

# Dispute Resolution in Cyberspace

by: Susan Patlyek

Alternative Dispute Resolution (ADR) methods have been in use since the early days of civilization.(1) In the middle ages, crimes were seen as acts of injury caused by one person against another. The parties were expected to reach an agreement that would restore both parties and the community to a state where all involved healed from injury.(2) As civilization has evolved, so has the types of conflicts and perspectives on conflict. The basic premise of conflict will always be the same: “an expressed struggle between at least two interdependent parties who perceive scarce resources, incompatible goals and interference from the other party in achieving their goals.(3)

However, the ways in which parties can interact with each other has changed over the centuries. During the middle ages talking or writing about someone in your own village or country would not effect others thousands of miles away. Historically, conflicts are perpetuated by physical interactions, by people who know each other or who have at least seen each other. With the advent of Internet technology it is possible to effect the lives of hundreds of thousands of people in a matter of hours anywhere on the planet.(4) In cyberspace it is possible to have a conflict over something that does not even physically exist or that can be changed with a push of a button.

Internet technology also changes the way communication and information management are used in dispute resolution. With the invention of the fax machine and e-mail it is now possible to instantaneously distribute large quantities of information to anyone, anywhere.(5) Since the invention of real time chat and electronic conferencing, it is no longer necessary to have both parties physically present in the same place. Technology has also made it relatively inexpensive and easy to store, retrieve and reuse existing information.(6)

There are two trends in cyberspace that have given rise to the need for more diverse options when dealing with online disputes: the rapid increase of users and the diversification of activities and interactions that take place on the web.(7) With this increasing interaction comes increasing conflict. These conflicts are different from traditional disputes, therefore, new methods of ADR need to be developed to meet the needs of these users.

On May 22, 1996, the National Center for Automated Information Research (NCAIR), held a conference on On-Line Dispute Resolution in Washington, D.C. This conference brought together experts from the Cyberlaw Institute (CLI), Georgetown University, American Arbitration

Association (AAA), Villanova Center for Information Law and Practice and MCI.(8) These experts discussed and designed regulations for the first active online ADR system on the Internet. Since May 1996, other organizations have set up shop online.

The three common ADR methods that are used on the web are arbitration, mediation and ombuds. Arbitration used in the Virtual Magistrate project and CyberTribunal, is a process where a neutral third party hears a presentation by the disputing parties and makes a decision which can be legally binding. Arbitrators traditionally received their power from the contracts of the parties.(9) Most contracts have arbitration clauses stating that if the parties become involved in a conflict they must take their case to arbitration.

Mediation, which involves a third party neutral who tries to facilitate communication between the disputing parties enabling them to design a mutually beneficial agreement, is used by the University of Maryland's Online Mediation project, the University of Massachusetts Online Ombuds Office and CyberTribunal.(10) (11)

An ombudsperson is a neutral third party, who receives complaints, conducts investigations and makes recommendations usually within a corporation or government.(12) (13) The An ombudsperson is not authoritative or a final decision maker, their job is to assist persons to help themselves. This process is used by the University of Massachusetts's Online Ombuds Office.

### **Advantages**

There are advantages aside from the speed and cost effectiveness of the online ADR process.(14) Online ADR is very convenient for those who have online access. In most cases, the parties are able to decide when to participate or respond. This gives them time to reflect on the issues for as much time as is needed. Since the process is void of physical contact, parties do not risk feeling threatened by the physical presence of the other party. The advantage to this is that the anonymity allows individuals to freely concentrate on the issues instead of on their feelings.(15) Online ADR also provides an educational opportunity for all parties involved to gain experience by using new technology and ADR methods simultaneously.(16)

### **Disadvantages**

There are some possible disadvantages to using online ADR. As in face to face mediation, neutrals need to be aware of the potential for power imbalances.(17) Power imbalances do not only take place in traditional forms, of ADR but also to technological situations. There is a potential for power imbalance when it comes to the comfort levels and previous experience of parties using online resources.

Access to online resources may also be a problem for some parties. Although the amount of daily Internet traffic will surpass the amount of telephone traffic world wide this month, there is still a

segment of the population that does not have access.(18) The way the Internet is set up may also cause some problems when dealing with confidentiality. Communication over the network involves copying, and there is no way to regulate what happens to those copies.(19) The lack of physical interaction can also be considered a disadvantage by some. Without this face to face relationship, some may feel it difficult to read the cues of body language, voice pitch and other non-verbal communications, as well as trusting the mediator.(20)

### **Virtual Magistrate**

The Virtual Magistrate (VM) project was the product of the May 22, 1996 Washington, DC conference. It is run jointly by the Villanova Center for Information Law and Policy, The Cyberspace Law Institute and the American Arbitration Association. This project was developed in response to the need for immediate global dispute resolution in cyberspace as a way to establish a consistent dispute resolution mechanism dealing exclusively with cyber issues.(21) VM is an experimental project to measure whether using online arbitration for resolving disputes which originated online would be utilized by cyber users. VM wants to provide Internet service providers (ISP) with informed and neutral judgments on appropriate responses when making decisions which involve allegations of copyright infringement or defamation

The Virtual Magistrate project offers arbitration to individuals who use online services, systems operators and people who claim to be harmed by wrongful messages, postings and files. The administrators had systems operators in mind when developing this project. Administrators hope that ISPs will use VM decisions as a basis for their contracts and that they will place an arbitration clause in their contracts.(22) VM will also consider cases which are directly related to online activities or commerce dealing with compensation or financial obligations.(23)

The Magistrates are selected by the AAA and the Cyberlaw Institute Subcommittee, they are be paid volunteers that are randomly selected when a case is accepted. Magistrates must be familiar with relevant legal principles as well as technical issues that they may encounter.

When a party wants to a apply for service they fill out a complaint, which is located on the VM's webpage. The complaint asks for a description of the action, objection to the activity and information about the other person. The complaint is then reviewed by the AAA who, if necessary, requests additional information about the complaint, then secures a participation agreement from both parties. After the necessary documents are secured the AAA begins assigning Magistrate(s) to the case. The VM tries to resolve all disputes within 72 hours of both parties agreeing to participate.

Communication between the Magistrate and the parties will take place on a designated listserv/newsgroup ("grist"). All participants receive a password for access to the grist, where the

decision will be posted. In some cases, it may be necessary for the Magistrate to communicate privately with a party. In these cases communication will take place via the Magistrate's private e-mail.(24)

VM will decide whether reasonable action should be taken by the systems operator; such as deleting, masking or restricting access to a message, file or posting. It may also be necessary for the Magistrate to decide whether access should be denied to certain parties.(25)

The Virtual Magistrate project expects system operators to support and enforce all decisions just as they would in private arbitration. All decisions will be made public unless otherwise deemed by the Magistrate.

### **Maryland's Online Mediation Service**

The University of Maryland's Online Mediation Service is administered by the University of Maryland School of Law Program for Dispute Resolution, and The Center for On-Line Mediation & Trade, Inc.(26) This program was developed as a service for Maryland residents who are involved in a family law or health care related dispute. The project's goal is to show that mediating family and health disputes online will cost less, facilitate agreements and create foundations for future use of conflict resolution methods.(27) There are advantages to mediating certain types of disputes online. Mediating family and health disputes online will facilitate agreement between the parties, and cost less than traditional mediation, especially when there is a great distance between disputants.(28) Maryland limits its service to domestic disputes such as custody, visitation, child support and property division; and health care disputes between either consumers and insurance companies, or consumers and health care device manufacturers.(29) In the case of domestic conflicts, it is hoped it will create a foundation for future conflict resolution after the divorce is final.

Maryland's divorce mediation is designed to help facilitate agreement between spouses. These agreements can specify issues which deal with children and/or property division. The agreement is binding under Rule S73A of the Court of Appeals of Maryland.(30) This rule gives the courts, after consultation with counsel, the power to order parties to attempt mediation where they see fit. All meditations are confidential. The service uses a variety of electronic communication tools such as e-mail, electronic conferencing (real time chat), private online chat, and video conferencing. Upon request traditional face to face meetings can also be arranged.(31)

Maryland's service is a four phase process.(32) Initial online communication takes place in Phase I. At this time the mediator answers any questions parties might have about procedures and the ground rules.

During Phase II, parties are given the opportunity to prepare and submit supporting information. This is also the time when the initial online meeting can be held with the mediator and both parties. This can be held in either real time or through electronic conferencing. After everything is discussed the mediator presents the settlement terms in Phase III.

This phase involves contacting each party separately through e-mail. The mediator presents each side with a memorandum which outlines the rationale of the mediator's settlement recommendations.

The final phase of the mediation may involve "shuttle diplomacy" if terms of the agreement are unacceptable to either side.(33) In the case of agreement, the mediator drafts a settlement that is circulated to both parties and their attorneys for review. When all parties involved are in agreement about the terms the settlement is formally executed.

### **University of Massachusetts Online Ombuds Office**

In July of 1996, the Center for Information Technology and Dispute Resolution at the University of Massachusetts opened its Online Ombuds Office (OOO). The OOO is an attempt to bring resources of an Ombuds office to online users. As with traditional Ombuds offices, the OOO is also a resource center where users can browse and read about common disputes regarding cyberspace as well as obtain articles on the subject. The project's primary target is disputes based on any of online activity. They also provide as resource helpful information for individuals involved in the following disputes; newsgroups and listservers, domain names, competitors, ISPs, and copyright. Recently, the OOO mediated 175 disputes for eBay, initial findings show a success rate of greater than 50%.(34) Other organizations that are working with the OOO are Up4Sale and World Organization of Webmasters.

The OOO suggests becoming familiar with their terms and conditions and the process before submitting the mediation request form. After submitting the form, a mediator or An ombudsperson will be assigned. If both sides are cooperating in using OOO there is a good chance for success.(35) The ombudsperson is always paired with someone who has some technical expertise and familiarity with the Internet. There are two reasons for this: context is always a factor of dispute resolution, and an ombudsperson might lack technical knowledge which might affect the outcome of the agreement.(36) The OOO uses real time chat in their Online Ombuds Conference Room and are experimenting with video conferencing and other interactive technology. The project strives to protect the confidentiality of the clients but does not guarantee it because of the nature of the Internet.

### **CyberTribunal**

A project that uses both mediation and arbitration is CyberTribunal, an experiment developed by the Centre de recherche en droit public (CRDP) in Montreal, Canada.(37) The purpose of CyberTribunal is to facilitate communication between the parties and, if necessary, act as a legal institution. It is the hope that this project will establish services that will prevent and resolve cyberspace conflicts. CyberTribunal specializes in the areas of electronic commerce, competition, copyright, trademark, freedom of expression and protection of privacy. The mediators and arbitrators are made up of professors and lawyers who specialize in information technologies and mediation. CyberTribunal focuses on two areas: development of the rules of conduct for cyberusers, and how these rules can be effectively applied by conflict experts. One of these rules is the use of arbitration and mediation clauses for online commercial transactions.(38) CyberTribunal also provides a CyberTribunal Certification Seal that can be posted on commercial websites.(39) This seal indicates to cyberusers the proprietor's commitment to the use of mediation and arbitration to resolve conflicts. Services are offered in French English and Spanish. CyberTribunal guarantees confidentiality. To ensure this each case is designated its own password accessed webpage.

### **Conclusion**

Online ADR is quick, free and in most cases confidential. The amount of online ADR methods available to consumers indicates that experts in dispute resolution feel online ADR is the most effective way to deal with online disputes. As technology continues to evolve it will continue to be imperative for the experts of ADR to develop new methods to better serve the public. The success of online ADR depends on such development. Rapidly changing technology not only changes the way people interact with each other but changes the nature of conflict and conflict resolution. The quicker and more diverse the Internet becomes the greater the need is for quick dispute resolution.

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