

New Mediator Capabilities in Online Dispute Resolution

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We live in turbulent times, especially where technology is concerned. Face-to-face conversations are increasingly giving way to communication over the Internet and mobile devices. As a result, the way we communicate with each other, whether personally or professionally, is constantly evolving.

Technology has changed every major industry in the United States, from medicine to entertainment to finance. It is inevitable that it will change dispute resolution as well. The younger generation uses technology to communicate with their friends, families, and professional contacts. For dispute resolution services to be relevant to them, it has to effectively leverage technology.

Even with that said, many of the mediators I speak with are skeptical about online dispute resolution (ODR), and they wonder how technology can help make dispute resolution processes more effective. In this short article, I'd like to offer a few possibilities that ODR opens up to mediators and arbitrators, and how these capabilities might improve the dispute resolution process.

Asynchronous Interaction

Face-to-face dispute resolution must happen in "real time" as each side reacts immediately to new developments. A mediator can call a time out or use a caucus to break up this flow, but in joint meetings and discussions disputants must engage in a give-and-take where their responses are expected right away. In the lingo of computer-mediated communication, this is "synchronous" interaction.

Online parties, however, have the possibility of "asynchronous" interaction, where their response is not expected immediately. Disputants can connect to the ongoing discussion at different times, and even defer their response until after they've had time to consult with others, do some research, or just contemplate the situation.

As some online dispute resolution writers have observed, this ability to interact asynchronously can help parties to "be at their best" in a mediation. Instead of reacting emotionally to a new development or escalating a discussion out of surprise, parties can consider an issue and communicate in a considered way. They can still react emotionally, but they have the option of stepping back and reflecting before they respond.

This asynchronous communication can also be a valuable tool for mediators and facilitators. Just as disputants can react emotionally to new developments, neutrals can get caught up in the immediacy of a face-to-face session. Third parties can benefit from the cooling distance provided by asynchronous interaction, allowing them to pay greater attention to their own biases and perhaps enabling them to become more reflective practitioners.

Pre-Communication Re-Framing

Re-framing is an important part of any mediator's skill set. Helping parties frame their communications in a way that the other side can best hear and understand is an essential component of moving a dispute toward resolution. However, in a face-to-face interaction, re-framing must be done in front of both parties. Once a name is called or an accusation leveled it can't be

pulled back, even if the mediator does manage to work with the disputant to re-frame the sentiment in a more productive way. Many mediators have had the experience of parties making progress and moving in a productive direction when one side makes an inopportune comment that derails the discussion and yanks parties back into name-calling.

Online, a mediator has a variety of options. If one party posts a comment that is very accusatory in tone, or violates ground rules about slinging insults, a mediator can discuss the sentiments expressed with the poster and help them to re-frame the posting before the other side has seen it. A mediator can even take the comment off of the live site and discuss it in caucus with the author before jointly posting a re-framed version. In the extreme case, a mediator can even set the system to require mediator approval of each posting between parties, allowing the mediator to re-frame each communication in a system along the lines of shuttle diplomacy.

These options allow the mediator to re-frame communications transparent to the intended recipient, so that the initial unproductive outburst and the resistance to re-framing can be dealt with behind the scenes and only the re-framed comment actually makes it to the listener.

Concurrent Caucusing

While some mediators refuse to caucus with individual parties during mediation sessions, others rely on it quite heavily. The ability to talk about issues with one side in a confidential way can be extremely valuable in moving parties toward a resolution. Interests and motivations that would never be expressed in a joint discussion can come out in caucuses, allowing parties to be heard and enabling the mediator to get a better sense of the sub-issues in a dispute.

Caucusing can be a crude tool in face-to-face mediation sessions, however. The mediator usually has to call the joint discussion to a stop, and then has to decide which of the parties should caucus first. The other party is then sent into the hallway to wait while the mediator caucuses. Then, usually to preserve the sense of even-handedness, the parties switch and the mediator caucuses with the other side. Then, after a relatively short amount of time (because the mediator is cognizant of the other party sitting outside the meeting room doing nothing) the parties are re-convened. Hopefully the delay hasn't derailed the progress that was being made before the caucus; often, mediators only call caucuses when the discussions hit a stalemate because they don't want to disrupt productive discussions.

Online, caucusing can be much more flexible. In Online Resolution's "Resolution Room" environment, mediators can caucus with parties at the same time the joint discussion is going on. In the joint discussion, postings reach all participants, but in caucus discussions the mediator interacts with one side or the other. This allows the mediator to caucus through the entire mediation, even when the discussion is progressing well. It also prevents the other side from having to wait during caucusing, or to wonder what secrets are being passed while they are out of the room.

It should be noted that maintaining three different concurrent discussions (joint, caucus A, and caucus B) can be a little confusing at times. However, this kind of mediator multitasking can be very effective, and it's not unlike having several documents open in a word processor. Managing these different threads (and making sure communications go in the right places) is one of the new skills ODR professionals need to master.

Ongoing Consensus Evaluation

Consensus Building processes often involve multiple parties discussing a wide variety of issues. Facilitators of these processes frequently have many balls to juggle, as each party is at a different

stage in accepting or rejecting proposals at hand. Often facilitators will evaluate the consensus of a group, going around the table and getting a sense of where people stand on an issue. This is a time consuming process that must be done judiciously, as parties can become frustrated with multiple consensus evaluations when they don't perceive that individuals are making any progress toward agreement. In addition, these consensus evaluations are frequently public, meaning that individuals must make open pronouncements of their positions even though they may be wrestling with different and conflicting desires. Once a statement is made in public many individuals feel the need to defend the position they've taken instead of continuing to consider alternatives.

Online consensus evaluation can be done in an ongoing way. In our Resolution Room environment, mediators and facilitators can poll participants to determine the extent to which they agree with certain statements, or to express what they see as the key obstacles to agreement. These results can be confidential, viewed only by the facilitator, or public as to totals (who voted for what, or what the "average" agreement number is) while keeping the identities of individual voters confidential.

This information can be very helpful to the mediators and facilitators, giving them a sense of how close or far the group as a whole may be to agreement. Parties are not forced to defend their opinions in public, which allows them to be more honest and less defensive.

Conclusion

Based on my conversations around the country, most ADR professionals can easily envision how audio and video-conferencing will allow for the delivery of effective dispute resolution services over the Internet, mostly by replicating face-to-face ADR processes. However, there are advantages to online dispute resolution service delivery and computer mediated communication that cannot be integrated into purely synchronous, face-to-face ADR service delivery. We are just beginning to use these techniques, but mediators should get trained in the new tools available online and try them out to see what benefits they can offer.

If you'd like to try out these tools for yourself, visit one of these sites:

- You can get a free 30 day demo of Modria's platform at mediationroom.modria.com. You can register as a mediator, open a case, and try out all the functionalities presented above.
- You can try out various mediation scenarios at juripax.com. There you can select from a variety of scenarios, from family mediation to a consumer issue to a workplace issue.
- Try out a cutting-edge negotiation platform at Smartsettle.com. Smartsettle uses the algorithmic power of computers to help crystalize trade-offs and generate pareto optimal outcomes.

A few other links to check out:

<http://www.odr.info>
<http://www.adrhub.com>
<http://www.odr2012.org>

<http://www.modria.com>
<http://www.juripax.com>
<http://www.smartsettle.com>
<http://www.cybersettle.com>
<http://mediationintheclouds.com>