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Resolving Offline Disputes Online: The Advantages of Using ODR in Lieu of Face-to-Face ADR

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Abstract: Once the Internet became a global marketplace in the mid-1990s, disputants commenced using online dispute resolution (ODR) to settle their conflicts that had originated online. Yet as Internet users became increasingly comfortable with ODR as a dispute resolution mechanism, they began using the online forum to resolve their disputes that they would have previously resolved using face-to-face interactions. The online environment can provide tools that may enrich parties’ dispute resolution experience beyond what is possible offline. This Article evaluates the merits of using online dispute resolution to resolve disputes that originate offline. It examines the existing criticisms of ODR, and it ultimately determines ODR to be superior to offline dispute resolution for a multitude of reasons, including cost-savings, efficiency, allowing parties increased reflection time in their emotionally-charged communications, reducing unequal bargaining power between disputants, and minimizing the detrimental effects of body language that occur when parties settle their conflicts in person. The Article then adumbrates some of the previous uses of ODR to resolve offline disputes and proposes some methods for practitioners to gradually embrace ODR.
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Introduction

Technology has transformed alternative dispute resolution (ADR) by supplementing and supporting the operation of many dispute resolution processes.\(^1\) Moreover, technology has led disputants to rely on the Internet to attempt to resolve their conflicts.\(^2\) Once the Internet became a global marketplace in the mid-1990s, disputants commenced using online dispute resolution (ODR) to settle their conflicts that had originated online.\(^3\) ODR developed around 1996\(^4\) in response to online consumers’ e-commerce conflicts that arose from their buying and selling goods from each other on websites like eBay.\(^5\) Initially, ODR was typically limited to commercial disputes between parties who were geographically separated.\(^6\) Yet as Internet users became increasingly comfortable with ODR as a dispute resolution mechanism, they began using the online forum to resolve their disputes that they would have previously resolved using face-to-face interactions.\(^7\) Disputants have adopted ODR in numerous types of conflicts, including family-law disputes,\(^8\) internet-domain-name disputes, consumer-transaction disputes, and insurance disputes.\(^9\) ODR is no longer considered radical nor is its

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\(^1\) Andrea M. Braeutigam, *Fusses that Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 282 (2005).

\(^2\) Alan C Tidwell *Handling Disputes in Cyberspace* 7 AUSTRALIAN DISPUTE RESOLUTION JOURNAL 245, 250 (1996).

\(^3\) Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 276 (2004-2005) at 276 (noting that the Internet has existed since the late 1960s, but the World Wide Web was not invented until 1989, and the federal government prohibited online commercial activity until 1992).


\(^5\) Ethan Katsh & Janet Rifkin, *Online Dispute Resolution: Resolving Conflicts in Cyberspace* (Jossey-Bass 2001) [hereinafter Katsh & Rifkin];


\(^7\) Rule, supra note 6, at 43-44.

\(^8\) Id.

use restricted to disputes that originated online. The quantity and type of disputes being resolved online will increase in the upcoming years, particularly in the non-commercial context. The pressing question for ODR scholarship is how we might adapt dispute resolution methods to an online forum in which human relationships unfold in a virtual space that in 2012 we can barely imagine?

Scholars have questioned the efficacy of ODR as a dispute-resolution mechanism. However, cyberspace possesses distinct attributes that render it preferable to other forms of ADR in many offline contexts. Previous scholarship on ODR is fairly limited and has not fully addressed how parties can use the Internet to resolve their offline disputes. One weakness of general ODR scholarship is that it often analyzes then-extant ODR services which have since become technologically outdated and ceased to exist. An additional weakness in the existing scholarship touching on ODR’s benefits to resolve offline disputes is that it has


10 Braeutigam, supra note 1, at 280.
11 Id.
13 See e.g., Joel B. Eisen, Are We Ready for Mediation in Cyberspace?, 1998 BYU L. Rev. 1305, 1308 (1998) (noting that there is almost universal agreement that mediation is most effective if the parties to the dispute are physically present before the mediator and arguing that without physical cues, and without oral communication, mediators cannot meet important process values). See also William T. D’Zurilla, Alternative Dispute Resolution, 45 La. Bar 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.”).
14 Cf. Braeutigam, supra note 1 at 280 (noting that cyberspace’s unique attributes make online mediation a suitable choice to resolve many disputes).
16 Braeutigam, supra note 1, at 280.
17 For example, numerous commentators explain how parties can use SquareTrade to resolve their disputes. However, eBay discontinued using SquareTrade as an ODR platform in May 2008 after altering its feedback system. See Square Trade Warranties, ODR CASES CAN NO LONGER BE FILED WITH SQUARETRADE, http://www.squaretrade.com/pages/odr-discontinued (last visited Dec. 22, 2011).
frequently narrowed its focus to using mediation-based,\textsuperscript{18} negotiation-based,\textsuperscript{19} or arbitration-based\textsuperscript{20} ODR rather than examining online dispute resolution more generally.\textsuperscript{21} Most commentators discussing ODR have primarily focused on how parties and mediators depend on the Internet for filing, scheduling, and managing ADR processes.\textsuperscript{22} Others have limited their explorations to how technology uses parties’ confidential settlement offers and demands to calculate what settlement, if any, the parties should mutually accept.\textsuperscript{23} Much ODR scholarship has chiefly argued that ODR’s acceptance in the legal profession is foreseeable given the growth of e-communities and the increasingly Internet-savvy generation.\textsuperscript{24} Yet despite touting the numerous benefits of ODR and ODR’s inevitability, ODR scholars have failed to propose adequate methods to create a hybrid process combining online and offline dispute resolution mechanisms.

\textsuperscript{18} See, e.g., Eisen, \textit{supra} note 13, at 1308-11, 1321 (expressing skepticism about online mediation due to its lack of in-person contact).

\textsuperscript{19} Id.

\textsuperscript{20} See, e.g., Thomas D. Halket, \textit{Improving Arbitration Through Technology: A Quest for Basic Principles}, 62 DISP. RESOL. J. 54, 56-61 (2007) (discussing fair use of technology in arbitration); Schmitz, \textit{supra} note 15 (exploring how binding online arbitration can effectively and efficiently resolve consumers’ conflicts with online merchants, and proposing how arbitrators in general should approach questions regarding use of technology to improve efficiency and make arbitration more cost-effective without jeopardizing due process); John R. Strout, \textit{Online Arbitration: A Viable Solution for Resolving Disputes that Arise from Online Transactions}, 1 J. AM. ARB. 75, 79-80 (2001). (discussing how online businesses are likely to embrace online arbitration, and to organize oversight groups to further foster such dispute resolution).

\textsuperscript{21} See, e.g., Braeutigam, \textit{supra} note 1.

\textsuperscript{22} See, e.g., Sarah R. Cole & Kristen M. Blankley, \textit{Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be}, 38 U. TOL. L. REV. 193, 194-95 (2006); see also Amy J. Schmitz, \textit{Legislat ing in the Light: Considering Empirical Data in Crafting Arbitration Reforms}, 15 HARV. NEG. L. REV. 67 (discussing arbitration empirical research and ODR software’s use in mediation, as well as findings from an experiment revealing how computer-mediated communication impacts formality, party empowerment, efficiency, emotion, mediator control, and other salient aspects of the dispute resolution process).


\textsuperscript{24} See Schmitz, \textit{supra} note 21, at 68 (citations omitted); Hoffman, \textit{supra} note 12, at 9 (discussing how ADR will increasingly embrace technology in the years to come).
In this article, I examine how ODR can resolve disputes that originate offline. I argue that ODR is better than face-to-face interaction for resolving disputes and should be used for disputes that do not originate online. Part I traces the history of ODR and explains the most common ODR processes. Part II summarizes the scholarship critiquing ODR and discusses some considerations that counsel against ODR. Part III focuses on the unique attributes of online communication to explore its advantages compared to offline dispute resolution. Part IV presents examples of non-commercial disputes that are especially apt for ODR in order to provide insight into evaluating whether the online forum is the superior dispute resolution locale. Part V introduces some purported hybridizations of the dispute resolution process that combine offline and online dispute resolution methods. Finally, I conclude with some guidance for parties considering using ODR to resolve their offline dispute.

I. General Overview of Online Dispute Resolution

A. History of ODR’s Rapid Growth

ODR developed from the broader ADR movement.25 Disputants developed alternatives to litigation in an attempt to circumvent the court system’s inherent weaknesses: case overload, delay, expense, and parties’ dissatisfaction with litigated outcomes.26 Negotiation, mediation, arbitration, early neutral evaluation, and combined processes such as med-arb (mediation-arbitration) and arb-med (arbitration-mediation) all became viable alternatives to litigation.27 ADR’s efficiency, cost-effectiveness, and prospects for disputants’ self-determination

25 Rule, supra note 6, at 11.
27 Braeutigam, supra note 1, at 277.
encouraged parties to adopt ADR in numerous offline settings.\textsuperscript{28} To capitalize on parties’
alacrity to use ADR, community centers and for-profit companies began offering mediation
services.\textsuperscript{29} Overburdened courts steered parties away from litigation as well, oftentimes
mandating that parties try using ADR to resolve their dispute before going to trial.\textsuperscript{30} Like the
other ADR forms discussed above, ODR developed in response to the search for a convenient,
cost-effective, efficient way to resolve disputes and alleviate court docket pressures.\textsuperscript{31}

The federal government initially spurred the growth of the ODR movement by creating
ICANN to handle disputes involving commercial actors’ rights to domain names.\textsuperscript{32} With
businesses creating new domain names to advertise their wares, trademark holders became
increasingly anxious about safeguarding their trademarks from infringement, particularly when
their online competitors started registering domain names that were similar, or even equivalent
to, their trademarks.\textsuperscript{33} The ICANN dispute resolution mechanism reinforced the notion that
ADR processes themselves were preferable to traditional litigation for the cost-effective,
efficient resolution of disputes that originated online.\textsuperscript{34}

The most significant catalyst behind the development of ODR was increased e-
commerce.\textsuperscript{35} Beginning in 1995, e-commerce grew exponentially when disputes arose

\begin{small}
\begin{enumerate}
\item \textit{Id.} at 278.
\item \textit{Id.}
\item \textit{Id.} at 285.
\item \textit{Id.}
\item Katsh, supra note 3, at 279-80. A domain name is commonly known as the internet address, for example, www.mediate.com. It is actually a string of numbers, an IP (Internet Protocol) address, that is unique to each computer, and the address is used to locate other computers over the Internet. INTERNET CORP. FOR ASSIGNED NAMES AND NOS., WHAT IS THE DOMAIN NAME SYSTEM?, http://www.icann.org/faq/dns (last visited Nov. 20, 2011).
\item In 1998, the federal government vested the responsibility of overseeing domain names in the hands of the Internet Corporation for Assigned Names and Numbers (ICANN).\textsuperscript{32} ICANN consequently established governing rules for handling domain name disputes: the Uniform Dispute Resolution Policy (UDRP). The ICANN process represents a milestone in ODR’s development.
\item ICANN has resolved more than 5,000 conflicts stemming from the rights to domain names. ICANN Information, INTERNET CORP. FOR ASSIGNED NAMES AND NOS., (Nov. 3, 2011) http://www.icann.org/general/.
\item Braeutigam, supra note 1, at 285.
\end{enumerate}
\end{small}
between buyers and sellers who bought and sold items in eBay auctions.36 Consumers embraced online shopping, not only to purchase goods from large retail stores but also to purchase goods from other online users in different parts of the world.37 Internet auction sites like eBay popularized online person-to-person transactions.38 But as commercial activity increased, so did disputes between commercial actors and trading partners.39 Traditional methods of resolving conflicts were no longer feasible, both because of the sheer volume of disputes that arose and because disputants were frequently located in different states or even different nations.40 Consumers and merchants in the global marketplace lacked a practical way to resolve their disagreements.41 The low-dollar value of many disputes exacerbated this dilemma.42 Because of the geographic distance between disputants, it was implausible for them to meet face-to-face.43 To bolster consumers’ confidence in e-commerce, eBay needed to find an effective method of resolving its customers’ disputes online.44

eBay was not the only company embracing ODR during the mid to late 1990s. Foundations, institutions, and universities funded experimental projects that were designed to resolve online disputes.45 For-profit ODR websites emerged in response to increased demand for ODR from upper-level governmental and corporate bodies with substantial business


37 KATSH & RIFKIN, supra note 5 at 77.

38 Id. at 73.

39 See KATSH & RIFKIN, supra note 5, at 3 ("Cyberspace seemed to us to be too active, too entrepreneurial, too competitive and too lucrative a place for it not to have many conflicts."); Rule, supra note 6, at 27-28 (outlining other early ODR experiments that emerged to handle disputes that arose online, such as the Virtual Magistrate Project, CyberTribunal, and the Online Ombuds Office).

40 Rule, supra note 6, at 27.

41 Id.

42 Id. at 28.

43 Id.


45 See Braeutigam, supra note 1, at 282.
activity. ODR has been especially popular in the past decade for resolving small claims. This popularity prompted the Federal Trade Commission’s (FTC) 2000 public workshop and 2001 roundtable discussions exploring expanded use of ODR for resolution of consumer disputes regarding online transactions, but federal regulators have not pursued these efforts since that time.

In order to address jurisdictional issues that arise as a result of international online disputes, ODR is gaining popularity in the international business community. Contemporary ODR is also marked by increasing integration of ODR technologies in private and government ventures, as well as by the adoption of ODR in disputes traditionally handled offline.

B. Defining Online Dispute Resolution

The scholarly literature on online dispute resolution uses ODR as a term of art, and also refers to ODR as online-ADR, e-ADR, eDR, cyber-ADR or automated ADR. ODR is basically any form of online ADR. More generally, it involves the use of technology to assist

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46 Id.
47 See Philippe Gilliéron, From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?, 23 OHIO ST. J. ON DISP. RESOL. 301, 302 (2008) (noting use for consumer small claims).
49 See Schmitz, supra note 15, at 181 n. 11 (citing Federal Trade Commission, http://www.ftc.gov/ (last visited Dec. 6, 2011) (“It appears from the FTC site and other research that little has happened since these events.”)
50 See Mary Shannon Martin, Note, Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-To-Consumer E-Commerce, 20 B.U. INTL L.J. 125, 151-54 (2002). The European Union along with the U.S. government, have “endorsed the use of ADR or ODR for resolution of . . . e-commerce disputes.” Id. at 151. The U.S. Federal Trade Commission has also “undertaken efforts in the form of public workshops to explore the current state of ADR in the online community.” Id. at 153-54. The American Bar Association has also created a task force to study potential ODR models for e-commerce disputes. “The willingness of both the United States and the E.U. to explore and encourage the use of ODR is a tremendous step towards an agreement on how to handle . . . e-commerce disputes. . . .” Id. at 154.
51 Braeutigam, supra note 1, at 282.
53 KATSH & RIFKIN, supra note 5 at 2.
people with the resolution of their dispute without resorting to litigation.\textsuperscript{54} ODR can consist of any online communication, including emails, text messaging, video conferencing, or a combination of ODR and face-to-face meetings.\textsuperscript{55} The chief ODR processes include negotiation, mediation, and arbitration.\textsuperscript{56}

The phrase “online dispute resolution” implies that the dispute resolution process occurs online, but ODR is much more than online dispute resolution in the strict sense of the phrase.\textsuperscript{57} For example, it includes not just the resolution of disputes but also preventative and strategic mediation strategies and conflict transformation.\textsuperscript{58} And ODR is not technically restricted to the “online environment”—just as the acronym ADR no longer completely encapsulates the nature and range of processes that it now encompasses, so, too, the acronym ODR has branched out beyond mere cyberspace applications.\textsuperscript{59} ADR and ODR have become terms of art and have replaced the words they originally intended to represent: they convey meanings that are both flexible and evolving.\textsuperscript{60} In this article, I use the term ODR to encompass not only ADR conducted predominately using online technology such as email or specifically designed email-based platforms, but also the integration of all electronic technology—whether computer, telephone or video-based—into dispute resolution processes.

\textsuperscript{54} Id.; Rule, supra note 6 at 44 ("[a]ny use of technology to complement, support, or administer a dispute resolution process falls into the world of ODR.")
\textsuperscript{55} Braeutigam, supra note 1, at 266.
\textsuperscript{56} Id.
\textsuperscript{57} Alexander, supra note 52, at 250.
\textsuperscript{58} See, e.g., Julian Gresser, Strategic Alliance Mediation - Creating Value from Difference and Discord in Global Business; 2 EUROPEAN JOURNAL OF LAW REFORM 651, 679 (2004).
\textsuperscript{60} Alexander, supra note 52, at 260.
1. Online Arbitration

Online arbitration involves a neutral third party issuing a binding or nonbinding decision over the Internet to settle a dispute. In documents-only arbitrations the arbitrator renders her decision after reviewing documents submitted by both parties, without utilizing live witnesses’ testimony. Documents-only arbitration comfortably translates to the online forum because parties can quickly and cheaply copy documents and transmit them over the Internet. In addition, parties can rapidly initiate proceedings online by either scanning written documents or electronically creating documents and subsequently e-mailing them to the arbitrator and the other parties. Compared to face-to-face arbitration, online arbitration is more convenient because to arbitrate, parties need only travel to their computers. Moreover, the simplified document-only process lowers the costs of travel, producing witnesses, copying, and postage. Online arbitration services include DRS (Dispute Resolution Services), Mediation Arbitration Resolution Service (MARS), JAMS, Online Resolution, Online Confidence, and Web Assured.

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62 Rule, supra note 3, at 42-43.
63 Id.
64 Id. The arbitrator and the parties can converse using text-based modes, such as email. Id. Moreover, the arbitrator can report her decision online. Id.
65 Id. For the numerous advantages of binding online arbitration, see generally Schmitz, supra note 15.
66 For a general list of ODR services, subdivided by continent rather than by type of service provided, see Berkman Center for Internet & Society, ODR Providers, Harvard Law School, http://cyber.law.harvard.edu/ecommerce/odr.html (last visited Dec. 22, 2011). It is unclear how often Harvard Law School updates this site, as it contains links to ODR services that no longer exist such as SquareTrade.
68 Mediation Arb. Res. Servs., MISSION STATEMENT, http://www.resolvemydispute.com/odr/ (last visited Dec. 7, 2011). While I was able to access this site during the first week of December, I tried to access the site several times between Dec. 19th and Dec. 22nd and found the site to be temporarily unavailable.
2. Online Mediation

Online mediation is an informal, private process of dispute resolution facilitated by a neutral third party that parallels offline mediation in many respects but is conducted through digital communication.\(^73\) Early online mediation websites relied primarily on email for information exchange between disputants, but current websites use threaded discussion technology or “bulletin boards” that archive the messages on a secure page.\(^74\) Parties and the mediator can thus send, receive, and read messages by accessing a single website.\(^75\) Some platforms prevent a party from seeing messages that the opposing party has sent to the mediator, and prohibit parties from communicating directly with each other.\(^76\) Other platforms allow the mediator to edit or delete participants’ postings from a universally viewable posting space.\(^77\)

Parties can mediate in real-time by chatting online.\(^78\) Whereas simple email mediations have been adequate for small consumer conflicts on eBay, chat technology and even videoconferencing have been necessary for parties in complex negotiations.\(^79\) The chat room model emulates face-to-face meetings more than emails do, but unlike a face-to-face encounter, it physically separates the disputants.\(^80\) It includes different threads for different issues in the underlying dispute, separate and restricted conversations between the mediator

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\(^73\) Online mediation encompasses emails, chat sessions, cyber courts, and video conferencing. It reproduces many of the features of traditional face-to-face mediation. *See ONLINE RES., HOW IT WORKS*, http://www.onlineresolution.com/ (last visited Nov. 20, 2011).

\(^74\) *Id.* SquareTrade, for example, organized discussions on a single secure case page. *Id.*

\(^75\) *Id.*

\(^76\) *Id.*


\(^78\) Rule, *supra* note 3, at 49-54.

\(^79\) *Id.* at 140-41.

\(^80\) *Id.*
and the disputants when needed, and simple electronic storage of the mediation record.\textsuperscript{81} The mediator can passively observe the parties, shape their exchanges by asking questions, or serve as a filter between them.\textsuperscript{82} However, in most current online mediation platforms, communication is still asynchronous.\textsuperscript{83}

Online mediation is used in a variety of disputes, including e-commerce disputes, family disputes, business disputes, and employment disputes.\textsuperscript{84} Prominent online mediation providers include Internet Neutral,\textsuperscript{85} e-Mediator,\textsuperscript{86} Dispute Manager,\textsuperscript{87} WebMediate,\textsuperscript{88} Resolution Forum,\textsuperscript{89} and the now-defunct SquareTrade.\textsuperscript{90} A number of private practitioners also offer online mediation or avail themselves of the Internet in offline mediations.\textsuperscript{91} Although online mediation currently involves the use of a human third-party, commentators have noted that disputants might even use computers as virtual mediators who would listen, acknowledge, define disputes, mutually reframe and encourage settlement.\textsuperscript{92}

### 3. Online Negotiation

Unlike traditional ADR processes, online negotiation lacks an analogous offline counterpart.\textsuperscript{93} Online negotiation entails the use of automated procedures and threaded

\begin{footnotesize}
\textsuperscript{82} Braeutigam, \textit{supra} note 1, at 295.
\textsuperscript{83} \textit{Id.} at n. 62. Some ODR services supplement textual communications with videoconferencing; however, there are bandwidth issues for broadcast-quality videoconferencing that undermine its utility. \textit{See} Alexander, \textit{supra} note 52, at 251.
\textsuperscript{84} \textit{See} Rule, \textit{supra} note 3, at 87-215.
\textsuperscript{91} Braeutigam, \textit{supra} note 1, at 284.
\textsuperscript{92} \textit{See} L. Boulle, \textit{Options for cyber-med}, ADR BULLETIN 1 (10) April 1999 at 128, 129.
\textsuperscript{93} \textit{Id.}
\end{footnotesize}
discussion technology to assist decision-making and provide negotiation support. Assisted negotiation systems can render expert advice in cases in which human intelligence was previously needed to process the factual information underlying a dispute. Using sophisticated branching technology, software programs create elaborate decision trees that calculate potential outcomes for disputes. After interrogating the user about the dispute, the system applies the respective law or other benchmarks to the factual circumstances underlying the conflict and formulates a conclusion.

There are two main types of online negotiation: automated negotiation (also known as blind bidding) and negotiation support systems. Each process exploits software-driven algorithms and computer analysis to resolve disputes. In automated negotiation, parties propose putative settlement ranges to a computer program, and the program automatically notifies them when they have reached a mutually satisfactory settlement. Contemporary providers of automated negotiation include: Cybersettle, The Claim Room, WebMediate, and Dispute Manager.

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94 See Alexander, supra note 30 at 252.
95 Id.
96 Id.
98 Braeutigam, supra note 1, at 283.
99 Id.
100 “Typically, the process involves three rounds of ‘bidding’ where one party makes a demand and the other makes an offer. If the offer is larger than the demand, the dispute settles immediately. If not, the bidding proceeds to another round. When the amounts for demand and offer are sufficiently close, for example, thirty-percent apart, the case settles for the arithmetic mean of the two figures. Some systems require a small acceptable range of difference to settle, while some enable disputants to select their own settlement parameters.” Braeutigam, supra note 1, at 285.
101 CYBERSETTLE, WHAT IS CYBERSETTLE, (last visited Nov. 3, 2011). Cybersettle is currently the most popular provider of automated negotiations. Id.
Blind bidding does not depend on human participants; rather, computer software serves as the intermediary for the parties to trust with the information that reveals whether or not they are within settlement range.\textsuperscript{105} Automated negotiation is thus designed to increase the efficiency, speed, and productivity of the settlement process.\textsuperscript{106} Insurance disputants rely on automated negotiation to avoid the problem of revealing their bottom lines, which frequently precludes settlements when parties resolve insurance disputes offline.\textsuperscript{107} Nevertheless, scholars have criticized the use of automated negotiation to resolve insurance disputes, arguing that its lack of human involvement vitiates claims adjusters’ roles in evaluating and negotiating claims.\textsuperscript{108}

Like automated negotiation systems, negotiated support systems (NSS) draw on ODR’s unique opportunities for resolving disputes using computer-aided analysis.\textsuperscript{109} In NSS, parties input variables and their negotiation preferences, and then advanced software systems use the variables to construct ranges of options and optimal outcomes based on the degree of party satisfaction indicated by the user for each option.\textsuperscript{110} NSS eliminates or minimizes some of the challenges of conventional negotiation, such as adversarial tactics, high cost, tedium, irrational thinking, and positional bargaining.\textsuperscript{111} Consequently, the parties base their decisions on a complete set of thoroughly evaluated information, which results in improved negotiated

\begin{footnotesize}
\begin{enumerate}
\item Braeutigam, \textit{supra} note 1, at 284.
\item \textit{Id.}
\item \textit{Id.}
\item See \textit{id.} at 145. Critics contend that automated negotiation systems shift insurance disputes away from customer service and thoughtful claims evaluation. \textit{Id.} They also fear that less experienced adjustors will use the technology to cut corners. \textit{Id.}
\item \textit{Id.}
\item \textit{Id.} at 644-45.
\end{enumerate}
\end{footnotesize}
Throughout the NSS process, parties can generally readily engage the services of a facilitator for guidance and assistance.113

NSS uses various kinds of software programs. For example, SmartSettle is designed to help parties negotiate without counsel,114 while SettleTheCase is designed to provide strategic and planning assistance to attorneys, mediators, corporate clients, or individuals that are preparing for participation in an ADR session.115 Risk-analysis software programs like Decision Analysis by TreeAge (DATA) use decision trees to help parties negotiate.116 The U.S. Federal Mediation and Conciliation Service has developed a system amalgamating standard collaboration software and negotiation support.117 Arno Lodder and John Zeleznikow created a computer-mediated ODR process that amalgamates techniques developed from argumentation, artificial intelligence, and decision-support game theory.118

Online negotiation, mediation, and arbitration all face similar criticisms from scholars analyzing ODR. I explore these critiques below.

112 Id.
113 Id.
116 Id. at 67-8.
117 See Rule, supra note 3, at 180.
II. Addressing Criticisms of ODR and Acknowledging its Limitations

ODR must have some serious potential disadvantages (or must raise serious questions) because it has not been embraced as quickly and universally as many commentators expected.119

Commentators have voiced three primary reservations about whether technology facilitated communication mediums will be effective when used for dispute resolution. First, technology has not developed to the point that it will always be available and function as promised when it is most needed, and indeed might never attain such a standard of perfection.120 This point is difficult to argue against, but a weak argument when online dispute resolution is compared to offline dispute resolution. After, human beings often fail to be available and behave as promised, and behave less predictably than technology does. A second related concern about technology’s shortcomings is that technology can be manipulated to unfairly benefit some parties.121 Critics’ third concern is that people cannot have effective and productive conversations without the intimacy and trust that only face-to-face contact creates.122 They believe that technology-facilitated communication media loses verbal and nonverbal cues that are indispensable for effective communication.123 I address these latter two concerns below.


120 Sarah R. Cole & Kristen M. Blankley, Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be, 38 U. Tol. L. Rev. 193, 202-03 (2006).

121 Id.

122 Id.

123 James P.T. Fatt, It’s Not What You Say, It’s How You Say It, COMM. WORLD, June-July 1999, at 37, 37-38, available at http://findarticles.com/p/articles/mi_m4422/is_6_16/ai_55580031/ (discussing the general significance of nonverbal communication, especially eye contact, in the context of Western business and social cultures).
A. Inequitable Technological Access and Proficiency Privileges Certain Disputants and Creates Confidentiality and Internet Security Concerns

ODR is thought to privilege people with computer access as well as those who are more comfortable using online technology.\(^\text{124}\) In fact, as ODR expands to address disputes that originate offline, these disparities become more significant and problematic.\(^\text{125}\) The incongruences between individuals with access to information and those who lack such access generally correlate with socio-economic factors of income, race, ethnicity, education, profession, and gender.\(^\text{126}\) This stratification has created a class of “virtual elites” who can use their superior online literacy to dominate online discussion forums.\(^\text{127}\) A difference in typing skills may have a dramatic effect on a technology-facilitated dispute resolution process when the parties are required to communicate primarily by text.\(^\text{128}\) “Research has shown that persons with good typing skills and a connection with high data flow can easily dominate chat-room meetings.”\(^\text{129}\)

Unfamiliarity or discomfort with technology may result in the parties, including the mediator, being unable to adequately express their emotions and feelings.\(^\text{130}\) Although many individuals possess the skills necessary to engage in ODR successfully, power imbalances

\(^{124}\) Braeutigam, supra note 1, at 292.

\(^{125}\) Sourdin, supra note 97.

\(^{126}\) Id. Bias concerns might be mitigated through government regulation of ODR providers and government funding of services to address bias and trust issues that may hinder ODR's development and acceptance. Schmitz, supra note 15, at 45. However, such government intervention and subsidization may be implausible given current federal and state budget constraints, especially since the United States has embraced private dispute resolution and already emphasized that government funds will probably not be dedicated to consumer dispute resolution in the near future despite rising consumer-protection concerns. Id.

\(^{127}\) See Gerald Doppelt, Equality and the Digital Divide, 24 HASTINGS COMMUN. & ENT. L.J. 601, 604-05 (2002); see also SCHULTZ ET AL., supra note 9, at 36.

\(^{128}\) Larson, supra note 119, at 636-37 (noting the difference between users weaned on technology and users who learned to navigate the Technology Revolution as adults); Pappas, supra note 39, at 7 (noting that “the baby-boomer generation did not grow up online and many if not most still prefer to settle their disputes in person. It is often hard to teach ‘old dogs’ new tricks . . . .”).

\(^{129}\) See Doppelt, supra note 127, at 604-05 (footnote omitted).

\(^{130}\) Sourdin, supra note 97, at 3.
result from the fact that parties’ familiarity and comfort level with relevant hardware and software can be quite different.\textsuperscript{131}

However, these disadvantages stemming from inequitable technological prowess are not as severe as they seem at first blush.\textsuperscript{132} Those who lack access to online technology or feel discomfort in using it may choose not to use ODR, thereby decreasing the potential for disadvantage that stems from their lack of technological acumen.\textsuperscript{133} I acknowledge that ODR currently does favor those with computer access, but I believe the benefit from such accessibility is marginal. As one commentator noted, “the computer industry continues to develop ever newer, user-friendly, plug-and-play interfaces that enable even the technologically challenged to participate in Internet communications.”\textsuperscript{134} Additionally, many people without computer access are still using ODR to resolve their disputes—they are just using more primitive forms of ODR than computers, such as mobile telephony and text messaging.\textsuperscript{135} Finally, in the aggregate, technology levels the playing field and minimizes information asymmetry in conflict resolution by giving people access to resources and information that empower their bargaining capabilities.\textsuperscript{136} Even if online dispute resolution

\textsuperscript{131} See, e.g., Cole & Blankley, \textit{supra} note 22, at 206-07 (discussing the types of “access issues” that can arise in an ODR situation, particularly when one of the parties does not own his own computer or is not as familiar with certain types of technology); Larson, \textit{supra} note 119, at 636-37 (describing the “digital divide” among different age groups—particularly between younger people who have grown up with computer technology and Baby Boomers who had to acquire computer skills as adults—as well as between genders and among ethnic groups); Pappas, \textit{supra} note at 11 (commenting on the “digital divide” among different ethnic segments of the American populace); Schmitz, \textit{supra} note at 244.

\textsuperscript{132} Sourdin, \textit{supra} note 97, at 3.

\textsuperscript{133} \textit{Id.}

\textsuperscript{134} Alexander, \textit{supra} note 52, at 250. One especially promising technology to close the gap between ODR and face-to-face communication is teleimmersion, which though not yet widely available, allows users to project 3d images of themselves onto a different geographic area. \textit{Id.}

\textsuperscript{135} \textit{Id.} at 244. For example, mobile telephony has been integrated into the blind-bidding service at Philippine Online Dispute Resolution to resolve simple monetary claims between disputing parties. \textit{Id.} Parties may also opt to receive text-message notifications about the organization’s other ODR processes. \textit{Id.}

may unfairly benefit those with technological prowess, dispute resolution practitioners are developing numerous strategies to embrace ODR while leveling the playing field for all disputants.\(^{137}\)

A more legitimate concern about uneven technological proficiency between parties is that the online environment can hamper confidentiality.\(^{138}\) Unlike face-to-face mediation, online mediation records the mediator’s and parties’ communications and saves them in an electronic record.\(^{139}\) This recordkeeping permits a party to print and disseminate email communications without the opposing party’s knowledge, which could seriously jeopardize the “development of open and honest exchanges.”\(^{140}\) A related legitimate concern about ODR is that because cyberspace is often not a secure forum for resolving disputes, hackers will be able to access disputants’ confidential information.\(^{141}\) Parties concerns about confidentiality and internet hacking may impact the extent to which they embrace ODR. I believe that ODR’s benefits of recordkeeping and allowing multiple parties to access information about the dispute,\(^{142}\) as well as ODR’s other numerous benefits (discussed below in Part III) outweigh the potential pitfalls of breaches of confidentiality and Internet security. Still, these are

\(^{137}\) Alexander, supra note 52, at 250.
\(^{139}\) Id.
\(^{140}\) Id.
\(^{142}\) See, e.g., infra notes 333-37 and accompanying text (discussing how parties can benefit from having the internet community provide feedback on their disputes).
legitimate concerns, and parties should ultimately select the dispute resolution forum most tailored to their comfort level and individual strengths.\textsuperscript{143}

B. Textual Communication Reduces Disputants’ Communication Cues

Some critics of ODR believe that the absence of meaningful linguistic cues when communicating online hinders ODR’s usefulness as a dispute resolution mechanism.\textsuperscript{144} They claim that people cannot fully replicate the dynamics of synchronous face-to-face interaction online.\textsuperscript{145} They further contend that in a text-based environment, online users cannot perceive friendliness, attentiveness, humor, or emotion.\textsuperscript{146} Critics of ODR also allege that the absence of non-verbal cues, real-time feedback, and subtlety of meaning obviates indispensable components of the dispute resolution process.\textsuperscript{147}

It is true that ODR participants cannot depend on either the non-verbal cues of body language and facial expressions or the verbal intonations that supply important cues in face-to-face mediation.\textsuperscript{148} Further, since people often interpret written text differently than words spoken in the shared context of face-to-face communication, capturing the emotional content of a party’s words is difficult without tone of voice cues.\textsuperscript{149} In the absence of nonverbal cues, participants may have particular difficulty gauging each other’s sincerity.\textsuperscript{150} For example, a party might misinterpret a comforting remark as patronizing or find a joke to be offensive

\textsuperscript{143} Braeutigam, supra note 1, at 279. See also Joseph W. Goodman, The Advantages and Disadvantages of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites, J. INTERNET L., May 2006, at 1, 12 (discussing the advantages of online dispute resolution).

\textsuperscript{144} Id.

\textsuperscript{145} Id. Accord Eisen, supra note 13, at 1308 (“Electronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation.”).

\textsuperscript{146} See Bruce Leonard Beal, Online Mediation: Has Its Time Come? 15 OHIO ST. J. ON DIS. RES. 735, 737 (2000).

\textsuperscript{147} Id.

\textsuperscript{148} Id.

\textsuperscript{149} Braeutigam, supra note 1, at 262.

\textsuperscript{150} Id.
because she did not cue into the writer’s intentionally ironic tone.\footnote{Robert Gordon, \textit{The Electronic Personality and Digital Self}, 56 Dis. Res. J. 8, 17 (Apr. 2001).} In addition, disputants may not feel the mediator has understood the degree of anger and frustration they are experiencing.\footnote{Id.} Friendly chit-chat, which is commonly used to establish and build rapport, may also be rare in online discussions, and many online communicators convey messages in a businesslike tone; consequently, even a gregarious person can come across online as unfriendly.\footnote{Id.}

Critics of ODR also contend that online disputants’ inability to see or hear each other inhibits their developing mutual trust and rapport.\footnote{See Rule, supra note 6, at 84. \textit{But see} Braeutigam, supra note 1, at 285 (noting that “many people are quite “chatty” and do like to inject bits of personal information into their communications” and suggesting that these people are less likely to engage in “friendly banter” with opposing parties.)} Online mediators and participants cannot use non-verbal cues of body language and facial expressions; nor can they rely on the verbal intonations that are instrumental rapport-building tools in face-to-face encounters.\footnote{Id.} Textual online communication can be interpreted differently than words spoken in the shared context of face-to-face communication.\footnote{Id.} ODR impedes cooperative negotiations by precluding the disputants from building mutual trust and rapport, experiencing catharsis, and utilizing positive interpersonal dynamics.\footnote{Id.} Without face-to-face interaction, discussions may be more polemic and oppositional because parties tend to ignore conciliatory or inclusive statements.\footnote{Id.}

In addition, online communicants may have difficulty ascertaining a third party neutral’s personality without using the cues afford by face-to-face interaction.\footnote{National Alternative Dispute Resolution Advisory Council, Online ADR – Background paper (Canberra, Attorney-- General’s Department, January 2001), 6.} One ODR
critic claims that in the online environment, the mediator is not able to convey serious demeanor, professionalism, humor, or “just plain charisma.”\textsuperscript{160} Without visual or auditory cues, the mediator may come across as a “disembodied voice [who] cannot use her own physical ‘personhood’ to set the parties at ease and create an environment for sustained problem-solving.”\textsuperscript{161} A related problem is that arbitrators frequently rely on credibility judgments about witnesses based on the subtle cues that can be detected more effectively in person than via current audio or video technologies.\textsuperscript{162} As one commentator noted, “[i]t may be many years before technology can transmit all of the subtle cues that we pick up from other people when we meet face-to-face.”\textsuperscript{163}

Reduced online communication cues might also create sinister attribution bias.\textsuperscript{164} Such bias occurs when disputants attribute sinister motives and trust-eroding personal characteristics to each other, such as bias, incompetence, abrasiveness, prejudice, or deceitfulness.\textsuperscript{165} Without physical presence and body language and other informative social cues, individuals draw their own conclusions about a person, including perceptions of intelligence, honesty, competence, beliefs, and prejudices, and some research suggests that online communicants have a tendency to consciously or unconsciously evaluate people they encounter online.\textsuperscript{166}

\textsuperscript{160}Beal, \textit{supra} note 146, at 737.

\textsuperscript{161}See Katsh et al., \textit{supra} note 44 at 714. The authors, who conducted seminal work in ODR for eBay, were referring to email messages. Because he was not physically present, the mediator found it difficult to temper the interactions of already distrustful parties without sounding controlling or judgmental.

\textsuperscript{162}Alexander, \textit{supra} note 52, at 268.

\textsuperscript{163}\textit{Id.}

\textsuperscript{164}Gordon, \textit{supra} note 151, at 17-18. See also Michael Morris et al., \textit{Schmooze or Lose: Social Friction and Lubrication in E-mail Negotiations}, 6 \textit{GROUP DYNAMICS} 89, 91 (2002).

\textsuperscript{165}\textit{Id.}

\textsuperscript{166}See Gordon, \textit{supra} note 151, at 15.
Some ODR critics allege that online dispute resolution is inferior to offline dispute resolution because it inhibits mediators’ reframing capabilities.\textsuperscript{167} In traditional offline dispute resolution, reframing is when a mediator restates parties’ words in less accusatory terms.\textsuperscript{168} In cyberspace, this reframing process entails textual rewriting: a mediator can paraphrase and cut and paste sentences into an e-mail as a means of altering tone and prioritizing certain issues.\textsuperscript{169} However, some commentators believe that in the online environment, it is “less easy for the mediator to speak to the parties simultaneously, and it is more difficult for the mediator to change the feelings or the tone of expression between the parties.”\textsuperscript{170} In online mediation, the mediator may have more trouble permanently refocusing the parties’ statements to be more positive since parties can review previous e-mails, whereas they cannot review their spoken conversations, which are thus more quickly forgotten and reframed.\textsuperscript{171} Furthermore, the mediator has no visual cues in order to assess how comments are affecting the parties and which statements should be reframed.\textsuperscript{172} Without the ability to effectively reframe and accurately interpret disputants’ non-verbal cues, a mediator’s trust and rapport with the parties may become compromised.\textsuperscript{173}

Critics fail to appreciate the positive benefits of online reframing. Online mediators have more time to reframe parties’ comments. Moreover, reframing may be less necessary online, since unlike parties speaking face-to-face-, parties communicating via text have the opportunity to revise their own written comments multiple times before sharing them with the

\textsuperscript{167} Ethan Katsh et al., \textit{supra} note 44, at 714.
\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.} at 715.
\textsuperscript{170} \textit{Id.}
\textsuperscript{171} \textit{Id.}
\textsuperscript{172} \textit{Id.}
\textsuperscript{173} \textit{Id.}
other side. Lastly, ODR also allows for reframing to occur in negotiations as well as in mediations. Throughout the negotiation process, online negotiation software can provide parties with access to legal information about the likely outcome of their litigation/dispute and remind them about their BATNA (best alternative to a negotiated agreement). Software that enables the threading and structuring of discussions as well as record-keeping allows disputants to review statements made by a particular party over a period of time or statements made by all parties on a particular theme or on all themes on a given date. By capturing and reiterating previous communications between the parties, online negotiation encourages better advice from lawyers to clients, more informed negotiations and settlement decisions, and improved access to justice, particularly for unrepresented clients. The online dispute resolution practitioner can easily paraphrase parties’ arguments to highlight how the putative outcomes have satisfied parties’ interests.

ODR critics exaggerate the extent to which a mediator cannot pick up on the parties’ verbal and non-verbal cues online. People have adapted to communicating without relying on the cues of face-to-face communication by drawing on textual cues to relay physically perceptive information. For example, emoticons, brackets, and capital letters have all become useful methods to convey emotion online. Internet users do not consider the online, text-based environment to be constraining or emotionless. Nuances of emotion can be

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174 Alexander, supra note 52, at 265.
175 Id.
176 Id.
177 Id.
178 Id.
180 Braeutigam, supra note 1, at 260.
communicated “by even the simplest and most perfunctory messaging.” Text-based communication is dynamic enough to support the kind of expression and interplay needed for people to connect with each other, to understand each other, and to feel involved in the process of dispute resolution.” While it is true that in face-to-face dispute resolution, paralinguistics such as intonation, inflexion, voice volume, or verbal pitch relay information that helps to clarify participants’ intent and mitigate any ambiguity of meaning in the participants’ dialogue, text-based communication has its own paralinguistic cues. ODR critics have thus failed to recognize how technological adaptations have transformed human text-based interaction in the twenty-first century.

More importantly, countervailing research has consistently revealed that computer-mediated communication is not inferior to face-to-face interaction. In fact, some commentators have found that users of computer-mediated systems actually participate more equally using computer-mediated processes than they do in face-to-face interactions.

Anne-Marie Hammond found that the reduced communication cues and textual communication did not significantly impact participants’ experience in online mediation.

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181 Alexander, supra note, at 268 (warning dispute resolution practitioners that these nuances are frequently misinterpreted and even subtle misunderstandings of them can damage relationships).
182 Id.
183 Id.
184 Braeutigam, supra note 1, at 272.
185 Id.
187 Anne-Marie G. Hammond, How Do You Write “Yes” ?: A Study on the Effectiveness of Online Dispute Resolution, 20(3) CONFLICT RES. Q. 261, 263-5 (2003). The study records the experience of a variety of mediators and disputants in fifteen online mediation simulations, using eight different dispute scenarios. The case types were professional negligence and product liability; personal negligence and auto accident; workplace complaint involving wrongful dismissal; workplace complaint involving sexual harassment; a post-divorce custody dispute; and two e-commerce disputes. Online debriefing surveys composed of 100 questions were given immediately after the simulations, and online focus group discussions were conducted a few days after the debriefing surveys. Id.
Her study revealed that the lack of body language in online mediation experience did not constrain participants’ ability to express their emotions or to feel understood.\textsuperscript{188} Participants noted that the textual form of communication was effective because people write in the same manner as they speak and thus felt they had no trouble conveying their intended meaning.\textsuperscript{189} In fact, the majority felt capable of overcoming the lack of non-verbal cues.\textsuperscript{190} In addition, many disputants felt more comfortable expressing themselves by writing than by talking to each other;\textsuperscript{191} found the mediation to be less hostile;\textsuperscript{192} experienced confidence in communicating;\textsuperscript{193} believed their communications were honest and open;\textsuperscript{194} and believed that overall, ODR can be used successfully for resolving disputes.\textsuperscript{195}

Lastly, while the majority of ODR is currently text-based, ODR is becoming more “life-like” as technologically advances,\textsuperscript{196} and these advances can compensate for ODR’s deficiencies compared to face-to-face interactions. One might assume that the online environment cannot clue parties into each other’s physical environments, but technology has been able to electronically transmit sensory data – such as material relating to touch, smell and taste – for more than a decade.\textsuperscript{197} Videoconferencing can alleviate disputants’ concerns that arise from not seeing each other and can effectively mimic face-to-face interaction.\textsuperscript{198}

\begin{footnotesize}
\begin{enumerate}
\item Id. at 276-8.
\item Id. at 276.
\item Id.
\item Id.
\item Id. at 276.
\item Id. at 277.
\item Id.
\item Id. at 274.
\item Id. at 279.
\item See id. (explaining how newer technologies will make our interactions online feel far more like in-person communications).
\item Sourdin, supra note 97, at 1-2 (citing National Alternative Dispute Resolution Advisory Council, Online ADR – Background Paper (Canberra, Attorney-General’s Department, January 2001)).
\item See Julia Hörnle, Online Dispute Resolution--The Emperor's New Clothes? Benefits and Pitfalls of Online Dispute Resolution and its Application to Commercial Arbitration, Apr. 5, 2002, http://www.bileta.ac.uk/ (follow
\end{enumerate}
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Commentators’ criticisms about the large gap between face-to-face and online dispute resolution processes may soon become moot given the rapid pace of technological change.

Ultimately, when trying to decide whether or not to resolve their dispute online, parties should consider the type of dispute and the nature of the disputants. While face-to-face interactions might be considered one of the richest experiences of human interaction, and may even be preferable to online interactions in certain situations, they also have numerous limitations. One can understand these limitations by appreciating ODR’s numerous benefits, which I explore in the section below.

III. ODR’s Unique Benefits

The online forum has several evident advantages compared to traditional ADR: speed; twenty-four hour access, ability to handle and process data, and ability to transcend geographic boundaries. The cost savings inherent in ADR, which already are significant, can be increased substantially through the strategic adoption of technology. ODR considerably reduces the costs of resolving disputes by reducing travel costs, legal costs, and sometimes,
eliminating the need for legal counsel. Moreover, the nature of online communication itself provides unique benefits to all ODR processes. ODR promotes clearer, more focused, less hostile communication, as it and enables disputants to vent their emotions without hindering the mediation. In addition, the online forum may ameliorate or even eliminate power imbalances and thus provide a better forum for disputants who are at a disadvantage in a traditional face-to-face mediation due to race, gender, ethnicity, socio-economic factors, and differences in negotiating behaviors.

A. Reducing the Detrimental Effects of Body Language

ODR minimizes the detrimental effects of body language. When a party perceives negative body language, whether or not it is a misinterpretation, she tends to focus on negative content and will react to it, increasing the likelihood of retaliatory behavior and/or impasse. In a text-based environment, parties cannot observe negative behavior or misinterpret each other on the basis of non-verbal cues. In the absence of non-verbal cues and negative behavior, parties can better address the substantive issues underlying the dispute rather than the negative emotional content conveyed by the visual or auditory signals in face-to-face 

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203 SCHULTZ ET AL., supra note 9, at 55-56. (“All of these things are beneficial to women (especially minority women and poor women), who have historically had fewer economic resources than white men, and are often victims of gendered violence.”) (citations omitted).

204 Id.

205 Id.

206 Id.

207 Id.

208 Gibbons et al., supra note 80, at 44 (noting that hostile behaviors like yelling, using threatening gestures, or otherwise signaling harm or ill-intent can escalate conflict to the point of impasse).

209 Id.
encounters. By filtering out negative linguistic cues, online dispute resolution thus fosters a less-confrontational communication process and keeps parties focused on important issues.

ODR is preferable when parties are known to one another and have a history of negative verbal or non-verbal behavior patterns. A lack of body language in online dispute resolution does not constrain disputants’ abilities to express their emotions or to feel understood.

B. Physical Separation of Participants

Another advantage to resolving disputes in the online environment is that the Internet creates distance between parties. Unlike traditional dispute resolution processes that depend on the physical presence of the disputants and the mediator/arbitrator, in online dispute resolution the parties are physically separated. Such physical separation is preferable for participants who find potentially hostile face-to-face encounters to be distressing. Moreover, cyberspace will likely benefit these parties’ negotiation outcomes since a face-to-face dispute resolution system will lead these parties to avoid conflict due to their fear of confrontation. Such conflict-avoidant parties are disadvantaged in negotiations because they may make concessions or wholly give in to the demands of the more assertive or aggressive

\[\text{Gordon, supra note 151, at 15 (stating that “the great blizzard of nonverbal cues interferes with the proper reception of content message. In other words, people are often unable to accurately ‘hear’ each other during face-to-face conversations.”).}\]

\[\text{Id.}\]

\[\text{Id. However, online dispute resolution is not appropriate where there is a risk of violence between parties who live in the same geographic area. See Rule, supra note 3, at 85. Should violence erupt during the course of mediation, the online mediator may not become aware of an imminent threat of violence, nor be able to physically intervene. Id. Rule describes a situation where he physically stepped between disputants that were headed for a physical altercation. Id. at 66.}\]

\[\text{Hammond, supra note 187, at 9.}\]

\[\text{Id.}\]

\[\text{Id. at 10.}\]

\[\text{Id.}\]

\[\text{Id.}\]
parties simply to resolve the dispute as soon as possible.\textsuperscript{218} “Parties who are anxious about face-to-face confrontation are more likely to be at ease when physically separated, and therefore able to more fully engage in the search for mutually acceptable solutions, rather than avoid the conflict or fall into the pattern of concession.”\textsuperscript{219}

Similarly, the disinhibiting nature of Cyberspace encourages Internet users to adapt their personalities to the online forum and adopt mannerisms that they would not otherwise possess in face-to-face encounters.\textsuperscript{220} For example, individuals who are shy, reserved, or nervous in face-to-face social interactions can become assertive and straightforward online.\textsuperscript{221} These newly empowered disputants negotiate from a position of strength and communicate more directly.\textsuperscript{222} In offline disputes between higher-status and lower-status individuals, lower-status individuals are at a disadvantage because they usually make concessions aligned with the thinking of the dominant group, which undermines their bargaining power.\textsuperscript{223} Online, however, the power dynamics shift since lower-status individuals will tend to become more assertive and therefore will be less deferential.\textsuperscript{224} Hence, the disinhibiting factor of online communication compensates for the power differences that are inherent in hierarchical relationships.\textsuperscript{225}

\textsuperscript{218} See Bernard Mayer, The Dynamics of Conflict Resolution: A Practitioner’s Guide 30-32 (Jossey-Bass 2000) (“[S]ome people are much more comfortable engaging a conflict . . . others will go to great lengths to avoid conflict, to disengage as quickly as possible, and to prevent its recurrence.”).

\textsuperscript{219} Braeutigam, supra note 1, at 280.

\textsuperscript{220} Id.

\textsuperscript{221} Id.

\textsuperscript{222} Id.

\textsuperscript{223} Gordon, supra note 151, at 15.

\textsuperscript{224} Id.

\textsuperscript{225} Id.
The effects of physical separation imply that the online dispute resolution is suitable where disputants are uncomfortable meeting face-to-face.\textsuperscript{226} For this reason, cyberspace is an appropriate forum for family disputes.\textsuperscript{227} Family disputes are typically imbued with high levels of conflict, emotional barriers, and tense communication.\textsuperscript{228} Even in situations involving amicable divorcing couples with well-established patterns of communication who are adept at reading each other’s non-verbal cues, the online forum reduces the impact of those cues, reducing the confrontational nature of the dispute resolution process.\textsuperscript{229} Online dispute resolution also facilitates communication between divorced couples who live far away from each other, and/or no longer prefer to meet face-to-face.\textsuperscript{230} Continued communication between divorcees is often strained due to post-divorce resentment and angst.\textsuperscript{231} Since the online forum is less confrontational and facilitates issue-oriented discussion, divorced couples may actually have greater success and less emotional hostility when conversing on post-divorce issues, such as child custody, visitation, and alimony.\textsuperscript{232}

ODR’s physical separation of disputants is also beneficial for domestic abuse victims.\textsuperscript{233} Face-to-face meetings become implausible when the continued threat of violence against a domestic abuse victim makes restorative justice dangerous.\textsuperscript{234} Even when the threat of violence has abated or ceased to exist, the unique psychological characteristics of the victim-offender relationship may vitiate the benefits of a face-to-face, intimate dispute

\textsuperscript{226} Id.
\textsuperscript{227} Id.
\textsuperscript{228} Id.
\textsuperscript{229} Id.
\textsuperscript{230} Id.
\textsuperscript{231} Id.
\textsuperscript{232} Id.
\textsuperscript{234} See \textit{id.}; Hopkins & Koss, \textit{supra} note 282, at 709.
resolution between a victim and her former attacker.\textsuperscript{235} The majority of scholars evaluating the efficacy of using mediation as a dispute resolution mechanism for domestic abuse victims admonish dispute resolution practitioners to avoid mediation when they suspect that one of the parties faces a history of domestic abuse\textsuperscript{236} since the highest risk of violence against domestic abuse victims occurs after they have asserted independence, left, or reported the abuse.\textsuperscript{237} Consequently, domestic abuse victims may feel safer keeping a distance from their former attackers when resolving disputes with them.\textsuperscript{238} Furthermore, offline mediation may be more dangerous than online dispute resolution because it allows an abusive spouse to physically contact his battered wife for the first time since they separated.\textsuperscript{239} The added comfort and protection attributable to physical separation permits disputants who feel threatened or are otherwise unwilling to meet face-to-face to still take advantage of dispute resolution processes, only at a safer distance.\textsuperscript{240}

\textsuperscript{235} See Kathleen Daly & Julie Stubbs, Feminist Engagement with Restorative Justice, 10 THEORETICAL CRIMINOLOGY 9, 17 (2006).

\textsuperscript{236} See Nancy Ver Steegh, Yes, No, and Maybe: Informed Decision Making about Divorce Mediation in the Presence of Domestic Violence, 9 WM. & MARY J. WOMEN & L. 145, 180-87 (2003); Peter Salem & Ann L. Milne, Making Mediation Work in a Domestic Violence Case, 17 FAM. ADVOC. 34, 35-36 (1995) (describing why many believe that mediation is inappropriate when there is a history of domestic violence between the parties); see also Kerry Loomis, Comment, Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court, 35 CAL. W. L. REV. 355, 366 (1999) (noting that domestic violence victims experience retaliation more frequently after mediation than they do after trials because the mediation system does not have a protection system in place, and the victims attempt to assert her rights can trigger more violence. Id).

\textsuperscript{237} Loomis, supra note 236, at 366.

\textsuperscript{238} Rogers, supra note 211, at 367.

\textsuperscript{239} MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 257 (2nd Ed. 2003). Battering is often triggered or increased in response to a woman’s acts of independence, or when women attempt to assert autonomy. Id. For example, “women are often forced to leave jobs and training programs and go back on welfare when the men in their lives pressure or intimidate them because the men are jealous of the freedom.” Id.; see SUSAN SCHECHTER, WOMEN AND MALE VIOLENCE: THE VISIONS AND STRUGGLES OF THE BATTERED WOMEN’S MOVEMENT 220, 224 (1982).

\textsuperscript{240} See Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L.J. 1545 (1991). One study “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.” Id. at 1601.
C. Asynchronous, Textual Communication

The asynchronous, textual nature of online communication provides numerous benefits. Synchronous interactions can easily escalate a conflict because a person’s first response might not be his best or most reasonable. Disputants often develop frustrating and destructive communication patterns, such as interrupting each other and “tuning out” to what the opposing party is saying. In contrast, asynchronous interactions provide a built-in cooling-off period, giving disputants additional opportunities to reflect before responding. Consequently, disputants have increased time to craft more focused, less inflammatory responses and process emotional concerns either internally or with a third party neutral. Parties using online dispute resolution can thus minimize the risk that they will cursorily utter an overly emotional statement that would bring the dispute resolution to a standstill. While asynchrony does not preclude parties from being melodramatic or insulting in their online communications with one another, it does provide them with increased time to make considered contributions.

ODR’s asynchrony also benefits the third-party neutral. Online mediators have more time to consider parties’ biases, reflect upon the parties’ needs, process their own emotional

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241 See Rule, supra note 3, at 63-64.
242 THOMAS SCHULTZ, GABRIELLE KAUFMANN-KOHLER, DIRK LANGER & VINCENT BONNET, ONLINE DISPUTE RESOLUTION: THE STATE OF THE ART AND THE ISSUES 10 n. 37, http://www.online-adr.org/reports/TheBlueBook-2001.pdf (Dec. 2001) (E-Commerce Research Project of the University of Geneva). Mediators working with frustrated disputants have to spend their time attempting to alter these destructive patterns or minimize the damage they cause by using a variety of techniques. See Rule, supra note 6, at 63-64.
243 See Rule, supra note 6, at 66.
244 Id. Even where emotions run high, potentially damaging statements may never be made because disputants have reflected before responding. Id.
245 Id.
246 Braeutigam, supra note 1, at 285, n. 136.
247 Id.
responses, and construct thoughtful responses. This temporal distance helps the mediator promote understanding between the disputants.

Asynchronous communication complements textual communication. Empirical evidence demonstrates that disputants pay additional attention to the content of their communications both as a result of typing and as a result of increased reflection time before responding. “Statements are more direct and understandable, and thus less likely to be misinterpreted. This clarity of language alleviates the potential emotional toil of dispute resolution.

Furthermore, asynchronous, textual communication ameliorates poor communication dynamics between disputants by mitigating interruptions and inattentiveness. In cyberspace, parties adopt novel communication patterns, partly because their communication is temporally asynchronous. The disputants cannot interrupt each other online nor respond instantaneously without thinking through their responses. The asynchronous nature of communication is also important because people generally communicate more fastidiously when writing than they do when speaking because they are actively, mutually involved in conveying their ideas by typing, reading, and reviewing them. In fact, research demonstrates that “two-thirds of email users take about the same care composing email as they do with memos and letters.” This extra care gives parties additional time to reflect and cool

248 See Rule, supra note 7, at 66.
249 Id.
250 See SCHULTZ ET AL., supra note 37.
251 See id.
252 See Rule, supra n. 3 at 163.
253 Id. at 139.
254 Id.
255 Id.
257 Id.
down, which they can use to clarify their thoughts and prevent counterproductive hostility, which ultimately leads to participants building increased rapport and trust.\textsuperscript{258}

\textbf{D. Anonymity of the Mediator or Arbitrator’s Identity}

While participants using ODR to resolve their offline disputes have usually had previous face-to-face encounters, they will not have had a face-to-face interaction with the mediator or arbitrator they have chosen to help resolve their dispute.\textsuperscript{259} Moreover, the mediator/arbitrator will not know their identities.\textsuperscript{260} Unlike face-to-face interaction, the online forum hides participants’ age, social status, gender, race, ethnicity, etc.\textsuperscript{261} Without these cues, individuals tend to avoid stereotyping.\textsuperscript{262} The anonymity of cyberspace thus assists participants who are traditionally disadvantaged in resolving their disputes due to differences in race, class, and gender.\textsuperscript{263} In addition, this anonymity substantially reduces the likelihood of mediator/arbitrator bias.\textsuperscript{264} Consequently, disadvantaged disputants may experience more favorable outcomes online than they would in face-to-face communications.\textsuperscript{265}

\textsuperscript{258} \textit{Id.}
\textsuperscript{259} Braeutigam, \textit{supra} note 1, at 295.
\textsuperscript{260} \textit{Id.}
\textsuperscript{261} \textit{Id.} at 296.
\textsuperscript{262} \textit{Id.}
\textsuperscript{263} \textit{Id.}
\textsuperscript{264} \textit{Id.} The notion of mediator/arbitrator bias stems from studies in traditional mediation which show that because mediators are negatively influenced by the race and gender of the parties, women and minorities consistently experience poorer outcomes in mediation. \textit{See} Marc Galanter, \textit{Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change}, 9 L. & SOCY. REV. 95, 97 (1974); \textit{see also} Christine Rack, \textit{Negotiated Justice: Gender & Ethnic Minority Bargaining Patterns in the Metro Court Study}, 20 HAMLIN J. PUB. L. & POLICY 211, 215 (1999) (positing that women and minorities are susceptible to bias and unfavorable outcomes in mediation). These studies hypothesize that race and gender influence the behavior of the parties themselves, as well as the behavior of mediators.
\textsuperscript{265} Braeutigam, \textit{supra} note 1, at 285.
E. Leveling the Playing Field for Parties with Unequal Bargaining Power and Vindicating the Legal Rights and Interests of Parties Who Would Not Otherwise Bring Claims

Online communication benefits parties with less bargaining power. The distance provided by ODR assists those who tend to avoid conflict because the online environment is less confrontational than an in-person meeting and parties can participate more readily without undermining their bargaining positions. Parties that would typically act diffidently instead act assertively, without passively adopting the ideologies of the dominant group, thereby mitigating the effects of power imbalances. Lower-status disputants will also be happier with the dispute resolution process itself, regardless of its actual outcome.

To see how ODR is especially useful to resolve disputes between parties of unequal status, consider a mediation between an employee and employer. The online environment equalizes the interaction between these two types of disputants and is less daunting for the employee. In face-to-face dispute resolution, an employee can feel overwhelmed and intimidated because he is more likely to be unrepresented and appearing alone in the mediation than his employer, who will typically bring one or more attorneys and corporate executives to the dispute resolution table. ODR helps offset some disadvantage that workplace disputants might face as a result of outright discrimination and unconscious bias from third-party neutrals.

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266 Id.
267 Id. See also David Allen Larson & Paula Gajewski Mickelson, Technology Mediated Dispute Resolution Can Improve the Registry of Interpreters for the Deaf Ethical Practices System: The Deaf Community Is Well Prepared and Can Lead by Example, 10 CARDOZO J. CONFLICT RESOL. 131, 140-41 (2008) (noting how “[t]echnology can protect parties from uncomfortable or threatening face to face confrontations and offer vulnerable individuals a place where their communications can appear as forceful as the statements of someone who is physically much larger and louder”).
268 Braeutigam, supra note 1, at 286.
269 Id.
270 Id. at 285.
271 Id. at 286.
272 Id.
and disputants.\textsuperscript{273} While today’s workplace is increasingly diverse, discrimination remains pervasive, and disputants should value any dispute resolution process that can militate against the effects of discrimination.\textsuperscript{274}

Traditional face-to-face dispute resolution deters parties from vindicating their legal rights and interests because it is riddled with biases based on socio-economic factors and literacy.\textsuperscript{275} First, traditional dispute resolution favors people who are physically attractive, articulate, well-educated, or members of a dominant ethnic, racial, or gender group.\textsuperscript{276} Second, ADR’s reliance on written materials negatively affects parties with poor literacy skills.\textsuperscript{277} Since online dispute resolution favors individuals with different skill sets, it provides them with better opportunities for a fair resolution of their disputes.\textsuperscript{278}

In addition, the online forum provides a possibility for redress for those who would not otherwise seek to vindicate their legal rights.\textsuperscript{279} In e-commerce, jurisdictional issues may deter parties from filing complaints to assert their grievances,\textsuperscript{280} and the low-dollar value of most e-commerce claims makes it financially unfeasible for them to do so.\textsuperscript{281} ODR also provides victims of crimes with restorative justice that would not otherwise be available to them.\textsuperscript{282}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{273} Id.
\item \textsuperscript{274} Id.
\item \textsuperscript{275} Id.
\item \textsuperscript{276} Gibbons et al., supra note 80, at 44.
\item \textsuperscript{277} Id. Regardless of whether ADR occurs online or offline, the dispute resolution process is not wholly oral; written materials like documentary evidence and settlement agreements are a crucial ingredient of a face-to-face dispute resolution. \textit{Id.}
\item \textsuperscript{278} Id.
\item \textsuperscript{279} Id.
\item \textsuperscript{280} Id; Dr. Saby Ghoshray, \textit{Charting the Future of Online Dispute Resolution: An Analysis of the Constitutional and Jurisdictional Quandary}, 38 U. Tol. L. Rev. 317, 326-30 (2006).
\item \textsuperscript{281} Gibbons et al., supra note 80, at 44.
\item \textsuperscript{282} C. Quince Hopkins & Mary P. Koss, \textit{Incorporating Feminist Theory and Insights Into a Restorative Justice Response to Sex Offenses}, 11 Violence Against Women 693, 696 (2005). Were restorative justice available online, it would be widely accessible. \textit{Id.} See also Rogers, supra note , at 343 (“Although certain positive aspects of the restorative justice system may be lost if mediation takes place online, this new medium may open the possibility of some type of mediation for parties that might otherwise be unable to even address the crime.”)
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instance, by closely simulating real-life interactions and thus replicating face-to-face encounters, videoconferencing can significantly increase women’s ability to seek restorative justice to address disputes caused by gendered violence, regardless of the parties’ geographic locations.\textsuperscript{283} ODR’s cost savings disproportionately benefit individuals who might otherwise be deterred from filing claims.\textsuperscript{284} Online dispute resolution is frequently the only dispute resolution mechanism that can successfully allow parties to vindicate their legal rights and interests in a cost-efficient and timely manner.\textsuperscript{285}

F. Cost and Time Savings

Compared to litigation, online dispute resolution is an efficient, cost-effective method for resolving disputes.\textsuperscript{286} Parties do not need to coordinate schedules or alter their work arrangements to participate in or travel to the dispute resolution sessions.\textsuperscript{287} Nor will parties need to purchase new clothes, dress formally, arrange for child care, or spend time and money completing other activities they would otherwise do to prepare for a traditional face-to-face meeting.\textsuperscript{288} Even when parties conduct their negotiations synchronously, they can access their dispute at any time, from different time zones, and from different places.\textsuperscript{289}

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\textsuperscript{283} See Katsh & Rifkin, supra note 5, at 42.
\textsuperscript{284} Schultz et al., supra note 9, at 55-56 (noting that such deterrence was historically caused by gender and economic power imbalances and the fact that women, especially minority women and poor women, have historically had fewer economic resources than white men and are often victims of gendered violence) (citations omitted).
\textsuperscript{285} Id.
\textsuperscript{286} Even when the parties do not have to pay for their own mediation, the mediation is not free for judicial system as whole, as there is lost opportunity cost from using a court’s strained resources to mediate.
\textsuperscript{287} Braeutigam, supra note 1, at 286. In today’s global economy, disputes frequently arise between individuals who have never met each other in person and even people who live in different countries. Id. Conflicts arise in virtual workplaces, distance-learning programs, and online consumer transactions. See Rule, supra note 5, at 135-7. In addition, people often file claims with insurance companies or government agencies without ever having had a face-to-face interaction with anyone regarding these claims. Braeutigam, supra note 1, at 295. ODR can provide participants in these interactions with an opportunity to vindicate their legal rights and thus effectively given them protection from socio-economic disadvantage. Id.
\textsuperscript{288} Schmitz, supra note at 200.
\textsuperscript{289} Braeutigam, supra note 1, at 286.
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The cost and time savings afforded by ODR are especially fruitful in the employment context.\textsuperscript{290} Workplace disputes are expensive in terms of lost wages, productivity, and employee dissatisfaction, and both employers and employees would often prefer to reach a quick resolution for both financial and psychological reasons, especially if the employer and employee will continue to have a professional relationship after settlement has been reached.\textsuperscript{291}

\textbf{G. Parties Using Private Caucusing}

ODR also promotes increased efficiency and greater trust in private caucusing.\textsuperscript{292} An online mediator can caucus with participants concurrently, throughout the entire mediation, and without the opposing party knowing when the private caucus is occurring.\textsuperscript{293} Offline caucuses, conversely, interrupt the flow of negotiations and cause delays while the mediator meets with each party, creating frustration or suspicion as disputants wait and wonder what is being discussed with the other side.\textsuperscript{294} In offline caucuses, mediators need to worry about the amount of time they spend separately with each participant as the mediators shuttle back and forth between parties in separate rooms in order to caucus.\textsuperscript{295} Online asynchronous mediations mitigate these problems since “the online mediator can strategically and seamlessly use caucuses to get a better understanding of issues and concerns without disrupting the process or frustrating the waiting party.”\textsuperscript{296} Concurrent caucusing allows for continuous contextual interventions throughout the dispute resolution process unlike face-to-face caucusing which generally takes place only after communication between the parties becomes difficult.

\begin{flushleft}
\textsuperscript{290} \textit{Id.} \\
\textsuperscript{291} \textit{Id.} \\
\textsuperscript{292} Rule, supra note 6, at 63. \\
\textsuperscript{293} \textit{Id.} \\
\textsuperscript{294} Braeutigam, supra note 1 at 284. \\
\textsuperscript{295} Alexander, supra note 52, at 251. \\
\textsuperscript{296} Braeutigam, supra note 1 at 284.
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caucusing, a distinct attribute of ODR, thus has numerous advantages compared to offline caucusing.297

**H. Summarizing and Qualifying ODR’s Benefits**

In summary, ODR is a viable if not superior option to offline dispute resolution in numerous contexts. Online dispute resolution fosters new patterns of interaction and increases understanding between disputants.298 Therefore, the online environment is generally an appropriate forum for resolving disputes.

ODR is certainly not a suitable mechanism to resolve all disputes.299 To discern when a conflict should be resolved online, disputants should analyze the type of dispute and the needs of the parties.300 The level of personal interaction appropriate for different types of disputes can dictate which form of ODR best resolves the dispute.301 For instance, a personal-injury plaintiff whose underlying claim involves damages for his noticeable disfigurement may want to use the physicality of a face-to-face interaction to make the opposing party feel uncomfortable or even guilty about the harms he has allegedly caused the plaintiff and therefore more willing to make concessions during settlement.302 Physical interaction may also help provide closure if the parties’ preeminent goal is to heal a significantly damaged personal relationship.303 Face-to-face encounters may also be preferable because some people simply prefer communicating in person, and do not find that textual communication provides for a free and candid discussion of their feelings and interests in a less-hostile environment.304

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297 Alexander, supra note 52, at 252.
298 Braeutigam, supra note 1 at 286.
299 Id.
300 Id. at 287.
301 KATSH & RIFKIN, supra note 5, at 136.
302 Id.
303 Id.
304 Id.
ODR is fruitful in the following situations: when the disputants desire to avoid confrontation but need to concentrate on the substantive issues; the history of interaction would be a negative influence on a face-to-face mediation; the parties have a pattern of communication that is frustrated by the tendency to interrupt, exhibit overt hostility, and act confrontationally; and the dispute is emotionally charged.\textsuperscript{305} The attributes of online communication suggest that high-conflict matters are well suited to the online forum.\textsuperscript{306} The online forum is also a superior choice when: the disputants are of unequal status in a hierarchy; the disputant is inclined to be deferential; the dispute involves people of different socio-economic status and are known to one another; the dispute involves people of different socio-economic states and are not known to one another.\textsuperscript{307}

IV. Historical Examples of Offline Disputes Resolved Using Online Dispute Resolution

A multitude of dispute resolution practitioners have successfully used online dispute resolution to resolve their disputes that originated offline. I elaborate on some of the most prominent examples of using ODR for offline disputes in the following sections.

A. Square Trade

SquareTrade was an efficient, low-cost solution to the problem of resolving low-value, cross-border disputes in the business-to-consumer (B2C) context.\textsuperscript{308} Although eBay originally created Square Trade to resolve online-only e-commerce disputes,\textsuperscript{309} Square Trade evolved to

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\textsuperscript{305} Braeutigam, supra note 1, at 290.
\textsuperscript{306} Id.
\textsuperscript{307} Id.
\textsuperscript{308} Id.
\textsuperscript{309} To boost consumer confidence in the fairness of online auctions, in 1999 eBay and the Center for Information Technology and Dispute Resolution at the University of Massachusetts conducted a pilot project in online mediation to assist buyers and sellers with resolving their disputes. Nearly 150 disputes were mediated online in a text-based email format with the help of a mediator. The pilot project was considered successful, and led
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resolve disputes that arose offline. For example, it provided ODR services for business-to-
business (B2B) disputes that occurred offline, as well as for real estate disputes between home
buyers and sellers. SquareTrade partially attributes its successful growth to its recognition
that the Internet has the potential to provide more effective dispute resolution services for both
online and offline disputes.

SquareTrade first provided disputants with tools to engage in unassisted negotiation and
thus resolve the dispute themselves. A party was asked to fill out a web-based standard
claim form that identified the type of dispute and presented a list of common solutions, from
which the claimant selected the ones to which he had agreed. SquareTrade contacted the
other party via email, telling him about the SquareTrade process and inviting him to participate
in using it to resolve his dispute. Both parties were often eager to participate since using
SquareTrade was the only means by which the aggrieved claimant could obtain redress and the
potential defendant could receive positive feedback. The opposing side filed a response,
choosing the resolutions. If both parties agreed on the same resolution, the dispute was
resolved. If the negotiation was unsuccessful, parties were provided with a free
technologically-assisted negotiation. A web interface software program shaped

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310 Id.
311 Id.
312 Braeutigam, supra note 1, at 280.
313 Id.
314 Id.
315 Id.
316 Id.
317 Id.
318 Id.
319 Id.
communications by restricting the amount of text disputants could send in a single message, encouraging the proposition of agreements, establishing deadlines, and even shaping the tone of exchanges.\textsuperscript{320} Eventually, the parties could hire a mediator to assist them further.\textsuperscript{321} Much of SquareTrade mediators’ work centered on issues that exist in the offline world, such as reputation, fair dealing, and honesty.\textsuperscript{322}

\textbf{B. Mediate-net}

Unlike most early ODR systems, Mediate-net’s sole goal was to investigate online dispute resolution’s applicability to offline disputes.\textsuperscript{323} The project attempted to utilize novel technology to resolve two types of disputes that would otherwise be resolved in an offline setting: “(1) domestic disputes such as custody, visitation, child support, and property division; and (2) healthcare disputes between either customers and insurance companies, or customers and health care device manufacturers.”\textsuperscript{324} Rather than engage in face-to-face interaction, most disputants mediated via email and online chat, and subsequently relied on electronic conferencing and videoconferencing if they owned the required e-conferencing equipment.\textsuperscript{325}

\textbf{C. Virtual World Disputes}

Parties interacting in virtual worlds have utilized face-to-face dispute resolution for their disputes that originated in virtual reality. Virtual courts and ADR meetings allow for

\textsuperscript{320} Id.

\textsuperscript{321} Id. For a fuller description of the SquareTrade resolution process, see the Internet archived version of Square Trade, \textit{A Simple, Four Step Process to Resolve Disputes}, http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp (input URL into Internet Wayback Archive Machine). First, users attempt to resolve their dispute without the assistance of a mediator. If the dispute is not resolved at the first stage, SquareTrade provides a free technologically assisted negotiation process to the disputants. \textit{Id}.

\textsuperscript{322} Id.

\textsuperscript{323} Mediate-net, which was launched in 1996 and was funded by the National Center on Automated Information Retrieval (NCAIR). It is often referred to as the University of Maryland Online Mediation Project.

\textsuperscript{324} Victorio, \textit{supra} note 9, at 285.

\textsuperscript{325} The service was provided by the Program on Dispute Settlement at the University of Maryland and the Center for On-Line Mediation. Mediate-net closed during 2001 at the end of its experiment phase. \textit{See SCHULTZ ET AL.}, \textit{supra} note 9, at 10 n. 37.
expanded means of expression and case presentations in a video-game-like digital online environment. Virtual spaces let users assume the form and identity of digitized avatars and interact on social and economic levels with other avatars in an on-going community that exists purely online. In virtual worlds, players use real-world dollars to buy and sell virtual world goods, go to virtual stores and own virtual real estate. These exchanges have led to virtual disputes among users, ranging from virtual avatar “assaults” to breach of virtual real estate sales.

Some commentators have advocated online dispute resolution communal systems and virtual courts to cheaply and efficiently resolve these virtual disputes. Nevertheless, virtual world software companies have often mandated that users resolve these disputes in person. For example, Second Life, a prominent virtual space with more than six million members, has generated disputes regarding its users’ avatar actions and virtual ownership rights, and at one time it required that those disputes be resolved through face-to-face arbitration proceedings until a court held the pre-dispute arbitration clause in its user agreement unconscionable. Emphasizing the cost savings of resolving disputes online, the court found Second Life’s arbitration clause unduly oppressive since it imposed high fees and travel costs on individuals by requiring in-person arbitration in California.

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327 See Kunze, supra note 326, at 105-07.

328 Id. at 102-10, 116-17 (discussing virtual rights within virtual worlds and the need for an online dispute resolution system coupled with peer feedback to foster community expression and satisfaction); see also Joshua A.T. Fairfield, Anti-social Contracts: The Contractual Governance of Virtual Worlds, 53 McGill L.J. 427, 435-36 (2008) (describing virtual worlds and their governance per EULAs).

329 See Fairfield, supra note 328, at 429-33 (proposing that disputes regarding virtual transactions could better be handled through an intra-communal common law system).

330 Bragg v. Linden Research Inc., 487 F. Supp. 2d 593, 605-06 (E.D. Pa. 2007) (finding consumers effectively had no choice but to accept Linden’s arbitration clause).
clause still requires face-to-face litigation in California, but only for those claims whose amount in controversy is at least $10,000.324

V. Proposed Methods for Gradually Incorporating ODR into Offline Dispute Resolution

When faced with a dispute, attorneys, mediators, arbitrators, and disputants should consider whether cyberspace might be the preferred forum for resolution.331 Would the disputants fare better online than offline? And what attributes of the dispute and the disputants help answer this question?

Parties who do not feel comfortable moving the entire alternative dispute resolution process to cyberspace could attempt to resolve only part of their dispute online. Before physically meeting in a face-to-face negotiation, they could exchange information about their expectations via e-mail and swap position statements. Or the parties could chat online about their interests so that both parties could glean facts from each other, and then take a few days to develop a new negotiation strategy before meeting a few days later to try to reach a final settlement. Research has shown that “small talk,” or casual phone conversations preceding or accompanying email negotiations reduces hostility between disputants and contributes to the success of ODR.332 Alternatively, rather than beginning with ODR, parties could use ODR as a last resort if they had previously failed to reach a settlement using offline dispute resolution mechanisms. If the parties begin negotiations in a face-to-face interaction but find that they are not able to truly voice their interests in the offline dispute resolution process, they could try to settle again by meeting online at a later date.

331 Id.
332 Nadler, supra note 367, at 239-45.
The aforementioned amalgamation of online and offline mechanisms to resolve disputes is known in the mediation context as “Hybrid Mediation.”\textsuperscript{333} In hybrid mediation, the mediator might begin the mediation in person to encourage the parties to build trust and rapport, then proceed online to discuss the parties’ issues.\textsuperscript{334} During any point in the mediation process at which the mediator believed a face-to-face meeting would be helpful, she could temporarily move the mediation back offline.\textsuperscript{335} “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.”\textsuperscript{336} Hybrid mediation may also encourage mediators to develop innovative methods of combining offline and online mediation to provide disputants with optimum safety, thereby providing an optimal dispute resolution mechanism for parties who would otherwise feel threatened or victimized by traditional mediation.\textsuperscript{337} One commentator has characterized hybrid mediation as superior to either purely online or purely offline mediation because it allows the mediator to utilize a continuum of options according to the needs of both the parties and the mediator herself.\textsuperscript{338} The use of websites like SquareTrade and Mediate-Net to resolve both online and offline disputes demonstrates the increasing popularity of hybrid dispute resolution.

An additional possibility for gradually incorporating the Internet into ADR processes is the use of Crowdsourced Online Dispute Resolution (CODR).\textsuperscript{339} Crowdsourcing is (1) the act

\textsuperscript{333} Gibbons et al., \textit{ supra} note 81, at 63.
\textsuperscript{334} \textit{Id.}
\textsuperscript{335} \textit{Id.}
\textsuperscript{336} \textit{Id.} at 250.
\textsuperscript{337} Rogers, \textit{ supra} note 233, at 369.
\textsuperscript{338} Gibbons, et al., \textit{ supra} note 81, at 88.
of taking a job traditionally performed by a designated agent (usually an employee) and (2) outsourcing it to an undefined, generally large group of people in the form of an open call.”

CODR thus involves using the collective wisdom of Internet users to help parties resolve their disputes by mimicking traditional ADR mechanisms or court proceedings. Crowd members can facilitate a settlement of a dispute by writing reflections of their thoughts about the underlying conflict to both parties and e-mailing them to the parties or posting them on an Internet bulletin board. Another option is that the parties themselves or a third party neutral can design multiple-choice opinion polls for members of the Internet community to take, thus soliciting general feedback on the merits of each party’s arguments. The parties can then use these opinions to bolster their bargaining positions in their own face-to-face dispute resolution. Alternatively, disputants can trust online crowds to resolve the parties’ disputes by rendering a binding decision, as occurs with eBay’s Community Review Forum.

A more radical hybrid form of ODR that parties might adapt quickly and cheaply is the use of virtual space to resolve an offline dispute. In these virtual worlds, parties can vindicate their legal rights as avatars in a digital environment, which may be especially convenient and satisfying for individuals who need such visual aid to adequately communicate and express themselves. For example, in Second Life, avatars can resolve their dispute in an e-Justice

342 Id. at 10.
343 Id. at 5-6.
344 Id. at 6.
346 See Jennifer L. Mnookin, Virtual(ly) Law: The Emergence of Law in LambdaMoo, 1 J. COMPUTER-MEDIATED COMM. 3, 3-15 (1996), available at http://jcmc.indiana.edu/ (last visited Dec. 15, 2011) (noting the benefits of the give-and-take allowed through this system despite system criticisms and the debate between
Centre, a 3D building with meeting rooms in the virtual world that provides avatars the option of using its mediation and arbitration services.\textsuperscript{347} Avatars can initially meet attempt to mutually settle their disputes through mediation, and then arbitrate unresolved issues through a relatively rapid and inexpensive process that resolves disputes using an online arbitrator’s binding determination.\textsuperscript{348} Some commentators have championed the use of virtual worlds to resolve virtual disputes\textsuperscript{349}—I believe these spaces could additionally be used to support traditional offline dispute resolution processes as well.

Even if parties choose to resolve their dispute offline, they could use the Internet to educate themselves about dispute resolution so that they can could handle their dispute more efficiently and minimize the time and expense of their face-to-face interactions. Indeed, many dispute resolution websites act as referral and information points in addition to providing PDR services or touting ODR’s benefits.\textsuperscript{350}

Another simple way to use ODR to educate the public on dispute resolution is to inform people that they actually have a legitimate potential right of action. By disseminating information about company behavior, websites can cheaply inform parties that their legal rights may have been violated.\textsuperscript{351} While in previous decades, it would have been expensive and ineffective for individual consumers to warn a company’s other customers or potential customers that the company had not honored its obligation to its customers, today such an


\textsuperscript{348} Id.

\textsuperscript{349} See, e.g., Schmitz, supra note 15, at 244.

\textsuperscript{350} Sourdin, supra note 97, at 1 & n.2-3.

\textsuperscript{351} Such information dissemination is inexpensive because the cost of creating and running a website or connecting to the Internet is a very small fraction of the cost of buying advertising space in a newspaper, paying for a television commercial, or erecting a billboard. See id. at 3.
individual can cause substantial harm to a company’s reputation with negligible cost and effort.”352

The legal profession could make other very small changes to embrace the use of technology when resolving offline disputes. For example, when parties enter a mediation center, they could sign in electronically rather than walking up to the counter. Another possibility is for mediators and arbitrators to gradually embrace e-mail communications with disputants.353 Some commentators have even endorsed specialized technological training for dispute resolvers in e-mail, computer software and hardware, and “the new social software and social codes of the digital age.”354 Dispute resolution practitioners could even use the Internet to promote nationwide training standards for mediators and arbitrators, facilitating the goals of those scholars who advocate for creating entry-level exams and specific credentialing requirements for dispute resolution practitioners.355

Numerous dispute resolution practitioners have embraced at least some communication technologies as a crucial element of their practices, especially in online mediation.356 Existing

352 Orna Rabinovich-Einy, Balancing the Scales: The Ford-Firestone Case, the Internet, and the Future Dispute Resolution Landscape, 6 YALE J. L. & TECH. 1, 11 (2004). While it used to be prohibitively difficult for individual consumers to communicate with one another and compete with the near monopoly corporations have traditionally had in mass communications, today’s consumers can be in contact with one another, gather and disseminate information, and join forces through electronic communications on the Internet, either through their own websites or through chats or listservs run from other websites. Id. These developments are having a direct effect on consumer complaints and disputes. Id. Moreover, numerous websites have been developed chiefly for the purpose of allowing consumers to trade information about a company’s reputation and post reviews of businesses. See, e.g., TRIP ADVISOR, http://www.tripadvisor.com (last visited Dec. 27, 2011); YELP, http://www.yelp.com (last visited Dec. 27, 2011).

353 See Alexander, supra note 52, at 265. In a 2006 mediation workshop, Alexander asked dispute resolvers what percentage of their communications with the parties took the form of email, and the middle of the range was 30 to 40 percent, with one mediator reporting that 80 percent of her communications were via email. Id. at 255.

354 See id.

355 See, e.g., Hoffman, supra note 11, at 10 (calling for a basic entry-level test and rigorous licensing requirements in specialized mediation techniques similar to those used in the field of psychology).

356 See, e.g., James Melamed, We Are All Online Mediators, MEDIATE.COM, (Oct. 2009), http://www.mediate.com/articles/we_are_all_online_Mediators.cfm (acknowledging traditionalists’ criticisms of online mediation while also asserting that despite the traditional focus on face-to-face communication, “most mediators now mail nothing and e-mail everything. . . . The reason we are embracing communication technologies is
mediation providers are increasingly relying on online advertising. Many of these mediation services do not actually mediate online but simply information online on offline mediation or allow parties to fill out forms or complete other administrative tasks online. For example, parties using AAA WebFile must resolve their dispute in person but they can file a mediation case online for commercial, labor, employment, and hurricane insurance mediations. Client demand has driven this embrace of technology, as parties strive to use ODR to reduce dispute resolution expenses and to expedite the completion of perfunctory administrative work and tasks associated with scheduling a face-to-face meeting to resolve their dispute. One mediator commented that he “systematically refer[s] divorcing parents” for whom he provides mediation services to their state’s online resources regarding child care and parenting tips because failure to do so “would be, in [his] mind, mediator malpractice.”

Conclusion

ODR officially began in 1996 and has since expanded in numerous directions, driven by rising e-commerce and alternative dispute resolution’s reputation for fostering efficiency and cost-savings for courts and disputing parties. The search for more convenient, cost-effective ways of resolving disputes will continue as long as disputes exist. Contemporary scholarship on ODR no longer questions its viability as a dispute resolution mechanism, but

357 Gibbons et al., supra note 80, at 250.
358 Id.
359 Miller-Moore & Jennings, supra note 23 at 38.
360 Melamed, supra note 356.
361 Gibbons et al., supra note 80, at 251.
362 Id.
instead debates which disputes ODR is best suited to resolve.\textsuperscript{363} I believe that ODR is far superior to face-to-face interaction for parties of unequal negotiating power, for family disputes, and for employment disputes. I also believe there are numerous advantages to using online dispute resolution over face-to-face dispute resolution for many other types of disputes. The online forum provides unique opportunities to resolve both online and offline disputes.\textsuperscript{364} Online dispute resolution has numerous convenience-related advantages: the parties and the mediator/arbitrator do not have to be in the same location, city, or time-zone; the dispute resolution can occur outside of traditional business hours; and the parties can participate from their own homes or offices.\textsuperscript{365} Critics questioning ODR’s efficacy have hyperbolized the impact of restricted verbal and nonverbal cues in a text-based environment.\textsuperscript{366} Critics assume that ODR’s impersonal character offsets its cost and time savings.\textsuperscript{367} However, research has shown that computer-mediated communication is often superior to face-to-face interaction.\textsuperscript{368}

Many individuals who object to using ODR to resolve offline disputes likely have untested biased assumptions about their ability to resolve a dispute without a face-to-face interaction.\textsuperscript{369} They fail to appreciate the participatory value they can acquire by using the Internet to solve their offline problems. The legal profession’s reluctance to embrace ODR also likely stems from people’s basic unfamiliarity with the medium.\textsuperscript{370} An increased understanding of ODR will assist parties in making more informed choices about which kinds

\textsuperscript{363} Brauetigam, supra note 1, at 284.  
\textsuperscript{364} Id.  
\textsuperscript{365} Id.  
\textsuperscript{366} Id.  
\textsuperscript{368} Brauetigam, supra note 1, at 284.  
\textsuperscript{369} Id.  
\textsuperscript{370} Id.
of disputes are best settled in the online world.\textsuperscript{371} To gain acceptance in the legal community, online dispute resolution does not need to replace alternative dispute resolution.\textsuperscript{372} Disputants should consider ODR one of many possible types of ADR that they can use.\textsuperscript{373} No dispute resolution method is optimal for all situations—selecting the best dispute resolution method for a given conflict necessarily depends upon the nature of the disputants and the type of dispute involved.\textsuperscript{374}

I believe that ODR will significantly impact the field of dispute resolution for decades to come. Online dispute resolution sites, such as iCourthouse and VirtualCourthouse.com typically lack the financial resources of the document preparation services and are thus less well known, but they are nevertheless becoming more widely used.\textsuperscript{375} Given their low costs, convenience, and ubiquitous nature, online dispute resolution venues are replacing small claims courts and may soon compete more effectively with lawyers who provide face-to-face legal services.\textsuperscript{376}

Disputants should remember that ODR is not called OADR: it should not be considered to be merely an alternative to a standard dispute resolution mechanism but rather should be a primary means that parties embrace to resolve their disputes. Regardless of the extent to which the legal community embraces ODR to resolve offline disputes, ODR will remain extremely useful for resolving disputes that originate online because of the inherent difficulty in using

\begin{footnotesize}
\begin{enumerate}
\item \textit{Id.} at 285.
\item \textit{Id.}
\item \textit{Id.} at 286.
\item \textit{Id.}
\item See Schmitz, \textit{supra} note 15, at 183 (characterizing ODR as inevitable based on the rise of e-communities and the Internet-savvy generation).
\item William Hornsby, \textit{Challenging the Academy to A Dual (Perspective): The Need to Embrace Lawyering for Personal Legal Services}, 70 Md. L. Rev. 420, 432 (2011); see also Schmitz, \textit{supra} note 1, at 181 (suggesting that online dispute resolution is being used to resolve small claims).
\end{enumerate}
\end{footnotesize}
traditional ADR methods in low-value, cross-border online conflicts. Practitioners and disputants should thus familiarize themselves with the many benefits of ODR before selecting an alternative forum for dispute resolution. The online environment can provide tools that may enrich parties’ dispute resolution experience beyond what is possible offline. Parties in offline disputes should consider using online dispute resolution to address their disputes that originate offline in lieu of using face-to-face interactions.


378 Braeutigam, supra note 1, at 292.

379 See Katsh et. al, supra note 44, at 718 (underscoring that ODR’s greatest future potential lies not in its ability to mimic face-to-face interaction but rather in its ability to provide an even better dispute resolution experience for all parties than face-to-face interaction could ever provide).