

Mediating in Your Pajamas: The Benefits and Challenges for ODR Practitioners

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Many alternative dispute resolution (ADR) professionals remain skeptical of on-line dispute resolution (ODR) out of a belief that the cold, impersonal realm of cyberspace cannot adequately accommodate human emotions and meet the needs of disputants as fully as face-to-face ADR processes. This essay discusses how emotions and cognitive limitations influence the mediation process on-line, possible methods by which ODR neutrals may address human needs, and some of the challenges and rewards experienced by ODR practitioners as they use technology to deliver traditional ADR services.

Millions of disputants are seeking and receiving assistance with the resolution of their disputes on-line through mediation, arbitration, facilitated dialogues, teleconferences, videoconferences, and hybrids that integrate on-line technologies into traditional ADR processes.¹ As with all processes and forums, the goal is to fit the “forum to the fuss” (Sander and Goldberg, 1994). Just as mediation is not the right process for all disputes, ODR will not be appropriate in every case.

However, as millions of disputants have learned, and as thousands of ADR-ODR professionals can attest, on-line technologies are useful in addressing many types of disputes (Raines, 2005). ODR cases are typically similar to off-line ADR cases: they involve real people seeking redress or resolution to a problem with the help of a third-party neutral, at a reasonable cost, within a reasonable time frame. Disputants often choose the ODR format to overcome problems posed by multiple jurisdictions or geographic distance, or purely for convenience.

This essay will discuss some of the ways in which the “human factor” (that is, emotions and cognitive limitations) influence the mediation process on-line, possible methods by which ODR neutrals may address human needs, and some of the challenges and rewards experienced by ODR practitioners as they use technology to deliver traditional ADR services. In the end, you are likely to find that ODR is simply another way of supplying ADR services, with neutrals required to use *generally* the same skill set, with the added twist of doing so via the medium of technology.

While there has been more research on ODR in recent years, very little work has yet to examine the practice of ODR (Raines, 2005). This article represents an attempt to begin the process of raising questions about what it is like to be an ODR practitioner. It does this by sharing the author’s personal experiences as an ODR practitioner with more than five years of experience on more than eight thousand cases, as well as through sharing the experiences of a number of other ODR practitioners. Some of the information presented comes from feedback gained at the 2004 annual convention of the Association for Conflict Resolution (ACR) held in Sacramento, where a roundtable discussion was held among approximately twenty-five on-line neutrals, mostly mediators and arbitrators. This was the largest known gathering of seasoned on-line practitioners to date. Some of those present had been acting as on-line neutrals for five years or more, with thousands of cases to their credit, while others had just begun offering ODR services. The majority of these ODR practitioners worked for Squaretrade.com, while others had independent ODR practices or worked through other organizations.

A second source of data is a small number ($n = 10$) of surveys and interviews of ODR practitioners conducted by the author. Most of the respondents work for Squaretrade.com, a company that deals primarily with disputes arising from eBay transactions and other disputes occurring as a result of Internet transactions; thus this small sample is not assumed to represent the larger ODR practitioner population.

The Human Factor in ODR: Dealing with Anger and Frustration On-line

Neutrals who practice both on-line and off-line tend to agree that on-line disputants often express higher levels of anger during their opening statements (typically typed, not spoken) and in the initial communications that follow the commencement of mediation. Because these communications

are not occurring in a face-to-face environment, disputants are less inhibited and more likely to engage in escalatory behavior, such as name calling, blaming, accusations of negative intentions and dispositions, and other highly negative attributions (see Thompson and Nadler, 2000, for more on attribution theory). Societal norms concerning communication etiquette seem to be less influential in restraining expressions of anger and hostility in on-line communication than in face-to-face or telephone communication. The anonymity of the on-line medium makes people feel safer expressing strong emotions than they do in the face-to-face environment. It is also likely, however, that because body language is absent in the on-line environment, communicators feel a need to use strong language to communicate explicitly emotion that in-person would be implicitly conveyed through eye contact, sighs, cold stares, and so on.

The ACR roundtable participants discussed various methods for dealing with this challenge. The group's consensus was that neutrals need to recognize and validate the emotions of on-line disputants repeatedly and explicitly as an important step in the mediation process. If disputants come to know that the mediator has registered their emotion, they may feel less need to keep conveying it over and over again. For example, just as off-line neutrals might do, ODR neutrals commonly begin their communications with statements such as, "I can tell this has been really frustrating for you," or "I know it is hard to be patient in a case like this, and I really appreciate your efforts to work this out cooperatively in mediation." Expressions of recognition and empathy allow disputants to feel that the mediator has heard them and that their emotions have been understood.

As in off-line mediation, refusing to acknowledge the expression of emotions can lead to feelings of alienation from the neutral and a sense that the mediator simply is not concerned or does not "get it." Many of these disputants may be tempted to drop out of mediation in protest, as a way to express their anger or out of frustration with the dispute itself. While more research needs to be done, anecdotal accounts from on-line mediators suggests that it is more common for disputants to "walk out" on an on-line mediation session than it is for them to leave a face-to-face process. When frustration with the process gets high or when disputants feel that impasse is likely, they may quit responding to messages from the neutral or the other parties. This is the on-line equivalent of walking away from the table in a traditional mediation process, but doing so is easier, with fewer concerns about losing face, in an on-line format. To reduce this possibility,

neutrals can educate and remind disputants about the empowering elements of the mediation process itself:

“You do not have to agree to this (or any) proposal if you feel it is not in your best interests.”

“Each of you will have an opportunity to share your side of the dispute fully, to talk about your needs, and to communicate any ideas or suggestions you have about how to solve this problem.”

“No one will force you to participate in or agree to an outcome that you feel is unfair.”

As is the case in off-line mediation, this acknowledgement and validation need not be confused with a loss of impartiality. Anger, which often stems from fear, is heightened by a feeling of powerlessness and a lack of control. Reminding disputants of their power and influence in the mediation process can help mediators to diffuse the disputants' anger and get them focused on problem solving.

Because some asynchronous processes take place over days or even weeks, it is also important for the mediator to use many summary statements to remind parties of where they are in the process, of what they have achieved so far, and about the issues left to be resolved. Asynchronous mediation formats allow mediators and parties to write draft comments and responses, giving them time to reflect more deeply on how best to communicate their needs and ideas. This is one important benefit of ODR over face-to-face processes.

Feedback from on-line neutrals also indicates the important role that mediators can play in reframing angry language into more neutral language before sharing it with the other party or parties. This is most frequently possible when the on-line mediation takes place in the “shuttle diplomacy” format, in which disputants send their messages only to the mediator and the mediator then shares the concerns of disputant A with disputant B. This is similar to an off-line mediation done solely through a caucus format, except that the ODR format gives the neutral more time to digest what was said and then craft an effective response.

ACR roundtable participants noted that sometimes angry disputants do not channel their anger toward the other party but instead direct it toward the mediator. One on-line neutral noted that for this reason ODR practitioners need to have a “thick skin.” Any social distance or sense of respect toward the mediator commonly shown in face-to-face processes is

sometimes absent or reduced in on-line processes. On-line disputants may make a statement such as the following to their mediator or other neutral: “Any intelligent person could tell that the other person is a liar.” Attacking the mediator occasionally occurs in off-line processes, but it appears to be more common on-line. When communication is occurring in an asynchronous environment (meaning that communication is not occurring simultaneously between the disputants and mediator, as in a chat room, but instead through a series of e-mails or other messages separated by time), the mediator can take the necessary time to calm down, reflect, and make a cool response instead of a hot response. ACR roundtable participants agreed that humility was an important characteristic for all neutrals, but possibly even more indispensable for on-line mediators.

Trust Building and Repair

Trust building and trust repair are frequently important in off-line ADR processes, but trust-related problems can pose even larger barriers to resolution for disputants who have had all of their interactions on-line and have never met face to face. When individuals buy from or sell to people they have not met personally, they cannot benefit from face-to-face communication, eye contact, handshakes, and other forms of incoming non-verbal information. In the absence of this information, individuals are more likely to be wary of their transaction partner and to think the worst of him or her if problems arise (Ostrom and Walker, 2003). Ongoing relationships, whether professional or personal, help to ensure that transaction partners will behave in cooperative and appropriate ways (Axelrod, 1981), yet many business relationships developed in cyberspace are “one-shot” interactions. On-line disputants often state that they are hesitant to reach an agreement because they have little faith that the other party will live up to the mediated agreement or abide by the arbitrator’s decision. This lack of trust can keep resolution from occurring even when it is clear that both disputants would be better off by reaching a resolution through ODR. It is therefore imperative for ODR practitioners to be well versed in how to handle issues of trust building and repair.

When it is clear to an on-line neutral that lack of trust is hampering the process of dispute resolution, the neutral needs to decide how best to build trust between the parties. Spending time to build a positive relationship is one way this can happen. This is a good idea when the parties may have future interactions (such as a recurring buyer-seller relationship) or

when either party has exhibited dehumanizing behavior toward the other (for example, voicing a belief that the other person is worthless, a “scammer,” and the like). There are two basic kinds of trust: identification-based trust (IBT) and calculus-based trust (CBT). The former depends on the existence of a good relationship and empathy between the parties. When the parties care about each other and can understand the other side’s perspective, IBT may suffice. ODR practitioners may encourage parties to look into each other’s reputations in order to build this kind of trust (for example, is the other party a member of the Better Business Bureau? What is the party’s “feedback rating” if he or she is an eBay seller? and other documentable traits). They may also encourage the parties to introduce themselves by sharing brief biographies and pictures. Anything that helps to rehumanize the parties to each other and to build a sense of understanding between them may help address issues of distrust. This may be done best by phone, if adequate ground rules apply and the parties agree to remain civil. Likewise, if the disputants seem wary of using a mediator they have never met in person, the neutral may want to spend some time introducing him- or herself, summarizing his or her experience and qualifications, addressing the disputants’ concerns, and building rapport with and between the disputants. On-line disputants often appear to have a heightened sense of skepticism of the other party (or parties) and of the mediator.

The joint creation of shared ground rules may be one way to further this process and build trust in both the process and the parties, but the ground rules for on-line dispute resolution may be substantially different from traditional ground rules. For example, ODR neutrals may wish to have explicit discussions about when and how communication will take place via the chosen technology (for example, through the mediator only; parties check messages and respond within twenty-four hours; no e-shouting).

When building relationships is either inappropriate or not desired by the disputants, neutrals may instead try to focus on the use of increasing calculus-based trust. In CBT, individuals do what they promise to do or what is clearly expected of them out of a desire to avoid unpleasant penalties (Lewicki and Wiethoff, 2000), rather than out of a sense of obligation or empathy. This has also been called deterrence-based trust. On-line neutrals can work with the parties to craft agreements that have incentives to increase the chances of smooth implementation. For example, the agreement might state that party A will pay party B a specified amount of

money by date X. If the money is not received by then, there will be a 10 percent penalty or some other appropriate penalty will apply. For the deterrence to be effective, the punishment for noncooperation must be higher than the reward for noncooperation and the likelihood that punishment will occur must be high. Agreements reached through ODR can generally be enforced through the courts, just as private mediation agreements are enforced. The “agreement to mediate” may need to spell out which jurisdiction any enforcement disputes will use.

From speaking with ODR practitioners, it seems that building trust and repairing trust after norm violations is an important and challenging part of working in an on-line environment. While many family mediators also deal with these issues on a daily basis, the situations are somewhat different: divorcing or divorced couples often lack trust in each other on the basis of a history of trust violations in the presence of a deep personal relationship. In this case, CBT approaches (that is, building trust through self-enforcing, binding agreements) are more likely to work than are IBT approaches (that is, building trust by building relationships and empathy between the parties). In contrast, many disputants using ODR have never met one another face to face, yet they are likely to be cynical about the other’s trustworthiness even when no clear history of norm violation exists. In these instances, building relationships and empathy may be as effective as using CBT approaches. ODR practitioners often spend time rehumanizing the parties to one another by playing “devil’s advocate” or asking them to place themselves in the other’s position (that is, “perspective taking”).

Challenges and Benefits of ODR Practice

As the discussion so far indicates, some of the normal challenges faced by ADR practitioners are simply magnified when the process is conducted via the Internet or other ODR technologies. However, there are many advantages to an on-line ADR practice. This section examines the rewards and challenges specifically related to being an ODR practitioner.

Who goes into on-line dispute resolution? Just like traditional ADR practitioners, ODR practitioners come from all walks of life and include both attorneys and non-attorneys. Many ODR neutrals also work with court-connected ADR programs where they mediate civil, domestic, juvenile, or small claims cases in off-line formats. Like many ADR providers, many ODR neutrals have primary careers as attorneys, human

resources professionals, teachers, ombudsmen, conflict resolution trainers, and counselors, and they practice ODR in addition to these other responsibilities.

Due to the convenience factor, it is likely that a slightly higher percentage of ODR neutrals include retirees, stay-at-home parents, or others for whom a full-time, traditional practice is either impractical or undesirable. Some ODR practitioners begin offering ADR services through on-line formats as a way to expand their traditional practice or they offer these services after requests from their existing clients. Some practitioners integrate ADR and ODR, choosing to manage some of the dispute resolution process through e-mail, conference calls, or other technologies, while keeping some face-to-face meetings as well. This integration of ODR and ADR is increasingly common and can be used to maximize the efficiency of the dispute resolution processes by saving face-to-face meetings for those issues that cannot easily be dealt with on-line. For some disputes of low economic value, or when the parties live in differing legal jurisdictions (for example, London and New York), on-line dispute resolution simply makes economic and jurisdictional sense, as it may be less costly and more practical than other formats.

Rewards of ODR Practice

The ODR practitioners surveyed were asked to summarize the rewards and challenges of ODR practice. In general, their responses were strikingly similar to what we would expect from off-line practitioners, with only a few exceptions. One of the clearest exceptions comes from “the convenience factor.” On-line neutrals can generally work from homes or offices, rather than traveling to courthouses or other places where ADR services are traditionally offered. This not only is convenient, but also cuts down on the hours for which clients are billed for travel time. One respondent noted that ODR can be done from anywhere and that this has many advantages: “When I travel internationally for business or pleasure, I usually have to put my traditional ADR cases ‘on hold’ until I get back. As a private practitioner, this increases the cost of vacations to me. But with my ODR cases, I can take them wherever I go. I have done on-line mediation from Asia, Latin America, Eastern and Western Europe, and even from a cruise ship. As long as I can find an Internet café or other place to connect, I can take my work with me.”² This convenience was also noted by two semi-retired practitioners and one stay-at-home parent who had temporarily

withdrawn from her other work in order to be home with her young children.

In addition to the convenience factor, ODR neutrals found their work very rewarding in other ways. For example, they enjoyed the expressions of appreciation that sometimes come from the disputants at the end of a difficult case. While this also occurs in face-to-face processes, some disputants using ODR stated a belief that they would have lacked an outlet for resolution entirely if ODR had not been made available to them. Going to court simply is not an option for many of these disputants. Doing so might cost them more than the economic value of the case, especially if the disputants are geographically separated. A number of ODR neutrals stated they felt good about being able to help people who might otherwise not have adequate access to either ADR or justice processes.

ODR neutrals at the ACR conference and in the written surveys also noted that the on-line format had a “laboratory” element to it that allowed mediators to try different techniques in different cases and to learn from trial and error in order to improve their skills. While this is certainly true of traditional ADR processes, an asynchronous on-line format perhaps allows more time for reflection and conscious application of various skills and techniques. Additionally, ODR formats generally produce written records of the interactions that may allow for deeper reflection and study.

Challenges of ODR Practice

Some ODR practitioners noted that it can be difficult for disputants to overcome the barriers posed by communicating solely through the written word. “On both sides, the meaning behind the words in print is often lost or misconstrued, both between myself and a party and between the parties themselves, previous to beginning mediation. However, this is often the area that is easiest to ‘fix’ once I enter the picture and can help the parties to see the true meanings behind each other’s words.”³ It appears that ODR neutrals and other frequent on-line communicators are increasingly finding ways to express nonverbal emotions on-line. For example, writing in all capital letters is the on-line equivalent to shouting. The use of smiley faces or other symbols is also increasing, with shared meanings existing at least within national or cultural groups. On the whole, ODR neutrals felt that communication barriers posed by technological problems, computer illiteracy, or poor writing skills were insurmountable barriers in only a

relatively small minority of cases. However, there was agreement that these problems are serious obstacles in some cases and that ODR neutrals need to be vigilant in addressing these problems proactively whenever possible and in admitting defeat when they become impossible to overcome. It is better to have a case end in an impasse than to have a resolution that is not clearly understood by all parties.

Advice for New ODR Practitioners

When asked to share advice for new ODR practitioners, respondents had a variety of interesting things to say.

Be patient with yourself and with the parties, as there will be a learning curve with new technologies and formats. Practice on your own before launching your skills with real disputants.

The work can leave you feeling somewhat isolated. You “talk” to disputants all day via computer, but it is not the same. Make sure you get involved in civic or professional organizations, or form some sort of support group with other mediators so you can meet your social and professional networking needs outside the on-line environment.

ODR is sometimes too convenient. You can find yourself mediating at 2 A.M. or in the middle of a family reunion. As work and home merge, make sure you establish and maintain good boundaries so you can do both well.

Notes

1. For examples of ODR services see <http://www.squaretrade.com> and <http://arbiter.wipo.int/center/faq/domains.html>.
2. Anonymous respondent no. 4.
3. Anonymous respondent no. 2.

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