



Online Dispute Resolution: Got an ‘App.’ for That?

By Nicole Stewart-Kamanga¹

The focus of this essay is the efficacy of online dispute resolution. I will first briefly review the history of ODR and then examine its application to family law mediation.

Online dispute resolution is simply defined as the application of alternative dispute resolution techniques using the internet. At the intersection of military and academic collaboration fueled by Cold War mentality, came the internet. The internet’s reach makes it an unparalleled form of communication. It allows for decentralization such that time-zones, space, borders and other such barriers are relegated to the periphery. The internet allows for asynchronous communication; that is, the parties are not required to communicate at the same time. This characteristic is of particular benefit when the participants are in different time zones. Arguably, the internet’s most compelling feature is its’ interactive capability. This feature, known as the “fourth party” is central to ODR methodology. (In the alternative dispute resolution process, the mediator or arbitrator is known as the third party. The technology/software that makes the internet what it is and that the third party manipulates to interact with the participants is deemed the fourth party.)

With the explosion of the internet in the 1990’s, online transactions increased - followed closely by online disputes. ODR seeks to resolve those disputes as well as those that originate offline. Online dispute resolution employs many ADR techniques including mediation, audio/video conferencing, e-mail and chat rooms. This paper will focus on ODR and mediation.

Historically, ODR has been applied with great success to mediations involving single-issue, monetary disputes. One of the first extensive ODR applications was the SquareTrade system utilized by e-Bay. Pursuant to this system, complainants described their problem, then specified a solution(s) by using either a pull-down menu with pre-fixed options or an open-text box for written responses. SquareTrade subsequently e-mailed the other party who then generated their own solution or chose one already prepared. Parties also had the option to retain a Square-Trade trained mediator. The mediator relied on one-on-one asynchronous e-mails with each party. Prior to its discontinuance in 2008 for internal reasons, SquareTrade’s hybrid negotiation/mediation process resolved millions of buyer/seller disputes.

The system known as Cybersettle is another form of online dispute resolution. Created in 1996 by two lawyers, Cybersettle uses automated double-blind bidding to resolve monetary claims in personal injury cases. The users submit their offers and demands online. If the settlement offer exceeds the demand, the computer system will split the difference and settle on the median between the two offers. To avoid

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unfair results, the final settlement cannot exceed the demand by more than 20%. If the parties' offers are not within settlement range, no resolution is reached, the offers are never disclosed and the parties can submit a new case for settlement. Cybersettle has partnered successfully with the City of New York and the American Arbitration Association such that disputants can download files and supporting documentation, schedule appointments, make offers to settle and resolve cases in a fraction of the time required offline. Cybersettle states that they have facilitated over \$1.6 billion in settlements to date.

ODR and Family Law Mediation

I suggest that ODR be considered for family law cases. Members of the family law bar are well aware of the increasing number of unrepresented litigants in the court system, as well as the backlog of cases and the conflict escalation that can occur during litigation. This reality has caught the attention of government and the public alike and has effected a shift toward ADR and mediation in particular. The services provided by mediate393 in Toronto and other court-affiliated mediation programmes are examples of these initiatives. Why not increase the number of people who can be helped by moving some of these mediation services online?

The ability to access high-quality online mediation services from home or another convenient locale would be of great benefit to the disabled and elderly, parents requiring child care, individuals who are unable to take time away from work and parties who are separated geographically.

Critics contend though, that computer-mediated communication, as utilized in online dispute resolution, is a sub-optimal form of communication because the parties are unable to see and hear each other. Consequently, many of the subtle verbal and non-verbal cues that comprise communication such as eye contact and tone of voice are lost, particularly when using e-mail.

Notwithstanding the rich nature of face-to-face communication, one might well question whether direct interaction is of benefit to parties in dispute. By definition, their communication is often strained and ineffectual - replete with arguments, interruptions and the occasional abusive word. Curtailing direct contact might minimise these distractions and accelerate settlement.

ODR is less confrontational on a number of fronts. Its ability to support asynchronous communication affords parties the opportunity to "cool down," consult and provide a balanced response when faced with an inflammatory statement online. Theoretically, non-assertive parties also benefit from the physical distance offered by ODR making them less likely to acquiesce to the dominant party and improving the likelihood of an equitable resolution. Mediating online neutralizes the triggers that occur when parties meet in person. Consequently, they may be less invested in posturing and saving face and more focused on problem-solving. Additionally, ODR can level the playing field by addressing potential power imbalances based on race, gender and mediator bias, which frees the parties (and the mediator) to concentrate on the task at hand.

The online mediator is in a unique position. Along with the parties, s/he has an opportunity for reflection before responding, proffering a suggestion or (carefully) reframing an e-mail prior to forwarding it to the other side. Mediators may also choose to caucus with parties concurrently without the other being aware. They can question parties' motives, allow parties to vent, assess BATNA and other options within caucus, thereby de-escalating conflict and speeding up the mediation process.

It can be a challenge to establish rapport online; however, on-line small talk, caucusing, mirroring writing styles and timing (providing progress reports while parties wait for responses from the other side) are all effective tools that mediators can utilize in their efforts to build trust and rapport.

Finally, concerns about the efficacy of computer-mediated communication may require some tempering. According to a 2003 study in which mediators and disputants participated in 15 online mediation

simulations ranging from sexual harassment cases to product liability, a majority of participants found that they were able to overcome the lack of non-verbal cues. They did not feel constrained by the text medium but felt comfortable expressing themselves. They felt that they were understood by others because they wrote like they talked. Some disputants actually preferred writing and felt that it led to an open and honest, less hostile mediation experience.

These results reflect the reality that expression in text format is ubiquitous and many people today are very comfortable using this medium. Despite the ease with which many communicate online, there are barriers to its use. It must be acknowledged that internet access is financially prohibitive for some and that adequate literacy skills is a significant challenge for many in our society. Further, although many family law disputants find e-mail helpful, in the hands of others it is a harmful tool. Detailed tutorials would likely be required before such parties participated in an ODR process. Another potential barrier is the presence of domestic violence in the relationship.

Domestic Violence

ADR experts often counsel against mediation when domestic violence is a factor. Statistically, threats and actual incidents of violence increase during the period after separation - often when women are taking steps toward autonomy and breaking the silence of abuse. Mediation may be the first contact the abuser has had with the victim since separation and, unbeknownst to the mediator, he may use the opportunity to continue to control and re-abuse, however subtly. The mediator may not be able to discern these signs.

Needless to say, security is paramount in these cases; however, consideration should be given to the possibilities ODR presents. As noted above, due to screening procedures many victims are left with the Court system as their only alternative. There, they must deal with the abuser directly in an acrimonious environment. Surely, a re-traumatizing experience. ODR may be an option precisely because of the physical separation. Verbal and non-verbal cues are nullified which may minimize intimidation and empower the non-assertive party. The mediator can check in on the victim's emotional state as needed in caucus without the abuser's knowledge. S/he can also screen messages for abusive or threatening content or intent. Similarly, ODR may be helpful in difficult high conflict cases where parties are entrenched and unable to make headway.

Undoubtedly, highly specialized skills, screening and safety training would be required for mediators working with domestic violence cases online.

A Real-Life Application

In November 2011, Vancouver-based Smartsettle completed an online pilot project at their Family Resolution Centre. Using Smartsettle mediation software, separating couples participated in a hybrid process in which they engaged in traditional face-to-face mediation with the addition of an online component.

The goal of the face-to-face mediation was to clarify issues and needs sufficiently to produce a Framework for Agreement (FFA). Once the FFA was generated, the negotiations moved online for "eNegotiation" between the parties using the Smartsettle software, and "Visual Blind Bidding". The e-Negotiation rating system is designed to help the parties rank and score proposals from each side. This technique is purported to generate an optimized agreement that is best for both parties. Smartsettle indicated "overwhelming success" based on a modest sample size of 36 family law cases. In my opinion, this initial step indicates potential and warrants more extensive study.

Conclusion

Online dispute resolution has the capacity to de-escalate and resolve conflict by facilitating productive communication and assisting parties to generate value-added resources. It dovetails well with single-issue monetary disputes but is certainly not limited to that arena. I have proposed that family law cases and ODR may be a very good fit. Careful consideration should also be given to domestic violence cases.

Face-to face mediation services are effective; however individuals in dispute may not want to engage with each other at a level where they are subject to a “blizzard of non-verbal cues.” They may require a more concise communication experience that will allow them to obtain information, discuss their needs and explore resolutions in an accessible, confidential, convenient forum. This leaner form of communication may not be lacking at all - it may be entirely appropriate and indeed welcomed by the parties.