# Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message

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# CYBER-MEDIATION: COMPUTER-MEDIATED COMMUNICATIONS MEDIUM MASSAGING THE. MESSAGE

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But I'm just a soul whose intentions are good
Oh Lord, please don't let me be misunderstood.[1]

## INTRODUCTION

The course of ecommerce is not always smooth. Disputes are inevitable. These disputes will have to be resolved if ecommerce is to develop to its full potential. Alternative Dispute Resolution (ADR) is a range of processes for resolving online disputes.[2] Businesses and consumers who engage in ecommerce are often more willing to mediate than to arbitrate their disputes in an online forum[3] because mediation is a voluntary process in which a third-party facilitator assists the parties to the dispute to arrive at a mutually agreed upon resolution.[4] Generally, mediation requires a neutral third party capable of protecting the integrity of the proceedings and facilitating communication between the parties.[5] "For mediation to be most effective, however, the parties must perceive the mediator to be impartial, perceptive, persuasive, trustworthy, interested, innovative and prepared."[6] The

1. Santa Esmeralda, *Don't Let Me Be Misunderstood* (Phillips Records 1979).
2. ADR is not one method of resolving disputes but is rather shorthand for numerous methods such as mediation, arbitration, and mini-trials that are used to avoid traditional litigation. *See, e.g.,* BLACK'S LAW DICTIONARY (7th ed.1999).
3. *See generally* Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "ebay law,"* 15 OHIO ST. J. ON DISP. RESOL. 705 (2000).
4. ROBERTA S. MITCHELL & SCOT E. DEWHIRST, THE MEDIATOR HANDBOOK: A TRAINING GUIDE TO MEDIATION TECHNIQUES AND SKILLS 3 (1990) (describing mediation as "organized negotiation," a "voluntary dispute resolving process in which a third-party facilitates and coordinates the negotiations of disputing parties") (emphasis omitted). Kimberly Kovacs defines mediation as "assisting parties to reach a mutually satisfactory or acceptable resolution and assisting individuals in achieving a new perception of their relationship and attitudes." Kim Kovacs, *Lawyer Ethics in Mediation: Time for a Requirement of Good Faith in Mediation.*, DISP. RESOL. MAG., 9-13Winter 1997, at 9.
5. John W. Cooley, *Mediator & Advocate Ethics*, 55 DISP. RESOL. J., Feb. 2000, at 73, 75.
6. Robert S. Greenbaum, *"R" Is for Resolution: ADR in the Commercial Law Setting*, NEW JERSEY LAW., Aug.-Sept. 1993, at 27, 29.

parties must enter into mediation with good faith[7] and with the intent to resolve the dispute.[8] The parties are typically present. This is problematic in the ecommerce context. Legally, and more importantly for effective online mediation, virtual presence may be enough; but virtual presence may not be as effective in breaking down walls and building trust because many individuals are inexperienced at developing relationships using computer mediated communication.[9] The distinguishing characteristic of online mediation is that the mediator and the parties do not share simultaneously the same physical location.[10] Physical presence, at least to some mediators, is the *sine qua non* of mediation.

This Article examines the feasibility of online mediation. It evaluates some modalities, presents cross-cultural mediation as a theoretical construct to describe online mediation, and recommends guidelines for the practice of online mediation. Some commentators have observed that ideal online mediation remains an aspiration, suggesting that technologies such as videoconferencing are the "obvious solution to the lack of face-to-face encounters."[11] Yet others have found that online mediation, even at the email level, is an acceptable, if not preferred, method of resolving some types of disputes.[12] This is a false dilemma. Mediation exists on a continuum from face-to-face to pure online mediation. Most of the legal literature evaluating the potential of online mediation can be best characterized as the battle of the anecdotes. No legal scholars have looked at the rich social science[13] literature on the effects of computer-mediated communications.[14] The authors hope to begin to rectify this neglected interdisciplinary area of scholarship and to apply these lessons to online mediation. Informed by the computer-mediated communications (CMC) literature, online mediators will make a substantial contribution to dispute resolution.

Part I of this Article analyzes the need for online mediation, the capability of online mediation to meet these needs, some common misconceptions accepted in the

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7. *See* Kovacs, *supra* note 4. *Cf.* Edward F. Sherman, *Good Faith Participation in Mediation: Aspirational, Not Mandatory*, DISP. RESOL. MAG., Winter 1997, at 14.

8. Judith P. Meyer, *The Pros and Cons of Mediation*, 52 DISP. RESOL. J., Summer 1997, at 8, 15.

9. Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1308-09. "Theories of strategic choice imply that trust is a precondition of sharing information...." Jim Sheffield, *The Effects of Bargaining Orientation and Communication Medium on Negotiation in the Bilateral Monopoly Task: A Comparison of Decision Room and Computer Conferencing Communication Media, in* CHI'89 PROC. (K. Bice & C. Lewis eds., May 1989).

10. *See* Eisen, *supra* note 9; Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735 (2000); William T. D'Zurilla, *Alternative Dispute Resolution*, 45 LA. B.J. 352 (1997) ("There is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator."); *see also* Kathleen Valley, *The Electronic Negotiator*, HARV. BUS. REV., Jan.-Feb. 2000, at 16, 17, *available at* http://www.mediate.com/articles/valley.cfm (comparing face-to-face negotiation with online negotiation and finding face-to-face superior).

11. *See* Beal, *supra* note 10, at 737; *see also* Eisen, *supra* note 9, at 1308-09.

12. *See generally* Katsh et al., *supra* note 3, at 710.

13. "[T]he field of Communication is the 'offspring' of five different disciplines: psychology, psychiatry, anthropology, sociology, and ethnology." *An Overview of Nonverbal Communication in Impersonal Relationships, at* http://www.hamp.hampshire.edu/~enhF94/kinesics.html (last visited March 12, 2002). The authors concede that they have barely scratched the surface of this literature and merely present some theories of computer-mediated communication that would be useful to legal mediators.

14. The authors base this assertion on numerous queries such as "(computer /s mediated /s communication) & ADR mediation" in the Westlaw TP-ALL database. Using this methodology, the authors were unable to locate any relevant documents.

legal-mediation community, the technological infrastructure on which online mediation takes place, and identifies some of the associated real world legal issues raised by technology. Part II discusses differences between physical presence face-to-face mediation and online virtual mediation, examines a sample of the many scientific studies of computer-mediated communication, and postulates how these studies should inform views on whether and when online mediation is feasible. Part III describes some existing online mediation programs as models of what might be and describes various software programs to facilitate the mediation process. Since no article on mediation would be complete without a simulation, part IV applies this Article's lessons to a paradigmatic hypothetical.

Finally, the Article concludes by taking the position that although online mediation is still in its infant stages, it has the potential to provide new and creative methods to facilitate the resolution of the entire gamut of disputes from the easily resolved to those that are intractable. If online mediation is to be efficacious at resolving disputes, future efforts at online mediation must be informed by both the experiences of the mediator and the existing research in computer-mediated communications.

## I. PRIMER ON ONLINE MEDIATION

At a minimum, online mediation is feasible only if the technology permits it, the law allows for it, there is a need for it, and it can satisfy this need. This section will discuss the social, technological, and legal predicates necessary for online mediation.

### A. *Background*

Any discussion of online mediation requires an analysis of the context[15] in which the mediation takes place. Technology prescribes how individuals interact on the Internet and the tools that will be available to an online mediator. Internet technology also raises serious concerns regarding the legal context of the mediation. Online mediation must have a connection to a geographic sovereign. This sovereign's laws will govern the mediation. This section will discuss how available technology and law define the power relations and tools available to the disputants and the mediator.

### 1. Technologies/Communication Modalities

Online mediation will take place on the Internet so it is useful to summarize briefly some important characteristics of the Internet and how individuals interact using the Internet. The Internet is "an international network of interconnected computers."[16] More than 200 million people worldwide communicate on the Internet.[17]

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15. Context refers not merely to non-determinate background; context refers to any set of conditions and factors that dynamically endow a transaction or dispute. Context exerts force on bargaining behavior. Donald G. Gifford, *A Context-Based Theory of Strategy Selection in Legal Negotiation*, 46 OHIO ST. L.J. 41, 47-48 (1985).

16. *See* Reno v. American Civil Liberties Union, 521 U.S. 844, 849 (1997).

17. *See* William J. Holstein, *A Motorola Coaster: How the Venerable Company Snapped Out of Its Funk*, U.S. NEWS & WORLD REPORT, June 21, 1999, at 42.

Access to the Internet is obtained through a variety of sources. Some individuals access the Internet through educational institutions, employers, and public libraries; but most users access the Internet at home through an Internet Service Provider (ISP).[18] These services can provide electronic mail (email),[19] access to the World Wide Web (the Web)[20], instant messaging services, videoconferencing, and other forms of digital data transmission.[21] Together, these services comprise "cyberspace"—the virtual world "located in no particular geographical location but available to anyone, anywhere in the world, with access to the Internet."[22] The concept of "cyberspace" is inherent in "the electronic nexus between the individual, the networks, and other individuals."[23]

People build strong communities on the Internet.[24] Technology defines communities in cyberspace. Although email is the predominant form of Internet communication, other technologies facilitate communication and community building online. Generally, as communications media become more interactive, users find it easier to develop online relationships. Passive websites are the least interactive and so provide minimal opportunities to develop an online relationship. AOL's Instant Messenger; Internet Relay Chat (IRC), a form of live chat;[25] MUDS;[26] and videoconferencing programs such as Netmeeting[27] have also become quite popular for facilitating "real-time" discussion and community building.

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18. *See Reno*, 521 U.S. at 849. Also known as Internet access providers (IAPs), they are companies that provide subscribers with access to the Internet. *See* Ian C. Ballon, *Internet Issues for the Travel Industry*, 790 PLI/COMM. 11, 19-20 (1999).

19. "Email" is the electronic transmission of information via a local area network (LAN) to a wide area network (WAN) through the Internet to another Local Area Network to the recipient. *See* Ballon, *supra* note 18, at 18.

20. "A Web site is an electronic location on the World Wide Web that may contain text, graphics, visual images or sound." Ballon, *supra* note 18, at 20. "Web sites are comprised of multiple "pages" (that may be shorter or longer than actual paper pages of information)." *Id.*

21. *See Reno*, 521 U.S. at 849.

22. *Id.*

23. Llewellyn Joseph Gibbons, *No Regulation, Government Regulation, or Self-Regulation: Social Enforcement or Social Contracting for Governance in Cyberspace*, 6 CORNELL J. L. & PUB. POL'Y 475, 485 (1997).

24. *See generally* The Graphic, Visualization & Usability Center's (GVU) 10th WWW User Survey, *available at* http://www.gvu.gatech.edu/user_surveys/survey-1998-10/graphs/general/q56.htm (last visited Oct. 28, 2001).

25. "A form of interactive online communication that allows you to have real time conversations with others on your computer. Chatting on the Internet can take place via Web pages in places known as chat rooms or on IRC channels. Either way, when participating in a chat discussion, your messages are instantaneously relayed to other members and their messages are instantaneously relayed to you." *See* http://www.netlingo.com/lookup.cfm?term= chat (last visited Oct. 28, 2001).

26.      Short for Multi-User Dungeon (or Multi-User Dimension) a cyberspace where users can take
         on an identity in the form of an avatar and interact with one another. Originally, MUDs tended
         to be adventure games played within enormous old castles with hidden rooms, trap doors, exotic
         beasts, and magical items. Nowadays, the term is used more generically to refer to any
         cyberspace. MUDs are also known as 3-D worlds and chat worlds.
*See* http://www.webopedia.com/TERM/i/instant_messaging.html (last visited Oct. 28, 2001).

27. "A product developed by Microsoft Corporation that enables groups to teleconference using the Internet as the transmission medium. NetMeeting supports Voice on the Net, chat sessions, a whiteboard, and application sharing. It's built into Microsoft's Internet Explorer Web browser," *at* http://www.webopedia.com/TERM/N/ NetMeeting.html (last visited Oct. 28, 2001); Microsoft, *at* http://www.microsoft.com (visited May 9, 2000).

Some online communities exist largely through email and may be as cohesive as a group of pen pals.[28] Some communities are fixed with long-term participants while others are transitory.[29] Other communities, such as MUDs, are highly interactive in real time.[30] In these communities, individuals develop personae and exchange information in a virtual environment of their own creation.[31] Some communities like the World Wide Web may be a heterogeneous mixture of different types of communities. For some users, the Web is an old fashioned general store where people meet to exchange gossip; for others, the Web is merely a modern shopping mall or tourist center where one goes for impersonal commerce or to see the "sites." The individual's relationship to a community is largely defined by the communication technology, so the individual may have a very simple superficial connection to the community or a very complex, enduring relationship, depending on the technology.[32]

These communal loyalties affect how the individual relates to others in cyberspace. Each community has its own customs and traditions that must be considered when mediating an online dispute. Within any of these groups, there may be a few, or in the case of Usenet, literally thousands of sub-communities, many of which have nothing in common but those similarities forced on the community by a shared technology.[33]

While these technologies create and define communities online, they also represent tools that will be useful in mediating online disputes. Most ecommerce relationships will begin and exist entirely online. Ecommerce disputes will arise out of commercial relationships begun in each type of online community. Ecommerce is more than just business-to-business or business-to-consumer, rather it embraces smaller consumer-to-consumer transactions as well. Frequently, as in any real world commercial relationship, social, cultural, and other non-economic considerations will affect dispute resolution. These considerations may be a function of the technology that initially created the relationship and course of business that led to the dispute. Mediators must understand the technology that created the environment that nurtured the commercial relationship. The authors contend that the technology that facilitated the creation of the relationship will adequately serve to resolve disputes arising out of that relationship. Disputes arising from complex relationships require either sophisticated communications media or simple communications media used in sophisticated ways over a period of time by the parties to build the relationship. In either case, the same media should be sufficient to resolve ecommerce disputes. Therefore, online mediation will be adequate in most situations to resolve ecommerce disputes.

The following basic tools will be available to online mediators.

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28. Gibbons, *supra* note 23, at 496.

29. For an insight on communal, almost utopian life on the Internet, see HOWARD RHEINGOLD, THE VIRTUAL COMMUNITY: HOMESTEADING ON THE ELECTRONIC FRONTIER (1994); for the dystopian view of digital communities, see CLIFFORD STOLL, SILICON SNAKE OIL: SECOND THOUGHTS ON THE INFORMATION HIGHWAY (1995).

30. *See generally* RHEINGOLD, *supra* note 29; STOLL, *supra* note 29.

31. *See generally* RHEINGOLD, *supra* note 29; STOLL, *supra* note 29.

32. *See generally* RHEINGOLD, *supra* note 29; STOLL, *supra* note 29.

33. *See generally* RHEINGOLD, *supra* note 29; STOLL, *supra* note 29.

## a. Email

Email, or Electronic Mail, is ASCII-text[34] data sent via the computer from one person to another. Email is ubiquitous. Many companies provide free email accounts, for example, Hotmail, Yahoo, and Excite. This type of mail is called IMAP mail[35] or web-based mail. Other individuals may receive email through a contract with an ISP. This type of mail is usually POP mail.[36] Email is instantaneous and the turn-around time is minimal. Email may also contain digital data files. These files may contain text, music (.mp3), still-photographs or images (.jpg), motion pictures (.mpeg), and exact replicas of an original document (.pdf). Email does not require simultaneous interaction. Yet, if desired, all parties can participate simultaneously without conflict. Messages can be ordered or prioritized as a ready reference for future discussions.[37] For example, the parties may raise numerous topics, themes, and interests. Upon discovery of these issues, the online mediator may identify and thread messages so that the mediator and parties can identify and respond to separate lines of thought. Alternatively, the mediator may drop unproductive lines of discussion. Email also saves time "because people write more slowly than they speak, but read faster than they speak."[38] Also, readers can ponder or ignore messages based on the importance of the message to the proceeding. The media richness of email may be increased using textual or graphic paralinguistic signals.[39]

Email also permits the mediator and participants to control their self-presentations. Irrelevant factors such as gender, race, ethnicity, age, and disability in oral/auditory communication are not readily revealed using email. Yet, individuals can reveal their true feelings. Online venting of anger and frustration in written words may cause the writer to spend time referring to the cause of his/her emotions. Additional time for reflection while typing affords the emotionally upset person a chance to reconsider the statements before sending them. Email mediation may also address fairness and political concerns over the physical, psychological, and economic dangers of mediation to women, the poor, and the less powerful.[40] At this point in time, ease of use, low cost, and narrow bandwidth make email the optimal communicative medium for online mediation of ecommerce disputes.

On the downside, email relies entirely on written language. Language may divide communicators into the "in group" of those who understand and the "out group" of

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34. "Acronym for the American Standard Code for Information Interchange. Pronounced ask-ee, ASCII is a code for representing English characters as numbers, with each letter assigned a number from 0 to 127." *See* http://www.webopedia.com/TERM/A/ASCII.html (last visited Oct. 28, 2001).

35. "Short for Internet Message Access Protocol, a protocol for retrieving email messages." *See* http://www.webopedia.com/TERM/I/IMAP.html (last visited Mar. 14, 2002).

36. "Short for Post Office Protocol, a protocol used to retrieve email from a mail server." *See* http://www.webopedia.com/TERM/P/POP2.html (last visited Mar. 14, 2002).

37. Mary M. Connors, *Living Aloft: Human Requirements for Extended Spaceflight, at* http://www.hq.nasa. gov/office/pao/History/SP-483/ch6-3.htm (last visited Mar. 12, 2002).

38. Jacob Palme, *Support for Decisions by Email, at* http://www.dsv.su.se/~jpalme/ietf/JPMADS.pdf (last visited Mar. 12, 2002).

39. *See infra* Section II(C)(2).

40. "The risks of prejudice are greatest in informal settings involving direct confrontation where few rules exist to constrain conduct." Michelle Herman et al., *An Empirical Study of the Effects of Race and Gender on Small Claims Adjudication and Mediation, in* JAMES J. ALFINI, ET AL., MEDIATION THEORY AND PRACTICE 327 (2001).

those who do not.[41] To the extent that language differences increase, mistrust, concealment, and inflexibility also increase, as does the risk of communication breakdown. One answer to the language barrier is employment of a mediator who is a translator.[42]

### b. Instant Messaging

Instant messaging is "a type of communications service that enables [the user] to create a private chat room with another individual. Typically, the instant messaging system alerts [the user] whenever somebody on your private list is online. [The user] can then initiate a chat session with that particular individual."[43] Chat is "[a] form of interactive online communication that enables typed conversations to occur in real-time. When participating in a chat discussion, [the user's] messages are instantaneously relayed to other members in the chat room while other members' messages are instantaneously relayed to [the user]."[44] A chat room is a

> site on the World Wide Web where any number of computer users can type in messages to each other (chat) in real time, creating an online conversation. These messages usually appear on an area of the screen next to the user's nickname or handle. Most chat rooms have a particular topic (which [the user is] expected to discuss) but there are some that are purely for meeting other people. Some chat rooms are designed as elaborate 3D environments allowing a [user] the ability to select an avatar that represents [the user] in this meeting place.[45]

Instant messaging has many of the advantages and disadvantages of email, but instant messaging allows for faster participation and permits the participants to reach a settlement more quickly. Chat rooms permit simultaneous conversation without interruption. Chat rooms offer correspondents certain paralinguistic, proxemic, and kinesic advantages.[46] As with email, correspondents are spared the psychological trauma of angry and threatening tone, invasion of personal space, or menacing gestures. Parties may save the conversation narrative for use as a reference point for future discussions.

### c. Videoconferencing

Currently videoconferencing is expensive and uses digital telephone lines. In the future, inexpensive videoconferencing may be available using the Internet. Videoconferencing uses television technology to transmit between sites. Videoconferencing allows participants to see and hear each other and be seen and heard with video cameras, microphones, monitors, speakers, and computers. "The high-tech element of the system, the CODEC (an acronym for code/decode), is a

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41. *Id.* at 394.

42. *Id.* at 395.

43. Http://www.webopedia.com/TERM/i/instant_messaging.html (last visited Oct. 28, 2001).

44. Http://www.netdictionary.com/html/c.html (last visited Oct. 28, 2001).

45. Http://www.netlingo.com/lookup.cfm?term=chat%20room.html (last visited Oct. 28, 2001).

46. *See generally* ROBERT M. BASTRESS & JOSEPH HARBOUGH, INTERVIEWING, COUNSELING AND NEGOTIATING: SKILLS FOR EFFECTIVE REPRESENTATION, at 131-44 (Aspen 1990) (identifying and describing nonverbal communication and techniques).

'black box' that converts sound and video signals from analog to digital on the sending end, compresses the result, and reverses the process after transmission to the receiving end."[47] Existing videoconferencing sends audio and video signals over digital telephone lines.[48] Videoconferencing technology typically uses one to three Integrated Services Digital Network (ISDN)[49] lines that transmit signals at speeds of 128 to 384 kbps (kilo-bits per second). Since optimally, the larger the bandwidth, the more lifelike the transmission, as broadband[50] quality increases and costs decrease, videoconferencing will become readily available.

    Videoconferencing is not the panacea that many legal mediators assume that it will be.

> Human interaction has both verbal and nonverbal elements, and videoconferencing seems precisely configured to confound the nonverbal ones. It is impossible to make eye contact properly, for instance, in today's videoconferencing systems, because the camera and the display screen cannot be in the same spot. This leads to a deadened and form affect in interactions, eye contact being a nearly ubiquitous subconscious method of affirming trust. Furthermore, participants aren't able to establish a sense of position relative to one another and therefore have no clear way to direct attention, approval, or disapproval.[51]

In one study comparing radio, television, and newspaper, researchers discovered that radio listeners were able to detect deception 73.4 percent of the time, newspaper readers 64.2 percent, and television viewers 51.8 percent.[52] This study does not support videoconferencing as the superior alternative. Credibility is a key element in building trust. Therefore, a mediator selecting among computer mediation communications media must weigh the value of the additional visual cues against the interfering noise caused by current videoconferencing technology. Whether it is better to have fewer but more accurate cues, or more cues and a greater sense of

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47.  Samuel L. Davis, *A Practical Guide to Videoconferencing: Need Testimony from a Witness Hundreds of Miles Away? New Technology Can Bring the Witness to Court—Without the Time and Expense of Travel*, TRIAL, Mar. 2000, at 48, 48.

48.  *Id.*

49.  "[A]n international communications standard for sending voice, video, and data over digital telephone lines or normal telephone wires. ISDN supports data transfer rates of 64 Kbps (64,000 bits per second)." *See* http://www.webopedia.com/TERM/I/ISDN.html (last visited Oct. 28, 2001).

50.  "Broadband is a descriptive term for evolving digital technologies that provide consumers a signal switched facility offering integrated access to voice, high-speed data service, video-demand services, and interactive delivery services." Federal Communications Commission Website, *Glossary of Terms*, *at* http://www.fcc.gov/glossary.html (last visited Mar. 13, 2002). Accordingly, there is no formal legal definition, but the Federal Communications Commission frequently employs "descriptive terms such as 'high-speed services,' 'advanced services,' and 'broadband services' to refer to a larger subset of services that end users can access with asymmetric capabilities and speeds that are less than 200 Kbps, but are generally also considered high-speed (*i.e.*, greater than 128 Kpbs in a wireless environment or 144 Kbps in a wireline environment)." Federal Communications Commission Website, *Common Carrier Bureau Public Notices*, *at* http://www.fcc.gov/Bureaus/Common_Carrier/Notices/2000/fcc00057.doc (last visited Mar. 13, 2002).

51.  Jaron Lanier, *Virtually There*, SCIENTIFIC AMERICAN, April 2001, at 66.

52.  Richard Wiseman, *The Megalab Truth Test*, 373 NATURE 391 (1995). This study's methodology has been criticized. *See, e.g.,* Oliver Braddick, *Distinguishing Truth from Lies*, 374 NATURE 315 (1995). Professor Wiseman's study is extremely interesting because it involved 41,471 subjects and attempted to move from laboratory research into the "real world."

communication without consciousness of possible miscommunication is a decision for the mediator.

## d. Tele-immersion

The future of video conferencing for creating virtual reality is unlimited. Tele-immersion is a new medium of videoconferencing.

> [Tele-immersion] approximates the illusion that the user is in the same physical space as other people, even though the other participants might be hundreds or thousands of miles away. It combines the display interaction techniques of virtual reality with new vision technologies that transcend the traditional limitations of a camera....The result is that all participants, however distant, can share and explore a life-size space.[53]

Unfortunately, while a promising tool of the future, tele-immersion is approximately 100 times more expensive than competing alternatives and requires bandwidth available only to computing departments in major research universities.

## e. Choosing a means of communication

Numerous software and hardware options within each of the above forms of Internet communication occasion correspondingly strategic mediation design decisions. Initial decisions concern purely technical matters such as availability of hardware/software, cost, ease of use, and bandwidth. As the mediator moves beyond establishing the basic ability to communicate at a distance, the mediator must also plan to achieve higher order needs of the mediation, *i.e.*, how the particular technology will affect the mediation process. The mediator must consider whether technology should be used to distance the parties psychologically, to bring the parties together, to speed the process up, or slow the process down. Technology is a variable that may manipulate the mediation.[54] Using technology, the mediator may selectively filter out cues that detract from the mediation[55] or add cues incrementally

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53. *Id.* Currently, it requires access to Internet II, eight two-gigahertz Pentium processors, and up to sixty cameras. Tele-immersion consumes between twenty to eighty megabits-per-second per site. A three-way mediation, mediator, and two parties would require 60 to 240 megabits-per-second of bandwidth. A tele-immersion cluster costs $30,000 to $50,000. Wiseman, *supra* note 52, at 391.

54. One basic divide among mediators concerns the extent to which the mediator modifies the communications between the parties. As such, party-centered, non-directive mediators assume the competence of the parties to resolve their problem. Party-centered mediators merely afford the parties the opportunity to communicate. Mediators who are antagonists assume greater responsibility for increasing the parties' regard for each other and assisting the parties to identify a viable alternative.

55. Mediator manipulation of party perceptions is commonplace among mediators who reframe narratives and positions and employ tactics of social influence. *See* Robert B. Ciadini, *Influence: The Psychology of Persuasion, in* JAMES J. ALFINI, ET AL., MEDIATION THEORY IN PRACTICE 93 (2001) (describing reciprocation, commitment and consistence, social proof, liking, authority, and scarcity); Richard Berke & Craig R. Fox, *Psychological Principles in Negotiating Civil Settlements,* 4 HARV. NEGOT. L. REV. 1, 39-56 (1999); KIMBERLEE K. KOVACH, MEDIATION PRINCIPLES AND PRACTICE 108 (1994) (reforming involves substitution of a party's language with, for example, neutral and broader statements of issues by the mediator).

Robert Benjamin, a teacher of mediation, negotiation, and conflict management theory and skills has written:
> Mediators, like trickster figures, are in some measure illusionists....Their use of deception and strategic intervention is calculated not for self-gain at the expense of conflicting parties but rather for the parties' benefit. As a result, ideally, the parties learn, but at the very least they survive the conflict. All human beings, and especially mediators, deceive, manipulate, and even sometimes

as needed to facilitate mediation. The mediator may also slow down communications by using asynchronous technology (*e.g.*, email) or speed up response using synchronous technology (*e.g.*, instant messaging).

The purpose of mediation, whether physical or virtual, is to "facilitate communications, promote [] understanding, [and] focus [] the parties on their interests and creative problem solving to enable parties to reach their own agreement."[56] For effective mediation, the mediator must gain the trust and respect of the parties through impartiality and effective use of mediation skills.[57] The mediator adds to the process by enriching the context in which the parties communicate. The mediator is also a sounding board to facilitate communication between the parties. The mediator may do this by active listening; that is, "hearing" and restating the parties' unspoken communication.[58] Active listening acquires not just verbal cues;[59] a good active listener notices the incongruity between the verbal message and a party's body language. In online mediation, the mediator must pay attention to the use of emotions, emoting, delay or lag time in communication not attributable to technology, and the creative use of grammar, text, or graphic symbols. Active listening is the explicit importation of the parties' kinesic and paralinguistic communications into the mediation process. In either physical presence mediation or virtual mediation, the mediator accomplishes empathic communication by "attending, paraphrasing, reflecting feelings, and summarizing."[60] Alternatively, the communication may be a neutral perspective on one party's likelihood of success in future actions. This clearly communicates how the other party views the dispute. In any formalistic category of successful mediation, the *sine qua non* of mediation is the mediator as communication-facilitator. This enriching context facilitates or improves the possibilities for the parties to communicate their interests and needs and to reach a resolution.

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lie. That is a given. It is the purpose of the deceit that must be examined....If...the deception is designed to shift and reconfigure the thinking of disputing parties, especially in the midst of conflict and confusion, and to foster and further their cooperation, tolerance, and survival, then the deception may well be a "noble lie."

John W. Cooley, *Mediation Magic: Its Use and Abuse*, 29 LOY. U. OF CHI. L. J. 1, 4-5 (1997) (quoting Robert D. Benjamin, *The Constructive Uses of Deception: Skills, Strategies, and Techniques of the Folkloric Trickster Figure and Their Application by Mediators*, 13 MEDIATION Q. 3, 17 (1995) (quoting LOYAL RUE, BY THE GRACE OF GUILE: THE ROLE OF DECEPTION IN NATURAL HISTORY AND HUMAN AFFAIRS (1994) (defining noble lie)). *Compare* Charles Crower, *Negotiation Ethics: How to Be Deceptive Without Being Dishonest/How to Be Assertive Without Being Offensive*, 38 S. TEX. L. REV. 713 (1997) (distinguishing between fraud that is deception regarding material matters or withholding information when legally obligated to disclose, from embellishment, puffing, estimates of price or value, evasion, statements of opinion, or personal views).

56. John Feerich et al., *Standards of Professional Conduct in Alternative Dispute Resolution*, 1995 J. DISP. RESOL. 95, 123.

57. *See* Christopher Honeyman, *On Evaluating Mediators*, 6 NEGOTIATION J. 35-36 (1990) (discussing how effective mediators generate party trust through effectiveness in investigation, empathy, inventiveness, problem-solving, persuasion and presentation skills, distraction, managing the interaction, and substantive knowledge). Mediators should also assume a variety of roles that enhance effectiveness: catalyst for settlement, educator, translator, expander of resources, bearer of bad news, agent of reality, and scapegoat. *See* Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply to Professor Susskind*, 6 VT. L. REV. 85 (1981).

58. Eisen, *supra* note 9, at 1331-32.

59. ALLAN EDWARD BARSKY, CONFLICT RESOLUTION FOR THE HELPING PROFESSIONS 45 (1999) ("Active listening refers to the intentional use of self in order to demonstrate to a speaker that you have heard and understood the speaker....").

60. *Id.*

While some mediations absolutely require the physical presence of the parties involved,[61] others may be resolved more effectively online. Determining which is which will require a knowledgeable mediator.[62] Skillful selection and use of technology may overcome lack of physical presence and, in some cases, the lack of physical presence may be an asset.[63] For example, one study demonstrated that when negotiators are motivated to maximize joint outcomes, the use of rich media to communicate[64] will result in a greater total sum of party satisfactions than those negotiations using leaner media.[65] But, when negotiators are motivated to maximize their own outcomes, the rich media quickly revealed the conflict. Therefore, "[c]omputer conferencing technology may be superior for competitive bargaining tasks because the absence of visual communication prevents the negative socioemotional angst from adversely impacting task performance."[66] Consequently, parties should include CMC options in an analysis of factors related to choice of negotiation strategy.[67]

### 2. Legal Context for Online Mediation

The purpose of this section is not to resolve any of the many complex legal issues related to mediation in the online context, but rather to identify a few of the legal issues that will influence online mediation.[68] The "location" of the virtual mediation is legally significant. In the physical world, the place of the mediation is readily identifiable. Parties who negotiate and mediate in Florida can reasonably assume that Florida law governs. The parties may vary some of the default rules and assumptions by contract. But, what if the mediator is physically in California, one party is in New York, and the other is in Florida and they are communicating using the Internet in an attempt to mediate an ecommerce dispute? Which jurisdiction's laws will govern the mediation? The laws governing the mediation are important. For example, some jurisdictions have professional licensure standards to qualify as a mediator;[69] some jurisdictions provide for mediator immunity so that the mediator

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61. "The mediation community might argue that body language and other non-verbal techniques are critical to the success of a mediation, and cannot be achieved through text-only mediation." Jeffrey Krivis, *Taking Mediation Online*, DISP. RESOL. MAG., Summer 1998, at 25.

62. *Cf.* Jim Melamed, *The Internet and Divorce Mediation*, *at* http://www.mediate.com/articles/melamed9.cfm (last visited Oct. 28, 2001) (discussing the advantages of using the Internet for divorce mediation).

63. *See* Ethan Katsh, *Online ADR Becoming a Global Priority*, DISP. RESOL. MAG., Winter 2000, at 6. Several factors to consider in selecting disputing media are (1) geographic location of principals, (2) desire for efficiency, (3) desire for cost effectiveness, (4) party familiarity with online communication, and (5) desire for competitive bargaining. *See also* discussion *infra* note 222.

64. Richer media convey more information and less ambiguity. For example, face-to-face is richer than telephone and telephone is richer than email. *See infra* Section II(B)(1) (defining media richness).

65. Sheffield, *supra* note 9, at 47.

66. *Id.*

67. *See generally*, DONALD G. GIFFORD, LEGAL NEGOTIATION: THEORY AND APPLICATIONS (West 1989); Gary T. Lowenthal, *A General Theory of Negotiation Process, Strategy, and Behavior*, 31 U. KAN. L. REV. 69 (1982).

68. Many of these legal issues are addressed in the Uniform Arbitration Act. *See* Nat'l Conf. of Comm'rs on Uniform State Laws, *Uniform Arbitration Act*, *at* http://www.law.upenn.edu/bll/ulc/uarba/arbitrat1213.htm (last visited Mar. 14, 2002). As jurisdictions adapt the Act, the concerns expressed in this article will become less problematic for domestic mediation.

69. *See, e.g.*, CAL. FAM. CODE § 3164 (West 1994); MO. SUP. CT. R. 88.05 (West 1994).

has no[70] or limited liability,[71] and the ethical obligations of the mediator may vary by jurisdiction.[72] Whether a given act within the mediation process may rise to the unauthorized practice of law is a question of state law.[73] In some jurisdictions, the mediator's assistance to the parties in reducing the resolution to writing or the mediator's candid evaluation of a party's chance of success should the case proceed to litigation may result in a charge of unauthorized practice of law either against the attorney-mediator who may not be admitted in a jurisdiction that may assert some interest in the mediation or against a lay-mediator who is not an attorney in any jurisdiction.[74] The legal and evidentiary effects of statements made during the mediation vary by jurisdiction.[75] Many jurisdictions provide confidentiality concerning the use of statements made during mediation.[76] For example, statements made during the course of mediation may not be used as evidence in later judicial

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70. *See, e.g.,* Wagshal v. Foster, 28 F.3d 1249 (D.C. Cir. 1994), *cert. denied,* 514 U.S. 1004 (1995) (mediators serving without compensation in court-sponsored program have judicial immunity); Mills v. Killebrew, 765 F.2d 69 (6th Cir. 1985) (mediators in mandatory state court mediation procedure served a quasi-judicial function and were entitled to absolute immunity); Howard v. Drapkin, 222 Cal. App. 3d 843 (1990) (quasi-judicial immunity extended to mediators).

71. "At least 19 states provide some immunity for mediators." JAY E. GRENIG, ALTERNATIVE DISPUTE RESOLUTION WITH FORMS, § 7.45 (2d ed. 2000); Cassondra E. Joseph, *The Scope of Mediator Immunity: When Mediators Can Invoke Absolute Immunity,* 12 OHIO STATE J. ON DISP. RESOL. 629, 631-32 (1997).

72. Primary among the ethical obligations commonly assigned to mediators is the obligation to remain impartial with regard to the parties and the outcome. An additional ethical obligation prohibits disclosures of mediation communications to parties and non-parties subject to exceptions where the public interest in avoiding future harm is great. *See* Tarasoff v. Regents of University of California, 551 P.2d 334 (Cal. 1974). Further, a mediator should not undertake to mediate a dispute if the mediator does not competently understand the subject matter of the dispute. *See* FLA. R. CIV. P. 10.640 (2000). Online mediation may require that the mediator be knowledgeable in the technologies available to use during the course of the mediation. *Cf. Developments–The Paths of Civil Litigation,* 113 HARV. L. REV. 1851, 1874 (2000) ("Certain realms of dispute resolution may also require a neutral's expertise in a substantive field of law or industry...."). More importantly, the mediator should have expertise in the area of the online norms that surround the transaction and the technology and software that provided the infrastructure that led to the dispute. *See* GRENIG, *supra* note 71, § 11.11 ("The mediator must be able to 'speak the language' in order to gain the parties' trust and confidence. Knowledge of the...field also enables the mediator to clarify the facts and narrow the issues.").

73. Geetha Ravindra, *Balancing Mediation with Rules on Unauthorized Practice,* 18 ALTERNATIVES TO HIGH COST LITIG. 21 (2000).

74. *See, e.g.,* KAN. STAT. ANN. § 23-603(d) "the mediator shall decline to act as attorney...for either party during or after the mediation." "The mediator shall advise each party in writing to obtain legal assistance in drafting any agreements." *Id.* § 23-603(c) (2000).

75. FED. R. EVID. 408 and 409 should preclude these statements from being admissible in federal courts and in those states that have analogous rules of evidence. These statements may also be privileged under FED. R. EVID. 501. *See* Folb v. Motion Picture Indus. Pension & Health Plans, 16 F. Supp. 2d 1164, 1179 (C.D. Cal. 1998) (citing Pamela A. Kentra, *Hear No Evil, See No Evil, Speak No Evil: The Intolerable Conflict for Attorney-Mediators between the Duty to Maintain Mediation Confidentiality and the Duty to Report Fellow Attorney Misconduct,* 1997 BYU L. REV. 715, Appendix A (collecting statutes and noting that every state but Delaware has some form of mediator privilege, although when the privilege attaches and the scope of the privilege varies among the states); David A. Ruiz, *Asserting a Comprehensive Approach for Defining Mediation Communication,* 15 OHIO ST. J. ON DISP. RESOL. 851 (discussing different approaches to privileges in mediation).

76. *See, e.g.,* OHIO REV. CODE ANN. § 2317.023(B). "No person shall disclose a mediation communication in a civil proceeding or in an administrative proceeding." R.C. § 2317.023(B) (Anderson 2001); Alan Kirtley, *The Mediation Privilege's Transition from Theory to Implementation: Designing a Mediation Privilege Standard to Protect Mediation Participants, the Process and the Public Interest,* 1995 J. DISP. RESOL. 1, 8, 16 (1995) (asserting that weight of scholarly authority is that confidentiality is essential to mediation); *ABA Meeting Examines Uniform Mediation Act,* 53 DISP. RESOL. J., Nov. 1998, at 6, 6 (reflecting concern over mediation confidentiality due to differing state laws).

proceedings.[77] Statements made to or by the mediator are privileged and confidential.[78] Clearly, the mediation laws of a jurisdiction may affect how the parties and the mediator proceed in a highly charged dispute.[79]

Unlike arbitration, the literature discussing the role of the law governing the mediation is scarce, but one may look to arbitration by analogy and synthesize some possible ground rules.[80] The law governing the arbitral proceedings is, in almost all cases, the law of the arbitral situs. The arbitral situs is the place where the parties agreed that the arbitration would take place. This is often a legal fiction because, frequently for the convenience of the parties, the actual physical proceedings may occur in a different jurisdiction or multiple jurisdictions.[81] There is no reason why the mediator and parties could not select in the agreement to mediate in a jurisdiction whose laws support the mediation process. By analogy, courts should give the agreement to mediate the same deference they give an agreement to arbitrate and apply the law of the chosen jurisdiction.[82] These issues are unresolved and may present complex choice of law questions in the ecommerce and online mediation context. Until these issues are resolved, and depending on the nature of the dispute, prudent lawyers must consider the legal advantages of knowing which laws govern the mediation process. This lack of legal certainty may, in a few instances, hinder the growth of online mediation.

## B. Need for Online Mediation

As individuals and businesses interact on the Internet, commercial disputes are inevitable. These commercial disputes will be small and large, consumer versus business, business versus business, national and international, and any other combination that one can imagine.[83] The vast majority of disputes will be resolved informally without the need for neutral third-party intermediaries; however, a significant portion of online ecommerce disputes will require neutral third-party intervention. One option is to have the state judicial apparatus resolve these disputes. Another option is ADR, which permits the parties, either pre-dispute or post-dispute,

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77. *Folb*, 16 F. Supp. 2d. at 1180.

78. *See generally* Lake Utopia Paper Ltd v. Connelly Containers, Inc., 608 F.2d 928, 930 (2d Cir. 1979); *Folb*, 16 F. Supp. 2d at 1175 (noting most courts have found the need for confidentiality in mediation); Dennis Sharp, *The Many Faces of Mediation Confidentiality*, 53 DISP. RESOL. J., Nov. 1998, at 56, 57.

79. Jaime A. Lee & Carl Giesler, *Confidentiality in Mediation*, 3 HARV. NEGOTIATION L. REV. 285, 285 (1998); *but see* Eric D. Green, *A Heretical View of the Mediation Privilege*, 2 OHIO ST. J. ON DISP. RESOL. 1, 11 (1986).

80. *But see generally* 9 U.S.C. §§ 201-208 (1994) (providing for the enforcement of both domestic and foreign arbitration awards).

81. GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION IN THE UNITED STATES 76 (1994).

82. *Cf.* Note, *Making Sense of Rules of Privilege under the Structural (Il)logic of the Federal Rules of Evidence*, 105 HARV. L. REV. 1339, 1357-58 (1992) ("The activity protection of mediators could be supplemented in several ways...private confidentiality contracts...."). *But see* Grumman Aerospace Corp. v. Titanium Metals Corp., 91 F.R.D. 84, 87-88 (E.D.N.Y. 1981) (Courts cannot "permit parties to contract privately for the confidentiality of documents, and foreclose others from obtaining, in the course of litigation, materials that are relevant to their efforts to vindicate a legal position."). Even if the parties can select a forum that respects mediation values, there is no guarantee that, in collateral proceedings and in third-party proceedings not involving the parties to the mediation, courts will respect the intentions of the parties to the mediation.

83. Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675, 675-76 (2000).

to craft their own method for resolving the dispute. Judicial resolution of ecommerce disputes may be problematic because of the evolving technological nature of ecommerce and the jurisdictional and choice of law issues raised by ecommerce transactions.[84] Due to the distinctive characteristics of ecommerce, the better alternative is ADR.

When ADR takes place using computer-mediated communication in the online environment, it is often referred to as online dispute resolution (ODR).[85] ADR is well established in the area of brick and mortar commerce, and most, if not all, of the same laws and principles that apply to ADR in the brick and mortar regime will apply when ADR resolves ecommerce disputes. The legal issues may be less important than the technological and social challenges found when engaging in ADR in a computer-mediated ODR mediation environment. ODR is the computer mediated communication analogue of ADR. ODR is not only a digital communication channel; ODR has the additional element of information processing tools. ODR technology may be so influential at the mediation as to almost become the "fourth party" to the mediation.[86] ODR ranges from mediation, which aims at encouraging the parties to reach an amicable voluntary resolution of their disagreement, to binding arbitration that imposes on the parties a legally enforceable arbitral award through the reasoned decision of an arbitrator, who applies the private law created by the parties to the dispute.[87] Pure ADR may not be an exact fit in cyberspace. ADR is vested with social values and concerns that may not be retained in an electronic medium, especially in ecommerce that involves individuals or institutions from different real world cultures.[88]

The Organization for Economic Cooperation and Development (OECD) has noted the need for efficacious ADR:

> The online environment is playing an important role in the global market. Both consumers and business will derive significant benefit from online interactions. With these benefits and the expected increase of business-to-consumer (B to C) national and international interactions, come new challenges. Of particular significance are the challenges of identifying the competent forum and applicable law, and of obtaining redress across borders. Given that traditional court-based dispute settlement mechanisms may not provide effective redress for

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84. *Id.* Sophisticated disputants prefer international arbitration to traditional litigation because arbitral awards are more easily enforced than the judgments of foreign courts. No judgment of a foreign court "has any effect, of its own force, beyond the limits of the sovereignty from which its authority is derived," Hilton v. Guyot, 159 U.S. 113, 163 (1895), unless a country has entered into an agreement to recognize the judicial awards of another country. *See generally* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 481 (1978).

85. ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION 2 (2001). "ODR draws its main themes and concepts from alternative dispute resolution (ADR) processes such as negotiation, mediation, and arbitration. ODR uses the opportunities provided by the Internet not only to employ these processes in the online environment but also to enhance these processes when they are used to resolve conflicts in offline environments." *Id.*

86. *Id.* at 93-116.

87. *See generally* BORN, *supra* note 81.

88. Gibbons, *supra* note 23, at 492.

electronic commerce interactions, there is a need to examine alternative dispute
resolution (ADR) mechanisms...to fairly and effectively settle disputes.[89]

Globally, ADR is the preferred method of resolving disputes between
transnational corporations.[90] Many governments are encouraging business to adopt
ADR as the preferred method of resolving disputes.[91] In the United States, ADR is
the politically and judicially favored dispute resolution mechanism.[92] The U.S.
government supports "the development of adequate, efficient, and effective alternate
dispute resolution mechanisms for global commercial transactions."[93] The current
preference for ADR by the courts and the executive and legislative branches of
government clearly makes ADR the favored dispute resolution mechanism, even
over the traditional judicial fora in the United States. The proposed European Union
Ecommerce Directive requires member states to establish alternative dispute
resolution procedures for ecommerce contracts and to include provisions for ODR.[94]
Even absent government encouragement, many traditional businesses have learned
that existing institutions such as contract law (private law making) and its corollary
alternative non-judicial dispute resolution (private adjudication or ADR) may be
used in new and creative ways. Both traditional and ebusinesses synergistically
couple the efficiency and flexibility of private law and private adjudication with the
technological and communicative nature of cyberspace, achieving, in many
instances, an economically optimal result.

Ecommerce may require more formal channels for dispute resolution.[95]
Ecommerce permits businesses to drastically reduce overhead costs, thus yielding

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89. Organization for Economic Cooperation and Development, *Orientation Document: Building Trust in the Online Environment: Business to Consumer Dispute Resolution*, *at* http://www.oecd.org//dsti/sti/it/secur/act/Online_trust/orientation_document.doc (last visited Mar. 13, 2002).

90. Lee Uehara, *Online Arbitration Speeds Settlements*, Feb. 25, 2001, Associated Press, *available at* 2001 WL 13676601 (Companies such as "AOL Time Warner, AT&T, Dell Computer, IBM, Microsoft, Network Solutions and Visa U.S.A. are working together to propose industry standards [for online ADR].").

91. *See, e.g.*, International Trade Law (UNCITRAL), International Commercial Arbitration and Conciliation, *available at* http://www.uncitral.org/en-index.htm (last visited Oct. 28, 2001); The 1961 (Geneva) European Convention on International Commercial Arbitration, *available at* http://www.asser.nl/ica/eur.htm (last visited Oct. 28, 2001); The 1962 (Paris) Agreement Relating to Application of the European Convention on International Commercial Arbitration, *available at* http://www.asser.nl/ica/eurapp.htm (last visited Oct. 28, 2001); The 1965 Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, *available at* http://www.asser.nl/ica/wash_en.htm (last visited Oct. 28, 2001);The 1972 Moscow Convention on the Settlement by Arbitration of Civil Law Disputes Resulting from Relations of Economic and Scientific-Technical Cooperation, *available at* http://www.asser.nl/ica/moscow.htm (last visited Oct. 28, 2001); The 1975 (Panama) Inter-American Convention On International Commercial Arbitration, *available at* http://www.asser.nl/ica/iaci.htm (last visited Oct. 28, 2001).

92. *See, e.g., Framework for Global Electronic Commerce*, *available at* http://www.ecommerce.gov/framewrk.htm (last modified Dec. 29, 1997); House of Representatives. Rep. No. 91-1181, at 2 (1970), *reprinted in* 1970 U.S.C.C.A.N. 3001 ("[Arbitration] will serve best interests of Americans doing business abroad....").

93. See *Framework*, *supra* note 92. As of the writing of this article, the Bush Administration has not stated a policy in this area.

94. Communication from the Commission to the Council and the European Parliament E-Commerce and Financial Services, *available at* http://europa.eu.int/comm/internal_market/en/finances/general/ecom_en.pdf (last visited Oct. 28, 2001).

95. As of April 2001, The Center for Information Technology and Dispute Resolution had identified 20 online dispute resolution providers. *See* http://aaron.sbs.umass.edu/center/onlineadr.htm (last visited Oct. 28, 2001). Perhaps the abundance of dispute resolution providers is the best indicator of need.

much higher profits.[96] Labor is no longer needed to perform the time-consuming tasks of taking orders and filling out shipping manifests.[97] Instead, the consumer completes simple online forms, or customers can program their inventory systems to automatically reorder specific items when supplies reach a critical level. In such a case, human interaction is minimal.[98]

The incorporation of telecommunications and automation in the minutiae of daily life has resulted in disintermediation.[99] Merchants and consumers no longer have informal relationships. The ecommerce process is automated, faceless, disembodied, and depersonalized. The lack of informal relationships between "customers" and the individuals who processed orders also removed the intermediaries from whom customers could seek assistance when the process failed. This may lead to the need to automate dispute resolution and rely on more formal dispute resolution processes. Reducing human interaction does not necessarily result in greater consumer satisfaction. In one online consumer satisfaction survey performed in October 1999, one-fifth of online shoppers had experienced transactional problems in the previous twelve months. Federal Trade Commission Internet complaints rose by 10,627.[100] Of the total 18,622 complaints, 10,688 involved Internet auction transactions.[101] Due to the increase in complaints arising out of business done on the Internet, ODR is rapidly becoming a sought after service. Ebusinesses and consumers on the Internet are often willing to mediate their disputes in an online forum.[102]

## C. Advantages of Online Mediation

Online mediation presents many advantages. In the ecommerce context it may be the only financially feasible option for low dollar value disputes and for individuals who cannot afford to travel long distances (at great expense) to resolve a dispute. An asynchronous ODR process can occur twenty-four hours a day, seven days a week, at the parties' and mediator's convenience. The parties, their attorneys or advocates, and the mediator do not have to travel to a distant location. There is no expense to provide a neutral facility at which to conduct the mediation. Since the parties are located at their usual place of business, documents and other materials are readily available. The mediator can dedicate discrete time to each communicative transaction, thus reducing mediator costs. Party time and mediator time will be active productive time rather than merely sitting at a conference room table waiting for the next stage in the mediation process. "Through asynchrony," the Internet permits "participants and mediators to be at their thoughtful best, rather than their

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96. *See* U.S. DEP'T OF COMMERCE, THE EMERGING DIGITAL ECONOMY 14 (1997), *available at* http:www. ecommerce.gov/emerging.htm (last visited Oct. 28, 2001).

97. *Id.*

98. *Id.*

99. *See* Office of Tax Policy, Treasury Dep't, *Selected Tax Policy Implications of Global Electronic Commerce* (1996), *reprinted in* Daily Tax Rep. (BNA), Nov. 22, 1996, at L-7; Andrew L. Shapiro, *Digital Middlemen and the Architecture of Electronic Commerce*, 24 OHIO N.U. L. REV. 795, 795 (1999); Reuven S. Avi-Yonah, *International Taxation of Electronic Commerce*, 52 TAX L. REV. 507, 515 (1997).

100. This number was up from 7995 in 1998. U.S. DEP'T OF COMMERCE, *supra* note 96.

101. *Id.* This number was up from 4407 in 1998 and 107 in 1997. *Id.*

102. Katsh, *supra* note 63, at 8.

immediate often worst."[103] Asynchronous communication does not require complex feats of scheduling so that the parties and the mediator are together at the same time on the same date at the same physical location. Finally, the mediator may privately caucus with either or both parties without artificially interfering with the flow of the mediation. These characteristics save both time and expense while promoting efficiency in the mediation.

## D. Misconceptions and Problems

The major challenge to online mediation is to overcome resistance based on inexperience. This section will discuss two of the major objections to online mediation.[104] First, there is an unexamined assumption that physical presence, face-to-face dispute resolution, is superior to dispute resolution mediated by other communication channels. Secondly, there is a perception that there is no paradigm to guide mediators in the uncharted realm of cyberspace. Neither perception is necessarily true.

### 1. There Is No There, There: Physical Presence versus Virtual Presence

As one commentator observed, "the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact."[105] This so called paradox is really not a paradox at all. While it is true that mediation is usually conducted in a face-to-face setting, the distance is not imposed on the parties as a result of being on the Internet. Rather, the distance is imposed by the parties' physical locations. In this sense, online mediation imposes or offers an electronic nearness for the parties. It is this proximity that is the starting point for facilitating communication online.

Traditional mediation allows the parties to observe one another as they react to the mediation process. Depending on the technology used, online mediation may limit opportunities to observe the opposing party's spontaneous body language or verbal responses throughout the mediation process. Even if spontaneous body language or verbal responses are perceptible, the communicative media alters how they are understood. Under some circumstances, the lack of body language may be an advantage. Due to the lag time in online mediation, the parties will have more opportunity to think about their disputes and to respond in a manner that will promote resolution to the dispute or to dwell on perceived slights and become agitated.

Another misconception is that email will be the main (sole) technology used in online mediation. Although email is the predominant form of communication on the Internet, it is not the sole form of communication. There are many other

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103. Melamed, *supra* note 62, at 1.
104. *Infra* Section II(B)(1-4) discusses in greater detail the theoretical perspectives initially presented in this section.
105. Eisen, *supra* note 9, at 1310. Eisen suggests that mediation practices cannot easily be emulated in cyberspace because "cyberspace is not a 'mirror image' of the physical world." *Id.*

technologies that can be used for online mediation.[106] As online mediation evolves, mediator training should evolve to cover the technologies available for mediation. While the actual forum (virtual versus physical) is different, the basic principles of mediation still apply and may be enhanced as new technologies become available.

Based on their experiences with unmoderated lists, some mediators worry that the virtual presence mediation will degenerate into an online flame war absent the social sanctions that moderate human behavior in the physical presence of other individuals. This is potentially a positive characteristic of Computer-Mediated Communication (CMC); CMC promotes equality in the communicative marketplace. "The lack of nonverbal cues about physical appearance, authority, status, and turn-taking allows users to participate more equally and with more extreme affect on CMC systems than in many face-to-face interactions."[107] This concern of runaway socioemotive content is based on unmoderated list serves. The mediator is the moderator for virtual or physical presence mediation and is responsible for the decorum and tranquility of the mediation.

Finally, there is a misconception that physical presence mediation is neutral while virtual mediation favors those with computer skills. Face-to-face mediation tends to advantage individuals who are physically attractive, articulate, well-educated, or members of a dominate ethnic, racial or gender group. Both forms of mediation advantage those with different skill sets. The reality is that "embedded in every tool is an ideological bias, a predisposition to construct the world as one thing rather than another, to value one thing over another, to amplify one sense or skill or attitude more loudly than another."[108] As one commentator observed,

> The routine use of a medium by someone who knows how to use it typically passes unquestioned as unproblematic and "neutral"[;] this is hardly surprising since media evolve as a means of accomplishing purposes in which they are usually intended to be incidental. And the more frequently and fluently a medium is used, the more "transparent" or "invisible" to its users it tends to become. For most routine purposes, awareness of a medium may hamper its effectiveness as a means to an end. Indeed, it is typically when the medium acquires transparency that its potential to fulfill its primary function is greatest.[109]

Mediators assume that because they use the medium of physical presence mediation often and the vast majority of their life experience is based on physical presence communication, it is neutral and transparent. Rather, it too advantages some participants and subordinates others. Mediators must realize that

> [a]ny medium facilitates, emphasizes, intensifies, amplifies, enhances or extends certain kinds of use or experience whilst inhibiting, restricting or reducing other kinds. Of course, [the] use of any medium for a particular task may have advantages over "the alternatives" (such as "saving" time or labour), but use

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106. *See supra* Section I(A)(1).

107. Ronald E. Rice & Gail Love, *Electronic Emotion: Socioemotional Content in a Computer Mediated Communication Network*, 14 COMMUN. RES. 85, 89 (1987).

108. Daniel Chandler, *Shaping and Being Shaped*, CMC MAGAZINE, Feb. 1996, *available at* http://www.december.com/cmc/mag/1996/feb/chansel.html (last visited Mar. 13, 2002).

109. *Id.*

always involves a "cost." There are losses as well as gains. A medium closes some doors as well as opening others, excludes as well as includes, distorts as well as clarifies, conceals as well as reveals, denies as well as affirms, destroys as well as creates. The selectivity of media tends to suggest that some aspects of experience are important or relevant and that others are unimportant or irrelevant. Particular realities are thus made more or less accessible—more or less "real"—by different processes of [communication].[110]

A mediator's purpose is to serve as a neutral third party who facilitates communication between the disputants. Whether the medium is physical presence mediation or virtual mediation, it is incumbent upon the mediator to ensure a level playing field[111] if the mediation is to be successful.[112] In the online context, this will require the mediator to actively consider the role of communications in the mediation process.

### 2. Cross-Cultural Paradigm of Online Mediation

Mediators looking for an analogous communications model to guide online mediation may usefully consider cross-cultural mediation.[113] Online mediation differs from physical-presence mediation in that it is, in essence, almost always a form of cross-cultural[114] mediation.[115] Culture may embrace disparate and wide-ranging elements or culture may be defined solely as language or by a method of communication.[116] "Language is culture....Language structures meaning, determines

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110. *Id.*

111. *See generally* BARSKY, *supra* note 59, at 125-26 (discussing whether mediators have an ethical obligation to ensure a level playing field).

112. By "successful," we mean more than merely reaching an agreement to divide a fixed pie; we mean an agreement that expands the options and possibilities to the parties. Success in mediation is often measured by reaching agreements. *See* Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS Redress (TM) Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399, 400 (2001). However, transformative mediation defines mediation success quite differently. Transformative mediation seeks directly to "generate empowerment and recognition among the disputing parties." *Id.* at 399. "Empowerment and recognition often result in settlement. However, this is only a secondary effect. The theory is that experiencing empowerment and recognition will improve each party's ability to approach and resolve both current and future problems....[Transformative mediation] create[s] opportunities for the parties to take control of their own decision-making." *Id.* at 402. Selection of mediation strategy will depend upon the importance of settlement relative to other factors including the nature of the relationship of the parties whether ongoing or one-time, the number of items on the agenda, each party's choice of negotiation strategy, the viability of alternatives to settlement, the timing of the mediation, and each party's perception of self and fairness.

113. Eisen, *supra* note 9, at 1331.

114. "Culture [is] a group of individuals who share certain common meanings[;]" yet "similar things and experiences might have different meanings within each culture" and between individuals in each culture. Linz Audain, *Critical Cultural Law and Economics, the Culture of Deindividualization, the Paradox of Blackness*, 70 IND. L.J. 709, 716 (1995). Mediators should assist parties to avoid deindividualization that attributes to individuals cultural attributes or values based on immutable characteristics, superficial tokenism, or historic stereotypes, if they are to effectively communicate.

115. *Cf.* MARINA L. MCINTIRE, INTERPRETING: THE ART OF CROSS-CULTURAL MEDIATION, PROCEEDINGS OF THE NINTH NATIONAL CONVENTION OF THE REGISTRY OF INTERPRETERS FOR THE DEAF 78 (1985) ("'Culture' should not be misunderstood. We are not talking about ethnic cultures...We have a culture because we have our own language, American Sign Language.").

116. *Id.* "In CMC, English is widely used and thus it functions as a world esperanto. Unlike esperanto, which is an artificial language, computer-mediated English takes some attributes of a lingua franca, or a pidgin or creolized language." Alexander E. Voiskounsky, *Telelogue Conversation*, 2 J. COMPUTER MEDIATED COMM., *at* http://www. ascusc.org/jcmc/vol2/issue4/voiskounsky1.html (last visited Mar. 13, 2002) (concluding that Internet English is a form of pidgin English).

perception, and transmits culture. It communicates thought and subjective cultural experiences at deep and subtle levels."[117] "[E]ach new technology not only extend[s] the reach of human communication, it also alter[s] the ways in which humans relate[] to information and to each other."[118] The existence of an Internet culture may be found in its *sui generis* method of communication that has fashioned a new worldview. Correspondingly, in the course of online mediation, the mediator may become a cultural interpreter to bridge the communications "gap" in online communications.[119] On the Internet, the mediator may no longer retire solely to the default rules that social conventions and verbal-language supply. In particular, those conventional usages of body language, verbal-language, and shared assumptions based on physical impressions may be lacking in some forms of online mediation.[120]

As an online cultural interpreter, the mediator must first teach the technology to the parties. This is analogous to finding a common language in a cross-cultural negotiation. Once the parties, with the help of the mediator, have selected the technology for the mediation, the mediator must spend time helping the parties to develop paralinguistic cues to replace those that are lacking in virtual, as opposed to face-to-face, communication. This is really no different from mediating face to face between individuals from different cultures. The mediator in either context educates both parties in the expected social and communicative norms. In cross-cultural mediation, parties may misinterpret. To avoid misinterpretation, parties must learn to understand the sender's intended signs. The sender can learn, for example, that a common greeting is considered an insult in another culture and can refrain from using it. The receiver may also learn that the "deadly insult" was intended as a polite gesture. In physical presence mediation, the mediator educates the parties concerning cultural differences in order to eliminate "noise." In online mediation, the mediator tries to minimize "noise" caused by the technology or the parties.

Another problematic "cultural area" in online mediation is how the parties and the mediator process time.[121] "[T]here appears to be a continuum of time orientation, with monochronic time on one end and polychronic time on the other."[122] Monochronic individuals or cultures tend to prefer to do one thing at a time and have a high need to complete a task before moving to another task or topic. They tend to think in a linear manner and process information in a sequential orderly

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117. Courtland C. Lee, *Cultural Dynamics: Their Importance in Culturally Responsive Counseling, in* MULTICULTURAL ISSUES IN COUNSELING: NEW APPROACHES TO DIVERSITY 23 (Courtland C. Lee ed., American Counseling Association 2d ed. 1996).

118. R. Cathcart & G. Gumpert, *Mediated Interpersonal Communication: Toward a New Typology*, 64(3) Q. J. SPEECH 267, 270 (1983).

119. Carley H. Dodd, *Cultural Differences in Information Processing, in* DYNAMICS OF INTERCULTURAL COMMUNICATION 36 (McGraw-Hill 2d ed. 1987) ("To the intercultural communicator, an understanding of another culture is necessary to ensure message flow, understanding, and satisfying results from our communication efforts.").

120. "Shared assumptions based on physical impressions" is an attempt to describe neutrally first and subsequent impressions. These impressions could also be characterized as stereotypes, bias, or prejudice. But, these are the assumptions, whether accurate or inaccurate, based on the party and mediator's prior life experiences that will inform them of the participants in the mediation.

121. Dodd, *supra* note 119, at 86-89.

122. *Id.*

manner. Polychronic individuals or cultures tend to attempt to accomplish several things simultaneously. Monochronic or polychronic individuals do well in their respective cultures but may experience difficulties in communicating with individuals of the other orientation.[123] Online mediation permits the mediator to create an environment that mediates between these two orientations. For example, email allows for multiple topics to be discussed simultaneously; yet, threading the topics focuses each thread on only one issue.

Another assumption concerns the extent to which cultures expect individuals to know about situations. "A culture in which information about a procedure is rarely communicated is a high context culture. Members are expected to know how to perform in various situations, but the rules of the cultural performance remain implicit. The context is supposed to be the cue for behavior."[124] "In a low context culture, on the other hand, information is abundant, procedures are explicitly explained, and expectations are discussed frequently."[125] Communication often breaks down when an individual from a high context culture attempts to communicate with an individual from a low context culture. Communications break down because the underlying assumptions or the "context" of the communication are rarely understood by both parties, much less discussed or explicitly stated. The high context individual assumes that the low context individual understands and would, in fact, perhaps be insulted if she filled in the contextual gaps, while the low context individual waits in frustration for the additional information necessary to understand the task. Because the ODR takes place in a uniquely communicative medium, the mediator may use technology to insure that the parties are sharing common assumptions and bridge the high/low context cultural issues without unnecessarily offending either party.

Computer-mediated communication is best characterized as a specific form of cross-cultural communication, even for individuals sharing a common culture. The role of the mediator remains the same but the selection of techniques may change. Because mediators have engaged in cross-cultural mediation since the earliest days of mediation, mediators already have at least rudimentary skills to apply to online mediation. Mediators must apply this knowledge to the technological tools provided by the Internet.

## II. COMMUNICATION AND MEDIATION

Ideally, the choice between dispute resolution alternatives should be informed. Disputants and their lawyers[126] should possess sufficient information to examine

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123. *Id.*

124. *Id.*

125. *Id.*

126. Several states (Arizona, Colorado, Hawaii, Kansas, Michigan, and New Jersey) impose duties on lawyers to advise clients on dispute resolution options. Nancy H. Rogers & Craig A. McEwen, *Employing the Law to Increase the Use of Mediation and to Encourage Direct and Early Negotiations,* 13 OHIO ST. J. ON DISP. RESOL. 831, 862-63 (1998) *excerpted in* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 408-09 (2001). To ensure that lawyers meaningfully counsel the client, Georgia requires lawyers to complete coursework in ADR. Suzanne J. Schmitz, *Giving Meaning to the Second Generation of ADR Education: Attorneys' Duty to Learn About ADR and What They Must Learn,* 1999 J. DISP. RESOL. 29, 33-35, *excerpted in* JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 408-09 (2001).

critically the relationship between the processes that exist in face-to-face mediation and those processes that exist in online mediation. This section will discuss the basic communication paradigm, the theoretical perspectives on Computer-Mediated Communication (CMC),[127] the theoretical perspectives on legal mediation, and whether a better understanding of CMC theory would assist legal mediators.

## A. *Communication Defined*

"Computer-mediated communication is simply the application of computing machinery to the process of communication."[128] In order to resolve (mediate) disputes in either physical presence or virtual presence, communication must take place. Of the essential elements of communication, the most significant difference between virtual and physical presence dispute resolution options is the channel. To determine the viability of online mediation, one must consider the medium used to transmit the message, *i.e.* the channel of communication.

## B. *Computer-Mediated Communication*

While social science commentators agree that the singular difference between computer-mediated communication and face-to-face communication is that non-verbal cues are reduced or eliminated in CMC, there is no agreement on the effect that this has on the communicative process.[129] Two major theoretical explorations

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127. "The term 'computer mediated communication' (CMC) refers to a type of interpersonal communication which is facilitated through the use of a computer network or conferencing system. In contrast, 'face to face communication' (FtF) describes the interpersonal communication setting in which all interactants share a common space and time context and can engage in communication where all five senses are used by the interactants." Eva M. Jettmar & Michael W. Rapp, *Computer Mediated Communication: A Relational Perspective*, Paper presented at the Annual Convention of Western States Communication Association, 1996, *at* http://www.danger-island.com/~true/papers/CMC.html (last visited Oct. 28, 2001). In this article, online mediation or virtual mediation is mediation using CMC while physical presence mediation is face-to-face mediation. *See id.*

128. Craig A. Summerhill, *Computer-Mediated Communication as Publication: Considering the World Wide Web in the Broader Sociological Context of Communication, at* http://www.cni.org/~craig/castalks/cmc.html (last visited Oct. 28, 2001). Communication is such an integral part of the human experience that individuals take it for granted; however, it is this basic process that is used when mediating a dispute, and therefore it is useful to review the basic communication paradigm. Communication has four essential elements. *Id.* The "sender" is the person transmitting the message, the "message" is the data that the sender is transmitting, the "channel" is the medium used to transmit the message, and the "receiver" is the person receiving the message. *Id.* Communication exists when all four elements are in place.

     Different communication processes achieve different efficiency levels. For example, remarkably inefficient communication characterizes the children's game in which the first child starts a message and the last child in a long sequence of children receives the message. The message received by the last child bears only a serendipitous relationship to the message sent by the first child. Other important aspects of communication include the "signal," the degree to which the message is received and understood; "noise," anything that interferes with the clarity of the signal; "feedback," the receiver's response to the sender's message; and the "reply," the data sent during feedback. *Id.* One must distinguish between data, information, and knowledge. Data is a fact that is not known to the receiver. Information is the receipt and understanding of the data by the receiver. If the receiver does not understand the message, data is not transformed into information. Knowledge is the general acceptance of data by the sender and receiver's cultures. *Id.* Finally, the entire process is filtered through the life experiences and physical abilities of the sender and receiver.

129. The vast majority of the studies cited in this article investigate email as the primary communicative technology. The authors focused on email CMC research because it is the technology that most individuals have access to and because email under Media Richness Theory is moderately lean, "at the midpoint of the information richness scale," Joseph Schmitz & Janet Fulk, *Organizational Colleagues, Media Richness, and Electronic Mail*, 18 COMM. RES. 487, 491 (1991). If the Media Richness Theory accurately describes the CMC process, then because

of cue loss in CMC have focused on the social information processing approach and the "cues-filtered-out" approach, and on how individuals process CMC information (social information process).[130] Social influence theory posits that social influences affect individual perception of media richness. In contrast, media richness theory posits that "media richness" is an immutable characteristic of each form of communication media. Traditional legal scholarship of online mediation tends to focus doctrinally on the lack of nonverbal cues to the detriment of alternative theoretical perspectives. This emphasis discourages legal commentators from identifying tools that can reintegrate cues into the online mediation process and discourages commentators from attempting to change social attitudes toward CMC. This section presents the theoretical perspectives that inform current understanding of CMC as a prelude to the authors' identification of tools for reintegration of cues in CMC and presentation of reasons for use of CMC.

### 1. Cues-Filtered-Out Theory

Early CMC research utilized Social Presence Theory[131] and the Media Richness Theory[132] to develop the cues-filtered-out approach."[133] Media Richness Theory posits that communicative technologies possess unique capabilities for transmission of the complete context of the communicative act. Under this theory, technologies import various levels of ambiguity. "Ambiguity is a function of a medium's richness, that is the capability of (a) facilitating feedback, (b) communicating multiple cues, (c) presenting individually tailored messages, (d) and using natural language to convey subtleties."[134] Many forms of CMC are extremely limited in their ability to transmit cues. "The rank order of media in terms of richness is face-to-face, telephone,[135] electronic mail, personal written text (letters, memos), formal written text (documents, bulletins), and formal numeric text (computer output)."[136] The richer the media, the greater the capability to reduce ambiguity. This characterization of communication media would seem to argue for employment of the most cue-rich medium. However, richer media and the increase in completeness may cost more than less rich media. Thus, if the task involves higher levels of ambiguity, leaner media will accomplish the same task more efficiently.[137]

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other forms of CMC are richer than email, if mediation via email is practicable, using other forms of CMC are also *arguendo*.

130. Jettmar & Rapp, *supra* note 127, at 3.

131. J. SHORT ET AL., THE SOCIAL PSYCHOLOGY OF TELECOMMUNICATIONS (1976).

132. R.L. Draft et al., *Message Equivocality, Media Selection, and Manager Performance: Implications for Information Systems*, 11 MIS Q. 355-66 (1987).

133. Jettmar & Rapp, *supra* note 127, at 3.

134. Schmitz & Fulk, *supra* note 129, at 488.

135. "This 'telephone' has too many shortcomings to be seriously considered as a means of communication. The device is inherently of no value to us." (Anonymous, Western Union internal memo, 1876), *available at* http://www.cisco.com/warp/public/784/packet/cache.html (last visited March 13, 2002). This quote is here merely to remind the reader that our time and cultures have changed their perspectives on communicative media. These perceptions are not static. *See supra* Section I(D)(2).

136. Schmitz & Fulk, *supra* note 129, at 488.

137. There is some question in the literature whether media richness is an objective or a subjective social construct. *See supra* Section I(D)(2). If media richness is a social construct, as individuals become more familiar with CMC, participants' perception of media richness and satisfaction with online mediation will grow. This suggests the long-term future for online mediation is positive.

Social Presence Theory hypothesizes that the psychological state of being "present" is a function of the quantity and quality of the cues one receives with the communication.[138] The social information processing theorists note that many of the prior studies supporting the cues-filtered-out theories were one-shot studies of extremely short duration in which the parties had neither the time nor motivation to create a positive impression.

### 2. Social Information Processing Theory

The social information processing theorists contend that the distinguishing characteristic between physical presence and virtual presence communication is the rate of impression formation, rather than question whether impression formation is possible. Further research and field experiments led some researchers to question the cues-filtered-out approach (media richness theory).[139] Subsequent research suggested "that bandwidth was an insufficient predictor of CMC effects on the nature of social interaction."[140] Consequently, given sufficient time, frequency of communication, and motivation, individuals engaged in virtual presence communication will develop impressions that are of equal accuracy as those engaged in physical presence communication.[141] "The more often an individual spends time communicating with others on-line, the more easily s/he can adapt to the lack of nonverbal and contextual cues and the more satisfied s/he becomes with the relationship."[142]

### 3. Social Influence and Communication Media Theory

The Social Influence model posits that an individual's media perception and use are influenced by others and the objective features of the communication's technology.[143] Individuals view different objective features of a given medium of communication differently. Selecting media for a specific mediation task is not an objective choice as pure Media Richness theories suggest; the sender must consider the receiver and his or her social context. Accordingly, the Social Influence Model proposes that media selection and use is subject to social influence, subjectively rational, not motivated by efficiency concerns, and "designed to preserve or create ambiguity to achieve strategic goals."[144]

### 4. CMC and Online Mediation

CMC is merely the channel through which communication takes place. The seminal question in online mediation is whether CMC as a channel is capable of carrying the data without unduly interfering with the receiver's ability to convert the data to understanding and knowledge so as to permit mediation. A related question

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138. Jettmar & Rapp, *supra* note 127, at 3.
139. J.B. Walther et al., *Interpersonal Effects in Computer Mediated Interaction: A Meta-Analysis of Social and Anti-Social*, 21 COMM. RES. 460, 464 (1994).
140. Jettmar & Rapp, *supra* note 127, at 3 (citing Walther, *supra* note 139, at 468).
141. *Id.*
142. Keven B. Wright, *Computer-Mediated Support Groups: An Examination of Relationships among Social Support, Perceived Stress, and Coping Strategies*, 47 COMMS. Q. 402 (1999).
143. Schmitz & Fulk, *supra* note 129, at 490.
144. *Id.* at 491.

is the effect of CMC on the sender's and receiver's respective physical and social filters that organize how the individual selects and uses data.

The most restrictive of the theories of CMC are the cues-filtered-out approaches. If online mediation is feasible using the most restrictive CMC paradigm, then online mediation is also possible under the less restrictive paradigms. Under the cues-filtered-out approach, the mediator must consider the amount of ambiguity inherent in the medium supporting the mediation, and as the level of ambiguity becomes more crucial, the mediator should evaluate the costs of richer media with the benefits of reducing ambiguity. The social information processing theory teaches that online mediation may under some circumstances take longer so that the parties can form impressions of their counterparts. "Most studies of interpersonal relationships within computer-mediated environments have [noted that problems] with the lack of nonverbal and contextual cues...can be apparently overcome as participants in on-line relationships increase the time they spend using the medium...and the more familiar they become with it."[145] These approaches do not preclude virtual presence mediation. Rather, these approaches teach that e-mediators will have to work harder to reintegrate cues into the online mediation and to reduce unnecessary ambiguity.

The social influence theory teaches that the mediator will have to work to select media on an ad hoc basis that is acceptable to the parties and work to help the parties accept the technology. But over time, as individuals become more CMC savvy, this will be less of an issue until the communications technology becomes transparent through its ubiquitous nature. Although each of these theories envisions a slightly different role for the mediator, all of these theories support CMC as a possible tool for mediation.

## C. Mediation

Legal literature reflects a recognition of communicative value of nonverbal signals in lawyer-client interviewing and counseling,[146] negotiation,[147] mediation[148] and trial practice.[149] Eye contact, facial expressions, or trunk lean may provide significant information regarding a mediating party's preferences. This section explores the effect on CMC of the availability of nonverbal cues or their substitutes.[150]

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145. Wright, *supra* note 142, at 404.

146. *See, e.g.*, ROBERT F. COCHRAN, JR. ET AL., THE COUNSELOR-AT-LAW: A COLLABORATIVE APPROACH TO CLIENT INTERVIEWING AND COUNSELING 33-35 (1999); ROBERT M. BASTRESS & JOSEPH D. HARBAUGH, INTERVIEWING, COUNSELING AND NEGOTIATION: SKILLS FOR EFFECTIVE LAWYERING 131-44 (1990).

147. *See, e.g.*, CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 37-60 (4th ed. 2001).

148. JAMES J. ALFINI ET AL., MEDIATION THEORY AND PRACTICE 124-25 (2001).

149. THOMAS A. MAUET, FUNDAMENTALS OF TRIAL TECHNIQUES 34 (1980).

150. Law and economics commentators on mediation assume the value of reducing psychological barriers that hinder the negotiation process and then analyze how the mediator "might overcome the barriers created by the strategic interaction of two rational, self-interested negotiators." Jennifer Gerarda Brown & Ian Ayres, *Economic Rationales for Mediation*, 80 VA. L. REV. 323, 324 (1996). Some law and economics theorists posit that "mediators can create value by controlling the flow of private information (variously eliminating, translating, or even creating it) to mitigate against adverse selection and moral hazard. *Id.* at 327. In this regime, the mediator adds value in the manipulation of information exchange that takes place during and between caucuses. *Id.* at 326 & n.8; *see generally* Ian Ayres & Barry J. Nalenbuff, *Common Knowledge as a Barrier to Negotiation*, 44 UCLA L. REV. 1631 (1997).

### 1. Spatial Dynamics

Spatial dynamics concerns the effects of environmental conditions surrounding each party during the mediation. [151] These environmental conditions include the party proximity to other parties and the mediator, party physical reactions (body language) toward other parties and the mediator, and the party reactions to the time or duration of the mediation. Proxemics, kinesics, and chronomics profoundly affect attitudes of the parties and can affect the ultimate outcome of the mediation. [152]

#### a. Proxemics

Proxemics refers to the parties' physical orientation to one another throughout the mediation process. [153] This physical orientation is one factor that may affect the attitudes of the parties throughout the mediation. [154] For example, parties sitting across a table from one another may unconsciously promote adversarialness. [155] Separating the disputants on opposite sides of the table may create a psychological barrier to communication, recognition, or agreement. Whereas seating parties next to one another on the same side of the table creates a less oppositional tone. [156] Elimination of the physical barrier may enhance the impression of a shared common place and psychologically, a shared common predicament.

The position of the mediator relative to the parties may trigger varied interpretation. Consider the following three scenarios. In scenario one, the mediator sits across the table from both disputants who are sitting next to one another. This may promote the perception that the parties are working toward a common goal. It also suggests that the equidistant mediator is truly neutral. Proxemically, this scenario may reduce defensive communication.

In scenario two, the mediator positions himself between the parties. While the mediator's neutrality appears to remain intact, the physical arrangement may imply that the dispute is one that the parties cannot resolve without mediator interference. This may require more effort by the mediator to achieve party empowerment.

Finally, consider scenario three, in which the mediator sits on the same side of the table as one of the disputants. This scenario may create an adversarial environment and an impression of mediator bias. This scenario most damages the neutral image of the mediator and can make the lone party feel alienated from the process.

Conceptually, proxemics does not appear relevant to text-based communication. It does, however, relate to videoconferencing and graphical avatar conferencing. In

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As discussed in this article, CMC provides a trained mediator numerous opportunities to manipulate and control information exchanges during the mediation process. Accordingly, virtual mediation should meet the needs of mediators who apply this approach to the mediation process.

    151. *See* Jeffrey S. Wolfe, *The Hidden Parameter: Spatial Dynamics and Alternative Dispute Resolution*, 12 OHIO ST. J. ON DISP. RESOL. 685, 686 (1997). *See also* Jeffrey D. Smith, *The Advocate's Use of Social Science Research into Nonverbal and Verbal Communication: Zealous Advocacy or Unethical Conduct?*, 134 MIL. L. REV. 173, 177 (1991).

    152. *See generally* Wolfe, *supra* note 151.

    153. *Id.*

    154. *Id.*

    155. *Id.*

    156. *Id.*

one study involving highly collaborative tasks using videoconferencing, subjects did not prefer the "collaborative" side-to-side position; rather they preferred the more "competitive" face-to-face position when videoconferencing.[157] While subjects preferred to be in person, face-to-face, for collaborative tasks, subjects were generally satisfied with videoconferencing. This study provides support for the media richness theory and for those attorney-mediators who contend that online mediation is only realistic when videoconferencing becomes viable.

When individuals were graphically represented in cyberspace by an avatar, proxemics was important. An avatar is a graphical representation of the user that interacts with other graphical representations, including those of other users.[158] One study found that even graphical representations have "personal distance" space among other avatars.[159] The further avatars were apart, measured in pixels, the more likely an individual would perceive the conversation as appropriate.[160] The closer avatars appeared on screen, the greater the social attraction between the parties.[161] In sum, whether measured in feet or pixels, distance matters. Research suggests that designers of online mediation software products, or mediators who use off-the-shelf products to create a graphical virtual environment for the mediation, need to consider proxemics in their design.

### b. Kinesics

"Kinesics" concerns the communicative aspects of physical reactions of parties toward one another.[162] Body language is absent in the text-based online mediation process and will probably be difficult to re-create. It is present in videoconferencing, but not to the same extent as in physical presence mediation. Without a face-to-face interaction between the parties, parties are more likely to express any response to comments made textually, whereas if the parties were in the same room together, the reaction would be more likely to involve body language rather than verbal expression. Textual expression may be more accurate and authentic than a "read" of ambiguous and culturally determined body language.

### c. Chronomics

Time is an important consideration in physical presence mediation. The time each party has to speak and the duration of the mediation may have a profound impact on

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157. Beverly Harrison et al., *An Empirical Study on Orientation of Shared Workspaces and Interpersonal Spaces in Video Mediated Collaboration, at* http://www.dgp.utoronto.ca/OTP/papers/video.mediated.collaboration/ishii.html (last visited Oct. 28, 2001); David Grayson & Lynne Coventry, *The Effects of Visual Proxemic Information on Video Mediated Communication,* 30 SIGCHI (1998), *at* http://www.acm.org/sigchi/ bulletin/1998.3/grayson.html (last visited Oct. 28, 2001) (suggesting that proximity has no effect in videoconferencing); *Mathew Lombard, Direct Responses to People on the Screen: Television and Personal Space, at* http://nimbus.temple.edu/~mlombard/diss_ab.html (last visited Oct. 28, 2001) ("subjects watching larger television screens reported more positive emotional responses to the people on the screen and the viewing environment and selected a viewing position that represented a smaller withdrawal from the encounter").

158. Dean H. Krikorian et al., *Isn't that Spatial?: Distance and Communication in a 2-D Virtual Environment, at* http://www.ascusc.org/jcmc/vol5/issue4/krikorian.html (last visited Oct. 28, 2001).

159. *Id.*

160. *Id.*

161. *Id.*

162. Smith, *supra* note 151, at 175.

the attitudes of the parties. If both parties do not receive equal time to state their position, the one receiving less time may feel slighted or even feel that the mediator is biased. This in turn can lead to increased hostility and lowered cooperation. Since text-based online communication permits the parties to participate to the extent they desire, greater or lesser participation should raise fewer inherent equity and bias issues. In addition, online mediating parties may avoid the time pressures to concede experienced by negotiators in face-to-face negotiations with pre-set itineraries for returning home.[163]

## 2. Paralinguistics

Paralinguistics is the study of the influence of verbal pitch, rate, volume, and mediating tone of the parties.[164] While the Internet is largely text based, the sender has several text options for sending paralinguistic cues. The best-known paralinguistic devices on the web are emoticons. Emoticons are ASCII text characters used to express emotion, such as :-) for a smile or :-( for a frown. Some programs allow for graphic representations of emotion, for example ☺ for a smile or ☹ for a frown. For example, Cindy saying, "Robin, you're awful." is ambiguous and is quite different from Cindy saying, "Robin, you're awful ☺." Since individuals cannot modulate the volume of their voice in text based discussions, ALL CAPS is known as shouting. Another option is "emoting." Emoting represents an action and is usually expressed in the third person, for example, messages sent by Cindy such as "Cindy crying, 'Robin, you're awful'" or "Cindy saying flirtatiously, 'Robin, you're awful.'" These cues may be used either in synchronous or asynchronous communication. Modern email programs give individuals the option of using different fonts, font sizes, and colors. All of which may be used to communicate paralinguistically and to enrich lean text-based communication.

## 3. Spatial Dynamics, Paralinguistics and Media

Not all media transmit all forms of spatial dynamics. For example, generally proxemics information is only transmitted in face-to-face communication. Kinesic information may be transmitted either face-to-face or via videoconferencing. Paralinguistic information may be transmitted face-to-face, by videoconferencing, or via audio-communication. Finally, linguistic information may be transmitted face-to-face, by video conferencing, by audio-communication, or via computer text messages. By selecting the media to be used in the mediation, the mediator may edit cues or other information that may affect the mediation. For example, even assuming mediation is appropriate, for two people who cannot tolerate each other enough to mediate in the same room, the tele-distancing of the parties may facilitate their ability to communicate and build bridges so that eventually face-to-face mediation may be successful.

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163. See discussion of negotiation deadlines in CHARLES B. CRAVER, EFFECTIVE LEGAL NEGOTIATION AND SETTLEMENT 231-34 (4th ed. 2001).
    164. BASTRESS & HARBAUGH, *supra* note 146, at 140-43.

### 4. Mediation Continuum

Mediators often characterize their dominant approach to mediation as either facilitative or evaluative. This section will evaluate how mediators whose approaches to mediation fall at different points along the continuum may experience online mediation.

#### a. Facilitation and Evaluation, Broad and Narrow

Professor Leonard Riskin has proposed a four-element scheme for identifying attitudes or orientations mediators typically adopt to assist parties in the mediation encounter. Two elements, facilitation and evaluation, reflect different levels of responsibility mediators assume for assisting in problem solving. "Facilitation" assists parties to achieve self-determination and self-discovery by encouraging "parties to develop their own understandings and outcomes,...educat[ing] the parties, or 'empower[ing]' them by helping them develop a sense of their own abilit[ies] to deal with problems and choices in life."[165] To carry out the strategy, facilitators do not use their own "assessments, predictions, or proposals."[166] They ask questions, clarify, and remain non-judgmental.

"Evaluation" strategy, on the other hand, calls for the mediator to "give [ ] advice, make [ ] assessments, state [ ] opinions—including opinions on the likely court outcome, propose [ ] a fair or workable resolution to an issue or the dispute, or press the parties to accept a particular resolution."[167]

Two additional Riskin scheme elements, narrow and broad, reflect the scope or breadth of the definition of the problem. A narrowly defined issue concerns the immediate matter before the parties such as a lawsuit or a single transaction. Mediator strategy attempts to resolve the party positions regarding this issue. A broadly defined matter encompasses more than the immediate matter and may include the parties' interests or relationships. Mediator strategy "directs parties toward...outcome[s] that respond [ ] to such interests."[168] Professor Riskin has graphically depicted the facilitation and evaluative approaches using the x-axis as the decision between the two. The y-axis divides the narrow and broad approaches. The matrix is known as the Riskin Grid.

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165. Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 29 (1996). Although more recent scholarship rejects the rigidity of four distinct mediator orientations, thus suggesting that skilled mediators are eclectic, constantly moving along a continuum according to needs of the participants in mediation. Dwight Golann, *Variations on Mediation: How and Why—Legal Mediators Change Styles in the Course of a Case*, 2000 J. DISP. RESOL. 41, 42 (2000).

166. Riskin, *supra* note 165, at 28.

167. Lela P. Love, *The Top Ten Reasons Why Mediators Should Not Evaluate*, 24 FLA. ST. U. L. REV. 937, 938 (1997).

168. *See* Riskin, *supra* note 165, at 30.

The sections below discuss computer-mediated communications within each Riskin Grid quadrant.

**MEDIATOR ORIENTATIONS**

| | |
|---|---|
| **EVALUATIVE NARROW** | **EVALUATIVE BROAD** |
| **FACILITATIVE NARROW** | **FACILITATIVE BROAD** |

### b. Evaluative-Narrow Approach

"A principal strategy of the evaluative-narrow approach is to help the parties understand the strengths and weaknesses of their positions and the likely outcome of litigation or whatever process they will use if they do not reach a resolution in the mediation process."[169] This approach requires a substantial understanding of the conflict and of the possible remedies by the mediator and requires preparation to actively intervene in the mediation process.[170] Preparation may include examination of documents and evidence "relevant" to the dispute.[171] This form of mediation begins with party presentations followed by individual caucuses.[172] During caucus, the mediator will "gather additional information and deploy [any number of] evaluative techniques."[173]

Evaluative techniques typical of the evaluative-narrow approach are

(1) "[Assessing] the strengths and weaknesses of each side's case;"[174]
(2) "[Predicting] the outcomes of court or other processes;"[175]
(3) "[Proposing] position based compromise agreements;"[176]
(4) "[Urging or pushing] the parties to settle or accept a particular settlement proposal or range."[177]

Aside from the additional time that may be required, this mediation approach may take place online. Chat rooms and email allow a mediator to communicate with both parties together or individually. The only hurdle here is the mediator's examination

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169. *Id.* at 26.
170. *Id.*
171. *Id.*
172. *Id.* at 26-27.
173. *Id.* at 27. By employing any of the four approaches when mediating online, a mediator can protect each party's interests by, for example, creating private chat rooms or sending confidential email for online caucusing to explore bottom lines, real interests, offers that mask the true positions, and withholding of information.
174. *Id.*
175. *Id.*
176. *Id.*
177. *Id.* at 28.

of relevant materials. In such a case, there are many available options that can overcome this potential problem. Today's technology provides methods of packaging documentation and sending it via email to a recipient who can view it without compromising the integrity of the document. For example, pleadings and memoranda can be scanned and saved in Portable Document Format and transmitted online. This format is universally utilized and the software required to view the documentation is freely available. The costs of document scanning may be minor in comparison to the costs associated with party travel and document shipping to a physical mediation site.

### c. Facilitative-Narrow Approach

The facilitative-narrow mediator is similar to that of the evaluative-narrow mediator in that the mediator attempts to "educate the parties on the strengths and weaknesses of their claims and the likely consequences of failing to settle."[178] Rarely do facilitative-narrow mediators examine any documents or give opinions as to the outcome of the case.[179] The facilitative-narrow mediator will place the "burden of decision making" on the parties by utilizing facilitative techniques to inform the parties of their options.[180] These techniques are generally questions that assist parties in making their own decisions.[181] Among these techniques are

   (1) "[Asking] questions;"[182]
   (2) "[Helping] the parties develop their own narrow proposals;"[183]
   (3) "[Helping] the parties exchange proposals."[184]
   (4) "[Helping] the parties evaluate proposals."[185]

This form of mediation can easily be used in the online context for two reasons. First, because there is no need for the mediator to examine documents, there is no need to prepare documents for the online mediation. Second, because there is a focus on the immediate issues, this approach is very efficient. This form of mediation may be the most time efficient online mediation.

### d. Evaluative-Broad Approach

Describing the strategies and techniques of the evaluative-broad mediator[186] is difficult because of the broad scope of the mediator's approach and the varying

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178.  *Id.*

179.  *Id.*

180.  *Id.*

181.  *Id.*

182.  "The mediator may ask questions—generally in private caucuses—to help the participants understand both sides' legal positions and the consequences of non-settlement. The questions ordinarily would concern the very issues about which the evaluative-narrow mediator makes statements....[strengths, weaknesses, consequences, costs, etc.]. " *Id.*

183.  *Id.* at 29.

184.  *Id.*

185.  *Id.* Transformation is discussed *infra* Section II(D)(4)(f).

186.  *Id.* at 29.

degrees of evaluation that each mediator may provide.[187] The evaluative-broad mediator will learn as much about the parties "interests" and their situation as possible and use that information to formulate options.[188] The mediator will then "direct the parties towards an outcome that responds to [the mediator's understanding of their] interests."[189] To this end, a mediator may utilize the following techniques:

(1) "Educate herself about the underlying interests;"[190]
(2) "Predict impact (on interests) of not settling;"[191]
(3) "Develop and offer (interest-based) proposals;"[192] and,
(4) "Urge the parties to accept the mediator's or another's proposal."[193]

Due to the varying nature of the evaluative-broad mediation, it is difficult to predict what effects it may have on online mediation. While it may take additional time, for parties willing to accept ideas from third parties, the combination of the mediator's inquiries into the interests of the parties and the offer of settlement options will, at the least, assure that the parties have a great range of possible solutions.

### e. Facilitative-Broad Approach

"The facilitative-broad mediator's principal strategy is to help the participants define the subject matter of the mediation in terms of underlying interests and to help the participants develop and choose their own solutions that respond to such interests."[194] Facilitative-broad mediators may also "help participants find opportunities to educate or change themselves, their institutions, or their communities."[195] Facilitative-broad mediation is similar to the transformative theory.[196] Facilitative-broad mediation may employ some of the following:

(1) "Help parties understand underlying interests;"[197]
(2) "Help parties develop and propose broad, interest-based options for settlement;"[198] and,
(3) "Help parties evaluate proposals."[199]

These processes, too, may occur online.
Online mediation is feasible regardless of where the mediator falls in the Riskin Grid.

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187. *Id.* at 29-30.
188. *Id.* at 30.
189. *Id.*
190. *Id.* at 31-32.
191. *Id.* at 32.
192. *Id.*
193. *Id.*
194. *Id.*
195. *Id.*
196. *See infra* Section II(D)(4).
197. Riskin, *supra* note 165, at 32.
198. *Id.* at 34.
199. *Id.*

## 5. Transformative Mediation

The transformative mediation process attempts to "strengthen [one's] capacity to analyze situations and make effective decisions" while "[strengthening] [one's] capacity to see and consider the perspectives of others."[200] Mediators attempt to empower the parties to make clear decisions for themselves while considering the effect on all involved.[201] Transformative mediation is not "settlement driven." Rather, it is based on supporting the parties through their own decision-making process.[202] This form of mediation has a role in online mediation. Consider the following application of the ten "hallmarks" of the transformative mediation approach in the online context.

### 1. *The Opening Statement*

The purpose of the opening statement is two-fold.[203] First, it helps the parties to "clarify their own goals, resources, options, and preferences and make clear decisions for themselves and about their situation."[204] Second, it allows the parties to "consider and better understand the perspective of the other party, if they decide to do so.[205] This opening statement will not suffer from CMC. Moreover, transformative mediation may be enhanced by the online experience, as parties may direct themselves to the transcript of the mediation for greater self-awareness and recognition of the other's perspective.

### 2. *Settlement Is Up To the Parties*

The mediator does not decide. This is critical to the transformative process in that the mediator must reject all personal feelings of "responsibility" in generating an outcome to the mediation.[206] This is particularly important for the mediator to recognize, as it can actually hinder the possibility of the parties learning and compromising on their own. No aspect of this hallmark prevents an online mediator from adjusting her role in this party-centered direction.

### 3. *The Parties Know Best*

The mediator should not demonstrate approval or disapproval of the parties' views and decisions.[207] With online mediations occurring via chat rooms or email, parties lack the ability to observe other parties and the mediator's response to what was said during the mediation. With this communications cue missing, the parties will not be able to observe the mediator's response to their position or idea. Therefore, a mediator can essentially keep his or her reaction to himself or herself and avoid inadvertently steering any of the parties or altering the power dynamics between the parties.

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200. Joseph P. Folger & Robert A. Baruch Bush, *Transformative Mediation and Third-Party Intervention: Ten Hallmarks of a Transformative Approach to Practice*, 13 MEDIATION Q. 263, 264 (1996) (identifying the principal goals of transformative mediation as empowerment and recognition).

201. *Id.* "[E]mpowerment means that the mediator watches for the points in the process where the parties have opportunities to gain greater clarity about their goals, resources, options and preferences, and then the mediator works with these opportunities to support the parties' own process of making clear and deliberate decisions." *Id.*

202. *Id.* at 265.

203. *Id.* at 266.

204. *Id.*

205. *Id.*

206. *Id.* at 267.

207. *Id.* at 268.

### 4. *The Parties Have What It Takes*

In transformative practice, the mediator assumes the parties' underlying competence and decency. CMC strengthens the mediator's positive assumptions about the parties. CMC may lessen or eliminate stereotypes, dominance, subjugation, and dismissiveness. CMC permits the parties to control their presentation. Irrelevant physical characteristics, mannerisms, gender, race, ethnic origin, age, education, accent, sexual orientation, or social status are not necessarily disclosed to affect the mediator's perception of the competence and decency of the parties. On the other hand, CMC does not allow characteristics that may be sympathetic or create common ground to become part of the mediation without the parties or mediator being physically present. It is important to consider technology situations that could give rise to negative judgments about the parties. Two that could be a problem for a computer savvy mediator are (1) frequent typographical mistakes; and, (2) computer errors leading to lost files or simply being unable to utilize the computer system properly. It is important for the mediator to take the ability of the parties to use a computer system into account when mediating, as it will probably require additional patience on the part of the mediator to avoid frustration. To this end, the mediator can focus on the linguistic interaction between the parties instead of worrying about the mediator's kinesic reaction to the parties. This allows the mediator to be more optimistic about the parties' competence and motives. Again, the lack of face-to-face interaction avoids inadvertently discouraging the parties through body language or facial expressions and keeps the mediation on an optimistic path.

### 5. *There Are Facts in the Feelings*

"In transformative practice, third parties view the expression of emotions—anger, hurt, frustration, and so on—as an integral part of the conflict process." [208] These sources of recognition in Transformative Mediation *may suffer* from the absence of face-to-face interaction. CMC can, however, convey to some extent the parties' emotions as discussed in section (c)(2) above. Further, research suggests the possibility that individuals will be more open in a CM environment. People may be more likely to say what they mean when not confronting their adversary face-to-face. This will provide for the expression of more genuine feelings.

### 6. *Clarity Emerges from Confusion*

"Interveners who understand the transformative framework expect that the disputants will frequently be unclear and uncertain about the issues underlying their conflict, what they want from each other and what would be the 'right' choices for them."[209] As previously mentioned, the lack of face-to-face interaction may facilitate the parties' honesty, participation, and clarity of thought.

### 7. *The Action Is in the Here and Now*

"In the transformative approach to practice, third parties remain closely focused on the here and now, on the stream of individual comments and moves that parties make throughout the session." [210] The behavior "in the room" allows the mediator to exploit opportunities for empowerment and recognition by

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208. *Id.* at 271.
209. *Id.* at 272.
210. *Id.* at 273.

slowing down the discussion and working with the parties on clarification.[211] This too may differ in virtual presence mediation. Throughout the physical mediation process, the mediator usually focuses on two aspects of the parties' behavior. First, the mediator pays close attention to the parties' verbal language as they interact with one another. Second, the mediator observes body language, also paying close attention to how the parties physically interact.[212] In online mediation physical responses are lost; however, the lack of body language in online mediation may be compensated for in the choice of language, the use of emoticons, emoting,[213] or changes in response time in the virtual mediation process. The cues will range from the obvious to the subtle and online mediators should be trained to detect the "tone" of the parties. A good starting point is the substantial body of materials systematically studying discourse in the computer mediation context.

8. *Discussing the Past Has Value for the Present*

"When they are following the transformative approach to practice, [mediators] not only allow but even encourage disputants to talk about past events—the history of the conflict—because doing so is often a very good way to achieve the goals of empowerment and recognition."[214] Mediation online satisfies this hallmark. Online mediation may offer greater safety to parties to remember and air past grievances or injuries. In addition, parties will be able to see the text of the adverse party's views. Instead of hearing it one time, it may be read repeatedly for better and better recognition of the other's experience of what happened.

9. *Conflict May Be a Long-Term Affair*

"Interveners who understand the transformative framework are aware that their work involves stepping into a stream of interaction that began before the intervention and, in most cases will continue in some form after the intervention is finished."[215] With this in mind, online mediators might suggest several meetings online or maintain an open communication with the parties. One advantage of online mediation is that the parties may engage in ongoing discussions that are not necessarily limited to a formal set time.

10. *Small Steps Count*

Success is an incredibly motivating factor in mediation.[216] Online mediators can detect micro-accomplishments of empowerment and recognition that text reveals.

In sum, not only can the transformative approach to mediation be utilized online with little adaptation, but also many characteristics may actually be enhanced by their application online. Even though some of the characteristics may suffer slight application problems, mediators may be properly trained to overcome these issues and utilize the transformative approach with little problem, and in some circumstances, online mediation may be the superior alternative.

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211. *Id.*
212. See discussion of kinesics and proxemics, *supra* Section II(C).
213. *See supra* section II(C)(2) (describing emoting).
214. Folger & Bush, *supra* note 200, at 273.
215. *Id.* at 274.
216. *Id.* at 275.

*D. Computer-Mediated Communications Theory as Applied to Traditional Mediation Theory*

Social science literature and personal experience have demonstrated that computer-mediated communication and face-to-face communication are different.[217] The question is how to eliminate or minimize the perceived negative aspects of CMC or, better, how to turn perceived difficulties into assets during the mediation.

> At a strategic level there are several ways to address the issue: (a) develop mechanisms to adapt people to the computer environment (*i.e.*, fit the people to the technology); (b) alter the computer environment so that it matches face-to-face communication (*i.e.*, fit the computer environment to meet the usual expectations and familiar interaction patterns of potential users); (c) use a mixed or optimizing strategy in which different combinations of computer and face-to-face communication techniques are employed (*e.g.*, select the best medium or mix of media for the task and group relationships).[218]

These options are not exclusive. Already, as individuals go online, they are adapting to the technology. Simultaneously, software is being written to adapt technology to the human element. In the future, mediators will have increasing opportunities to use new forms of technology and new software programs to facilitate CMC, and as the technology already demonstrates, opportunities to engage in new problem solving techniques that are difficult, if not impossible, in face-to-face communication.

## III. PRACTICE OF ONLINE MEDIATION

In selecting tools for online mediation, the mediator should be aware of the cultural impact of the chosen technology. Frequently the participants will be from different real-world and technological cultures and may react to mediation technology differently. For example, if face saving is an instrumental skill in a party's culture, technology should be chosen to allow the possibility of face saving. When mediating between two individuals of different status in a culture where status is instrumental, the mediator may wish to level the playing field by using technology that eliminates status cues, thus empowering the lower status individual or technology to re-create those cues.

*A. Online Programs*

There are many ODR programs.[219] These programs fall into three primary classifications: (1) programs that use computer-mediated communication merely to facilitate the administration of physical-presence mediation; (2) hybrid-mediation programs, those in which the mediator may use virtual-presence, physical-presence, or some mixture of the two during the course of the mediation; and (3) virtual-

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217. Bradford W. Hesse et al, *Temporal Aspects of Computer-Mediated Communication*, 4 HUMAN BEHAVIOR 147, 161 (1988).

218. *Id.*

219. http://aaron.sbs.umass.edu/center/onlineadr.htm (last visited Oct. 28, 2001).

mediation programs, which exist entirely online and rely solely on virtual presence during the course of the mediation. Of the virtual-presence mediation programs, there are two main categories: those that use technology as an aid to a human mediator and those that rely on the software-as-mediator to bring resolution to the dispute. Both uses of technology in mediation present interesting possibilities, opportunities, and challenges.

### 1. Physical-Presence and Virtual Administration

Existing mediation providers are increasingly moving onto the Internet to advertise their mediation services.[220] Many online mediation services do not actually mediate online but rather provide information online or allow parties to complete forms or complete other administrative tasks online. The actual mediation takes place in the physical presence of the mediator and the parties.[221] The use of technology to reduce expenses and to facilitate the routine administration and tasks associated with scheduling mediation does not implicate the concerns raised in this article.

### 2. Hybrid Mediation

Hybrid-mediation projects use both face-to-face (physical presence) and online (virtual presence) mediation techniques. The mediator may start the mediation in person, allowing the parties to develop an impression of each other. The mediator may then proceed online to work through the issues, but at any point in the mediation process where a face-to-face meeting would be helpful, the mediator may bring the parties together. This eclectic approach to mediation permits the mediator to fashion a suitable mediation process to meet the social, emotional, and financial needs of the parties under almost all circumstances.

The University of Maryland online mediation project steps away from the technological focus of most online dispute resolution programs. Unlike most online mediation programs that focus on ecommerce or commerce, the primary focus of this program is family law mediation. This program utilizes email as its primary communication method.[222] In certain circumstances, face-to-face meetings are also used. This eclectic mixture of mediation options is superior to either solely physical presence or solely virtual presence mediation. Hybrid mediation permits the mediator to move along a continuum of options as needed by the mediation process. This is just the beginning of a new trend in online dispute resolution in that many more types of disputes will be added to the online mediation process.

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220. *See, e.g.,* Mediate.com Homepage, *at* http://www.mediate.com (last visited Oct. 28, 2001).

221. For an excellent article on incorporating the Internet into a mediation practice, *see* James Melamed, *Integrating the Internet into Your Mediation Practice, available at* http://www.mediate.com/articles/melamed8.cfm (last visited Aug. 7, 2001). For an excellent source for practical information of use to online mediators, see http://www.mediate.com (last visited Oct. 28, 2001).

222. Physical distance assures safety, a need in reorganizing families in which there has been physical or psychological abuse. For example, one study "that compared people who chose to mediate with those who rejected the opportunity found that 44% of the reasons given by women who rejected mediation services offered to them centered around their mistrust of, fear of, or desire to avoid their ex-spouse." Trina Grillo, *The Mediation Alternative: Process Dangers for Women,* 100 YALE L.J. 1545, 1601 (1991).

### 3. Virtual-Presence Mediation

The virtual-mediation projects may easily be classified into two groups: those projects that use technology to assist the human mediator and those projects that rely solely on technology to mediate the dispute.

#### a. Technology in Aiding Human Mediator

In the human adjunct programs, the technology is merely one more tool for the mediator, but the mediator does not meet with the parties face-to-face. The mediator selects from a palette of options depending on the nature of the dispute, the technology available to the parties, and the relationship between the parties. This type of mediation permits the mediator to take advantage of any opportunities presented by the parties to assist them in reaching a settlement. Since this is the most flexible form of mediation, it should be the preferred option in the vast majority of online mediations when the dispute presents complex issues and interests that are not readily quantifiable.[223]

The University of Massachusetts Online Ombudsman Office is considered the premiere online mediation program. This online dispute resolution program focuses on disputes rising out of online activity.[224] The dispute resolution utilized in this program is predominantly mediation.[225] The program selectively incorporates technology in the mediation process and uses technology to enhance the capabilities of the mediator. Upon receiving a complaint, the mediator contacts the other party via email, informs the party about the program, and asks whether the party is willing to mediate.[226] Each party then has the opportunity to present its wants, needs, desires, and claims. The mediator then attempts to distill the fundamental issues and relevant facts. This agenda-setting phase may require several attempts before the mediator expresses the dispute in a manner acceptable to the parties. This process of schema and correction is repeated, with the parties growing closer until they agree. "The mediator facilitated the information exchanges by providing a buffer, soliciting discussion and responses, and reformulating not only the dispute but also the claims of each party in search of that ground where a deal might be constructed. At the decision point, if there was not the necessary movement for determinative resolution, the disputes were considered at impasse and largely left dormant (or to the devices of the parties themselves)."[227]

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223. One of the more recent forms of ADR is the mini-trial or summary jury trial. There is a rough ODR analogue, the virtual courtroom. *See, e.g., iCourthouse, at* http://www.icourthouse.com (last visited Mar. 14, 2002); ALAN SCOTT RAU, ET AL., MEDIATION AND OTHER NON-BINDING ADR PROCESSES (Foundation Press 2002). The model of the virtual courtroom is that an individual completes an online form (complaint); the person being complained of has an opportunity to respond (answer). Visitors to the website then sit as a virtual jury; however, unlike the traditional common law jury, jurors are permitted to ask questions and make statements, and, generally, the "verdict" is not binding. *Id.* at 11. Because this article focuses on the mediator as communications facilitator, further discussion of virtual courthouse programs as a form of mediation is outside the scope of this article.

224. UMass Center for Information Technology and Dispute Resolution Homepage, *at* http://www.ombuds. org/center/index.html (last visited Mar. 14, 2002).

225. *Id.*

226. Katsh, *supra* note 63, at 7.

227. *Id.*

## b. Technology as Mediator

For some mediation projects, the role of the mediator in setting the agenda and facilitating the process is vested entirely in the code of the software used by the project. These programs work well when the economic value of the dispute is easily quantifiable, the parties do not seek personal reconciliation, and there are opportunities for mutually beneficial exchange. In contrast, they do not work well when the issues are not readily reducible, or where repeat players require an adjustment to their relationship.

An example of a code-based mediation program is Cybersettle, a patented double-blind bidding process.[228] By online mediation standards, Cybersettle is a success. Cybersettle has helped its clients settle over $50,000,000 in claims, is used directly or by administrators for over 475 insurance companies, and has over 60,000 users.[229] Cybersettle is the exclusive "settlement tool" of the Association of Trial Lawyers of America (ATLA).[230] This endorsement by both the plaintiff and defense side attorneys in the personal injury bar is a strong endorsement of the integrity of the Cybersettle process and its ability to deliver a fair settlement to both sides of a personal injury dispute. Cybersettle allows the parties to make confidential offers of compromise. "If the offer is within, a preset settlement formula, typically, 30% or $5,000 of the demand, the case immediately settles for the mean amount."[231] Each round starts the process fresh, offers are not compared between rounds. If the parties do not settle, they can resubmit the process to Cybersettle with new offers or negotiate directly. Since neither side knows the others side's offers, this negotiation strategy does not influence subsequent attempts to settle the dispute. Because Cybersettle is automated, it is a relatively inexpensive method of resolving a dispute. Cybersettle's fees range from $100 to $1,000 based on the value of the settlement, and the parties pay only if they settle.[232]

## c. Software Assistance

Any analysis of online mediation would be incomplete without including at least an introduction to some of the various types of software that may facilitate the mediation process. Through the use of such software, parties may be able literally to visualize their positions or gain a better understanding of the adverse party's position. This field is rapidly changing and no discussion could possibly be complete. The section presents a *sample* of the products that are available to online mediators.

## (1) SmartSettle

SmartSettle is an online negotiation assistance program that facilitates the negotiation process.[233] SmartSettle assists the parties to observe visually the progress

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228. Cybersettle Homepage, *at* http://www.cybersettle.com (last visited Mar. 13, 2002).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *See* SmartSettle Homepage, *at* http://www.smartsettle.com/flash.html (last visited Mar. 13, 2002).

of a negotiation through the use of graphic displays that guide a negotiation through a six-stage process.[234]

> Step 1. "Prepare for Negotiation"
> Parties request a SmartSettle case number by completing an online intake form.
> The parties may engage a SmartSettle mediator or select their own mediator.
> Step 2. "Qualify Interests"
> Mediator helps the parties to discuss their mutual interests and to identify issues without taking positions. The parties also agree on a "Framework for Agreement" [a] template blank form that will later be completed using the terms subsequently agreed to.
> Step 3. "Quantify Satisfaction"
> Parties exchange initial proposals with a range for negotiation. The mediator works with each party to elicit confidential preferences.
> Step 4. "Establish Equity"
> Parties exchange information and offer concessions. "Based on party preferences and concessions made by each party, packages are generated for the parties to consider." The mediator assists the parties to find common ground for resolution. "Equity is achieved by the parties when they accept the identical package as a tentative solution."
> Step 5. "Maximize Benefits"
> Software engages in preference analysis and optimization to generate possible improvements to the tentative solution.
> Step 6. "Secure Commitment."
> As soon as any party terminates the process, software automatically completes the "Framework for Agreement" with the current solution for signature by the parties.

In the penultimate stage of the SmartSettle process, SmartSettle suggests an "improvement" for the parties, which they may accept or reject, or they may continue negotiating.[235] SmartSettle is the bridge between online mediation and software assistance. Among the various applications for SmartSettle are

> 1. "Facilitates multi-party negotiation cases with any number of quantitative or qualitative issues";
> 2. "Connects stakeholders and interveners to a negotiation from anywhere in the world";
> 3. "Elicits complex preferences by allowing parties to associate confidence in relative importance of issues and package rating";
> 4. "Accurately models negotiation cases and party satisfaction functions allowing parties to experiment with 'what if' scenarios";
> 5. "Allows parties to keep track of all packages discussed throughout a negotiation";
> 6. "Generates fair compromises, equivalents and optimal solutions apportioning benefits according to an equity reference established by negotiating parties";[236]
> 7. Allows for simultaneous real-time online responses; and

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234. *Id.*
235. *Id.*
236. *Id.*

8. Permits automated mediation of disputes in simple, routine disputes.

SmartSettle attempts to be a comprehensive online mediation software package. If one were to select one tool to introduce novice online mediators to online mediation, it would be SmartSettle. SmartSettle is easy to learn and easy to teach clients to use. Yet, it has so many potential uses that an experienced online mediator will constantly discover new ways to use it to facilitate online mediation.

### (2) Legalspace

Legalspace assists online mediators with the daunting task of presenting the options available to the parties in a comprehensive and comprehendible manner.[237] Legalspace uses experimental graphics to visualize the available options.[238] For visual learners, among others, this can facilitate the parties' understanding of each others' positions and their varying needs. A few of the major utilities are a calendar function that records the discussions of the mediator and the parties in chronological order, a Gantt Chart to record events as the parties remember them, an outline program that shows the issues and sub-issues as identified by the mediator, an adjustable bar chart that allows the parties to define interactively the relative importance of issues from their perspective, a decision tree that works like a flow chart to assist the mediator to outline the options available to the parties, and the "Gantt Chart for Agreement" to outline the terms of the agreement.[239] One of the more interesting utilities is the "heatmap."

> On the HeatMap, the issues are represented by the oval, and the color matches the one on the Adjustable Chart. The importance of the issue is represented by the location of the oval vertically. The mediator's contribution is to define the distance of the parties on each issue, as he or she perceives it by dragging the ovals horizontally. The object of the mediation process is to aim towards moving all the ovals to the left.[240]

Legalspace is an excellent tool in any mediator's repertoire to assist the parties in resolving their dispute. Legalspace assists the mediator to facilitate the parties' imposition of structure on the mediation and to flesh out or demonstrate issues and concerns. The HeatMap utility is an excellent CMC method of enriching the communication and allowing a party to present "safely" hot button concerns without unnecessary affect.

### (3) DATA

Decision Analysis by TreeAge (DATA) is a computer-based risk analysis program that facilitates the negotiation process through the use of a "decision tree."[241] The software, although it incorporates little graphical material, utilizes tree

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237. *See* Legalspace Homepage, *at* http://www.wigitek.com/legalspace.html (last visited Oct. 28, 2001).

238. "The visualization software is being implemented as a system of Java applets linked to a database backbone to be deployed on the Web." *Id.*

239. *Id.*

240. *Id.*

241. *See id.*

branches to show the parties the available options and potential consequences.[242] Decision Analysis assists the parties to evaluate the issues that will affect the outcome at trial. Issues such as those raised by pretrial discovery, nature and complexity of the issues at trial, credibility of witnesses, possible counter-claims, unresolved statutory issues, whether the defendant will pay a judgment and possible outcomes should the case go on appeal, may be analyzed based on confidence intervals using Decision Analysis.[243] "Using such software, many mediators have been able to facilitate a cooperative effort among litigants and lawyers to arrive at a joint valuation of the dispute."[244] Decision Analysis is an excellent tool to use to educate the attorney or the client on possible weaknesses in their litigation strategy that may affect the settlement value of the case.

## C. Recommendations

The online mediator should begin by educating the parties as to the mediator's expectations for online mediation: time requirements, technology requirements, confidentiality requirements, and financial requirements. The mediator should reserve the right to decline to continue with online mediation, or to convert the mediation into physical presence mediation, if the mediator judges that online mediation is no longer suitable. These expectations should be written in the agreement retaining the mediator.

"The right tool for each job" should be the mantra of online mediators. Online mediators have a palette of tools to select from in any given mediation. Mediators should consider the technical sophistication of the parties in selecting technology to be used. Mediators should also consider the cost of licensing proprietary software or purchasing hardware for the mediation. Mediators should assure themselves that parties have access to the technology. Access is more than availability. Access, for the purposes of mediation integrity, is the capable or proficient use of the technology.[245] An efficient method of assuring access is to verify independently the parties' use of the technology. For example, the best way to assure that parties can use email is to send them email. Mediators should not assume the ability to use email includes the ability to send attachments. Mediators must consider the impact of the technology on the process. Technology is not neutral. Technology emphasizes some aspects of communication and minimizes or eliminates others. The mediator must be aware of what aspects of communication are important at each point in the mediation process. The mediator must be able and willing to manipulate the technology in furtherance of the mediation process.

A second concern should be that the mediation does no harm. Ecommerce disputes are potentially legal disputes. The mediator and the parties should realize that mediation takes place in the larger meta-context (shadow) of the law. The mediator and parties should, by contract and other private law mechanisms, endeavor to ensure, should the mediation fail or be challenged in court, that the

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242. *Id.*
243. Treeage Software, Inc. Homepage, *at* http://www.treeage.com.html (last visited Mar. 13, 2002).
244. *Id.*
245. *Cf.* Schmitz & Fulk, *supra* note 129, at 490 ("Lack of media-related skills inhibits use; 'rich' objective features may be perceived as irrelevant [if one] does not have the skill to access and use them.").

intent of the parties governs the subsequent dispute.[246] For example, the mediator and parties should agree to default rules for governing actions that may arise subsequent to the mediation. Since the legal default rules governing the mediation may be unclear, the mediator and parties must work to ensure that the underlying law supports the mediation. The golden rule of mediation should be that no party should be worse off because the party voluntarily agreed to mediate.

Finally, the mediator must work hard. Effective online mediation requires the mediator to enrich the communication medium and reduce ambiguity. The mediator must be aware of what happens in physical presence mediation and endeavor to replicate those aspects of physical presence mediation that are useful in a virtual mediation. For example, the normal social pleasantries that take place when the parties meet during mediation are absent online. In fact, the parties may have never met, and the mediator may have to work hard to humanize the parties. The mediator must endeavor to promote understanding while endeavoring to reduce unintentional faux pas related to the communicative medium. This may require that the mediator educate one or both parties about the social and linguistic conventions of interacting in cyberspace. This also requires an awareness of the nature of each communicative tool that the mediator will use during the course of the mediation.

## IV. ONLINE MEDIATION PARADIGM

No article on mediation would be complete without a simulation exercise. The following presents a simulation of an online mediation and what an online mediator should be aware of in computer-assisted facilitation of disputes.

Our facts are simple. Newventure, Ltd (London, England) is an Internet-based business selling widgets. It uses a software product by Acme, Inc. to manage its inventory and accounting system. Newventure orders and downloads the latest version of AcmePro v. 4.0. The specifications for AcmePro v. 4.0 state that it works with all versions of the operating system used by Newventure. Since the release of AcmePro v. 4.0, a newer version of the operating system was released, and Acme, Inc (Elysian Fields, California) was unaware of this release. Newventure recently upgraded its data management capabilities and installed the latest version of the operating system and AcmePro v. 4.0. Because AcmePro v. 4.0 is not compatible with the upgraded operating system, all Newventure's data processing operations

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246. Online mediation exposes mediators to significant risks of violation of rules prohibiting the unauthorized practice of law. In some states, mediation is not the practice of law (*see, e.g.*, Maine Bar Rule 3.4(h)(4)); in others, a lawyer serving as a mediator "is acting as a lawyer." *New Jersey Supreme Court Advisory Committee on Professional Ethics, Opinion No. 676* (1994) (cited in ABA Section of Dispute Resolution, Resolution on Mediation and the Unauthorized Practice of Law, Adopted by the Section Council on February 2, 2002, *at* http://www.adrworld.com). If the mediation is subject to the laws of a jurisdiction in which mediation is considered to be the practice of law, a lawyer serving as a mediator may need to petition the state for temporary admission to the bar. This significant burden would undoubtedly outweigh any advantage of online mediation. For this and other reasons, the ABA ADR Section adopted on February 2, 2002, a resolution explaining that "mediation is not the practice of law," that mediator discussions of legal issues "do not create an attorney-client relationship," that preparation of a settlement agreement by a mediator, incorporating the parties' understanding, does not constitute the practice of law, and that "mediators should inform the parties: (a) that the mediator's role is not to provide them with legal representation...; (b) that a settlement agreement may affect the parties' legal rights; (c) that each of the parties has the right to seek the advice of independent legal counsel throughout the mediation process and should seek such counsel before signing the settlement agreement." *Id.*

immediately cease and Newventure must process data manually. Newventure threatens to sue and to issue a press release.

(Confidential) Newventure discovers that, were it to change data management programs, the cost of migrating to a new platform would be prohibitively expensive and time consuming. Newventure must have its data management system online within a week or face changing database management systems or going out of business.

(Confidential) Acme is embarrassed that it did not update its webpage but feels that its various disclaimers provide adequate protection. Acme has no intention of fixing AcmePro v. 4.0 since v. 5.0 will be out within a matter of months. Currently, Acme is secretly testing a beta test version of v. 5.0 that is optimized to work on the new operating system.

(Mediation Instruction) Congratulations, you are being considered as the online mediator. This is your first online mediation. Initially, as in any mediation, you must educate the parties and determine if you are the right mediator. The starting point is your draft of your online submission form. At this point, you may email basic materials to the parties on mediation, the mediation process, your approach, and your curriculum vitae. As you are building the parties' confidence in your abilities as a mediator, you must also determine whether the dispute is susceptible to online mediation. So, you contact the parties. You explore what technology they have available, *e.g.*, bandwidth, videoconferencing, email, and whether the parties are comfortable using technology to discuss their dispute. You must also consider the software options. What software is available to the parties and which mediation software packages may facilitate resolution of this dispute? As in face-to-face mediation, you want to explore the nature of the dispute and the concerns of the parties regarding online mediation or technology-related concerns. You may also wish to consider how the laws of the relevant jurisdictions may affect the mediation. You may conduct discussions with the parties until you are comfortable, in your professional judgment, that this dispute is capable of being resolved through online mediation or you recognize that because of costs or other concerns, face-to-face mediation is the superior alternative to online mediation.

If the mediation is asynchronous, then the parties should be asked to notify the mediator if they will be unavailable by email for more than twenty-four hours, preferred or alternative email addresses, how long the parties have to respond to email, and other similar ground rules. If the mediation may require attachments, you want to establish which format will be used and any other technology requirements. You must make the parties aware that electronic communications made as part of the mediation process are confidential and may not be further distributed without the consent of all the parties and the mediator. If a message is inadvertently disclosed, then all parties and the mediator must be immediately notified. This ends the mediator instructions.

We do not have space to go through this simulation in greater detail. We would choose SmartSettle for this dispute as the superior alternative. Clearly a blind bidding program would not result in an optimal solution, since that would entail a series of amount bids until the parties bid a settlement figure within a fixed percentage of each other and the software would then settle within the agreed range. The theoretical optimal resolution is for Newventure to use the v. 5.0 beta software

under a confidentiality agreement until the new AcmePro v. 5.0 is released, then to buy the new software. In exchange, Acme would receive a release from liability, a possible positive review, and an additional test facility. These non-financial interest-based resolutions require a skilled mediator to engage in candid discussions with the parties and confidence building measures.

## CONCLUSION

Mediators, legal scholars, and policy makers must consider the existing and potential technical and legal infrastructure that supports and will support mediation. But, this is infrastructure, a basis on which to build online mediation. The many *ongoing* scientific studies of computer-mediated communication should inform their view on if, how, or when online mediation is feasible or desirable. As research progresses, the assumptions underlying online mediation should evolve. With these caveats, disputes arising out of any potential subject matter may be resolved using computer-mediated communication. The only limitations on online mediation are the needs of the parties and the mediator. Online mediation will not be an appropriate forum for every dispute.[247] Some disputes will not be suitable because the physical presence of the parties or the mediator is required to bring closure to the conflict, but there should be no blanket requirements for either physical presence or virtual presence mediations. This is a judgment call best left in the first instance to the parties or to the sound discretion of the mediator. Finally, training in the proper selection and use of technology should be incorporated into the training of existing and future mediators.

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247. *Cf.* Laurie S. Coltri & E. Joan Hunt, *A Model for Telephone Mediation*, 36 FAM. & CONCILIATION COURTS REV. 179, 182 (1998) (mediation screening for appropriateness of telephone mediation).

## APPENDIX A

## ONLINE ADR PROTOCOLS[248]

### I. Description of the Process

The process of Online Mediation typically involves a series of email messages between the mediator and each participant. In his or her professional discretion, the mediator may utilize joint email communication, web forum (more highly secure) discussion, textual or audio chat, instant messaging, fax and phone communications.

MIRC's (Online Mediators) program encourages mediators to structure their facilitation in the following manner:

> A. [P]articipants should be encouraged to present one or more confidential statements to the mediator setting forth the issue(s) they believe are in dispute, their interests for any settlement, and the various options the participant[s] see[] as possible.
> B. The mediator should summarize the issues and seek to gain agreement that the full range of presented issues will be addressed.
> C. The mediator is then encouraged to engage in a series of private electronic conversations with each participant, and jointly with participants in the mediator's professional discretion. These conversations are to include questions to fully understand each participant's perspective, interests and perceived options, as well as any comments and suggestions that may further settlement by the mediator.
> D. Upon conclusion of the electronic conversations, there should either be a confirmed settlement, including means of implementation, or the mediator's declaration that no agreement has been reached.
> E. If there is a settlement, the mediator should prepare a summary of the terms of settlement and ask each side to confirm that they will abide by the terms.

### II. Suggested Ground Rules

> A. PRE-MEDIATION RESPONSIBILITIES
> 1. The participants are asked to notify the mediator of any travel plans or other circumstances that may prevent them from participating for more than 24 hours in the mediation.
> 2. The participants are asked to notify the mediator of any acceptable alternative email addresses in the event of technical difficulty.
> B. SENDING/RECEIVING EMAIL
> 1. In the event the mediator sends a message to both parties at one time, be aware that REPLY TO ALL will have you sharing information with all listed participants. If you want to only contact the mediator, be sure that you simply

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248. Collin Rule, *Online ADR Protocols, available at* http://webboard.mediate.com/~OnlineMediators/ read?3334,333 (last visited Oct. 28, 2001) (reproduced with permission).

REPLY. You can never be too careful in ensuring that only those whom you want to get your message are in fact sent your message.

2. The mediator should respond within 24 hours of receipt of any participant email message or other communication.

3. It is the responsibility of all participants to check their email at least once per 24 hours and to be responsive to mediator communications.

## C. DELAY IN SENDING/RECEIVING EMAIL

In the event there is a delay in receiving a response online, the mediator shall be empowered to telephone, fax or use whatever other means are available to contact a participant. The parties should assume that if there has been no contact for 3 days, they should make every effort to contact the mediator and determine what the problem is.

## D. ATTACHMENTS

It is possible that the mediator will be transmitting attachments to certain messages. If this occurs, it is important that all participants are able to read the attachment(s). The mediator is therefore to seek to obtain agreement on an acceptable format (*i.e.* Word, Wordperfect, Rich Text Format or ascii) at the beginning of the mediation.

## E. DISTRIBUTION OF MESSAGES

All electronic communications generated from the mediation shall not be permitted to be distributed to a non-participant at any time without the express permission of all parties and the mediator. In the event of an inadvertent distribution, all effected participants shall be promptly notified.

## F. MANAGEMENT AND DISCLOSURE OF INFORMATION ONLINE

The mediator shall only disclose specific offers and ideas from one participant to another as the mediator is expressly authorized to share. If it is unclear whether a mediator is authorized to share information, the mediator shall request this permission from a participant and only share information with the other participant as is authorized.

## G. PRIVACY PROTECTED

1. The participants agree to not use any of the information presented or received during the mediation in any future legal, administrative, or other contested proceeding, nor in the media. This provision may be problematic depending upon the jurisdiction in which the mediation takes place. This includes all communications between the participants and with the mediator and OnlineMediators program from the earliest contact regarding possible mediation to the completion of the mediation.

2. The participants further agree to not disclose any information presented or received to other people who are not participants to the mediation, with the exception of participant professional advisors (attorneys, financial advisors, union representatives, and the like). In all such events, that fact that a participant consults with a professional advisor does not in any way lessen the confidentiality of the online mediation process. The confidentiality of Online Mediation is intended to protect all participants with the expectation of such confidentiality (non-admissibility and no contacts with media) and also to protect the mediator and OnlineMediators Program.