A second reason for the trend towards ADR lies in its growing acceptance by mainstream conflict systems, including court systems.[7] This acceptance has trickled down to affect the attitudes of litigants themselves.[8] Focusing on this reason is, in many ways, the natural next step in the evolution of ADR's rise (which has spanned the past four decades.) While the focus of ADR has largely been on face-to-face processes, incorporating technology into ADR processes has quietly been commonplace for a long time. Primarily, this has taken the form of using the telephone[9] as a simple measure for convening people who cannot or should not be together in the same room, whether owing to geographical situations, to extremely vitriolic situations, or to situations where violence has occurred.[10]

As Internet technology has become widespread, much attention has been directed at using these tools for dispute

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[6] Steve Abernethy, *The SquareTrade Experience in Online and Offline Disputes*, PROCEEDINGS OF THE 2003 UNITED NATIONS FORUM ON ODR 2003, *available at* http://www.mediate.com/Integrating/docs/Abernethy.pdf (last visited May 25, 2015).

[7] Modern alternatives to litigation have been heavily influenced by the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice, which took place in Minneapolis, Minnesota from April 7 to 9 1976. At this conference, US Chief Justice Warren Burger encouraged the exploration and use of informal dispute resolution processes. *See* LODDER, *supra* note 1.

[8] *See, e.g.*, Donna Shestowsky, *The Psychology of Procedural Preference: How Litigants Evaluate Legal Procedures Ex Ante*, 99 IOWA L REV. 637 (2014).

[9] *See* Jessica Carter, *What's New in Telephone Mediation? A Public Sector Mediation Service Steps Up to a New Level of Telephone Access for Parties in Mediation*, 11 *ADR BULLETIN* 1, art. 4 (2009); *see also* Mark Thomson, *Alternative Modes of Delivery for Family Dispute Resolution: The Telephone Dispute Resolution Service and the Online FDR Project*, 17 J. OF FAM. STUD. 253 (2011); Claudine SchWeber, *Your Telephone May be a Party Line: Mediation by Telephone*, 7 MEDIATION Q., 191 (1989).

[10] LODDER, *supra* note 1; *see also* Peter Salem & Ann L. Milne, *Making Mediation Work in a Domestic Violence Case*, 17 FAM. ADVOC. 34 (1994).

resolution.[11] In some ways, ODR is a natural evolution of convening over the telephone. Technology now offers parties different levels of immediacy, interactivity and media richness to choose from.[12] Through some platforms, parties can choose to communicate through text;[13] through others, they can convene in real-time video, allowing them to see each other and, possibly, a mediator.[14]

It is important to note, however, that ODR is far more than a range of new communication platforms. In fact, when discussing ODR one might be discussing any of the following:

The online communication platform used for exchanging messages and offers in an ODR process;[15]

A wide range of individual processes from the ADR spectrum that can be conducted online (e.g., online negotiation, online mediation);[16]

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[11] For early work on the subject, see Ethan Katsch & Janet Rifkin, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICT IN CYBERSPACE (2001) and COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: FOR E-COMMERCE B2B, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS (2002). For a recent compendium of work, see MOHAMED S. ABDEL WAHAB, ETHAN KATSH & DANIEL RAINEY, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION (2012).

[12] *See* A. Bhappu & Z. Barsness, *Risks of Email*, *in* THE NEGOTIATOR'S FIELDBOOK 395-400 (Andrea Kupfer Schneider & Christopher Honeyman eds. 2006).

[13] *See, e.g.*, Anne-Marie G. Hammond, *How Do You Write Yes? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RES. Q. 261 (2003).

[14] For discussion of video mediation see, Noam Ebner & Jeff Thompson, *@Face Value? Nonverbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DIS. (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2395857.

[15] This communication platform might be intended for the general public and widely accessible, whether for free (e.g., Skype) or at cost (e.g., telephone). On the other hand, it might be a specifically designed internet-based platform tailor-made to conduct dispute resolution process through, such as the platforms offered by companies such as eBay and PayPal or by ODR service providers such as Modria and Juripax. These platforms are tailored to support the types of communication and case-management encountered in dispute resolution.

[16] The spectrum of ODR, in terms of the processes offered online, is far too wide to detail here. For discussion of a variety of contexts in which ODR is offered, and

An ODR system - an environment in which parties to specific types of disputes are led through a particular process or set of processes on their way to a resolution, or;[17]

ODR technology / software, aiming far beyond the 'communications platforms' discussed above.[18]

B. Terminology and the Development of ODR

The ambiguity of terminology regarding the very meaning of the term "ODR" is not reserved solely for top-level terms. We certainly do not say this disparagingly, but rather encouragingly. ODR is a very young field and is advancing in leaps and bounds; it is little wonder that conceptual work, particularly of an academic nature, will lag somewhat behind. In our view, much of the work in the domain of ODR has focused upon practice rather than theory. A recent book edited by Mohamed Abdel Wahab, Ethan Katsh and Daniel Rainey is probably the first to delve conceptually into some of ODR's major themes[19]; in addition to chapters surveying ODR practice on six continents,[20] the book includes chapters zooming in on specific topics: artificial intelligence, mobile devices, e-commerce, consumer conflicts, government, courts and

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the range of processes designed to address them, see WAHAB ET AL., *supra* note 11.

[17] As opposed to an individual process, the system is a component of a larger environment. The best example of such a system is eBay's dispute resolution system. According to Colin Rule, former director of Dispute Resolution at E-Bay, thirty-five million disputes were filed with E-Bay in 2006. Colin Rule, Address at the Fourth International Conference on Online Dispute Resolution (June 8 2007); *see About Us*, MODRIA, http://www.modria.com/our-story/ (last visited May 15, 2015). The number of cases jumped to about sixty million disputes by 2012. *See* Arthur Pearlstein, Bryan Hanson & Noam Ebner *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 203-206 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

[18] ODR developers are seeking to create intelligent agents, and robust negotiation support systems (NSS). These systems aim to assist humans in achieving better outcomes then they would themselves, even when performing to the peak of their abilities.

[19] WAHAB ET AL., *supra* note 11.

[20] North America, Europe, Australia, Asia, Latin America and Africa. *Id.*

ombudsmanship.[21] This book is a worthy springboard for continued engaging with other theoretical principles of ODR.

In that spirit, this article aims to uncover other conceptual ambiguities and point out how the field can develop better through making distinctions between similar, yet different, concepts. In particular, this article will spotlight concepts and terms whose blurring are a logical part of ODR's evolution, given that the marriage between the world of technology and that of dispute resolution has led to reciprocal adoption of some of the most commonly used terms originating from either side. As precision gives way to convenience, and specific intent to general understanding, it is certainly understandable if some blurring of terminological usage and intent occurs.

As a young and rapidly growing interdisciplinary area of practice and inquiry, ODR has been served well by having areas of constructive vagueness, in which theorists and developers from different backgrounds could engage with each other using generally-understood terminology (even if not scientifically precise.) Our suggestion that ODR has reached a stage at which this terminological expansion can be revisited, with newly created or spotlighted frameworks, is in essence a suggestion that ODR has reached a milestone of maturity.

This clarification process is in no way a linguistic or theoretical endeavor; it we hope it to have immediate and significant practical impact. By providing new frameworks for exploring ODR platforms, processes, technology and systems, we hope to assist ODR developers and practitioners with new, sophisticated, tools for their work.

III. CORE ELEMENTS OF ONLINE DISPUTE RESOLUTION

In this paper, we will briefly introduce three specific elements that are core to ODR and would benefit from having a clarifying, discerning spotlight aimed their way: fairness, trust and security. In

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[21] *Id.*

a general sense, all three of these issues are important to any discussion of ADR, including in face-to-face settings.[22] In the realm of online processes and systems, they arguably have even greater importance. However, in the transition from discussing the familiar face-to-face setting, to discussing the online, the meanings associated with these terms have multiplied.[23] Since engendering senses of trust, security and fairness may be crucial to ODR's development and acceptance, we suggest that accurate understanding of these terms is essential.

As we discuss below[24], it seems clear that these concepts are important to all the connotations associated with the term ODR, and are key whether one is focusing on a communication platform, a dispute system, an individual process or a particular form of technology.[25] For example, one might posit that without access to secure, trusted and fair online dispute resolution systems, consumers would be reluctant to purchase products over the World Wide Web, whether from eBay, Amazon, low cost airlines or a multitude of other companies. Lacking trust in their counterpart, or in the neutral assisting them, individuals might not participate in a mediation process. Wary of insecure communications platforms, they may refrain from disclosures that could lead to quick resolution of conflicts. Further, concerned that a technological platform is programmed in way that is unfair to them, they may refrain from accepting its advice. Hence, to advance the field of ODR, we need to consider and develop issues of fairness, trust and security.

A. Fairness in Online Dispute Resolution

One of the major concerns raised by people using negotiation processes is about the fairness or justice of the process. [26] Individuals undertake negotiation to derive better outcomes than would

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[22] *See infra* Part III(A)-(C).
[23] *See infra* Part III(A)-(C).
[24] *See infra* Part III(A)-(C).
[25] *See supra* Part II(A).
[26] John Zeleznikow & Andrew Vincent, *Providing Decision Support for Negotiation: The Need for Adding Notions of Fairness to Those of Interests*, 38 UNIV. TOLEDO. L. REV. 101 (2007).

otherwise occur (either through abandoning the engagement with the other, or through engaging in other modes of conflict).[27] Negotiation processes can be classified as distributive or integrative.[28] In distributive approaches, the problems are seen as *zero sum* and resources are imagined as fixed: *divide the pie*.[29] In integrative approaches, problems are seen as having more potential solutions than are immediately obvious, and the goal is to *expand the pie* before dividing it.[30] Parties attempt to accommodate as many interests of each of the parties as possible, leading to the so-called "win-win," or "all gain," approach.[31] Traditional negotiation decision support has focused upon providing users with decision support on how they might best obtain their goals.[32]

Both of these approaches to negotiation might be understood to include commonly expressed notions of "fairness." For example, in integrative negotiation, one might consider that meeting the interests of all parties involves meeting these *equally*. One might also encounter parties who, while negotiating integratively, [33] express an interest in "being treated fairly", or relying on an objective criteria of "fairness" to assess any potential agreement.[34] In distributive negotiation, one party might frame her offer to split things down the middle as being "fair"; however, one notion of "fairness" which is not focused on in either of these approaches is the notion of an objective legal measure of "fairness" – that is, legal justness.

In some negotiation contexts, however, legal fairness is important.[35] For example, in Australian Family Law, the interests of

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[27] Id.

[28] RICHARD E. WALTON & ROBERT B. MCKERSIE, A BEHAVIORAL THEORY OF LABOR NEGOTIATIONS (1965).

[29] *Id.*

[30] *Id.*

[31] *Id.*

[32] Zeleznikow & Vincent, *supra* note 26.

[33] Such terms often appear in the seminal work of Roger Fisher and William Ury on interest-based negotiation (an approach related to integrative negotiation. ROGER FISHER & WILLIAM URY, GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN (1981).

[34] *Id.*

[35] Zeleznikow & Vincent, *supra* note 26.

the child are considered paramount, so the interests of the parents are negligible in negotiations between them.[36] Similarly, in employment law, individual bargaining between employers and employees might lead to basic needs and rights, such as recreation leave and sick leave, to be whittled away.[37] In both of these cases, parties have restricting standards of "fairness" imposed on them by law and the courts, limiting their negotiation range.

Expanding on the notion of an integrative or interest-based negotiation, scholars developed the notion of principled negotiation.[38] Principled negotiation promotes deciding issues on their merits rather than through a haggling process focused on what each side says it will and will not do.[39] In the domain of legal negotiation, Mnookin and Kornhauser introduced the notion of bargaining in the shadow of the trial (or law).[40] By examining the case of divorce law, they contended that the legal rights of each party could be understood as bargaining chips that can affect settlement outcomes.[41] The question of "What would a judge do in this case?" is therefore looming over parties' shoulders at an out-of-court negotiation session.[42] Thus, legal norms find their way into negotiation. The threat of a judicial decision is one way in which their effect is posed;[43] another is as a set of rules which parties might naturally adhere to, given that they are objective criteria,— standards legitimized by the law or society and not only by one party's say-so.[44]

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[36] *See* John Zeleznikow & Emilia Bellucci, *Legal Fairness in Alternative Dispute Resolution Processes – Implications for Research and Teaching*, 23 AUSTRALASIAN DISP. RESOL., J. 265 (2012).

[37] *Id.*

[38] FISHER & URY, *supra* note 33.

[39] *Id.*

[40] Robert N. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L. J. 850 (1979).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *See* FISHER & URY, *supra* note 33.

The role of fairness and justice in negotiation and other ADR processes is complex. Fairness includes several different aspects, with the foremost divide being that between distributive (or outcome) fairness, and procedural fairness.[45] In the environment created by the Internet, these complexities are compounded.

One challenge with adding "*legally just*" elements into ODR systems lies in the notion that ODR systems, by their nature, lend themselves to trans-jurisdictional situations and interactions.[46] Of course, Negotiation Support Systems[47] created for particular situations/jurisdictions (such as for Australian Family Law) can be more easily calibrated in this regard;[48] particular parameters can be pre-set according to law, and topics requiring resolution under law can be designated as mandatory fields in the system.[49] On the other hand, contexts or marketplaces in which there is no generally-applicable set of legal norms might greatly benefit from the development of measures, or at the very least principles, for the construction of negotiation support systems.[50] Alternatively, these marketplaces could benefit from the creation of dispute systems designs which are, in some way resembling legal, "just" and "fair."[51]

Through an examination of the relevant literature in a variety of domains – including international conflicts, family law, and sentencing and plea bargaining – and an in-depth discussion of negotiation support tools in Australian family law, Zeleznikow and Bellucci (2012) have developed a set of important factors that should

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[45] For elaboration on this topic see, Nancy A. Welsh, *Perceptions of Fairness, in* THE NEGOTIATOR'S FIELDBOOK, 165-74 (Andrea K. Schneider et al. eds., 2006).

[46] *See* Abernathy, *supra* note 8.

[47] *See* note 18 and accompanying text.

[48] John Zeleznikow, *Methods for Incorporating Fairness into Development of an Online Family Dispute Resolution Environment*, 22 AUSTRALASIAN DISPUTE RESOLUTION J. 16 (2011).

[49] *Id.*

[50] *Id.*

[51] ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

be incorporated into "fair" negotiation support processes and tools.[52] These factors include:

Transparency[53] - For a negotiation to be fair, it is essential to be able to understand - and, if necessary, replicate - the process in which decisions are made.[54] In this way unfair negotiated decisions can be examined, and if necessary, be altered;[55]

Highlighting and clarifying the shadow of the law[56] –In legal contexts, awareness to the probable outcomes of litigation provides parties with beacons or norms for the commencement of any negotiations – as they inform them of their alternatives to negotiation.[57] Bargaining in the shadow of the law thus provides standards for adhering to *legally just* and *fair* norms.[58] Providing disputants with advice about likely court outcomes by incorporating such advice in negotiation support systems can help support fairness in such systems.[59] In non-legal contexts, and in contexts in which multiple legal norms compete and clash, which norms cast this shadow? Without answering this question, we suggest that considering it, and, if possible, providing parties with a set of rules that will determine outcomes, might promote a sense of fairness.

Limited discovery[60] - Even when the negotiation process is transparent, it can still be flawed if there is a failure to disclose vital information.[61] Discovery processes increase settlements and decrease trials by organizing the voluntary exchange of information.[62] This benefit is often lost in a negotiation, especially if important information is not disclosed, or even worse, hidden.[63]

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52 Zeleznikow & Bellucci, *supra* note 36.
53 *Id.*
54 *Id.*
55 *Id.*
56 *Id.*
57 *Id.*
58 Zeleznikow & Bellucci, *supra* note 36.
59 *Id.*
60 *Id.*
61 *Id.*
62 *Id.*
63 *Id.*

Requiring specified aspects of disclosure in a negotiation might help enhance the fairness of the negotiation process.[64] Incorporating these factors does, however, have some drawbacks for the development of negotiation support systems:

(1) Disputants might be reluctant to be frank;

(2) Disputants may see mediators as biased;

(3) There is difficulty and danger in incorporating discovery, both in terms of time and money; and

(4) There is a difficulty in realising, ahead of time, the potential repercussions of disclosing confidential information to one's negotiation counterpart.

However, in thinking about incorporating fairness into a platform or a system, it may be that considering ways to organize, support and encourage information-sharing, rather than coercing the same, may be very helpful for promoting a sense of fairness.[65]

B. Trust in Online Dispute Resolution

We now discuss two central concepts that seem to have acquired multiple meanings, contexts and applications when discussed in the literature on ODR. "Trust" has deep roots in the context of dispute resolution, and stretching the concept to include technological aspects has strained its meaning to some extent. "Security" has deep roots in the field of computing and online communications, but its application to issues in dispute resolution requires refining.

Beginning with trust, this inconsistency in the discussion of trust in the ODR literature has been noted by Ebner, who suggests differentiating categorically between usages of the term "trust" as it relates to ODR.[66] Elaborating on this model, we suggest that four such categories exist.

i. ODR as a trust provider/facilitator.

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[64] Zeleznikow & Bellucci, *supra* note 36.

[65] *Id.*

[66] Noam Ebner, *ODR and Interpersonal Trust*, *in* ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 357-386 (Mohammed S. Abdel Wahab, Ethan Katsh, & Daniel Rainey eds., 2012).

Incorporating ODR into systems such as e-commerce is one measure expected to raise consumers' level of trust in the system.[67] Continuing development of the Internet, from a financial perspective, has always depended on the success of e-commerce, which is, in turn, absolutely dependent on trust.[68] This fragile condition has been summarized by Colin Rule's statement: "Transactions require trust, and the Internet is woefully lacking in trust."[69]

ii. User's trust in ODR

ODR must be marketed, and its technology must be constructed, in such a way that the public will trust it as an efficient and effective way of managing their disputes. This is no simple challenge. All forms of ADR have, historically, encountered public distrust at one point or another. In our experience, the notion of conducting these processes online often kindles strong distrust even from practitioners of ADR. Viewing dispute resolution as a process requiring warmth and human interaction, professionals may find it hard to imagine that Internet communication – seen as cold and distance-creating – could support the process. There is no reason to expect higher levels of trust amongst the general public. As a field, ODR must convince users that they can trust that the technology used will be benevolently designed or at least neutral. Practitioners must convince user that the technology a). will not fail or freeze up; b). will be able to support their dispute; c). will be competent in performing as promised; d). will not involve time or costs beyond what the consumer envisions, and; e). will be, in general, user-friendly.

iii. Interpersonal trust

Parties utilizing the ODR experience not only levels of distrust inherent in most conflict situations; they are also hindered by challenges to trust between parties, and trust between parties and

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[67] Rule, *supra* note 11.
[68] *Id.*
[69] *Id.* at 98.

their neutral, which are triggered by the nature of online communication and of the online environment.[70]

iv. *Trust in content offered by the system*

If an ODR system is going to provide parties with advice about dispute resolution norms (such as the outcomes of similar cases resolved in the past, information regarding the legal or marketplace norms affecting the dispute, or likely court outcomes) how can we enhance parties' trust in the advice? Untrusted advice will not have the effect the system was designed to encourage. If the system is going to give advice about trade-offs or optimizing agreements,[71] how can we ensure a sufficient degree of trust in the processes (the algorithms underlying and generating this advice) for doing so?If the system is going to provide an outcome (such as, the result of an automated blind bidding, or an automated decision on whether the type of claim raised is legitimate or actionable in the first place,)[72] how do we enhance users' trust in these outcomes? Obviously, a powerful connection between users' trust in the content, and the degree to which the system is perceived as "fair" exists, demonstrating the need for close examination of these concepts and the ways they interact in ODR systems.[73]

C. SECURITY IN ONLINE DISPUTE RESOLUTION

Similar to the term "trust," the term "security" has applications in the world of computer science as well as in the context of ADR. The world of computing has always been interested in protecting systems and data from malfeasant access. As the Internet

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[70] For further elaboration on interpersonal trust in the online environment, see Ebner, *supra* note 66.

[71] *See, e.g*, John Nash, *Two Person Cooperative Games*, 21 ECONOMETRICA 128 (1953); Steven J. Brams & Alan D. Taylor, FAIR DIVISION, FROM CAKE CUTTING TO DISPUTE RESOLUTION (1996); Zeleznikow & Bellucci, *supra* note 36; Ernest M. Thiessen,& Joseph P. McMahon, *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643 (2000).

[72] LODDER, *supra* note 1. See, in particular, Chapter Two of this text for a discussion of norms for the use of technology in dispute resolution.

[73] *Id.*

developed, new forms of threats to systems and data have emerged, and this has resulted in a never-ending cycle of security measures and breaches.

In traditional mediation, the term 'security' might be related to information security, discussed in terms of confidentiality (which the mediator promises parties, or which they promise each other)[74] or to privilege (which the law often grants to protect mediation conversations, documents, and testimony from making its way into the courtroom).[75] In addition, the term security might denote parties' sense of wellbeing and comfort. This might span "emotional security," where parties feel in a safe place, in competent hands, dealing with a neutral they can trust, and protected from their counterparty's abuse, or it might be be related to physical security – in the sense that the setting and the ground-rules are designed to prevent things from getting out of hand, or in the sense that screening or other measures might be necessary to avoid threats to physical wellbeing (e.g., in situations where violence is/has been an issue)[76]

As these worlds converge in the practice of ODR, it is important to separate between different connotations of the term; as a result of this importance, we have developed a framework for differentiation between four types of security.

i. Information Security

This context connotes the security of the ODR process in terms of protecting parties' information from being shared by outsiders to the process as a result of to human activity. Included are familiar dispute resolution issues such as a mediator's duty to keep what she learns to herself, parties' contracting with each other to keep a process confidential, and the legal notion of privilege, protecting

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[74] Samara Zimmerman, *Judge Gone Wild: Why Breaking the Mediation Confidentiality Privilege for Acting in Bad Faith Should Be Reevaluated in Court-Ordered Mandatory Mediation*, 11 CARDOZO J. CONFLICT RESOL. 353 (2009).

[75] *Id.*

[76] Elisabeth Wilson-Evered et al., *Towards an On-Line Family Dispute Resolution Service in Australia*, *in* MOBILE TECHNOLOGIES FOR CONFLICT MANAGEMENT 125-40 (Marta Poblet ed., 2011).

information from being uncovered by parties or judges in the course of a legal process.

ii. Data security

This context focuses on the protections set in place around the communication channels, the software, the servers and any hardware used for ODR. Such protection aims to prevent external people from hacking the system and obtaining non-public information, whether this is directly related to a dispute (e.g., pictures uploaded as evidence in an online arbitration case) or not (e.g., addresses and phone numbers). Additionally, focusing on this aspect of security would suggest that internal limitations be set in place to ensure that parties to disputes or their neutrals cannot access areas or information they are not allowed to view (e.g., protecting a conversation held in a private caucus chat room between one party and a mediator from being viewable by the other party).

iii. Personal security

In this context, security connotes the provision of safe and clearly defined processes to protect users from actual harm, whether physical or emotional.[77] In ODR, the risk of physical harm is reduced, owing to the parties' physical separation; indeed, ODR can serve an important function in providing ADR services in cases where there is the potential for domestic violence (or in other cases where there is a need for shuttle mediation.)[78] Interestingly enough, in this domain we have noted that some disputants want to use ODR, yet prefer not to utilize available video conferencing for the purposes of convening; the reduced social presence of their counterparty, it seems, lends to an enhanced sense of personal security on an emotional level.

iv. System security

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[77] *Id.*

[78] *Id.; see also* Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence,* 24 OHIO ST. J. DISP. RES. 349 (2009).

Used in this context, security connotes the degree to which users feel confident that the ODR service they are using – the technological platform or its human operators – is not utilizing their information, participation, behavior or data in any way. As a user, my sense of security might be enhanced so long as I feel the service is not using my data, selling my data, using me as an unknowing participant in an experiment, or anything else. Specific uses that I, as a user, might be concerned about, or might certainly like to be consulted about, might include the service, *inter alia* : 1) using my data, without my permission; 2). using data in ways I might not like; 3).data mining, for any purposes; 4). learning about conflict behavior (beyond what is needed to service my own dispute); 5). learning about bargaining behavior (beyond what is needed to service my own dispute); 6.) learning about typing speed, time spent on particular pages, or advertisement-clicking – preferences, and; 7). any other use of data else.

IV. CONCLUSION

To become a more mature domain, Online Dispute Resolution (like its older sibling Alternative Dispute Resolution) needs to develop theoretical models as well as implement practical solutions. Prevalent amongst these theoretical issues – with critical practical ramifications - are the concepts of fairness, trust and security in ODR.

In this brief article we have introduced and discussed critical issues in each of these domains, and demonstrated why they need further development. We have noted that for ODR systems to be considered *fair*, we must ensure that such systems are transparent, give advice about the shadow of the law and alternatives to negotiation as well as provide some degree of transparency.

When examining trust in ODR, we need to examine ODR's role in providing trust in online activities, consider the effect of users' trust in ODR on the field's development, recognize the unique dynamics of interpersonal trust development in the online environment, and enhance users' trust in advice or other content

offered by an ODR system. We have also suggested that there are four distinct connotations of the term "security" in ODR: Information Security, Data Security, Personal Security and System Security. Finally, we note that that these three concepts of fairness, trust and security all merit closer examining; the interactions between them are worthy of further research as well.

Online Dispute Resolution (ODR): What Is It, and Is It the Way Forward?

Julio César Betancourt

Elina Zlatanska

1. Introduction

Online Dispute Resolution (ODR) refers to the use of Alternative Dispute Resolution (ADR)[1] mechanisms over the internet.[2] ODR methods can be used to deal with both offline- and online-related disputes. The idea of using ADR mechanisms "online", as opposed to "offline", appears to have arisen in the 1990s.[3] During that decade, some of the most noticeable ODR services were provided by: (1) the Virtual Magistrate Project[4]; (2) the Online Ombuds Office (OOO)[5]; and (3) the Online Mediation Project.[6] These projects were originally developed under the auspices of various institutions, including the American Arbitration Association (AAA) and the National Center for Automated Information Research (NCAIR).

[1] The *initialism* ADR, commonly and mistakenly referred to as an *acronym* for "Alternative Dispute Resolution", was coined by Professor Frank E.A. Sander of Harvard Law School. See Frank Sander, "Varieties of Dispute Processing" (1976) 70 *Federal Rules Decisions: Addresses Delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice* 111–134; Frank Sander, "Alternative Methods of Dispute Resolution: An Overview" (1985) 37(1) *University of Florida Law Review* 1; and Simon Roberts et al., *Dispute Resolution: ADR and the Primary Forms of Decision-Making* (Cambridge: Cambridge University Press, 2005), p.5. ADR, in plain English, refers to the idea of settling and resolving disputes through different means other than litigation. As to the notion of ADR, see Henry Brown et al., *ADR Principles and Practice* (London: Sweet & Maxwell, 1993), p.9; Karl Mackie et al., *The ADR Practice Guide* (London: Butterworths, 2000), pp.8–10; George Applebey, "Alternative Dispute Resolution and the Civil Justice System", in Karl J. Mackie (ed.), *A Handbook of Dispute Resolution: ADR in Action* (London: Routledge, 1991), p.26 and Albert Fiadjoe, *Alternative Dispute Resolution: A Developing World Perspective* (New York: Routledge-Cavendish, 2004), p.2.

[2] ODR encompasses a series of online means of communication, including "e-mail, Internet Relay Chat (IRC), instant messaging, Web forum discussions, and similar text-based electronic communications": in Robert Gordon, "The Electronic Personality and Digital Self" (2001) Feb–April *Dispute Resolution Journal* 11. See also Jason Crook, "What is Alternative Dispute Resolution (ADR)?", in Julio César Betancourt (ed.), *What is Alternative Dispute Resolution (ADR)?* (London: Chartered Institute of Arbitrators, 2010), p.25; José Antonio García Alvaro, "Online Dispute Resolution—Unchartered Territory" (2003) 7(2) *Vindobona Journal* 187; Jerome T. Barret et al., *A History of Alternative Dispute Resolution: The Story of a Political, Cultural, and Social Movement* (San Francisco: Jossey-Bass, 2004), p.261; Nadja Alexander, "Mobile Mediation: How Technology is Driving the Globalization of ADR" (2006) 27(2) *Hamline Journal of Public Law & Policy* 248. For a different view, see Rossa McMahon, "The Online Dispute Resolution Spectrum" (2005) 71(3) *Arbitration* 218.

[3] See, generally, Colin Rule, *Online Dispute Resolution for Business* (San Francisco: Jossey-Bass, 2002). See also Ethan Katsh, "Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes through Code" (2004) 49 *New York Law School Law Review* 275.

[4] See E. Casey Lide, "ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation" (1996) 12 *Ohio State Journal on Dispute Resolution* 219. See also Alejandro E. Almaguer et al., "Shaping New Legal Frontiers: Dispute Resolution for the Internet" (1998) 13 *Ohio State Journal on Dispute Resolution* 719.

[5] For a more complete explanation of the concept of ombudsman, see Talbot D'Alemberte, "The Ombudsman, a Grievance Man for Citizens" (1966) 28(4) *University of Florida Law Review* 545; George B. McClellan, "The Role of the Ombudsman" (1969) 23 *University of Miami Law Review* 463; Mary Seneviratne, "Ombudsmen 2000" (2000) 9 *Nottingham Law Journal* 13; Ian Harden, "When Europeans Complain: the Work of the European Ombudsman" (2000) 3 *Cambridge Yearbook of European Legal Studies*, pp.199–208.

[6] For an overview of these services, see Frank A. Cona, "Application of Online Systems in Alternative Dispute Resolution" (1997) 45 *Buffalo Law Review* 986.

Within a short period of time, dispute resolution professionals[7] realised that there were possibilities for considerable expansion of this burgeoning field.[8] In 1997, Professors Ethan Katsh and Janet Rifkin founded the National Center for Technology and Dispute Resolution, which "supports and sustains the development of information technology applications, institutional resources, and theoretical and applied knowledge for better understanding and managing conflict".[9] Four years later, the first book in the field of ODR was written.[10] Later on, the area of ODR started to be explored by institutions such as the US Federal Trade Commission, the US Department of Commerce, the Hague Conference on Private International Law, the Organization for Economic Cooperation and Development, the Global Business Dialogue, the World Intellectual Property Organization, and the European Union.[11] In the European Union, in particular, legislative measures have tended to favour the utilisation of ODR mechanisms.[12] Examples include the Directive on Electronic Commerce art.17 and the Directive on certain aspects of Mediation in Civil and Commercial Matters Recitals 8 and 9. Further, in the area of consumer law,[13] both a new Proposal for a Regulation on Online Dispute Resolution for Consumer Disputes and a Proposal for a Directive on

[7] For the purposes of this paper, the expressions "dispute resolution" and "dispute settlement" will be used interchangeably, although the authors acknowledge that they have a different meaning. The distinction is important because, terminologically speaking, the notion of "resolution" is related to the idea of joint decision-making, whereas the concept of "settlement" is connected with the idea of third party decision-making. See Tony Marks et al., "Rethinking Public Policy and Alternative Dispute Resolution: Negotiability, Mediability and Arbitrability" (2012) 78(1) *Arbitration* 19, n.6. See also Barbara Hill, "An Analysis of Conflict Resolution Techniques: From Problem-Solving Workshops to Theory" (1982) 26(1) *Journal of Conflict Resolution* 115. John Burton, cited by Gregory Tillett, *Resolving Conflict: A Practical Approach* (South Melbourne: Sydney University Press, 1991), p.9. See also Andrew Pirie, *Alternative Dispute Resolution: Skills, Science, and the Law* (Toronto: Irwin Law, 2000), p.42; John Burton, *Conflict and Communication: The Use of Controlled Communication in International Relations* (New York: Free Press, 1969), p.171.

[8] See Ethan Katsh, "Dispute Resolution in Cyberspace" (1996) 28 *Connecticut Law Review* 953. See also M. Scott Donahey, "Current Developments in Online Dispute Resolution" (1999) 16(4) *Journal of International Arbitration* 129.

[9] See National Center for Technology and Dispute Resolution (NCTDR), at *http://odr.info/* [Accessed June 12, 2013].

[10] Ethan Katsh et al., *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (San Francisco: Jossey-Bass, 2001), pp.1–240.

[11] Ethan Katsh, "Online Dispute Resolution: Some Lessons from the E-Commerce Revolution" (2001) 28 *Northern Kentucky University Law Review* 813. Similarly, working groups were set up by several other organisations with a view to studying this area. See Mireze Philippe, "Where is Everyone Going with Online Dispute Resolution (ODR)?" (2002) *International Business Law Journal* 192. See also UNCITRAL (Commission Documents), *Report of the United Nations Commission on International Trade Law* (2010) a/65/17; *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions* (April 23, 2010) UNGA A/CN.9/706; *Possible Future Work on Online Dispute Resolution in Cross-border Electronic Commerce Transactions, Note Supporting the Possible Future Work on Online Dispute Resolution by UNCITRAL, submitted by the Institute of International Commercial Law* (May 26, 2010) UNGA A/CN.9/710; *Possible Future Work on Electronic Commerce—Proposal of the United States of America on Online Dispute Resolution* (June 18, 2009) UNGA A/CN.9/681/Add.2; and UNCITRAL (Working Group III) *Report of Working Group III (Online Dispute Resolution)*, Twenty-fourth Session (November 21, 2011) UNGA A/CN.9/739; *Annotated Provisional Agenda* (August 22, 2011) A/CN.9/WG.III/WP.108; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules* (September 27, 2011) UNGA A/CN.9/WG.III/WP.109; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Issues for Consideration in the Conception of a Global ODR Framework* (September 28, 2011) UNGA A/CN.9/WG.III/WP.110; *Report of Working Group III (Online Dispute Resolution)*, Twenty-third Session (June 3, 2011) A/CN.9/721; *Annotated Provisional Agenda* (February 24, 2011) A/CN.9/WG.III/WP.106; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions: Draft Procedural Rules* (March 17, 2011) A/CN.9/WG.III/WP.107; *Report of Working Group III (Online Dispute Resolution)*, Twenty-second Session (January 17, 2010) A/CN.9/716; *Annotated Provisional Agenda* (August 26, 2010) A/CN.9/WG.III/WP.104; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions* (October 13, 2010) A/CN.9/WG.III/WP.105; *Online Dispute Resolution for Cross-border Electronic Commerce Transactions* (November 18, 2010) A/CN.9/WG.III/WP.105/Corr.1.

[12] Faye Fangfei Wang, *Online Dispute Resolution: Technology, Management and Legal Practice from an International Perspective* (Oxford: Chandos Publishing, 2008), p.43ff.

[13] The area of consumer law has received considerable attention within the ODR literature. See, e.g. Karen Stewart et al., "Online Arbitration of Cross-Border, Business to Consumer Disputes" (2002) 56 *University of Miami Law Review* 1111; Mohamed Wahab, "Globalisation and ODR: Dynamics of Change in E-Commerce Dispute Settlement" (2004) 12 *International Journal of Law and Information Technology* 123.

Alternative Dispute Resolution are currently being discussed.[14] These proposals are intended to improve the functioning of the retail internal market and enhance redress for consumers.

In principle, ODR mechanisms are expected, among other things, to "facilitate access to justice",[15] and should therefore be able to tackle some of the problems concerning the use of offline dispute resolution mechanisms.[16] It is believed that ODR could "resolve disputes quickly and more efficiently" than the traditional methods[17] but, to our knowledge, no research has been reliably and skilfully conducted to back up this assumption. ADR scholars have put forward various proposals aiming at developing an ODR system,[18] and during the last 10 years an important number of ODR services have been developed.[19] Within the vast array of ODR mechanisms, negotiation, mediation and arbitration appear to be the most commonly practised.[20]

As the legal profession has begun to modernise its working practices with the aid of several technological advances in computing and telecommunications,[21] one may wonder whether the utilisation of offline mechanisms will eventually be replaced by the employment of the so-called ODR mechanisms. This article provides a concise explanation of the notion of dispute resolution in cyberspace. It reviews some of the recent studies on the use of ODR, especially the use of e-negotiation, e-mediation and e-arbitration, considers the issues concerning the intricacies of settling and resolving disputes in cyberspace and concludes that the idea of banishing offline dispute settlement and dispute resolution methods—in the near future—is extremely unlikely ever to come true.

[14] See *Alternative Dispute Resolution and Online Dispute Resolution for EU Consumers: Questions and Answers*, Press Release (November 29, 2010), Memo/11/840.

[15] Gabrielle Kaufmann-Köhler et al., *Online Dispute Resolution, Challenges of Contemporary Justice* (The Hague: Kluwer Law International, 2004), p.68. For this to happen, it is necessary to explore, from a multidisciplinary perspective, how the internet can be used to improve access to justice through the deployment of ODR mechanisms. See Catherine Kessedjian et al., "Dispute Resolution On-Line" (1998) 32 *International Lawyer* 990.

[16] As to the perceived advantages of ODR mechanisms, see Lan Q. Hang, "Online Dispute Resolution System: The Future of Cyberspace Law" (2001) 41 *Santa Clara Law Review* 854; George H. Friedman, "Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities" (1997) 19 *Hastings Communications and Entertainment Law Journal* 695, 711; Laura Klaming et al., "I Want the Opposite of What You Want: Reducing Fixed-pie Perceptions in Online Negotiations" (2009) 1 *Journal of Dispute Resolution* 139.

[17] Robert Bordone, "Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems and a Proposal" (1998) 3 *Harvard Negotiation Law Review* 191.

[18] See, e.g. R. Bordone, "Electronic Online Dispute Resolution: A Systems Approach—Potential, Problems and a Proposal" (1998) 3 *Harvard Negotiation Law Review* 199; Joseph A. Zavaletta, "Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal" (2002) 7 *Journal of Technology Law and Policy* 24; Beatrice Baumann, "Electronic Dispute Resolution (EDR) and the Development of Internet Activities" (2002) 52 *Syracuse Law Review* 1232; Arno R. Lodder et al., "Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model" (2005) 10 *Harvard Negotiation Law Review* 287; George H. Friedman, "Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities" (1997) 19 *Hastings Communications and Entertainment Law Journal* 695; Michael E. Schneider et al., "Dispute Resolution in International Electronic Commerce" (1997) 14(3) *Journal of International Arbitration* 5.

[19] Julia Hörnle, *Cross-border Internet Dispute Resolution* (Cambridge: Cambridge University Press, 2009), p.76.

[20] Haitham A. Haloush et al., "Internet Characteristics and Online Dispute Resolution" (2008) 13 *Harvard Negotiation Law Journal* 328; Mary Shannon Martin, "Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce" (2002) 20 *Boston University International Law Journal* 151. See also Faye Fangfei Wang, *Internet Jurisdiction and Choice of Law: Legal Practices in the EU, US and China* (Cambridge: Cambridge University Press, 2010), p.156ff.

[21] George H. Friedman et al., "An Information Superhighway 'on Ramp' for Alternative Dispute Resolution" (1996) 38 *New York State Bar Journal* 38.

2. E-Negotiation

Negotiation is one of the most commonly practised forms of dispute resolution[22] and, probably, "one of the most basic forms of interaction".[23] It is believed that "people negotiate even when they don't think of themselves as doing so".[24] Negotiation, in essence, can be defined as any type of communication between two or more people with the aim of reaching an agreement. For this, negotiation can be seen as an amicable, and perhaps as a highly desirable, way of resolving disputes. With the advent of the internet, this form of interaction, particularly within the dispute resolution arena and the legal profession, has somewhat moved off the court corridors and polished offices of a law firm on to the Web,[25] which resulted in the advancement of the idea of electronically based negotiations (e-negotiation).

The first research project in the area of negotiation via the World Wide Web (INSPIRE) came into operation in 1996. This project was "[d]eveloped in the context of a cross-cultural study of decision making and negotiation".[26] Extensive experimentation with INSPIRE prompted the design of several other e-negotiation systems (ENSs).[27] These systems together with decision support systems (DSSs) have been classified into several categories, including planning systems, assessment systems, intervention systems and process systems.[28] Public awareness of both ENSs and DSSs, however, continues to be very low and, therefore, it remains to be seen whether electronically based negotiations that rely on these systems will gain widespread acceptance.

The notion of e-negotiation is inextricably linked with the concept of computer-mediated communication (CMC).[29] It is argued that CMC facilitates the interaction process through the use of computers. The internet, without a doubt, has become one of the main means of communication and information exchange. CMC through email, for example, is increasingly commonplace. In 2011, corporate users sent and received approximately 105 email messages per day, that is, 38,325 emails per year.[30] New research would be needed to determine how many of those email messages, if any, involved negotiations of some kind, but in terms of

[22] As to the notion of negotiation, see P.H. Gulliver, *Disputes and Negotiations: A Cross-Cultural Perspective* (New York: Academic Press, 1979), pp.1–293; Howard Raiffa, *The Art and Science of Negotiation* (Cambridge, MA: Belknap Press, 1982), pp.1–373; Roger Fisher et al., *Getting Together: Building Relationships as We Negotiate* (New York: Penguin Books, 1989), pp.1–216; Carrie Menkel-Meadow, "Toward Another View of Legal Negotiation: The Structure of Problem-Solving" (1984) 31 UCLA Law Rev.754; Linda Putman et al., *Communication and Negotiation* (Newbury Park, CA: Sage Publications, 1992), pp.1–294; Dean G. Pruitt et al., *Negotiation in Social Conflict* (Buckingham: Open University Press, 1993), pp.1–251; Max H. Bazerman, *Negotiating Rationally* (New York: Free Press, 1993), pp.1–196; Carrie Menkel-Meadow "Lawyer Negotiations: Theories and Realities—What Do We Learn From Mediation?" (1993) 56(3) *Modern Law Review* 361; Robert H. Mnookin et al., *Beyond Winning: Negotiating to Create Value in Deals and Disputes* (Cambridge, MA: Belknap Press, 2000), pp.1–354; Carrie Menkel-Meadow, "Teaching About Gender and Negotiation: Sex, Truths and Videotape" (2000) 16(4) *Negotiation Journal* 357; Roger Fisher et al., *Getting to Yes: Negotiating Agreement Without Giving in* (London: Penguin Books, 2011), pp.1–194.

[23] Bruce Patton, "Negotiation", in Michael Moffit et al. (eds), *The Handbook of Dispute Resolution* (San Francisco: Jossey-Bass, 2005), p.279.

[24] Fisher et al., *Getting Together: Building Relationships as We Negotiate* (1989), p.xxvii.

[25] Cf. Kathleen Valley, "Conversation: The Electronic Negotiator" (2000) Jan–Feb. *Harvard Business Review* 16.

[26] See Gregory Kersten et al., "WWW-based Negotiation Support: Design, Implementation, and Use" (1999) 25 *Decision Support Systems* 135. It is important to mention that research on e-negotiation has been carried out based upon three different approaches, namely normative, prescriptive and descriptive. See Mareike Schoop, "The Worlds of Negotiation" *Proceedings of the 9th International Working Conference on the Language-Action Perspective on Communication Modeling* (2004), pp.179–196.

[27] See, e.g. Jin Baek Kim et al., "E-negotiation System Development: Using Negotiation Protocols to Manage Software Components" (2007) 16(4) *Group Decision and Negotiation* 321. See also Ernest M. Thiessen, "Beyond Win-Win in Cyberspace" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 643, and Christopher A. Hobson, "E-Negotiations Creating a Framework for Online Commercial Negotiations" (1999) July *Negotiation Journal* 201.

[28] Gregory Kersten, "E-negotiation Systems: Interaction of People and Technologies to Resolve Conflicts" *UNESCAP Third Annual Forum on Online Dispute Resolution* (2004), pp.2–3.

[29] See Russell Spears et al., "Panacea or Panopticon?: The Hidden Power in Computer-Mediated Communication" (1994) 21(4) *Communication Research* 427. See also Rachel Croson, "Look at me When You Say That: An Electronic Negotiation Simulation" (1999) 30(1) *Simulation & Gaming* 24.

[30] See Sara Radicati, "Email Statistics Report, 2011–2015" (2011), available at *http://www.radicati.com/wp/wp-content/uploads/2011/05/Email-Statistics-Report-2011-2015-Executive-Summary.pdf* [Accessed June 12, 2013].

the effectiveness of e-negotiation—via email—it is believed that it can "lead to misunderstandings, sinister attributions, and ultimately, negotiation impasse".[31]

Research shows that email negotiations "1) increased contentiousness, 2) diminished information sharing, 3) diminished process cooperation, 4) diminished trust, [and] 5) increased effects of negative attribution".[32] Likewise, it has been proved that "resolving conflict, or reaching consensus … is better done face-to-face than electronically".[33] Similarly, it has been demonstrated that "[m]ore face-to-face contact produces more rapport, which in turn leads to more favorable outcomes for both parties".[34] In a similar vein, it has been pointed out that "[c]onventions of personal interaction that would apply in a telephone call or a face-to-face [mediation] do not apply in cyberspace".[35] Further studies have shown that "information exchanged over electronic media such as e-mail is less likely to be true".[36]

The great majority of the research in the area of e-negotiation through email[37] cast doubt upon the perceived advantages[38] of electronically based negotiations over face-to-face negotiations. In email communications, there is a likelihood that the parties will end up misreading each other's messages, and although one can say that further clarifications can be given, and that this means of communication continues to expand and so on,[39] no research has been done to support the hypothesis that e-negotiations via email are—or can be—more effective than face-to-face negotiations.

3. E-Mediation

E-mediation can be defined as a system-based—as opposed to a face-to-face-based—mechanism in which an impartial third party called "the mediator" facilitates the negotiation process between two or more people.[40] Because e-mediation is basically "[e-]negotiation carried out with the assistance of a third party",[41] it can be said that the arguments against the deployment of a system-based negotiation can be applied,

[31] Janice Nadler, "Rapport in Legal Negotiation: How Small Talk can Facilitate E-mail Dealmaking" (2004) 9 *Harvard Negotiation Law Review* 223. See also Don A. More et al., "Long and Short Routes to Success in Electronically Mediated Negotiations: Group Affiliations and Good Vibrations" (1999) 77(1) *Organizational Behavior and Human Decision Processes* 23; Elaine Landry, "Scrolling Around the New Organization: the Potential for Conflict in the On-line Environment" (2000) April *Negotiation Journal* 133; and Jacqueline Nolan-Haley, *Alternative Dispute Resolution* (St Paul, MN: Thomson-West, 2008), p.10.

[32] Noam Ebner et al, "You've Got Agreement: Negoti@ting via Email" (2009–2012) 31(2) *Journal of Public Law & Policy* 434.

[33] Gerardine DeSanctis et al., "Introduction to the Special Issue: Communication Processes for Virtual Organizations" (1999) 10(6) *Organization Science* 697.

[34] Leigh Thompson, "Negotiating via Information Technology: Theory and Application" (2002) 58(1) *Journal of Social Issues* 111; Aimee L. Drolet et al., "Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts" (2000) 36 *Journal of Experimental Social Psychology* 26. See also Michael Morris, "Schmooze or Lose: Social Friction and Lubrication in E-Mail Negotiations" 6(1) *Groups Dynamics: Theory, Research, and Practice* 93.

[35] Joel Eisen, "Are We Ready for Mediation in Cyberspace?" (1998) *Brigham Young University Law Review* 1311.

[36] Kathleen L. McGinn et al., "How to Negotiate Successfully Online" (2004) 3 *Negotiation* 8.

[37] Jill M. Purdy et al., "The Impact of Communication Media on Negotiation Outcomes" (2000) 11(2) *The Journal of Conflict Management* 162; Janice Nadler et al., "Negotiation, Information Technology, and the Problem of the Faceless Other" in Leigh Thompson (ed.), *Negotiation Theory and Research* (London: Psychology Press, 2006), pp.154–155; Charles Craver, "Conducting Electronic Negotiations" (2007) June *The Negotiator Magazine*, available at *http://www.negotiatormagazine.com/* [Accessed June 12, 2013].

[38] See, e.g. Amira Galin et al., "E-negotiation versus Face-to-Face Negotiation: What has Changed—if Anything?" (2007) 23 *Computers in Human Behavior* 789; Lynn A. Epstein, "Cyber E-mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?" (2001) 36 *Tulsa Law Journal* 840.

[39] David R. Johnson, "Screening the Future for Virtual ADR" (1996) April *Dispute Resolution Journal* 118.

[40] Cf. Gabrielle Kaufmann-Köhler et al., *Online Dispute Resolution: Challenges for Contemporary Justice* (The Hague: Kluwer Law International, 2004), p.22. See also Sarah Rudolph Cole et al., "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be" (2006) 38 *University of Toledo Law Review* 193. For an overview of the concepts of negotiation and mediation in the online environment, see Joseph Goodman, "The Advantages and Disadvantages of Online Dispute Resolution: An Assessment of Cyber-Mediation Web Sites" (2006) 9(11) *Journal of Internet Law* 10.

[41] Stephen B. Goldberg et al., *Dispute Resolution: Negotiation, Mediation and Other Processes* (New York: Wolters Kluwer, 2007), p.107.

mutatis mutandis, to the area of e-mediation.[42] This is true for both text-based and video-based systems.[43] Despite this, a small minority believes that in those cases in which it would not be appropriate to mediate face to face—e.g. when both parties are emotionally charged, when it would not be cost-effective to bring both parties together, when there is a huge power imbalance between the parties, etc—e-mediation becomes an option.[44]

The first research project aimed at determining the "effectiveness" of e-mediation to resolve online-related disputes, particularly the ones that arose out of eBay transactions,[45] was conducted towards the end of the 1990s. This project was developed "based on the premise that mediators could adapt at least some skills and tactics used in face-to-face practices to the online mediation process".[46] Both the mediator and the parties used email as a means of communication. Of 144 cases brought to mediation, only 50 of them, that is, less than 40 per cent were mediated successfully.[47] Not surprisingly, the project's reliance on text was considered to be one of the drawbacks of email as a primary form of interaction.[48]

The average internet user is possibly well equipped for being involved in online mediation sessions via email, chat room, instant messaging, etc.[49] These systems have something in common—they allow people to exchange written messages with one another over the internet. Nevertheless, written language does not "always convey the complete meaning of what an individual is trying to communicate".[50] A detailed examination of the relevant literature reveals that

> "the most influential linguistics of the first half of the [twentieth] century … went out of their way to emphasize the primacy of spoken as opposed to written language, relegating the latter to a derived secondary status".[51]

Such a distinction between written and spoken language may impinge upon both the effectiveness of the levels of communication[52] and, more importantly, the outcome of a virtual mediation.

[42] Janice Nadler, "Electronically-Mediated Dispute Resolution and E-Commerce" (2001) October *Negotiation Journal* 333.

[43] Llewellyn J. Gibbons et al., "Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message" (2002) 32 *New Mexico Law Review* 33.

[44] Susan Summers Raines, "Can Online Mediation be Transformative?: Tales from the Front" (2005) 22(4) *Conflict Resolution Quarterly* 437. See also Richard S. Granat, "Creating an Environment for Mediating Disputes on the Internet" (1996) *A Working Paper for the NCAIR Conference on On-line Dispute Resolution*.

[45] See Jason Krause, "On the Web" (2007) October *ABA Journal* 44. It is important to mention that the vast majority of the initiatives concerning the promotion and facilitation of e-mediation are related to consumer transactions. See Louise E. Teitz, "Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-line Dispute Resolution" (2001) 70 *Fordham Law Review* 1002.

[46] Ethan Katsh et al., "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 713. See also Richard Birke et al., "U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace" (2002) 50 *Mediation in Cyberspace* 208.

[47] Ethan Katsh et al., "E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of 'eBay Law'" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 711.

[48] For a different view, see James C. Melamed, "Mediating on the Internet: Today and Tomorrow" (2000) 1(11) *Pepperdine Dispute Resolution Law Journal* 11.

[49] Cf. Bruce Leonard Beal, "Online Mediation: Has Its Time Come?" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 738.

[50] Joseph B. Stulberg, "Mediation, Democracy, and Cyberspace" (2000) 15(3) *Ohio State Journal on Dispute Resolution* 641. See also Richard Victorio, "Internet Dispute Resolution (iDR): Bringing ADR into the 21st Century" (2001) 1 *Pepperdine Dispute Resolution Law Journal* 293.

[51] Wallace Chafe et al., "The Relation Between Written and Spoken Language" (1987) 16 *Annual Review of Anthropology* 383.

[52] Cf. Susan Nauss Exon, "The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution" (2010) 12 *Cardozo Journal of Conflict Resolution* 23.

4. E-Arbitration

E-arbitration may be defined as "an electronic version of offline arbitration".[53] It encompasses everything from the "online arbitration agreement" to the "online arbitral award".[54] Generally speaking, in light of the principle of party autonomy, the validity of online arbitration is not an issue.[55] In the international context, however, a number of concerns have been raised regarding the validity of not only online arbitration agreements[56] but also online arbitral awards,[57] especially, within the meaning of the New York Convention (NYC).[58] It has been posited that the NYC was adopted "at a time when the drafters could not foresee that [both arbitration agreements and arbitral awards] could take other than a physical form".[59] Therefore, one can only speculate that the courts will—in due course—agree that online arbitration agreements and online arbitral awards satisfy the formal requirements of the NYC.

At the time of writing, there are no "universally accepted rules … governing [online arbitration proceedings]".[60] Such proceedings are certainly taking place, although no comprehensive statistics on e-arbitration appear to have been published.[61] In online arbitration, the parties, the arbitral tribunal, experts and witnesses are expected to make use of electronic devices to take part in the arbitral proceedings. This involves the use of sophisticated software and hardware devices.[62] The existing systems, however, have been criticised on the basis that they can only deal with "very restricted classes of disputes, a simplified or basic arbitration process, the start of the process before variations become necessary [and] the process used by a single arbitration provider".[63]

Some argue that e-arbitration "*significantly* reduces the transaction costs of dispute resolution" [italics added],[64] and this might be true in some cases, but no research has been

[53] See Chinthaka Liyanage, "Online Arbitration Compares to Offline Arbitration and the Reception of Online Consumer Arbitration: An Overview of the Literature" (2010) 22 *Sri Lanka Journal of International Law* 175. For a different view, see Farzaneh Badiei, "Online Arbitration Definition and Its Distinctive Features" (2010) *Proceedings of the 6th International Workshop on Online Dispute Resolution*, pp.87–93.

[54] See, generally, Hong-lin Yu et al., "Can Online Arbitration Exist within the Traditional Arbitration Framework?" (2003) 20(5) *Journal of International Arbitration* 455.

[55] Cf. Richard Hill, "On-Line Dispute Arbitration: Issues and Solutions" (1999) 15(2) *Arbitration International* 199. See also Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) *ADR Online Monthly* 5; and Julia Hörnle, "Online Dispute Resolution", in John Tackaberry et al. (eds), *Bernstein's Handbook of Arbitration Law & Practice* (London: Sweet & Maxwell, 2003), pp.787–805. Legal scholars have raised several other concerns about: distrust of the operability and privacy of internet systems, fear about the "unseen" nature and neutrality of online arbitration providers, technological and presentation imbalances, elimination of face-to-face communications and the lack of voice; see Amy J. Schmitz, "'Drive-thru' Arbitration in the Digital Age: Empowering Consumers through Binding ODR" (2010) 62 *Baylor Law Review* 214.

[56] Alejandro López Ortiz, "Arbitration and IT" (2005) 21(3) *Arbitration International* 353.

[57] Paul D. Carrington, "Virtual Arbitration" (2000) 15 *Ohio State Journal on Dispute Resolution* 673.

[58] M.H.M. Schellekens, "Online Arbitration and E-Commerce" (2002) 9 *Electronic Communication Law Review* 113.

[59] United Nations Conference on Trade and Development, *Dispute Settlement: International Commercial Arbitration, Electronic Arbitration* (2003) UNCTAD/EDM/Misc.232/Add.20, pp.3–55.

[60] Julian Lew et al., *Comparative International Commercial Arbitration* (The Hague: Kluwer Law International, 2003), p.48. As to the regulatory framework for ODR, in general, see Rafal Morek, "The Regulatory Framework for Online Dispute Resolution: A Critical View" (2006) 38 *University of Toledo Law Review* 163–192. See also Tiffany J. Lanier, "Where on Earth Does Cyber-Arbitration Occur? International Review of Arbitral Awards Rendered Online" (2000) 7 *ILSA Journal of International and Comparative Law* 3. However, because of the widespread acceptance of arbitration, particularly within the commercial arena, it is believed that a useful first step would be the establishment of an international regulatory framework for resolving disputes through e-arbitration. Cf. Henry H. Perritt, "Dispute Resolution in Cyberspace: Demand for New Forms of ADR" (2000) 15 *Ohio State Journal on Dispute Resolution* 677.

[61] Thomas Schultz, "Online Arbitration: Binding or Non-Binding?" (2002) *ADR Online Monthly* 2.

[62] See, e.g. Dusty Bates Farned, "A New Automated Class of Online Dispute Resolution: Changing the Meaning of Computer-Mediated Communication" (2011) 2 *Faulkner Law Review* 335.

[63] Tony Elliman et al., "Online Support for Arbitration: Designing Software for a Flexible Business Process" (2005) 4(4) *International Journal of Information Technology and Management* 447.

[64] Roger P. Alford, "The Virtual World and the Arbitration World" (2001) 18(4) *Journal of International Arbitration* 456. See also Julia Hörnle, "Online Dispute Resolution—The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration" (2003) *International Review of Law, Computers and Technology* 28.

done on the costs of e-arbitration as opposed to offline arbitration. In general, it can be said that third-party decision-making is potentially more expensive than joint decision-making.[65] Research shows that, in the area of international arbitration, for instance, most of the costs are associated with both arbitral and legal fees,[66] and it remains to be seen whether arbitrators and legal representatives would be prepared to make a substantial reduction to their fees when conducting arbitrations online.

In terms of the appropriateness of online arbitration, it has been said that it is "particularly appropriate with respect to simple fact patterns and small claims".[67] Hence, online arbitration may appeal to the users of small claims and documents-only arbitration schemes, but definitely not to the users of "international arbitration", where complex issues and large amounts of money are at stake.[68] This is probably one of the reasons behind the perceived "virtual arbitration's low attractiveness" within this area.[69] It might be that e-arbitration needs to develop further before a full assessment of its efficiency can be undertaken,[70] but it is unlikely that "international arbitration", in particular, would ever take place entirely online.[71]

5. Conclusion

Despite some optimistic predictions about ODR's potential to coalesce—on a level playing field—with the traditional methods,[72] it is still too early to predict what the future of ODR might be.[73] The virtues of technological advances in the area of dispute resolution have perhaps been overestimated. ODR is just "another" option,[74] and in some cases it might even be the best option, but it is definitely not a panacea. States' dispute resolution machinery is a complex system[75] that cannot be replaced with "faster microprocessors and larger memory boards".[76] Dispute resolution mechanisms, in general, are a means of maintaining social order.[77] These mechanisms are intended to deal with conflicts and disputes—on the

[65] Cf. Sara Kiesler, *Culture of the Internet* (Mahwah: Lawrence Erlbaum Associates, 1997), p.235.

[66] Chartered Institute of Arbitrators, *Costs of International Arbitration Survey* (London: Chartered Institute of Arbitrators, 2011), p.2. See also Michael O'Reilly, "Conference Review: Costs in International Arbitration, London September 27–28, 2011" (2012) 78(1) *Arbitration* 59.

[67] Daniel Girsberger et al., "Cyber-Arbitration" (2002) 3 *European Business Organisation Law Review* 626.

[68] See Roger P. Alford, "The Virtual World and the Arbitration World" (2001) 18(4) *Journal of International Arbitration* 449. See also Justin Michaelson "The A-Z of ADR—Pt I" (2003) Jan. *New Law Journal* 182.

[69] Sami Kallel, "Online Arbitration" (2008) 25(3) *Journal of International Arbitration* 350.

[70] Nicolas de Witt, "Online International Arbitration: Nine Issues Crucial to its Success" (2001) 12 *American Review of International Arbitration* 441.

[71] Gabrielle Kaufmann-Köhler, "Online Dispute Resolution and Its Significance for International Commercial Arbitration", in Gerald Aksen et al. (eds), *Global Reflections on International Law, Commerce and Dispute Resolution, Commerce and Dispute Resolution, Liber Amicorum in Honour of Robert Briner* (South Africa: ICC Publishing, Publication 693, 2005), p.455.

[72] Andrea M. Braeutigam, "What I hear You Writing is … Issues in ODR: Building Trust and Rapport in the Text-based Environment" (2006) 38 *University of Toledo Law Review* 101. See also Benjamin Davis, "Building the Seamless Dispute Resolution Web: a Status Report on the American Bar Association Task Force on E-Commerce and Alternative Dispute Resolution" (2002) 8(3) *Texas Wesleyan Law Review* 538; Anne-Marie Hammond, "How Do You Write 'Yes'?: A Study on the Effectiveness of Online Dispute Resolution" (2003) 20(3) *Conflict Resolution Quarterly* 261–286, and Nicole Gabrielle Kravec, "Dogmas of Online Dispute Resolution" (2006) 38 *University of Toledo Law Review* 125.

[73] Francis Gurry, "Dispute Resolution on the Internet", in *Papers of the International Federation of Commercial Arbitration Institutions: 5th Biennial Dispute Resolution Conference* (New York: AAA, 1999), p.60.

[74] Andrea M. Braeutigam, "Fusses That Fit Online: Online Mediation in Non-Commercial Contexts" (2006) 5 *Appalachian Journal of Law* 301.

[75] This system facilitates, among other things, access to justice, and it can certainly be "improved" by means of technology. See, e.g., Pablo Cortés, *Online Dispute Resolution for Consumers in the European Union* (London: Routledge, 2011), p.95f.

[76] See Michael Wheeler, "Computers and Negotiation: Backing into the Future" (1995) April *Negotiation Journal* 169 and Ethan Katsh, "Ten Years of Online Dispute Resolution (ODR)" (2006) 38 *University of Toledo Law Review* 19.

[77] Cf. Jean Sternlight, "ADR is Here: Preliminary Reflections on Where it Fits in a System of Justice" (2003) 3 *Nevada Law Journal* 289.

basis of the rule of law[78]—and it is doubtful that such a function can be fully and effectively performed in cyberspace.

[78] Thomas Schultz, "The Roles of Dispute Settlement and ODR", in Arnold Ingen-Housz (ed.), *ADR in Business: Practice and Issues Across Countries and Cultures*, Vol.2 (The Hague: Kluwer Law International, 2011), p.140.

WHAT WE KNOW AND NEED TO KNOW ABOUT ONLINE DISPUTE RESOLUTION

Ethan Katsh[*] & Colin Rule[**]

Online Dispute Resolution (ODR) is the application of information and communications technology to the prevention, management, and resolution of disputes.[1] ODR originally emerged in the mid-1990s as a response to disputes arising from the expansion of eCommerce.[2] During that time the web was extending into commercial uses, becoming an active, creative, growing, and, at times, lucrative space. Such an environment, with significant numbers of transactions and interactions (where relationships are easily formed and easily broken) seemed likely to generate disputes. At the same time, it was also clear that disagreements emerging from online activities could not be resolved through traditional offline channels. With parties likely to be at a distance from each other and incapable of meeting face-to-face, these new disputes could only be resolved online. This meant that new tools and resources that exploited the capabilities of digital communication and information processing by computers had to be developed. Now, some twenty years later, ODR is the fastest growing area of dispute resolution, and it is increasingly being applied to other areas, including offline and higher value disputes. This rapid expansion merits a discussion of what we have learned about ODR so far, and what questions we still need to answer.

I. WHAT WE KNOW ABOUT ONLINE DISPUTE RESOLUTION

One thing we know about Online Dispute Resolution (ODR) is that it has evolved greatly in its fairly short life. Initial ODR processes generally mimicked offline alternative dispute resolution (ADR) processes.[3] Early experiments in resolving disputes online were often labeled "Online ADR" or "E-ADR." In the first significant ODR pilot project, with eBay in the late 1990s, an experienced human mediator used email to interact with the disputants using the same strategies with which he engaged disputants offline (e.g., assisted storytelling

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The authors greatly appreciate the suggestions of Leah Wing and Orna Rabinovich-Einy.
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1. *See* Arthur M. Monty Ahalt, *What You Should Know About Online Dispute Resolution*, PRAC. LITIGATOR 22 (Mar. 2009), https://www.virtualcourthouse.com/index.cfm/feature/1_7/what-you-should-know-about-online-dispute-resolution.cfm (stating that ODR allows multiple disparate policies to settle disputes using the Internet).

2. *See id.*

3. *See* Ethan Katsh, *Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace*, 21 INT'L REV. L. COMPUTERS & TECH. 97, 99 (2007).

and joint problem solving).[4] This was a reasonable mindset at the time and consistent with a theme that was often found in other contexts, namely that "[w]hen a new online technology is created for any process, the initial impulse is to create online mirror images of the 'live' or offline process."[5]

Approximately twenty years of experience has taught us that ODR is no more "Online ADR" than the online versions of banking, education, or gaming are simply the offline versions of those systems moved online. Once a process moves online, its very nature begins to change. Or, as Marshall McLuhan once wrote, "when a new technology comes into a social milieu it cannot cease to permeate that milieu until every institution is saturated."[6] That is what has been occurring with ODR and ADR over the last two decades. Some ODR approaches may resemble face-to-face ADR processes and ADR practitioners may employ ODR tools to supplement face-to-face meetings, but the goal of ODR is not simply to digitize inefficient offline processes. Technology changes the nature of the interaction between the parties and introduces new possibilities for helping them achieve resolution. We may learn from offline approaches in designing ODR systems, but the larger challenge is to take advantage of what we can do with technology that we could not do before. As a result, as the full potential of ODR is realized over time, future applications are likely to diverge more and more from how disputes were handled in the past.

Why is this? Because technology is moving us further and further away from the models and values of ADR that emerged in the 1970s and that are still prevalent today. ADR placed great value on resolving disputes face-to-face, emphasized the values of neutrality and confidentiality, and focused more on the resolution of individual disputes than on their prevention. ODR processes, on the other hand, are delivered online and, increasingly, rely on the intelligence and capabilities of machines. Most communications exchanged online are automatically recorded, thus leaving a "digital trail," which presents opportunities to collect and use data in novel ways. This has made it possible for extraordinarily large numbers of disputes to be handled at very low cost, removing the problem of capacity and price associated with a human third party decision-maker or facilitator. This has also meant that a large amount of data on disputing patterns is now available, and algorithms can now analyze that data quickly and efficiently, gleaning patterns and lessons that a human would not be able to discern. These characteristics allow for better quality control over the functioning of dispute resolution processes, as well as insights into the sources of various disputes. They allow for efforts to provide online dispute prevention (ODP) as well as resolution (ODR). At the same time, this ever growing digital

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4. Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. DISP. RESOL. 705, 707 (2000).

5. ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 260 (Ethan Katsh et al. eds., 2012).

6. MARSHALL MCLUHAN, UNDERSTANDING MEDIA: THE EXTENSIONS OF MAN 161 (1964).

data archive can mean less privacy in ODR processes, a dramatic development for an activity in which confidentiality has long occupied a central role.

As ODR has grown in use, the ADR model in which a human mediator alone manages the flow of information between the parties has gradually been supplanted by a model in which technology is looked at as a "Fourth Party,"[7] something that can be of value in both online and offline disputes. The Fourth Party may, in less complex disputes (such as many eCommerce disputes), replace the human third party by helping the parties identify common interests and mutually acceptable outcomes. Templates and structured forms can be employed that allow users to choose from various options and, by comparing the choices made by the parties, can highlight potential areas of agreement. More commonly, the Fourth Party assists, enhances, or complements the mediator or arbitrator.[8] For example, consider the specific informational tasks performed by third party neutrals. These might include brainstorming, evaluating, explaining, discussing, identifying, defining, organizing, clarifying, listing, caucusing, collecting, aggregating, assigning meaning, simulating, measuring, calculating, linking, proposing, arranging, creating, publishing, circulating and exchanging, charting, reminding, scheduling, monitoring, etc. Some of these are simple or clerical but some involve making decisions at appropriate times and in appropriate ways. Technology can assist with all of these efforts.

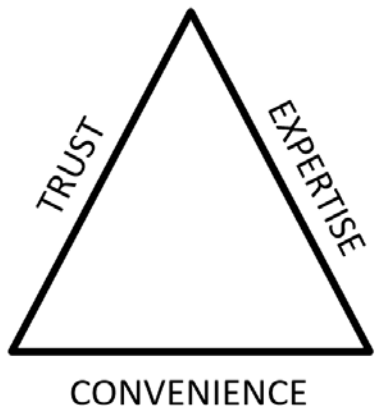

Figure 1: Empirical Research Opporunities in ODR

One way of understanding the opportunities ODR opens up for empirical research is to envision a triangle in which the sides represent convenience, expertise and trust (Figure 1). Any technological system, if it is to be used, must include all three elements but not necessarily to the same degree. All three are

7. ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93 (John Wiley ed., 2001).

8. *See* Janet Rifkin, *Online Dispute Resolution: Theory and Practice of the Fourth Party*, 19 CONFLICT RESOL. Q. 117, 119 (2001).

needed if the system is to attract users and survive over time, but the shape of the triangle can change and, by doing so, emphasize visually that more of one element is present than another. ODR began with a triangle that had a much longer convenience side. The earliest ODR systems were convenient because they enabled communication at a distance, often asynchronously, so that participation was possible at any time. In so doing, the technology removed many long established physical constraints imposed by time and space. ODR was not only extrajudicial but in a realm where physical constraints could be overcome. However, in the early days the expertise side of the triangle was quite limited in that there was no software that was assisting any of the parties in making decisions.

Over time, there has been a lengthening of the expertise side of the triangle, thus moving ODR even further away from the face-to-face ADR model. Expertise is now embedded in advanced software that takes advantage of the computer's processing capabilities, which are improving all the time. It is this accelerating processor speed that makes machines appear to be getting "smarter." It has been understood from the beginning that ODR was dependent upon software, but the software that tended to be employed in the earliest experiments was software that optimized convenient communication. Focusing on convenience and online-only activities also was not threatening to human mediators and arbitrators. However, as ODR software has become more advanced, and ODR has expanded its application to offline disputes, it has raised concerns that it may take on cases that previously required human attention.

Another set of lessons have grown out of the challenges of resolving disputes at scale. In the first few years of ODR, high volume platforms, such as eBay and PayPal, learned to utilize forms or structured templates to collect cases from users, and then developed software to process the data and manage the conversation as the dispute progressed.[9] A company called Cybersettle created a simple algorithm for handling monetary claims, and another company called Smartsettle developed a fairly complex software platform that could mathematically optimize resolutions across many negotiating points.[10] The dispute resolution triangle still was longest on the convenience side, but the expertise side was steadily lengthening.

Empirical research requires the availability of data. For a process like ODR, which collects data with every click of the mouse, we have, ironically, relatively limited empirical data about ODR processes. Until recently, ODR was employed mostly in the private sector. With a few exceptions,[11] large scale and private

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9. *See* DARIN THOMPSON, THE GROWTH OF ONLINE DISPUTE RESOLUTION AND ITS USE IN BRITISH COLUMBIA 1.1.3 (2014).

10. *See* ARNO R. LODDER & JOHN ZELEZNIKOW, ENHANCED DISPUTE RESOLUTION THROUGH THE USE OF INFORMATION TECHNOLOGY 75–76 (2010).

11. *See generally* J. N. MATIAS ET AL., REPORTING, REVIEWING, AND RESPONDING TO HARASSMENT ON TWITTER 5 (detailing the process a user must undergo to attain "authorized reporter" status).

eCommerce and social networking sites have not allowed empirical studies of their dispute resolution efforts. When they did conduct research and revealed the results, users objected to how data was being employed.[12] As ODR expands into the public sector, such as in courts and administrative agencies, we should be able to learn more about what works and does not work in ODR. These early observations from public implementations will be discussed in more detail below.

This Paper provides an overview of the present and insight into the future by focusing on three large-scale, data-producing and quite different ODR ventures. The first and most well-known involves the online auction site eBay, a web site that handles approximately sixty million disputes a year.[13] The second is the Internet Corporation for Assigned Names and Numbers (ICANN) domain name arbitration process[14] that, in the last sixteen years, has handled over 50,000 disputes between owners of a domain name and holders of a trademark that is identical or similar to the domain name.[15] The third is a more recent experiment involving online property tax appeals, a local process in North America that affects every homeowner. These three examples provide data both on what we know or are learning as well as on what questions await answers.

A. eBay and the Value of Disputes

It has been estimated that from 3–5% of eCommerce transactions end in a dispute.[16] For sites without a feedback or reputation system that users can consult before making a purchase, the percentage would be even greater. Reputation systems allow users to make judgments as to which sellers provide the greatest chance of a successful transaction, and therefore lowest risk of a dispute. Based on global eCommerce transaction volume, that means there are

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12. *See, e.g.*, Inder M. Verma, *Editorial Expression of Concern and Correction*, 111 PROC. OF THE NAT'L ACAD. OF SCI. OF THE UNITED STATES OF AM. 10779 (2014) (clarifying that authors of an empirical study gathered user data in accordance with the U.S. Department of Health and Human Services Policy for the Protection of Human Research Service, even though this did not fully conform with the principles of obtaining informed consent and allowing participants the opportunity to opt out).

13. *See* THOMPSON, *supra* note 9.

14. *Uniform Domain-Name Dispute Resolution Policy*, ICANN, https://www.icann.org/resources/pages/help/dndr/udrp-en (last visited Mar. 24, 2016).

15. *List of Proceedings Under Uniform Domain Name Dispute Resolution Policy*, ICANN, https://archive.icann.org/en/udrp/proceedings-list.htm (last visited Mar. 24, 2016).

16. COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, ECOMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 79 (2002) [hereinafter ONLINE DISPUTE RESOLUTION FOR BUSINESS]; Colin Rule, *Here Are the Keys to Crack the Code of the Collaborative Economy*, VENTURE BEAT (June 11, 2014, 11:00 PM), http://venturebeat.com/2014/06/11/collaborative-economy/ [hereinafter Rule, *Keys to Crack the Code*].

likely more than 700 million eCommerce disputes each year, growing to more than a billion disputes per year in 2017.[17]

The goal for a large eCommerce marketplace like eBay, however, is not to resolve an exceptionally large number of disputes. The goal is to maximize the number of successful transactions, and resolving disputes is essential to increasing that volume. By monitoring the buying and selling behaviors of users and extending the expertise side of the triangle, eBay can provide fast and fair resolutions that encourage buyers to engage in more transactions. This collection and analysis of the data generated by very large numbers of disputes can enable techniques and approaches that are not possible in face-to-face offline dispute resolution.

In the ADR world, various studies have measured satisfaction rates of users of different ADR systems. In actuality, these are measurements that derive from what the parties say about how they feel after participating in a mediation or arbitration. Companies like eBay, by having access to every click made by a user, can examine satisfaction in a different and more granular manner. In 2010, eBay and PayPal conducted a study[18] that was not intended to measure satisfaction in the traditional manner, by surveying disputants before and after participating in a dispute resolution process. Rather, it would compare the actual behavior of participants before and after the process, something it could easily measure with data they routinely collected.[19] In other words, eBay would not look at what users said but at their actions as buyers or sellers after participating in an online dispute resolution process.[20]

eBay randomly assigned several hundred thousand users to two groups and compared their buying and seller behavior for three months before and after the ODR experience.[21] This activity ratio indicated not only how more or less active the party became on the site after winning or losing a dispute, but could also calculate how much the company gained or lost financially as a result of someone participating in the ODR experience.[22] It did this by knowing the value of each transaction the person engaged in before and after the dispute resolution process.[23]

The study designers had hypothesized that parties who "won" their dispute (e.g., received a reimbursement) would have increased activity and that parties

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17. *Worldwide Ecommerce Sales to Increase Nearly 20% in 2014*, EMARKETER (July 23, 2014), http://www.emarketer.com/Article/Worldwide-Ecommerce-Sales-Increase-Nearly-20-2014/1011039 [hereinafter *Ecommerce Sales 2014*].

18. ONLINE DISPUTE RESOLUTION FOR BUSINESS, *supra* note 16; Rule, *Keys to Crack the Code*, *supra* note 16.

19. *Ecommerce Sales 2014*, *supra* note 17.

20. Colin Rule, *Quantifying the Economic Benefits of Effective Redress: Large E-Commerce Data Sets and the Cost-Benefit Case for Investing in Dispute Resolution*, 34 U. ARK. LITTLE ROCK L. REV. 767 (2012).

21. *See id.* at 771.

22. *See id.*

23. *See id.*

that "lost" their dispute would have decreased activity.[24] It assumed, in other words, that parties that won would be more satisfied than parties that lost and would adjust their transaction volume accordingly. This did occur; but the most meaningful lesson of the study, and the most counter-intuitive, was that participation in the ODR process led to increased activity even from the losers.[25] What it found was that:

> [t]he only buyers who decreased their activity after filing their first dispute were buyers for whom the process took a long time, more than six weeks. This lesson affirmed feedback we had heard previously indicating that buyers preferred to lose their case quickly rather than have the resolution process go on for an extended period of time.[26]

eBay's ODR system is one that attends to all three sides of the triangle. The few clicks necessary to file a complaint enhances convenience, the capability to analyze data, extract information not previously accessible, and use that data to improve the user experience provides a kind of expertise not possible with systems relying on human labor. Trust is, in a sense, the overarching and primary goal and the data on usage patterns can bring to light new information as to what is needed to build trust and attract and maintain users. It is also, in a way, technological support for the maxim "justice delayed is justice denied."

B. Domain Name Disputes

At the heart of the opportunity to improve empirical research in ODR is the presence of data in a form that can be processed. In theory, since everything done online is recorded, the landscape for research in ODR should be much broader than empirical research in ADR. In our second example, data is being collected but research is still limited. This is not because the data is proprietary but because the system is not collecting data in an easily accessible, useable, and structured manner.

This second large-scale ODR experience concerns disputes about domain names. Domain names, such as modria.com or odr.info, are essentially online addresses and each domain name must be unique if the system is to work. Just as there cannot be two "Main Streets" in a town, there cannot be two domains with the same name. If there were, clicking on a URL or IP address would not lead us where we wanted to go.

The domain name system was invented in 1984 but only grew rapidly starting in the mid-1990s.[27] In 1990, there were just eight thousand domain

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24. *See id.*
25. *See id.*
26. *Id.* at 776.
27. Ian Peter, *History of the Internet Protocols*, NETHISTORY, http://www.nethistory.info/History%20of%20the%20Internet/protocols.html (last visited Mar. 24, 2016).

names, but by 2000 there were over a million.[28] Today, there are over two hundred and ninety million top level domains, such as .com, .net, and .org.[29] Gradually, during the 1990s, companies realized that domain names were valuable and became worried that their trademarks would be damaged if someone registered a domain name that was the same as the trademark.

In 1998, an entity named the Internet Corporation for Assigned Names and Numbers (ICANN) was established to manage the domain name system.[30] One of the first efforts ICANN undertook was to develop a dispute resolution system to resolve disputes between domain name holders and trademark owners. This system, called the Uniform Dispute Resolution Policy (UDRP), is referred to as non-binding arbitration since anyone dissatisfied with the decision can start over again by filing a complaint in court.[31] In practice, this happens infrequently.

Arbitrators under the UDRP can order a domain name to be transferred to a trademark owner if the arbitrator finds that the domain name was registered in "bad faith."[32] The policy provides a few standards for finding "bad faith." On the other hand, there would not be "bad faith" if the domain name holder could show "proof of a legitimate, non-commercial or fair use of the domain name."[33] In such an instance, the domain name holder could keep it even if it appeared to be similar to the trademark.

ICANN requires that organizations that provide arbitrators publish the decisions.[34] The provider organization is also selected by the complainant and, while there are several providers, almost all of the cases are heard by an arbitrator from either the World Intellectual Property Organization (WIPO) or the National Arbitration Forum (NAF).[35] Statistics show that both organizations rule in favor of trademark holders approximately 85% of the time.[36]

Particularly recently, WIPO has been much more transparent in how it selects arbitrators[37] and has also established a system for querying its database in

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28. HISTORY OF GTLD DOMAIN NAME GROWTH, ZOOKNIC INTERNET INTELLIGENCE, http://www.zooknic.com/Domains/counts.html (last visited Mar. 24, 2016).

29. Sean Michael Kerner, *Domain Names Top 294 Million in 2015*, ENTER. NETWORKING PLANET (July 2, 2015), http://www.enterprisenetworkingplanet.com/netsp/domain-names-top-294-million.html.

30. *Register Accreditation: History of the Shared Registry System*, ICANN, https://www.icann.org/resources/pages/history-2012-02-25-en (last visited Mar. 24, 2016).

31. *UDRP Is Not Federal Arbitration*, BALOUGH LAW OFFICES, LLC: BLOG, http://www.balough.com/udrp-not-federal-arbitration/#.VmUFMYQ4mCQ (last visited Apr. 5, 2016).

32. UNIFORM DOMAIN NAME DISPUTE RESOLUTION POLICY, ICANN, https://www.icann.org/resources/pages/policy-2012-02-25-en (last visited Mar. 24, 2016).

33. *Id.*

34. *Id.*

35. *See* discussion *infra* Part I.C.

36. *Case Outcome (Consolidated): All Years*, WORLD INTELLECTUAL PROP. ORG. (WIPO) (last visited Mar. 24, 2016), http://www.wipo.int/amc/en/domains/statistics/decision_rate.jsp?year=.

37. Letter from David Roache-Turner, Head, Domain Name Dispute Resolution Section, WIPO Arbitration and Mediation Center, to Andrew, http://domainnamewire.com/wp-content/WIPO-statement.pdf (last visited Mar. 24, 2016).

a manner that can generate lists of decisions involving a particular issue or category of cases.[38] For example, one can search for domain name decisions involving celebrities and domain names with a negative term attached to the trademark owner's name, e.g. walmartsucks.com. Data, at least for WIPO, now exists in a form that could easily be researched in novel ways. Unfortunately, the National Arbitration Forum provides no similar capabilities. It merely enables one to conduct a full-text search of the decisions decided by NAF.[39] A separate organization provides a means for a full-text search of the decisions of both providers.[40] There are, in other words, obstacles to research aimed at all UDRP decisions.

In the limited studies conducted on the domain name dispute resolution process, NAF has been widely criticized for assigning arbitrators non-randomly and, in some instances, to arbitrators who rule in favor of trademark owners more than 95% of the time.[41] There have been increasing numbers of domain name disputes handled by the two organizations but the percentage of disputes relative to the large number of domain name disputes is decreasing. In other words, a smaller and smaller percentage of domain names are being challenged.

The domain name process has been a success in terms of convenience. It is much less expensive than going to court and decisions are usually made in fewer than forty days. Questions of fairness, however, are still present. Approximately half of all respondents fail to respond. This may be because the respondent feels that its case is weak or, alternatively, feels that it is unlikely to receive a fair hearing. Arbitrators in such cases are still allowed to find for the domain name holder but such an outcome is unusual. The rules authorize the trademark owner to select the provider so it is not a surprise that NAF is often selected. ICANN accredits the providers but imposes almost no standards that would persuade domain name holders that the process is fair. The technology employed by both providers is largely focused on communicating and sharing documents, leaving the expertise side of the triangle almost non-existent.

C. Online Property Tax Assessment Appeals

Most citizens in North America are familiar with the process of receiving a property tax bill in the mail every year, with a valuation based on their local assessor's estimated value of their property. Taxes are levied against almost all

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38. *Index of WIPO UDRP Panel Decisions*, WIPO, http://www.wipo.int/amc/en/domains/search/legalindex/ (last visited Mar. 24, 2016).

39. *See Domain Name Dispute Proceedings and Decisions*, ARBITRATION MEDIATION INT'L, http://www.adrforum.com/SearchDecisions (last visited Mar. 24, 2016).

40. *See, e.g.*, *UDRP Search Engine*, DOMAINFIGHT.NET, http://domainfight.net (last visited Mar. 24, 2016).

41. *Important Statistics About UDRP Panelists from WIPO and NAF*, DEFENDMYDOMAIN.COM (Apr. 26, 2010, 11:37 am), http://defendmydomain.com/important-statistics-about-udrp-panelists-from-wipo-and-naf.

properties across the United States and Canada, including commercial, industrial, and residential holdings. Property taxes fund government with citizen payments set according to each citizen's ability to pay, as measured by property wealth. As the International Association of Assessing Officers (IAAO) explains, ". . . property tax is the only tax used in every state of the United States, the District of Columbia, and every Canadian province. In fact, the property tax remains the most important source of own-source and total revenue for local governments in the United States."[42]

Property Tax Assessors utilize software called Computer Assisted Mass Appraisal (CAMA) to calculate and track the values of every property within their jurisdiction and to send out all the tax bills to citizens.[43] These CAMA systems are advanced, but traditionally they have not focused on processing appeals. By law, every taxpayer has the right to appeal their property tax bill if they feel the amount is inaccurate.[44] There is usually a window of time after the bills are sent out when the taxpayers can request an informal review of their assessed valuation. Many assessment jurisdictions within North America are now using ODR systems for their property tax assessment appeals, and because these assessments are being conducted by public bodies, information about the number of cases filed, the time to decision, and outcomes are being shared with the public. One such assessment jurisdiction is the Property Appeals Assessment Board, or PAAB, in the Canadian province of British Columbia.

PAAB launched its ODR system for property tax appeals in its 2012 assessment season. After four years of managing appeals through the system and refining its flows, PAAB reported that it achieved a 75% amicable resolution rate for cases filed in the ODR system, meaning the assessed amount was adjusted by mutual agreement and the case was closed. This rate was approximately 10% higher than the amicable resolution rate achieved via teleconference the year before. Of the 25% of ODR cases that didn't resolve, 13% required adjudication and 12% were dismissed (for not complying with PAAB response deadlines). An earlier survey of users of the process indicated that 52% were satisfied with the time it took to resolve the appeal, 84% felt the ODR software was easy to use, and 78% were satisfied with the overall ODR experience. Preference surveys conducted by the B.C. provincial government also indicated that a majority of citizens preferred to access government processes online as opposed to face-to-face or over the phone.[45]

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42. INT'L ASS'N OF ASSESSING OFFICERS, STANDARD ON PROPERTY TAX POLICY 6 (2010).

43. *See, e.g.*, *The Job of the Assessor*, N.Y.S. DEP'T OF TAXATION & FIN. (May 2012), https://www.tax.ny.gov/pubs_and_bulls/orpts/assessjo.htm (stating that assessors use CAMA techniques to analyze sales and estimate values for multiple properties).

44. *See, e.g.*, S.C. CODE ANN. § 12-60-2520(a) (2014) (granting taxpayers the right to object to a property tax assessment).

45. *See* SAM B. EDWARDS III & DIOGO SANTOS, REVOLUTIONIZING THE INTERACTION BETWEEN STATE AND CITIZENS THROUGH DIGITAL COMMUNICATIONS 203–04 (2014).

These results are broadly in line with other assessment districts in North America that have implemented ODR for their informal review requests and formal appeals. Moving property tax assessment appeals online has empowered citizens by giving them more convenient access to redress and by shortening the path to resolution. As such, it is in line with other early stage ODR experiments, which had a longer convenience side of the ODR triangle. The outcomes of the process are still determined by human powered reviews, meaning the software-powered expertise is not yet driving the bulk of the resolutions. However, as more data is gathered over the life of the process, patterns in decisions may enable more algorithmic resolutions in the near future. The strong preference numbers also indicate that the system is trusted by citizens, especially as it is provided at no cost to individual filers and is maintained by the PAAB itself.

II. WHAT DO WE NEED TO KNOW ABOUT ODR?

ODR, like ADR, is a range of processes. ODR is a how, not a what. In time, most dispute resolution processes will likely migrate online, and ODR will be relevant to almost every kind of dispute. Professor Frank Sander's oft-cited concept of the multi-door courthouse[46] is an apt model for ODR systems designers, because online processes can offer a nearly infinite range of "doors" customized for nearly every kind of dispute. In addition, Professor Sander's suggestion that ADR providers "fit the forum to the fuss"[47] is also particularly relevant to ODR since there are both more "fusses" and more "forums" in the online environment, necessitating a wider range of redress processes to handle the broader spectrum of potential issues.

A. More Disputes

The demand for ODR derives largely from the growth in online disputes, such as disputes arising from eCommerce transactions or "on demand economy," disputes that cannot be managed face-to-face. There is also likely an increasingly inadequate supply of human mediators and arbitrators as numbers of disputes increase, as well where face-to-face options might be available but the disputes involve low values. The following assertions contain a number of hypotheses about the growth in the number and range of disputes, many of which can be tested empirically.[48] The first assertion is verified largely by what we know about eCommerce disputes but at least some of the other assertions in the list represent untested hypotheses and provide a framework for future research.

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46. Address by Frank E.A. Sander at the National Conference on the Causes of Dissatisfaction with the Administration of Justice (Apr. 7-9, 1976), *reprinted in* Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111 (1976).

47. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure* 10 NEGOT. J. 49 (1994).

48. *See* ETHAN KATSH & ORNA RABINOVICH, DIGITAL INJUSTICE (forthcoming 2016).

1. The number of disputes increases whenever transactions and relationships increase.
2. The more novel the activity, the greater the likelihood of disputes. The first iteration of an innovative product or activity rarely anticipates all the disputes that it will generate.[49]
3. The more valuable the item or issue in question, the more likely it is that a problem or grievance will turn into a dispute.
4. The more data that is not only collected but is processed and communicated, the more opportunities for disputes will occur. The more data that is collected, the more bad data there is.
5. Speed and time pressures lead to disputes. If value is likely to erode quickly, as is often the case with technology, pressure to protect and aggressively extend its value increases.
6. Increased complexity in relationships and systems create more opportunities for disputes. In the words of computer scientist Peter Neumann, "Complex systems break in complex ways."[50] When informing shareholders about a federal investigation of problems in correcting errors, Experian stated that "We might fail to comply with international, federal, regional, provincial, state or other jurisdictional regulations, due to their complexity, frequent changes or inconsistent application and interpretation."[51]
7. The easier it is to complain (by filling out an online form or sending an email), the more disputes there will be.
8. The lack of transparency in algorithms leads to disputes.
9. The less attention given to preventing disputes, the more disputes there will be.

B. More Forums

Alongside the challenge of more disputes is the opportunity for developing more and novel avenues for resolving disputes. "More" does not simply mean a

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49. "Models are useful in estimating project costs and timing. For example, if a model predicts that the bug discovery rate drops rapidly after an initial flurry of discoveries, this fact can be used to determine when software is ready for release: once the rate has reached an acceptable level, the software can be shipped. Such estimation can have significant economic effects upon an enterprise: ship too early and pay a price in service calls; ship too late and potentially lose customers who might look elsewhere." Sandy Clark et al., *Familiarity Breeds Contempt: The Honeymoon Effect and the Role of Legacy Code in Zero-Day Vulnerabilities*, 2010 ANNUAL COMPUT. SEC. APPLICATIONS CONFERENCE 251 (2010), http://www.acsac.org/2010/openconf/modules/request.php?module=oc_program&action=view.php&a&id=69&type=2.

50. John Markoff, *Killing the Computer to Save It*, N.Y. TIMES, Oct. 30, 2012, at D1, www.nytimes.com/2012/10/30/science/rethinking-the-computer-at-80.html?_r=0.

51. Jeff Horwitz, *Alleged Abuses Put Credit Agencies on the Hot Seat*, BOSTON GLOBE, June 17, 2014, http://www.bostonglobe.com/business/2014/06/16/miss-consumers-harmed-credit-reporting-giant/itY78fc4FbKAoz6KNO7qHO/story.html.

larger selection of what is already in existence. "More" in this context translates into the adoption of digital tools and systems that provide solutions to problems (small and large), as well as the use of information technologies in new ways that anticipate and prevent disputes. By generating more disputes, technology has made access to injustice easy. Technology also presents opportunities to develop new forms and formats that facilitate access to justice.

While some private companies may resist providing data about numbers or types of disputes handled, all have some incentive to provide information about the processes they employ to handle disputes. Facebook, for example, provides a series of screen shots of the process one can use to file a complaint.[52] The increasing number of ODR companies and governmental entities are also likely to post descriptions of their systems. There has recently been a growth spurt of ventures that are either already in operation or in various stages of development and which are all likely to serve as data sources. These include the following:

1. Private firms: Modria, Youstice, SmartSettle, Picture it Settled, Mediateitonline.com, NetNeutrals, Virtual Mediation Lab
2. The Hague Institute for Innovations in Law (HiiL)[53]
3. British Columbia Civil Resolution Tribunal[54]
4. UNCITRAL
5. EU Directive on ODR[55]
6. UK Online Small Claims Court[56]
7. Stop Errors in Credit Use and Reporting (SECURE) Act—Proposed legislation in United States to facilitate error correction in credit reports.

C. Opportunities for Research Distinguishing ODR from ADR

ODR presents so many novel capabilities and opportunities for dispute resolution that it requires a new research agenda to better define its optimal application. Simply applying prior face-to-face models for processes and ethical

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52. Mary Novak, *Facebook's User Conflict Resolution System: An Illustrated Walkthrough*, JUST COURT ADR (Aug. 27, 2014), http://blog.aboutrsi.org/2014/uncategorized/facebooks-user-conflict-resolution-system-an-illustrated-walkthrough/.

53. The Dutch Legal Aid Board has recently launched the Rechtwijzer, which is an end-to-end online divorce platform available to any Dutch couple. *Rechtwijzer 2.0: Technology that Puts Justice in Your Hands*, HIIL, http://www.hiil.org/project/rechtwijzer (last visited Mar. 24, 2016).

54. *What Is CRT?*, CIVIL RESOLUTION TRIBUNAL, https://www.civilresolutionbc.ca/what-is-the-crt/ (last visited Mar. 16, 2016).

55. Beginning in January 2016, all merchants in the EU will be required to post a link on their websites to the EU ODR complaint system. Certified ODR providers will also be able to resolve cross-border ecommerce disputes.

56. ONLINE DISPUTE RESOLUTION ADVISORY GRP., CIVIL JUSTICE COUNCIL, ONLINE DISPUTE RESOLUTION FOR LOW VALUE CIVIL CLAIMS (Feb. 2015), https://www.judiciary.gov.uk/wp-content/uploads/2015/02/Online-Dispute-Resolution-Final-Web-Version1.pdf.

rules is inadequate. There are many unanswered questions around ODR, and it will take time to both define the necessary questions, as well as analyze data collected from ODR to determine best practices. While many new research needs will likely become apparent over time, here is an initial list of the issues researchers will need to tackle in the near future to distinguish ODR from traditional ADR practice:

1. What will be the dispute systems design in the online environment?
2. Models for building trust, convenience, and expertise via technology
3. Skills needed for effective ODR service delivery
4. Use of data for prevention of disputes, when ODR provides much earlier access to disputants in the overall dispute lifecycle
5. Similarities and differences between technology-assisted negotiation and mediation
6. Areas of overlap between ODR and ADR, including the optimal use of technology inside of a face-to-face dispute resolution process
7. Use and role of apology in online processes
8. Sense of participation and voice in asynchronous, text-based interactions
9. Statistics on the percentage of agreements reached and upheld, especially in comparison to ADR and particular forms of ADR. There is a long standing statistic that face-to-face mediation leads to agreements in approximately 85–90% of time. Is online mediation similar? What variables can be isolated in online mediation that can affect the success rate?
10. Demographics: What are the demographics of those who are providing ODR? Is ODR replicating the same demographic patterns that ADR has been consistently critiqued for over the past 30 years: mostly white middle class people providing services, especially when they are volunteers, for lower income populations, disproportionately urban people of color? Is technology making headway in broadening who is giving and receiving services?
11. Breadth of data collection: it should be easier to gather data from a broad range of sectors (family, commercial, criminal, civil, education, environmental, public policy, etc.) and from across the globe. This will provide very useful comparative data and also in an increasing globalized world and the reality of the use of the Internet within and across borders. It can also provide a valuable overview of the landscape by types of technology, type of demographic, type of dispute resolution process, etc.
12. What types of technologies are being used most (i.e., video conferencing, texting, emailing, mobile phones, chat rooms, etc.)?
13. What barriers have people experienced in adopting technology? To employing ODR? For neutrals? For disputants? Breaking down these categories by demographics such as gender, age, race, ethnicity,

language, and—for disputants—being a respondent or complainant, being an individual or a business, etc.

14. What types of processes that involve dispute resolution but are not typically seen as ADR are increasing in use with the help of technology? One critique of the ADR field from those external to it is that there are other professions that handle disputes that have not usually been included in "the ADR profession" and yet are routinely turned to for handling disputes. This has narrowed the field and the professionalization process. Since ODR provides even more opportunity for inclusion, access, and creativity, it is an opportunity to gather data that would help us learn about who and how people are using technology to resolve or prevent disputes. Here are a few examples: preachers, rabbis, imams, and other religious leaders; facilitators; peacemakers; peace negotiators; youth program leaders; school vice principals; discipline system staff; customer service representatives; human resource personnel; probation officers; lawyers who are not serving in the capacity of neutrals; dispute system managers inside organizations; dispute system designers; etc.
15. Links between the collection of data in ODR and access to justice
16. Transparency in face-to-face processes versus ODR use of algorithms
17. How to conduct effective training in ODR; how it differs from ADR training; and whether ADR training should be a pre-requisite for ODR practitioners

III. CONCLUSION

Looking into the future, it is clear that the lines between ODR and ADR will continue to blur until it will be very hard to tell one from the other. Technology is insinuating itself into every area of our lives, changing our notions of the way global society should operate, and the way we resolve disputes will be no different. Eventually ODR may be the way we resolve most of the problems in our lives, with algorithmic approaches even more trusted than human powered resolutions. The only question is how long this transformation will take to play out.

The pace of that change will largely be determined by how quickly we can consolidate the lessons learned from ODR projects to date, and conduct new research to answer the remaining questions about how ODR can be made most effective. A decade ago the notion of ODR as the default means of redress for both online and offline disputes sounded like science fiction, but with the pace of technological change, such an assertion now seems almost likely. At some point soon, it may seem obvious that such an outcome was inevitable.

Human ingenuity has found solutions to previously insoluble problems for many decades. Now, as we wrestle with the ramifications of a fully and digitally connected world, we face new challenges that were unimaginable a generation ago. Advancing the practice and understanding of ODR may provide expanded

access to justice for citizens around the world, which will help achieve the objectives that purely face-to-face ADR services have been unable to deliver.