LENGTH: 26309 words

NOTE & COMMENT: BRAINSTORMING MEETS ONLINE DISPUTE RESOLUTION*

* This article is related to another article -- Lenden Webb, International BBB a la eBay, 36 CAL. W. INT'L L.J. 1 (2004), available at http://cisgw3.lawpace.edu/cisg/biblio/webb.html.

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LEXISNEXIS SUMMARY:
... ODR includes: group facilitation and organization similar to tools used at online sites www.yahoogroups.com and www.myevents.com, bundled into tools such as eBay's www.SquareTrade.com's largely automated mediation process, and www.cybersettle.com's "blind bidding" for quantitative negotiation. ... The strengths of the ODR processes are: 1) saving time and money and preventing judicial overload; 2) the freedom to choose processes and participants tailored to the mutual needs of the parties (such as privacy and confidentiality options), which leads to higher compliance; 3) achieving better results by creating outcomes that serve the real needs and interests of the parties; 4) collaborative efforts that end in understanding the interests of other parties; 5) increasing community involvement in dispute resolution; 6) increasing access to justice; and 7) providing an informal, consensual, non-adversarial process. ... Brainstorming as defined by Osborn is the process that stimulates idea-generation after identifying issues with six to eight diverse participants prepared for un-restrained, positive, creative thought sessions filled with rewards and praise for outlandish ideas. ... Participants are guided by a mediator to new, higher quality and quantity of perspectives via: humor, eschewing all rules, reverse engineering, games, analogies, matrices, snowballing trigger sessions, stories and role playing for 50-minute sessions. ... Not only

does this validate all comments regardless of non-verbal evaluations, but publicly transcribing ideas helps the group to remember previous ideas. ... Snowballing Trigger Sessions In the invitation and agenda-setting stages, a moderator can help build confidence, creativity and speed of brainstorming by starting the brainstorming several days early by introducing the topic in the meeting invitation. ... While e-mail is the lowest common denominator for dispute resolution, as soon as a mediator is involved, the communication should be on a secure site where the mediator can control communication. ... Auto-Prompts Mixing brainstorming methods decreases costs and will keep ODR accessible. eBay "now requires binding arbitration of its disputes as a condition to buying or selling on the eBay auction." ...

> The Internet is an extraordinary achievement and the challenge, as we see it, is not to use the Internet to duplicate the offline dispute resolution environment but to expand our thinking and look for ways that dispute resolution expertise can be of value online. ... If the taxes are ruled out for the FCC on the VOIP, this will break all the rules and hasten videoconferencing's arrival.

TEXT:

[*337] I. INTRODUCTION

The team leader starts by asking what a computer network really does. For a minute the question hangs in the air like a Zen koan, then the team members jump in. Someone makes the comparison to a home intercom system. The network is envisioned as a light-rail system, as a steel infrastructure, as a bible. The group moves rapidly through a slew of creative antics. With soft, calming New Age music in the background, the namers try their hand at writing advertising copy, they build on punchy tag lines, they watch the client's television ads. And then they write haiku poetry:

> *The fabric of work*
>
> *Gliding effortlessly fast*
>
> *Zigging and zagging*

By midmorning, the creatives have churned out hundreds of candidate names: Ensemble, Copernicus, Socket, Tango, Chainlink. The object is not so much to find the ultimate solution, but to keep the momentum going and build on the suggestions of others. "What about blackberry?" asks one consultant. "I see the network as a link of vines and tendrils. Oooh, what about tendril?" The session proceeds. [1]

[*338] Have you spoken with a customer service representative from India recently? Disputed a credit card charge online? Purchased anything at eBay or noticed that more of your friends are doing so? As an attorney, your eyebrows rise and your eyes follow the trail of the legal dispute, which has skipped town and left the comfortable jurisdiction of the hall of justice down the street.

When the disputes concern smaller dollar amounts and jurisdictional challenges arise because of international participants, must we shrug our shoulders and respond, "It simply can't be helped," or

that we are "powerless to do anything"? Hardly.

Given the increasing industrial capabilities compounded with the downward spiral of global labor costs and disappearing national borders, our everyday transaction partners are farther away, yet entertaining transactions at lower dollar amounts. Yet our courts cannot maintain this quickening pace and simply refuse to resolve issues immediately. Expensive litigation and time-consuming processes continue to place traditional court dockets out of reach. Additionally, formal jurisdiction is often not possible, so whatever mechanisms are used to resolve issues must gracefully leap state and national boundaries.

> *Can our courts work weekends? How about opening an all-night drive-thru for resolving disputes. Great. And did I mention cost? The process must be inexpensive, ideally free. Can we do that? How soon? Well, yesterday would've been nice. But can you get on that immediately? Super. The world would really appreciate it.*

Snicker now. Realize later that these seemingly out of touch desires are nothing less than what the consumer demands. And in the world of the almighty bottom line, the first one to accommodate the increasingly demanding consumer is the winner. Ask anyone from the maitre d' at your favorite restaurant to the shrinking marketing departments at airline companies worldwide. The legal system must sprout a better answer than the traditional court processes. Without such an answer, the valley between real-life daily transactions and the law will widen, with the consumer left in the widening gulch.

A. *Online Dispute Resolution -- Fast, Inexpensive, and Global*

Conflicts arising from international and lower-dollar transactions [2] can find relief with Alternative Dispute Resolution's ("ADR") newly minted sibling, **[*339]** Online Dispute Resolution ("ODR"). "[D]ispute resolution isn't really an alternative -- the courts don't work online, so dispute resolution is often the default." [3]

Online Dispute Resolution is the internet's application of arbitration, negotiation, mediation and facilitation. ODR includes: group facilitation and organization similar to tools used at online sites www.yahoogroups.com and www.myevents.com, bundled into tools such as eBay's www.SquareTrade.com's largely automated mediation process, and www.cybersettle.com's "blind bidding" for quantitative negotiation.

While many simplify the benefits of ODR to time and money, there is much more. The strengths of the ODR processes are: 1) saving time and money and preventing judicial overload; 2) the freedom to choose processes and participants tailored to the mutual needs of the parties (such as privacy and confidentiality options), which leads to higher compliance; 3) achieving better results by creating outcomes that serve the real needs and interests of the parties; 4) collaborative efforts that end in understanding the interests of other parties; 5) increasing community involvement in dispute resolution; 6) increasing access to justice; [4] and 7) providing an informal, consensual, non-adversarial process. [5]

> ODR has progressed rapidly since the early efforts, due primarily to recent web browsing enhancements and very fast Internet broadband connections. Unlike courts, settlement conferences, and arbitrations, ODR is open twenty-four hours a day, seven days a week, and incorporates both synchronous [6] and asynchronous communications capabilities. . . [7]

> **[*340]** Whereas early ODR endeavors were not-for-profit venues sponsored by universities and foundations, ODR venues of today are for-profit commercial ventures

providing services for both B2B and B2C [8] online transactions. ODR venues use differing approaches, ranging from automated dispute resolution to electronic courtrooms complete with juries. [9]

While the entire dispute resolution process is integral to success, this note focuses on the most volatile and potentially rewarding aspect of dispute resolution: brainstorming.

B. *Why "ODR-Brainstorming"?*

Brainstorming is the foundation for creative problem-solving. Brainstorming methods and human nature must be translated into the online environment in order for ODR to maximize its full potential. Sadly, many initial attempts at brainstorming in ODR environments were unsuccessful because brainstorming techniques were either misused [10] or not used at all. [11]

The first part of this note discusses brainstorming methods used in both adversarial and facilitative creative problem solving. Next follows a discussion of the disputes that play to ODR's strengths and why ODR may be the only hope for justice in such cases. In the final section, the practicality of re-injecting brainstorming methods into ODR as ADR is folded into ODR, is addressed. Using ODR we can manage a globalized economy where accountability of the mom & pop seller has been replaced by faceless, yet accountable, mom & pops from foreign lands.

 [*341] II. BRAINSTORMING'S CONTEXT: HISTORY & BOUNDARIES

Albert Einstein told us that "Imagination is more important than knowledge." [12] While creativity has always been a pillar of the U.S., our society tends to reward knowledge more often than creativity. The inhibitions and assumptions of adulthood dam the endless power of creativity. Unleashed from the chains of history and previous experience, youth has the freedom to truly brainstorm.

A. *List & Discard Assumptions*

Because we cannot erase all memory banks and become like children, we must search for alternatives to release free thought. The main suggestions center around "paradigm shifts" (*i.e.,* "thinking out of the box"). Some suggest activities such as, "List[ing] all your assumptions -- many are dead wrong." [13] By brainstorming the challenge's assumptions, the dilemma comes within grasp. [14] Next, remove the assumptions in order to free up imagination and creativity. This should be done with confidence that the present benefits need not be discarded, reminding participants to "start with the knowledge that (you) can return" to where you were. [15] With this open platform for thinking, the lack of boundaries brings new associations that were previously inhibited. To this end, creative artists are seven times more likely to carry a cross-wired disability called "Synesthesia." [16] This is the "absence of inhibition caused by cross-wiring" [17] in the brain. So break rules and find new answers!

 [*342] B. *Why and What is Brainstorming?*

Brainstorming is an idea-generating technique attributed to an advertising executive in the early 1900s named Alex Osborn. [18] While brainstorming enjoyed a "coming out" in the early 1900s, "similar techniques have been practiced" since Biblical times. [19] In fact, this technique has been practiced by "Hindu teachers in India for more than 400 years." [20] Brainstorming [21] as defined by Osborn is the process that stimulates idea-generation after identifying issues with six to eight diverse participants prepared for un-restrained, positive, creative thought sessions filled with rewards and praise for outlandish ideas. Counter to common culture, "hitchhiking" on another's creativity is encouraged. Participants are guided by a mediator to new, higher quality and quantity [22] of perspectives [23] via: humor, eschewing all rules, reverse engineering, games, analogies, matrices, snowballing trigger

sessions, stories and role playing for 50-minute sessions.

C. *Rule # 1 -- No Rules*

One of the rules is that brainstorming options need not conform to any rules. Leonardo da Vinci wisely said, "If you were to use rules in creating, you would never get to the beginning of anything." [24] Previous experience, history and assumptions must be expelled. Tell brainstormers the impossible is now strangely **[*343]** possible. History has been erased and they are free to try to re-construct the situation from the ground-up, with no established impediments. This allows imagination to flow freely during the session.

III. BEFORE BRAINSTORMING

A. *Whom to Invite*

Invite a crowd with energy and potential, and include those, "with influence, ultimate recipients of the solution, creative thinkers, and finally positive thinkers." [25] In 1950, J.P. Guilford defined five key traits of creative people: "fluency, flexibility, originality, awareness and drive." [26]

The optimal brainstorming group consists of six to eight persons. Such small groups help participants voice their "gut reactions and thus liberate sub-conscious ideas." [27] Larger groups might be useful for difficult issues or if the group has marginal brainstorming experience or lacks synergy. [28] Authors warn that, "[w]ith less than six, you limit the variety of perceptions. With more than eight, participants do not have enough 'airtime.'" [29] By being heard, the participants have a stake in the process. Additionally, a person cannot easily disappear in a small group, where the consensus is skewed by the ideas of vocal members.

In an adversarial [30] setting, maintaining equality in a brainstorm session is paramount. [31] The communal feel avoids intimidation and abuse of power.

 [*344] B. *Diversity Among the Participants*

Gerald Nadler and Shozo Hibino's landmark book in Creative Problem Solving lists a core principle: "The People Principle: Diversity will bring unorthodox answers and focus to the effort." [32] Brainstormers from varying backgrounds will have new perspectives because the assumptions that a person carries are a product of his or her environment. It is often because of their starkly contrasting assumptions that diverse participants yield a higher level of creativity and idea-generation. This is the kind of thinking that transcends an individual's limited perception of reality.

1. *Diversity: Too Much of a Good Thing?*

One caveat must be addressed: Cultural backgrounds may either limit or strengthen participation in brainstorming. One example is China, "where in distinct contrast to an American view of 'this is none of your business'...between Chinese parties, the dispute almost always becomes communitarian in perspective." [33] The Chinese tend to view any disagreement as being collectively dangerous where it affects a group rather than "being confined to the particular disputants." [34] Therefore, the Chinese look outside of themselves and brainstorm more efficiently with options from multiple perspectives. If the standard U.S.-based brainstormer could apply the Chinese methodology in addition to the natural, rights-based perspective, this combination of intrinsic and extrinsic foci would bring the party full circle to concentrate on not just the individual parties' interests, but also the easily forgotten aggregate interests. [35]

2. *Diversity to a Point, but Maintain some Familiar Faces*

While an entirely homogenous batch of participants might stagnate a creative brainstorming process, there is utility in having people familiar with the issues, "including peer review systems, [and] ombudsmen..." [36]

[*345] C. *Moderator: Vested or Neutral?*

1. *Facilitative Moderator: Vested*

For an issue that is not polarized or adversarial, the moderator should be the person with the highest level of vested interest. "The decision-maker/third party leading the brainstorming must 'own' the problem." [37] In a facilitative setting this vested interest would help evoke strong brainstorming efforts because of the facilitator's emotion and interest. Beyond his other investment, it is also beneficial that the vested moderator has pure motives in finding the glimmer of strength in every idea, regardless of its source. [38]

2. *Adversarial Moderator: Neutral*

A third party should have the ability to be seen as a neutral elixir of collaboration between the parties. [39] In that event, each party will likely carefully measure comments sent and received. Further, there will often be reflection on comments made by the neutral who should remind the parties that he or she has no vested interest. The third party might have a new, fresh perspective to benefit the entrenched parties. Finally, making the terms and the communication more accurate and measured will more likely resolve the dispute.

D. *Plant Seeds Early with Participants*

Agree beforehand on a specific agenda, process and time limits. This opens involvement via pre-session suggestions.

1. *No Rules in Brainstorming Options, but there are Procedural Guidelines*

The brainstorming icon, Alex Osborn, did a little "hitchhiking" of his own when he drew his four rules from his friend Guilford's list of "five creative traits... 1. Criticism is ruled out; 2. freewheeling is welcome -- the wilder the **[*346]** better!; 3. quantity (breeds quality); 4. combination and improvement are sought." [40]

Although rules must be removed, keeping order during the brainstorming process increases efficiency. Preparation is key to any process, and a well-prepared neutral will have greater fluency with a variety of brainstorming methods and latitude of ideas. There are many ways to facilitate the brainstorming experience via preparation and freeing participants of anticipatory questions and unknown variables. In order to meet expectations, the moderator should establish time limits, [41] procedural guidelines, agendas and goals in advance.

2. *Required: Issue and Goal Specificity*

"Some business agents will state: 'We have five demands--union security, vacations, holidays, wages and seniority,' and sit back down expecting the mediator by some Divine revelation to know exactly what the problem may be." [42] While it is imperative to list what categories are to be addressed, brainstorming without specific interests and goals is inhibitive. [43] "A problem well-stated is a problem half-solved." [44]

3. *Shared Goals*

Submitting a list of agenda items to be discussed in advance with tentative minutes from the last

meeting can help jumpstart brainstorming because the topic will percolate in the minds of participants beforehand. In order to focus and channel thoughts towards issues and goals, reading a "recap" of what was decided at the last meeting is a great way to encapsulate the progress made at the last session and not to lose the proverbial train-of-thought. Visibly posting these same agenda points and suggestions for the brainstorming session comforts participants with continuity, boundaries, and, most importantly, control.

[*347]   E. *Know Your Constituents*

Freedom *not* to do something gives one freedom *to* do it. [45] It follows that another important pre-brainstorming task is to know your constituents. Knowledge of the formerly unknown gives one freedom to make rational choices. Likewise, the first decision-making step for the European Economic Area was for the EC Commission to "informally seek advice from experts of the EFTA States." [46] Often a person might have the title of authority, yet fail to make suggestions freely because he lacks confidence regarding his constituent interests. From this fear stems a lack of willingness to volunteer even moderately improbable ideas. The virtual "pie" of possibilities immediately shrinks.

In addition to increasing confidence, the use of anonymous constituent questionnaires maintains accountability and posting their tabulated results yields transparency that helps all parties focus on interests instead of positions.

F. *Know Relational History and Legal Precedent*

On a relational side, studying history can help to predict the future. With such historical knowledge, arrangements can be made that would be outside of the options available in an adjudication but are fully desirable to the parties at hand. These, "[s]ocial arrangements are often effectively stronger than the new laws." [47] Thus, because humanity is predictable and repeats mistakes, studying the past can help incubate ideas for the future.

Similarly, from a legal perspective, make sure that you "[d]o your homework... Precedents and benchmarks help you generate reasonable proposals." [48] Knowing the other party and the enforcer's views helps define the boundaries that idea-generators may traverse if they have fully captured the underlying motives. The force of history and interests is stronger than positions. While a person is well advised to know his case's legal implications, the inter-personal and relational challenges are often equally, if not more important.

[*348]   G. *Know and Brainstorm Beyond Your BATNA, WATNA and MLATNA* [49]

In an adversarial brainstorming session, knowing your Best Alternative to Negotiated Agreement ("BATNA") helps a negotiator/brainstormer understand where the bounds of reality might lie. [50] All too often this is left as a concrete boundary, and the brainstormer neglects to look beyond this hypothetical boundary. Regardless, the initial BATNA might trigger a creative thought as part of a final solution that might be better than your initial BATNA. Just as worthy is identifying the Worst Alternative To Negotiated Agreement ("WATNA") and Most Likely Alternative To Negotiated Agreement ("MLATNA"). To brainstorm effectively, a party should go beyond its WATNA as well, listing ideas past its boundaries as options even though these terms are unfathomable. Once again, this shows the other parties how far you are willing to look in order to be creative in finding a mutually acceptable solution. This open-minded spirit brings a collaborative feel that "de-claws" opponents.

While brainstorming with an end in mind can prove useful, this end should be delineated by both your BATNA and a WATNA. Knowing minimum requirements of both parties was effectively used in the successful mediation of the West New Guinea Dispute in 1962 by Ellsworth Bunker, where the successful "Bunker Plan" contained minimum requirements of each side. [51]

Use of case law and history of similarly situated parties enables participants to brainstorm freely beyond their BATNA, WATNA and MLATNA. There is an "expanded pie" when the parties can speak freely of ideas that are outside of the parameters of the agreement. For case studies it is helpful to identify the results and the contributing factors in both legal *and* relational solutions. Without this background it would be inequitable to apply previous results to the present question.

H. *Time the Session to Equalize Bargaining Power*

Nothing is more rewarding than having all parties equally motivated to figure out a solution. Motivation should be measured in time, resources, risks forecasted **[*349]** and the rewards of finding a solution. [52] This helps to serve as a reality check for the ideas that are being construed. It also serves as a motivator to be productive and put energy into the process. [53] "Sometimes the parties have to be face-to-face with the potential devastation of the worst-case scenario to be willing to work together at all." [54] "[B]y scheduling a meeting on the deadline date, [one] can take full advantage of the presence of these pressures to effectuate a settlement..." [55] Pressure effectuates quick moves, reducing the posturing that retards effective communication.

Announce timelines at advantageous moments. Deadlines and other appropriate restrictions need not all be set out at the beginning of brainstorming. Inopportune timing of deadline announcements can result in exploitation. For example, "It is easy to imagine facts making it advantageous to the employer to prolong the procedure or pile on costs." [56] These disparate bargaining positions facilitated the use of the "take-it-or-leave-it" concept of "Boulwarism." [57] Time constraints are especially helpful for large bodies such as NAFTA parties. [58] Time constraints in general are a motivator to resolve issues independent of the adjudicative resources.

I. *Understand the Other Party's Interests*

Rather than working with the ends that you have in mind, an intelligent move is to idea-generate from the ground level of the other party's interests and values. One might believe that this applies to adversarial applications only, but knowing the other's interests and motivating values applies to facilitative meetings as well. **[*350]** An open stance about specific interests can develop into ideas that are easily adaptable into a final solution or other brainstorms. These well-founded brainstorms will reflect the desires and interests of all parties.

Find ideas that create value. "[A]nything you value highly and which the other party does not, presents an opportunity to create value." [59] So compare and weigh the effects of the differences in tolerances to risk, time constraints and resources. [60]

J. *Ideal Brainstorming Environment*

Adapting the tenured timepieces of the past to the nuances of the new is a challenge. We must tailor our documentation methods to the environment of inspiration instead of waiting for inspiration to visit our comfortable environment where we are accustomed to documenting things. When inspiration strikes we want to be armed. [61]

Depending on the culture, it pays dividends to mind personal space when brainstorming. For example, Americans have a heightened sense of appropriate personal space. [62] To accommodate this, an organizer must prepare with seating arrangements for participants comfortably spread throughout a room.

The set of the "physical environment [should be that of] a new physical perspective with no interruptions except needed breaks every hour. Large rooms 3x (sic) larger than [necessary for] the participants, on the cool side of things, with refreshments and open space between the participants." [63] In an adversarial setting, the parties should sit opposite each other and the "tables should be wide

enough to permit the parties to take notes and have whispered consultation with their colleagues without having their counterpart 'breathing down their throats.'" [64]

 [*351] In a facilitative setting only, brainstormers could stand since research shows people think better on their feet. [65] Conversely, standing would quickly backfire in an adversarial setting as it is more akin to motion, threats and physical aggression.

IV. AT THE BRAINSTORM SESSION: GENERALLY

A. *Begin with Games*

Altogether too often, participants begin to brainstorm with varying ideas of how the process works. This is often because they come from varying fields of education, training and experiences. The process is hindered further when participants are either adversarial or strangers. From acquaintances to long-standing business partners, people often have their emotional shields up, allowing only limited risk and idea sharing, to defend against any ego casualties. This shield is understandable because typically there is an immediate evaluative retaliation to proposed ideas. Yet shields inhibit the free-flow of ideas and in the brainstorming process, ideas must have time to grow before being dissected. To begin to solve this and other goals, a moderator could start the brainstorming session with a game.

Games that use brainstorming processes introduce participants to the brainstorming construct. This avoids false starts when the real brainstorming begins. The games also increase the confidence level of the actors when they brainstorm "correctly." The games also avoid a boring recital of rules and how-to's for those people experienced in the brainstorming process. Positive enthusiasm is needed for the synergy of an optimal session.

Games help people to relax, to lower their inhibitions, [66] to understand the mission, and to open up and leave their evaluative natures behind. "[T]he purpose of warm-up is to take a set of individuals, with personal prejudices and vested interests, and help move them into a temporary state in which they all work together and in which ideas are accepted and developed without evaluation." [67] Warm ups are imperative. Finally, exercises and games train people to be independent of the guidance of the mediator.

 [*352] Games also bring humor into the room, and valuable insights are a byproduct of humor. "[I]nsights, which are important in creative problem solving, involve a shift in perspective that occurs in humor." [68] This shift is helpful because, "No problem can be solved from the same perspective that created it." [69] Too much experience and knowledge can create a "blockage by the familiar." [70] In addition to creative thought, "laughing is another way to release emotional clutter, especially feelings of anger, guilt, and the kind of fear that's based on misunderstanding." [71]

B. *Brainstorm Categories before Specifying Alternatives*

Similarly, it has been suggested to list categories before branching into specific alternatives. This allows the brain to focus on the end result, allowing the brainstormed specifics to flow freely because of the ability to connect the dots instead of the overstated concern with present location. Nadler & Hibibo list "The Purpose Principle" [72] as one of their main tenets: where the group lets the purpose, not the problem, guide. If you can understand the purpose, the problem will unfold.

It is useful to encourage brainstormers to "[i]dentify categories before specific alternatives." [73] This helps expand thought and ensures that all creative solutions are found. It is suggested to start with a mind-map [74] or other visual construct. Once all the possible categories have been fleshed out, then the group can be redirected to find what alternatives are within each category.

[*353]   C. *Proper Prompting*

Closed-ended questions [75] do exactly what they say they do--bring closure to the discussion. A recommended lead-in for a discussion is instead to list the challenge in terms of. "How To..." or "How Might We..." This effective brainstorm rhetoric is "hypothetical, exploratory and invitational." [76]

D. *Post Ideas Immediately*

Progress encourages people. Seeing visual indicators of this progress fosters faith that the process will succeed. When a person makes a statement in front of a group, it is the mark of willingness to take the risk of rejection by all other people in the room. So while it is impossible for rules to prevent all forms of evaluation, [77] in order to encourage further discussion, all creative ideas must be memorialized in front of the group in a visible format. [78] Not only does this validate all comments regardless of non-verbal evaluations, but publicly transcribing ideas helps the group to remember previous ideas. Finally, written summaries of verbalized ideas acts as a form of visual paraphrasing to ensure that the message received was similar to the idea shared.

E. *Idea Specificity Helps Hitchhiking*

Called "hitchhiking," added specificity spurs others' thought processes and gives the necessary details to frame new possibilities. These details will later help the evaluative process to combine easily.

F. *Listen First, Evaluate Later*

In the case of adversarial brainstorming or even facilitative brainstorming with persons who are more emotionally vested in the outcome, it is often wise to **[*354]** listen initially so the person feels that he was able to vent, be heard and be understood.

People want to talk about themselves and their interests. Similarly, whether in an adversarial situation, or at a chamber of commerce mixer trying to rainmake for your fledgling law practice, you must seek first to understand before being understood. "[B]efore [participants] have [been listened to], they will resist the mediator's lead." [79] Find all issues before addressing brainstorming so the parties can work with all issues on the table.

1. *Listen and Apologize*

Listening is paramount. In an adversarial process, listening and a little empathy might be all the adversary requires. After listening, little more than an apology by a party will be required to end many disputes. Big companies such as Toro have changed their policies after finding they can avoid adjudication simply by listening and apologizing to the other party. [80] This is because being heard often gives a sense of control and satisfaction to the speaker, validating feelings by the time and attention taken to listen.

In order to facilitate such sharing, the moderator should "smile a lot!...[and] make appreciative noises!" [81] From body language to note-taking and open-ended questions, the key is to communicate interest in the adversary's interests.

2. *Do You Know My Basic Needs?*

Parties have many needs beyond the simple positions stated at the beginning of the meeting. The most basic needs that opposing parties should recognize are:

    a. Economic well being
    b. Belonging

    c. Recognition
    d. Security and
    e. Control over one's environment [82]

 [*355] A party who has an adversary lacking one of the above needs would be well-advised to see that the need is met or suffer the consequences of an unstable partner. [83]

3. *A Time to Redirect to the Future*

While listening to history from an adversarial participant is a valuable skill, there are times when it is appropriate to redirect that energy towards the future. For example eBay's online resolution process, "SquareTrade," [84] encourages the following language when parties issue threats: "Your anger is clear, Ryan, and I do regret that the situation has left you feeling that way. Let's look at the future for a moment." [85]

4. *Listen Without Evaluation*

Listening involves no evaluation. It is important to separate the act of inventing options from the act of deciding between them. [86] Effective brainstorming must be free of judgment and analysis. Only when the mind sees a horizon free of opposition does it freely explore new territory. "Keep an eye out for members who are by nature highly evaluative." [87] Explain the goal, the rules and why the brainstorming process works. Institute penalties for people who violate brainstorming rules. When enforcing penalties such as excusing someone from the room, make it a joke to avoid hard feelings. "If someone is repeatedly unable to resist criticizing, consider not inviting that critic to future problem solving sessions." [88] For the interim meeting, a good moderator will follow a derogatory comment with something like, "Y*es, the idea's impractical, but I'm* **[*356]** *presenting it in hopes that it might prompt someone to think of a related, but better idea."* [89] In addition to stimulating hitchhiked ideas, bad ideas can be very useful because they "[c]an show where not to go..." [90] Participants are encouraged to write down short ideas when listening, and quickly return their complete focus to listening. The speaker might have other ideas where creative thoughts can hitchhike.

5. *Effective Brainstorming is Recorded Loosely*

While maintaining progress points, interests and agreements on a visible board or easel is worthwhile, for sensitive topics the presence of a "stenographer or (other recording device) does inhibit...." [91] These exacting, permanent recorders carry more weight outside of the room with non-participants. Yet thinking about the repercussions from people outside of the walls does little to enhance the free exchange of ideas and creative thought. Both parties must be able to express the unimaginable without any fear of recourse or the solution results will be compromised.

G. *Beware of Cultural and Word Map Differences*

Parties will often neglect to account for the desires of involved parties, and consideration of the other party's culture is no exception. Each individual has a unique "map" to the words and actions of the group. [92] Culturally sensitive idea-generators should do their best to predict varying meanings. [93] We must also be sensitive not to offend, whether it be for reasons of sex, age, race, religion, economic backgrounds, etc. If a person feels that he or she is not wanted, he or she will mentally retreat from the discussion.

H. *Be Humble*

Few people enjoy working with pompous, self-centered parties who are only concerned about their

own successes. It is best to admit your humanity early, which will allow the other parties to drop their defenses as well.

[*357] I. *Find Agreements First (Common Emotional Perspectives)*

A strong moderator will help adversarial parties discover shared interests. When the similar vantage is found early in the process, the rest of the discussion can take a more collaborative tack. The challenge for the moderator is to find common perspectives quickly and use them subtly.

> Work with the easy issues first. This creates a cumulative effect that builds as parties spend time working together. The longer people remain in the process, the more they tend to be invested in an answer. [94]

When dealing with volatile situations or negotiations between parties with unequal bargaining power, simply keeping parties at the table increases the chances for resolution.

The agreements might seem trivial at first. "Agreements on procedure may be possible, for example, when agreements on substance are difficult. Partial agreements may be easier to reach..." [95] But great snowmen are not built in the first roll of snow; you must start small, rolling more and more agreement with each turn of the conversation.

"Brainstorming not only encourages the discovery of options, but also promotes communication and understanding between the participants, and the sense of collaborative problem solving." [96] Simply recognizing options together is helpful, *even though these options might be in unacceptable areas.* The collaborative spirit begins to replace the animosity.

J. *Collaborate First, Caucus if You Must*

In an adversarial setting, one of the natural tendencies of people in conflict is to caucus quickly to avoid pain and tension. While difficult, it is healthy to brainstorm with opponents where you want to re-establish working relations. If emotions are running high or parties are unsophisticated listeners, the parties might benefit from simply explaining their interests to the opponent and then stepping into an *ex parte* brainstorming caucus. "[A] recitation of the issue at the first joint meeting tends to be more realistic because of the presence of the other party." [97] Anything unshakable comes from being shaken. "Studies of consumer behavior have determined that customers who have a dispute with a business and then resolve that dispute effectively are more loyal to that business than
  [*358] consumers who never experienced a dispute at all." [98] So bear in mind that the squeaky wheel is worth a lot of grease.

V. AT BRAINSTORM SESSION: TOOLS THAT HELP THE PROCESS

Maslov's dictum states that "if the only thing you have is a hammer, everything looks like a nail." True success is found with processes tailored to the needs and personalities of the participants and to the situation.

There are three distinct types of learners: auditory, kinesthetic and visual. Just as listening to a lecture helps the auditory learner; writing down notes in class helps the kinesthetic learner; and seeing demonstrations with colors, role plays and graphics helps the visual learner. Writing down where the conversation and ideas have ventured helps to involve the visual and kinesthetic participants in idea generation by making it relevant to their way of thinking.

A. *Auditory Tools*

1. *Storytelling*

Telling stories lets imaginations run amuck where they are free to contextualize the challenging situations at their own pace and from their own perspective. Assumptions are guaranteed to vary from person to person. No two stories will look exactly the same in the participants' minds. Yet by hearing the problem in a narrative format, participants can tap into their individual repertoires of familiar problem-solving strategies to manage new information. Finally, challenges presented in this format are similar to the way we deal with life -- in real time.

2. *Metaphors, Analogies and Opposites*

"Use metaphors, analogies, [and] opposites." [99] Representing the challenge in creative formats results in faster solutions. Dean Emeritus Edward A. Dauer at the University of Denver College of Law suggests, "We should have a course called bizarre metaphors." [100] This enables creative thought and association of ideas previously as un-mixable as oil is to water.

Thinking of opposites can have a strong effect on people, allowing them to have an excuse to go where they would not otherwise feel free to go. Similar to asking a party to tell what the probable reasons and interests of the other party are, **[*359]** opposite thinking begins the process of "reverse-think" that can also expand the boundaries of what is discussable.

Because of its universal application, nature is the strongest metaphor. There is great advantage to using nature's universal laws to break misunderstood barriers of culture and language. Even within a culture, metaphors from nature can be used to analogize commonplace occurrences and re-apply relationships of characteristics of existing problems in new ways.

3. *Role Play*

Asking an adversary to think of the other side's interests is a far cry from having them participate in the other party's role. When a person is asked actively to advocate from another's perspective, the interaction takes on a whole new life. The shift of mindset can open up new areas of discussion in areas previously beyond the boundaries contemplated by the parties.

Do a role play, asking, "What would you do if the other party offered you this -- how would it affect you?" Ask questions that help "each side to think of new options for settlement and ask some thought-provoking questions." [101]

4. *"Spin the Bottle"*

This exercise is designed to loosen inhibitions because participants are required to "spit out an idea and the group has 107 seconds to discuss the idea." [102] This may work well for an ice breaker or warm-up game because it gets people to share who might otherwise be tempted not to say anything.

[*360] B. *Kinesthetic Tools*

For the kinesthetic learner, helpful techniques include: "life space mapping, life line, drawing (and other graphic representations), sand play, clay modeling, picture creation using fixed components, picture creation and story telling." [103] Clay is creative, bringing forth new ideas right alongside "etch-a-sketch TM" and "Legos. TM"

C. *Visual Tools*

1. *Gallery Method*

If one were to visit the offices of the headhunting firm, Jivaro, in Sun Valley, Idaho, their top producers would not be sitting in plush leather chairs while talking on their phone headsets, but rather, they would be on their feet! [104] For brainstorming processes, I would not take this so far as to suggest that the 50-minute brainstorming segments should be held standing at attention, but instead, envision phases during the interaction where the participants would get up and interact with the previous mind maps, drawings, and work products that line the wall. Instead of moving a collective notebook around a room to solicit ideas, "the gallery method moves the *people* around the ideas." [105] People think better on their feet.

2. *Colored Writing Utensils*

I would add that the participants should be equipped with colored writing utensils. Using a different color to represent the changes, the group could note which new ideas had "hitchhiked" onto old ones.

While not totally anonymous, this is a subtle way for those less-verbally inclined to voice an idea or thought they might not be willing to share otherwise. This would also serve as a medium to reflect on past comments in light of the following conversation and combine the best of both worlds.

3. *Checklists to Encourage Hitchhiking*

Knowing what to ask is important, and few processes are more common than Rudyard Kipling's WWWWWH process. [106] This enlists the basic questions of Who, What, When, Why, Where and How. Procuring this information can help **[*361]** ensure that the challenges' borders have been found and that no important puzzle pieces are left behind.

a. *Osborn's Scamper*

Rather than the traditional view that a stolen idea is derogatory, a brainstorming session should encourage ideas to be piecemealed and rolled into other ideas. This was Osborn's main tenet in his S.C.A.M.P.E.R. acronym. SCAMPER stands for "**S**ubstitute/**S**implify, **C**ombine, **A**dapt, **M**odify, **P**ut to other uses, **E**liminate or **R**everse." [107] When hitchhiking, ask silently or out loud:

> [C]an we combine? What existing things can be modified to meet this need? Can we magnify anything to create different alternatives? What can be reduced? Are any opposites feasible? Can we think of any substitutes? [108]

This movement and parsing of ideas via prompts creates many idea hybrids.

b. *"Artistic hitchhiking"*

Pablo Picasso said, "Good artists copy, great artists steal." [109] There is nothing 100 percent creative in this world. All we have to contribute to creativity is our manner of combining thoughts and ideas gleaned from other places. There is no closed market on taking and mixing together a concoction of ideas. Just as an incredible cook rarely, if ever, uses a unique ingredient, the imagination and creativity is in her combination of ideas from previous experiences.

Likewise, hitchhiking often works by finding the best from two worthy ideas and combining them. Ask, "Does this idea have any useful features I can extract and incorporate into another idea?" [110] The genius in artistic hitchhiking, like cooking, is in the selection of which aspects of an idea to glean and add to the other idea.

Checklists, brainwriting and trigger sessions are wonderful ways to bring out the creative element when there is a varying degree of power in the relationships of those in the room. With these parameters for creative thought, "naturally shy or quiet people, who might freeze up in a group, have just as much chance to express ideas as outspoken people." [111]

[*362] 4. *Two and Three-Dimensional Matrices*

Making a matrix is similar to the process of predicting the color of a child's eyes by using a Punnett (P u -nit) square. [112] In brainstorming, you would take the qualities (eye colors) of distinct components (parents) from the challenge at hand, and brainstorm various possibilities using a grid to see how they would combine. [113] You might even look to a higher level of combinations with, "grids, cubes, higher dimensional morphologies." [114] These combinations, "practice the idea of forced relationships" and bring new ideas to light. [115] So when dealing with new challenges, one should ask, "How are X and Y the same?" [116]

5. *Mind Mapping & Lineargrams*

Mind mapping is a simple tool invented by the famous thinker Tony Buzan: a mind map is simply a colorful, visual way to arrange ideas and problems. By understanding the problem better, Buzan asserted this would help in identifying possible solutions. Mind mapping can be a solitary pursuit or a group activity. Here's how to do it: [117]

> a. First, choose a subject for the whole map.
> b. Then take a piece of paper, large chalkboard or dry erase board and some colored pens.
> c. Turn the paper sideways (landscape) to give plenty of room for branches. That's also how our eyes prefer to see things.
> d. Draw a powerful picture in the center to stimulate ideas.
> e. For each main idea (topic), draw a branch coming out from the center.
> f. For ideas that belong with a main idea (subtopics), draw a branch coming out from the main idea. Write the ideas on the lines.
> g. Always write the right way up so that the map is easy to read.
> h. Leave one branch (or more) open to stimulate new ideas.
> i. Add pictures and color, coordinated to subtopics.
> j. Use symbols and codes such as ticks, arrows, crosses and clocks to reinforce your main points.

[*363] For the meticulous reader who squirms at the sight of a sock on the floor, Buzan's mushrooming mind maps can be replaced with a lineargram. A bit of a throwback to the excel spreadsheet, the categories are cleanly delineated and the chain of command inside categories and specific ideas fall neatly underneath in what looks dangerously like an organization chart.

6. *Diagrams, Drawings, Pictures and Maps*

Methods that help the participants gain a new perspective, or a new insight to an old perspective (thinking "inside the box") [118] are particularly helpful, such as diagrams and flow charts. Visual aids ensure that the messages the creative genius is sending are similar to what is understood by others in the room.

7. *Reverse Engineering*

Navigating a discussion is very similar to riding a motorcycle. In the California Highway Patrol-

sponsored CCRider class for motorcyclists, one of the skills learned on the open range is not to look at the immediate object that one is trying to avoid. Stated in positive terms, the riders are instructed to look ahead to the desired destination. Similarly, a focus on negative results will only yield the worst, but attention to what is desired will yield positive results. By focusing on the desired results for both parties and working backwards, the path to the destination will come naturally.

> Of course you know what you don't want. But do you know what you do want? Once you know where you want to go, discovering a way to get there is easier. [119]

Beckhard and Reuben (1987), Blake and Mouton (1984), Boulding (1986) and others have used various terms: "envisioning the desired future state," "social imaging," "future search," all espousing the merits of the same idea; brainstorm the desired result so participants can reverse engineer a solution. [120]

D. *Additional Tools*

1. *Snowballing Trigger Sessions*

In the invitation and agenda-setting stages, a moderator can help build confidence, creativity and speed of brainstorming by starting the brainstorming several days early by introducing the topic in the meeting invitation.

 [*364] Group discussions often inhibit individual brainstorming when an individual's creative thoughts could have been gleaned with little to no discussion at all. The drawback to individual brainstorming is that a person might become entrenched in his ideas. To prevent entrenchment and still cultivate individual creativity, participants should be asked before the discussion begins to write down several alternative options and remain open to hitchhiking their ideas onto the ideas of others.

In addition to enhancing confidence, creativity and speed, giving the participants an assignment to write down and bring to the first meeting can be a way to help all participants feel like they have entry-level ownership in the group process by contributing ideas at the inception of the meeting. A British website notes that the main goal is to bring even the most reclusive and timid of people into the healthy brainstorming foray. [121] Once shared, the ideas are now the "team's" ideas, and the individual is freed of any fear of evaluation. [122]

When dealing with a sensitive topic or disparate bargaining powers, a "snowballing" trigger session ("STS") may help to bring ideas anonymously to the front. This can be done by writing down ideas in private, then sharing with a partner, then with another duo, then the foursome shares with another foursome until the groups participating are reduced to 5-6 groups who participate in a general sharing session.

For adversarial settings, a useful snowballing trigger session tool is a stipulation list. This requires participants to arrive with a list of things they believe the other party will stipulate to as common knowledge. [123] "Split brain" groups are also useful. These "split brain" sessions are sometimes called

> Corpus Callosum...[The moderator] divide[s] the group in two, telling one to think of creative solutions, one to think of more reasonable solutions. Remove them from each other so they are physically separated and in private, conduct brainstorming as usual. Bring them back together and let the one person from each side pair off and compare brainstorms with a member of the other team. [124]

[*365] In the context of an STS, *Corpus Callosum* garners otherwise hidden ideas by asking people to represent a view (possibly) outside their natural construct.

The working life can all too often resemble the classroom experience, and John Wade suggests using trigger sessions to solicit wisdom from recluse members: "This enables individuals to test their ideas with a colleague before entering a riskier and perhaps more dominated larger group." [125] An STS also serves to increase the level of anonymity as ideas are representative of a group instead of a person. John Wade words it this way: "[With] gentle pressure on participants to produce a result for which they will be accountable...risk of public humiliation is reduced." [126]

Finally, an STS increases group synergy. The STS groups work as teams to encourage each other to bring solid ideas to the table in order to increase their group value with the entire room. [127] These small groups are rare opportunities to inject natural support for others and the desire to find the jewel in a fellow brainstormer's ideas. [128] STS also serves "...to minimize cliques, spread difficult people around, and widen the circle of potential friendships." [129] To enhance creativity, at each stage, people "hitchhike" on the ideas of previous groups, sparking new thoughts.

2. *Subcommittees*

Several ends are served by using a sub-committee to brainstorm: 1) for larger groups, a complicated task can be divided for later presentation to the group at large; 2) representatives from both sides can candidly express their desires and reservations without offending or slowing the group at large; [130] 3) the presentation of a sub-committee's findings is a powerful show of unity. The subcommittee's unified front minimizes the possibility of rejection from the group at large because **[*366]** a subcommittee's consensus gives "every assurance [they] will support the tentative agreement ..." [131]

3. *"Cracker Barrel" or "Card-Shuffling" Methods*

Another technique is to use a "cracker barrel" method [132] of gathering ideas by using an anonymous barrel or submission area for ideas. The degree of anonymity would depend on how often the ideas were placed in and fished out of the barrel. One solution to preserve anonymity would be to have required submission times like those used in card-shuffling processes. [133] Card shuffling simply mixes ideas after collection to preserve anonymity.

Using anonymous processes for fielding brainstormed ideas also eliminates the "social psychological phenomenon known as groupthink...[which] describes situations in which group members are so anxious to be agreeable and to reach a consensus that their evaluative capacity is thwarted and goes unused." [134] Not only could the ideas be anonymous, but inserting ideas from non-group members for sensitive matters increases the level of anonymity. While tough to eliminate altogether, groupthink is reduced when the social pressures of idea-ownership are eliminated or reduced by these anonymous idea solicitation methods.

E. *Jump Starts*

1. *Reverse Brainstorming*

As an alternative, the parties themselves can be prompted for reverse brainstorming, where they come up with ideas that would make their problem worse. This often serves the same purposes of finding a common emotional perspective, *i.e.,* to unify the parties, jump start the conversation and expand the boundaries of idea-generation.

[*367] 2. *A Horrible Suggestion*

"[T]here are some psychological benefits to suggesting a few crazy proposals as well." [135] To end silence a moderator can carefully voice a solution that would not be palatable to either party. While this may bring grimaces of discomfort from both parties, the ludicrous proposal by the neutral joins the parties in a common emotional perspective in their agreement to disagree with the moderator. Often this will get the conversation started again with the parties in control of the discussion.

3. Goal Reminders

If parties are not participating in idea-generation, a quick reminder of their end relationship goals and their Worst/Best/Most Likely Alternative To Negotiated Agreement also serves to bring parties back to the idea-generating table with a new mutual goal of avoiding undesirable results.

4. Threaten End of Discussion

Another way to rejuvenate discussion is a neutral's threat to end a discussion. Many things can go wrong with this method, because the neutral assumes that both sides have equal bargaining power, need for resolve, time horizons, and relationship goals, and that the chances for gain and loss are uncommonly equal. The "threat by the mediator to declare a 'no progress announcement' has quite a deterring effect on some parties with incentive to come to an arrangement." [136] While a moderator can use this threat to open the lips of taciturn parties, without equality, one party might take full advantage of the retreat.

F. Wrap Up

1. Fifty Minute Maximum

Giving people a break from their task every 50 minutes is important to the creative process. Why is this? A chance to take a mental break, recoup energy, mentally organize the thoughts that have flown around a room, and reconstruct the new reality of ideas and options can lead to valuable insights when the session re-convenes.

2. Time-Out Confidentiality

If you are going to have an overnight break in the middle of a brainstorming session, it is important to have the participants refrain from discussing meeting **[*368]** points with outsiders. This break is important because it allows the participants time to independently "marinate" their thoughts.

Inter-meeting confidentiality is key. Brainstorming without fear of reproof from one's constituents is imperative to a multi-step process of negotiation or mediation. Without a confidentiality agreement, participants will not freely express all the possible options. Additionally,

> Experience has taught that if the parties freely use the media to castigate each other for the lack of progress in the negotiations, the task of the mediator becomes exceedingly difficult. [137]

Ideally, a uniform, simple and neutral statement of progress would be made to the press, constituents and other third parties. [138]

3. Stopping

If the task of brainstorming categories and alternatives within each category has been done properly, the group might be finished. [139] Silence can be used to ensure that brainstorming has been

completed.

4. *Power of Silence*

Silence evokes withheld thoughts. Silence can be used to ensure that a topic has been thought through completely, or to emphasize the importance of the topic. Silence "spurs social loafers into action." [140] Silence can be used as a jump starter to conversation as well, because people innately avoid silence. [141] Silence serves as a miniature break allowing people to collect their thoughts, organize and **[*369]** restructure what has been said in the overall context of the brainstorming goal. To gain comfort with silence, silence could be timed. "Tell the group that silence is okay and quite natural during problem-solving sessions" [142] This could be done during a warm-up brainstorming game or in pre-brainstorming instructions that are enclosed with the agenda.

The best ideas are most likely to be mentioned in the last one-third of idea-generation. Often a "second-chance" meeting, after a decision has been made, but before it has been implemented, will result in notably better brainstorming. [143]

VI. MODERN BRAINSTORMING USING ODR

Videoconferencing using Voice Over Internet Protocol ("VOIP") and ODR are taking idea-generation into new environments. The question is, which of the traditional tools for idea-generation are well-suited for these new environments and which are obsolete?

At the 2004 2nd International Conference for Creative Problem Solving in San Diego, some attendees were unfamiliar with brainstorming tools while others were very comfortable with all tools listed. The overwhelming noteworthy item was that 100 percent of the participants agreed (either verbally or in response to the survey) that videoconferencing [144] (rather than textual ODR) would be the leading edge of the future of ODR. In addition, many of the brainstorming tools that are conceivably adaptable to textual ODR will have a much more natural fit into videoconferencing. [145]

A. *When to use ODR?*

ODR covers four main situations: 1) the dispute occurs outside of any jurisdiction; 2) the issues are too small to merit a lawsuit; 3) the parties wish to continue their relationship; 4) a company recognizes that often, the aggrieved opponents simply want an apology.

[*370] 1. *Weak Jurisdiction*

International E-contracts are a hot issue, but until they are formalized and there is global adoption of procedures and enforcement mechanisms, we will need various methods to resolve disputes. "ODR largely ignores jurisdictional questions, relying instead on the desire of the parties to resolve a problem out of court." [146] One of the biggest challenges in both international and internet law is the question of jurisdiction and conflict of laws. The gorgeous thing about creative problem solving in ODR's international and internet arenas is that much like arbitration law, the parties can choose their own standards, their own expectations, and even their own remedy. This avoids the thickening challenges of jurisdiction in an increasingly global world. These choices that currently lie beyond law are the future of law. International law is diverse and has many obstacles to effective enforcement. Law must grow to reflect the natural support of these actions in order to remain useful to an international society.

2. *Small Lawsuits*

With more and more transactions taking place online,

[C]omparatively small dollar amounts coupled with obstacles of time, travel expenses, language, culture, and possible physical disability issues create tremendous difficulties for online consumers and businesses alike when disputes arise. [147]

"[T]here's no way law enforcement is going to be able to get every fraudulent seller on eBay, especially when they may be on the other side of the planet." [148] The jurisdiction of international courts may one day have a unified front. Yet for **[*371]** now, international justice for medium to small transactions needs a jurisdictional home, and ODR's front door is wide open.

3. *Preserve a Valuable Relationship*

Abraham Lincoln said: "Discourage litigation. Persuade your neighbors to compromise whenever you can. Point out to them how the nominal winner is often the real loser -- in fees, expenses, and waste of time." [149] Lawsuits are a sign of sickness, and to keep a relationship healthy, one should avoid lawsuits like the plague. "In the Confucian view, [a] lawsuit symbolized disruption of the natural harmony that was thought to exist in human affairs" and "litigation led to... shameless concern for one's own interest to the detriment of the interests of society." [150] Lawsuits are the antithesis of a relationship because bringing such a suit is admitting that the relation has failed and that an artificial construct has to be brought in to put things in order.

ODR's strength is in the ability to maintain relationships, which helps parties avoid costly courts.

> The desire to reconcile any possible disputes through cooperation and consultations prevailed among the drafters (of NAFTA), thus dismissing the alternative of forming a permanent tribunal whose quasi-jurisdictional functions might have caused frictions among the Contracting States. [151]

This international community has the same perspective, *i.e.,* that an international forum for disputes is secondary to the relational powers that serve the same ends. [152]

4. *Apology may be all that is Required*

As the landscape company, Toro, has discovered, "adversarial issues will end simply by listening and apologizing to the other party." [153] Resolution may be as **[*372]** simple as confessing mistakes and legitimizing the feelings of opponents before focusing on your own rights and interests.

B. *ODR Tools*

Cyberspace's powerful tools allow communicating, storing, and processing information online. Online communication tools include: E-mail, Instant Messaging, Online Chat, Threaded Discussion, Solution-Set Databases, and Smart Boards.

1. *E-mail*

E-mail is the virtually instantaneous transfer of text messages, which reigns as king of online communication. I will discuss e-mail by explaining how it differs from other means of online communication.

2. *Instant Messaging*

Instant Messaging ("IM") is a synchronous [154] online chat variant to asynchronous [155] e-mail. "The expectation of the sender of an instant message is that he or she will get back an immediate response, whereas e-mail senders rarely expect an immediate response." [156] Beyond this basic difference, IM is limited to short exchanges and keystroke capability. However, "conversations frequently arise from IM sessions, which leads to a much more in-depth exchange of information..." [157] So while Instant Messaging has limitations, there are also noteworthy strengths, catering to ODR needs. [158]

[*373] 3. *Online Chat*

Online chat is a synchronous, text-based exchange of information. Often the three main differences between chat and IM are that there might be various users for online chat, the chat may be recordable and the history of the chat is often available to scroll through or save for perpetuity.

4. *Threaded Discussions*

Threaded discussions are often used in areas known as online "bulletin boards" where users can post comments regarding various topics. Threaded discussions follow a common theme via an asynchronous, textual exchange of information organized around specific topics. "Threaded discussions are powerful because they keep a record of an entire line of conversation." [159] Newcomers find threaded discussions useful because they provide an organization of thoughts. Archived communication makes agreements much easier to draft and keeps people accountable for what they say. [160] The moderator's language is also reusable, which allows the neutral increased accuracy in her speech during future sessions. While I believe this is a true strength, like any benefit it needs to be carefully reined in. Reused language has the danger of being too "formal," where the form text might not match the needs of the participants. It can prove fatal to the mediator's credibility when the participants quickly discern the neutral's impersonal communique. This might leave the participants feeling that the mediator's service is impersonal, or conversely, happy that the mediator is not re-inventing the wheel.

5. *Solution-Set Databases*

Solution Set Databases start by:

> [A]sking disputants what type of dispute they are engaged in. When the disputant specifies a dispute type, the ODR platform can display a list of common resolutions to that type of dispute. A disputant can then indicate which of the solutions would be acceptable to him, and then the platform can share that information with the other party. If the other party agrees to one of the proposed resolutions, then the matter is settled. [161]

Partial elements of this process are being used in eBay's SquareTrade ODR processes. This new automated flow is a great tool as SquareTrade boasts that over 90 percent of disputes are resolved online. Eighty-eight percent never required a human neutral's involvement.

[*374] 6. *Whiteboards v. Smartboards*

Instead of losing carefully drawn out examples and ideas from chalk or whiteboards, Smartboards are an effective way to brainstorm creatively yet retain the ideas that are drafted on the board.

> Whiteboards are great, except what do you do with all those great diagrams and notes once you're finished brainstorming? Now you can have your whiteboard and eat it too. Ibid is a simple whiteboard system that connects to your PC. With it, you can do all the

wild-and-crazy, out-of the-box thinking you want, and then take your notes and print, e-mail, or export them (as image files) into other programs. 'Course, for it to do any good, you've got to think of something really worthwhile to scribble. [162]

By freeing our thoughts and helping us remember what we were thinking, Smartboards are increasing our creative production!

C. *Salient ODR Points*

1. *ADR: Underrated King of Law*

Litigation is actually the Alternative to mainstream Dispute Resolution, as ADR is used in "95% of cases that never see the courthouse." [163] This same leap will happen in the next ten to twenty years with ODR. This will not completely replace, but will augment, the face-to-face success of ADR pioneered by JAMS and the AAA. These ADR groups have recently initiated ODR measures for business-to-business transactions. [164] However, they have effectively left the task of smaller and medium transactional amounts to automated ODR platforms such as SquareTrade and Cybersettle.

 [*375] Sophisticated people recognize the limitations of the court system. Does this mean that the court system is generally inappropriate? That 95 percent [165] of cases settle before trial indicates that the court system is antiquated. Mediation and other forms of ADR have a strong place on the internet and the internet is weaving itself tightly into our society. While face-to-face mediums will take longer to develop a mediation or ADR stronghold, the adaptive process for internet disputes will be short.

2. *Fewer Games*

> [ODR] avoids the psychological games lawyers often engage in during face-to-face negotiations. For example, tactics such as feigned or real anger or boredom are difficult to accomplish by e-mail. While we've all been a witness to an attorney who storms out of the room and states, "You're wasting my time, I'll see you in court," it's difficult to have the same effect when leaving the virtual negotiating room. [166]

While some face-to-face games might be avoided in ODR, others are invoked because of the lack of a face-to-face presence. The unanswered question is, since we are not negotiating in person, do we have *less to lose* when we are online, increasing the chances of other games that people inevitably play?

3. *Favorable Government Treatment*

There is favorable governmental treatment, in the form of better bid rates and lower loan payments, for companies who have an ODR program. Often all they must "show [is] that the business participated in the transaction in good faith." [167]

4. *Common E-mail Alone is Unreasonably Dangerous*

Common e-mail is not secure. Not only could copies of confidential discussions be sent to third parties, but most e-mail servers lack SSL secured handshakes and safe encryption techniques. [168] Soon, this will come to light and common, unsecured e-mail will not be viewed as what a "reasonable attorney" **[*376]** would use in order to facilitate discussion between adversarial parties or among members of a confidential group. [169]

E-mail misuse "enable[s] a party to print out and distribute e-mail communications easily ...without the knowledge of the other party. This may hinder the development of open and honest exchanges in cyber-mediation." [170]

Using e-mail is dangerous for mediation because "there is no way to stop one party from sending the other a copy of your e-mail exchanges with them." [171] While e-mail is the lowest common denominator for dispute resolution, as soon as a mediator is involved, the communication should be on a secure site where the mediator can control communication. E-mail as the medium for mediation should be avoided.

The standards of professional treatment will increase as technology increases. But currently common e-mail is simply that: common. [172] As such, we should recognize both the strength and volatility of e-mail, which is accessible to the general population.

> Mediation firms have established websites such as Internet Neutral, SquareTrade and WebMediate to facilitate the resolution of disputes. Although these websites rely primarily on online technologies such as e-mail, listservs, chat rooms, and instant messaging, they also incorporate more traditional communication methods into the negotiation process. [173]

This mixture of methods is perfectly represented by eBay's SquareTrade, which has automated the first stages of issue mediation. SquareTrade uses web-based forms with Graphical User Interfaces ("GUI's") for receiving complaints **[*377]** followed by e-mailed replies to parties. This approach eliminates 80 percent of problems without third-party human intervention.

During the "Direct Negotiation" process of SquareTrade, "[t]he success rate is close to 80 percent...When this fails, parties pay a fee [often $ 15] for a human mediator to work with the parties." [174] "SquareTrade.com statistics show that the overwhelming majority of ODR users would use the venue again." [175] eBay's successful use of SquareTrade is not just good business for parties in dispute but benefits eBay as well. Its commissions [176] depend on happy transactions. Everyone has a vested interest in seeing the process go smoothly.

a. *ODR platforms are superior to e-mail*

ODR platforms offer resources unavailable via e-mail. Effective ODR platforms/websites contain "[c]onversational capabilities, options for storing documents, group calendars, and some other useful tools like mechanisms to survey members and calculate results." [177] Having a website is valuable because "it then becomes a single online place where any participant can go to find any information or resource related to the dispute." [178] E-mail is simply not as effective for lengthy ODR. Anything that increases the transparent communication of a group enhances the chances for dilemma resolution.

Katsh and Rifkin suggest that ODR platforms use web-based forms instead of e-mail to begin their interactions with their clients for two main reasons: 1) "We can make certain that critical information is provided" and 2) "The information that is provided can be used efficiently." [179]

Forms provide a great method to give general information to the client, just as menu options have provided a means of communication to the public when it uses the telephone. This has been a proven method of saving time and money for the mediator, conserving the mediator for more difficult issues. Parties can share information, research help menus, and make more informed choices.

> E-mail is convenient, but as time passes and more and more messages are exchanged, it actually becomes less and less convenient because a burden is placed on users to manage

and organize them efficiently. Web-based alternatives, on the other hand, may seem less convenient at first, but ease of use **[*378]** rises over time, and most importantly, tools and resources become available that would not be accessible when e-mail is the primary vehicle for online interaction. [180]

Effective e-mail has limits. While it is "the lowest common denominator" [181] it is not enabled to effectively record and organize creative thought for more involved ODR processes. [182] In addition to the free sites mentioned, there are sites that are specifically designed for dispute resolution processes such as www.squareTrade.com and www.onlineresolution.com. These simple, interactive sites maintain a threaded discussion record to keep members up to date and serve as a unified meeting place for all communication to be shared and more importantly, organized.

b. *Weaning off e-mail: a difficult goal*

It is tough to wean people from using e-mail as their sole mode of ODR. How should this be accomplished? Changing the modus operandi from e-mail to a website for their interaction promises to be a difficult transition. Yet an examination of www.paypal.com, eBay and www.evite.com's processes, makes clear that it is possible to use e-mail as a tool to notify users to visit the website when updated information has been posted. At these successful sites, participants are e-mailed when any information is posted on the site, with a direct link to the webpage where the website's activity is happening. This method serves the needs of the parties to keep the information in a secure place, yet uses e-mail as the consumer's proven tool of choice to communicate basic update notices.

This weaning will be similar to the initial reluctance of many tenured attorneys to complete research online, as

> the number of people willing to actually get involved in the internet is still surprisingly small among lawyers. Perhaps it is true, as one author concluded, that lawyers "harbor latent nostalgia for the days of parchment and quill pens, or at least for mag cards and IBM Selectric typewriters." [183]

[*379] But this won't last. We *will* become a wireless society.

c. *The "reasonable lawyer" does not rely on unsecured e-mail*

In today's connected, parsimonious world, many people are starting to use e-mail before they call. E-mail is free, definite, and it doesn't interrupt like a phone call. However, while e-mail is assumed to be safe, servers of clients and people who are carbon copied in e-mails are often *not* secure. It would be better for all involved to communicate on a secure server with an SSL (encrypted) platform using e-mail as the notification of a reason to visit the secure website. Technology guru Bob Compton in San Diego writes, "No files should be kept locally as in Outlook. All files should always be available from a webserver off site, and anybody with the right passwords can securely access them over the net. That is clearly better than just [typical] POP3 e-mail." [184] E-mails without these secure connections lack the proper "handshakes" between servers that enable the confirmation of secure lines of communication between nodes in the worldwide web's servers. These "naked" e-mails are a risk to all involved -- clients, affected third parties and attorneys.

In order to maintain a professional level of responsibility in maintaining confidentiality as required by Model Rule 1.6 of Professional Conduct, one must often ask, "What would the reasonable attorney do?" Attorneys must improve at using the tools that are available for their use in storing and sharing

information. The days of making our e-mail boxes disorganized warehouses for information are long past. The next step that is required for responsible attorneys communicating online via an ODR platform or simple e-mail is to make sure they are using secure processes. Having collaborative discussions memorialized and available for reference at secured sites rather than using loose e-mails constitutes due diligence for today's attorney who is doing the basics both to protect clients and to avoid malpractice liability.

 [*380] d. *E-mail is unorganized*

In addition to raising safety and privacy concerns, e-mail can become an awkward tool. "E-mail programs are capable of supporting communication between multiple parties, but beyond three or four participants things can get very confusing." [185] A threaded online discussion with categories and a feeling of order can invigorate quick online dispute resolution.

5. *ODR Resolves Common Document Difficulties*

When working on a common document, it is often difficult to identify who has the working version or what changes have been made. This is solved with ODR tools where single-text-tools can be used to "track changes." [186]

6. *Asynchronous Communication Removes Power Differentials*

"People in relationships based on past power differentials can communicate on more of a level playing field when online communication options are brought into the picture." [187] For example, "parents who had a very difficult time communicating with their children ... [find that] after they send their children off to college, a rich e-mail correspondence [begins]." [188]

7. *Reflective Communication*

"[I]n writing, people have more of the tendency to explain why they are saying what they're saying . . ." [189] Taking time to collect reactions to an adversary's comments offers many advantages. Problems can erupt from having a reactionary response to a tense situation. Accordingly, asynchronous ODR should facilitate a calculated response. This medium gives the opportunity to reflect on another party's comment before responding. These breaks not only provide a chance for reflection, but also an opportunity to keep an even temper when interests are threatened. "[P]hysical presence of a party can trigger emotional hostility in another party, especially when one party tries to dominate or intimidate the other. ODR allows parties to interact in an impersonal, detached manner, and to post comments, not under emotional pressure, but after they have been carefully thought through." [190] Time outs and asynchronous communications are easy under ODR conditions and lead to healthy interaction.

 [*381] ODR also allows for further research before responding. "A more constructive reason for a recess is the injection of a new idea that cannot be pursued productively until after each side has discussed it fully away from the bargaining table." [191] ODR allows for speedier resolution of these disputes because there will be times where the research necessary will be available online during the discussion. ODR allows for these goals to be achieved concurrently during synchronous [192] or asynchronous communication with the neutral or other selected members in private chat rooms or instant messages. [193]

ODR permits the mediator to preview the points with the parties.

> [A] mediator can give each party some suggestions for what to do during the mediation and some things to think about, at a time when the party in fact has time to think about these things. ... The mediator has time to brainstorm the unhurried and carefully gleaned

input from both sides and is therefore more likely to enter the mediation proper with many ideas in mind concerning the particular manner in which the mediation should be conducted, and often even with substantive ideas. [194]

This comes naturally in the technological environment where textual communication is asynchronous and previous attempts at resolving the dispute are available for third-party review. It is often advantageous for people to contemplate a communication received before firing off a hasty reply. The asynchronous interaction of text-based ODR or asynchronous (taped) videoconferencing increases chances to research and reflect before communicating.

[*382] 8. *New Forms of Communication*

Through speed of reply, font selections, semantics, message length and Graphical User Interface, textual communication contains many forms of communication imbedded in its meta-language. While many people bemoan the end of face-to-face communication, a paradigm shift is required to recognize the richness of other forms of non-verbal communication. It is easy to think of all that has been lost with ODR, but the challenge lies in recognizing new opportunities arriving with ODR's new medium.

Some believe that 90 percent of non-verbal communication is lost when using ODR. Particularly, Katsh, Rifkin, and Gaitenby worry that the e-mail medium causes the mediator "difficulty using the intuitive cues of body language, facial expression, and verbal tonality that are part of face-to-face mediation processes." [195] In contrast, Thiessen and McMahon seem to place less weight on these factors and more weight on the rational, technocratic side of approaching "efficiency frontier[s]." [196] The truth is that other nuances replace the non-verbal cues. Instead of thinking inside a vacuum, when the communication of body language is unavailable, other, new and useful communication tools fill the void. Attitudes and various forms of meta-communication are infused via new communication tools. The new tools all play a part in bringing the participants closer to a mutual understanding without "noise" [197] in the communication channels.

Other forms of communication would replace traditional face-to-face body language. Word choice, phrasing, and careful attention to the text of a communication would take on new importance. Length and speed of reply to communication and questions would take on additional meaning. Finally, Graphic User Interfaces, font choice and interplay of communications would compensate for the lack of physical body language with other clues to interpret a party's message.

A self-aware person can force the body language he wants to convey (*i.e.* use a "poker face") instead of signaling dissent or evoking negative responses. Online, this distraction is less visible and brainstorming is less inhibited by these emotional reactions.

[*383] 9. *Better Neutrals Available*

Because of ODR's virtual elimination of time and distance barriers, more talented neutrals may enter the pool of affordable moderators because "travel; convenience; time and other expenses are significantly minimized." [198]

10. *The Holy Grail has Arrived: Videoconferencing*

Voice Over Internet Protocol (VOIP) is here and it is coming on strong. In 2001, videoconferencing was considered unattainable, yet very desirable. "[W]e are also not at a point where we can anticipate how videoconferencing might be employed and when it will be widely and readily available." [199] Yet VOIP developments now promise to mainstream ODR, because with dissipating costs, the Holy Grail of

Videoconferencing has arrived. Along with actual cost reductions in VOIP technology, the dramatic FCC tax regulation changes will have a mushroom effect on the VOIP industry. This opening of possible rewards and net profits will attract more investment and will bring the fabled videoconferencing from mythical possibility to reality. ODR using videoconferencing will be a much easier leap from ADR because it will retain many of the familiar face-to-face elements.

11. *Younger Attorneys*

Newer generations are more receptive to typed and telephonic communication to resolve disputes and brainstorm solutions. Yet because our culture still looks to age as a sign of wisdom and strength, many of the moves will come at the minimum comfort requirements of the older generations entrenched in traditional adjudication and ADR. Because ADR is largely a lawyer-based occupation, ODR's expansions to the boundaries of technical possibilities will be limited by the number of lawyers willing to get involved over the internet.

12. *Concurrent Caucusing*

Private caucusing will be easier to achieve in the online environment because the caucusing and brainstorming can be used simultaneously. Concurrent caucusing is infinitely better online because there is no unsightly slinking away by the other party or the neutral. Concurrent caucusing also ends the discomforting breaks in the communication process. This increases the ability of a moderator to help participants while interacting with each other in separate online forums. Split screens and additional caucusing tools aid the mediator in the appearance of impartiality.

[*384] 13. *Shuttle Diplomacy Cons*

Internet mediation could be viewed as a type of Kissenger-esque "shuttle diplomacy" [200] because of its indirect contact with the participants. Particularly in a family or community mediation, shuttle diplomacy is not ideal because of its lack of personal participation and lower investment in the process. When a person has invested less in resolving a dispute, there is often less effort to understand all the issues or prevent further costly investment in the future.

14. *Invisible Neutral Mentoring*

In the rush to minimize barriers to becoming a moderator, court mediators are only required to have 30 hours of training, four years of college and eight mediations of experience. [201] This is partly because mentoring is "hard for administrators to monitor..." [202] In ODR, however, as long as parties consent to have an uninvolved monitor, the process of improving skills and having checks and balances for the development of a neutral is significantly more viable than in live mediation where the neutral's supervisor would detract from the process. While confidentiality is more volatile, carefully orchestrated ODR provides a more natural method to solicit feedback on the neutral's performance.

VII. ODR'S DISTINCTIVE BRAINSTORMING FACTORS

A. *Advances Between Meetings*

While the collaborative gains from creative brainstorms in face-to-face ADR are dependent upon participant meetings, ODR is more flexible in its capabilities for progress between meetings.

B. *Ongoing Consensus Evaluation*

Ongoing consensus evaluations can be confidential so there is no need to defend one's half-baked position. This confidential disclosure of status will be **[*385]** "viewed only by the facilitator, or they can be made public while keeping the identities of the individual voters confidential." [203] People can

stay focused on the project at hand and not have to defend their egos or become entrenched in their positions until the facilitator knows there is a large amount of common ground.

C. *Trust*

Before brainstorming, people must be familiar and comfortable with the processes involved. "[O]nline consumers...must have an understanding of ODR methods and processes before they are willing to trust and use these programs." [204] While many people believe that online trust is difficult, the universal marketplace takes the reputation of one interaction and makes it transparent to all interested parties. [205] Instead of an increased fear of whom one is dealing with, this leads to an increase in online trust.

D. *"One More Time " for Success*

"[S]oftware that brought the disputing parties together [just] one more time might resolve many problems." [206] Just "one more time" is so incredibly easy with the omnipresence of computers and ODR. Even after disputants at the neutral's table say there is no possible resolution, settlement is often reached. This "one more time" concept is much easier online.

E. *Physical Distance Yields Free-Thinking*

ODR will fully regain the power of brainstorming tools when videoconferencing comes back to the forefront. "[T]he parties would be freer using virtual chalkboards and smartboards than they would be if they could see each other" [207] Virtual chalkboards and smartboards are more readily used for brainstorming when parties are not physically present, yet retain their effectiveness gained from their high visibility.

[*386] F. *Newfound Source of Justice*

ODR is speedy, efficient, inexpensive, and erases distance concerns that would end hopes of dispute resolution if ODR were not available.

> [W]hat the Internet allows are many different forms of communication and interaction to be structured and organized on a Web "site" in a way that gives us something novel: virtual places and virtual processes. [208]

The average eBay dispute is "typically resolved in about 10 to 14 days." [209] This is the kind of speed that courts can only dream of. ODR has proven its worth, and the question now is, how are we best going to use ODR?

G. *Online Parties: A Better Breed?*

"Internet parties (and this is a purely personal observation based on years of experience with the Internet, both personal and business) appear not to resort to litigation as easily as traditional parties... because they tend to be more sophisticated in knowing that disputes must be dealt with quickly and cheaply" [210]

H. *Early Intervention*

ODR provides a new avenue for early feedback, allowing companies to change course quickly and avoid needless litigation. This is accomplished by ODR's creation of feedback loops that help businesses continuously improve their "transaction models and customer service...shield[ing] them

from frivolous litigation..." [211] A company must know what the customers want, and what better way to do this than direct end-user contact? "The degree to which the company pays attention to feedback from its customers and partners" [212] is *the number one indicator of online success.*

Beyond early sensitivity, ODR offers easier methods to brainstorm after a problem has been acknowledged. "Because of convenience, ODR can often be called into disputes much earlier than traditional face-to-face ADR." [213] Early warnings serve to protect people's interests and in addition to preventing harm, **[*387]** serve to help people feel a sense of control over their environment. Control is a lion's share of why they are disagreeing in the first place.

I. *Auto-Prompts*

Mixing brainstorming methods decreases costs and will keep ODR accessible. eBay "now requires binding arbitration of its disputes as a condition to buying or selling on the eBay auction." [214] Even eBay resorts to arbitration [215] instead of mediation for disputes with eBay, because eBay recognizes that mediations, as ideal as they are for disputes between their customers, are too time consuming for eBay to be involved in.

While we have been enthusiastic about the productivity of mediation, the numbers for ODR using auto-prompt programs such as SquareTrade are even better. Take, for example, these statistics that have helped bolster the reputation of mediation: Of the 831 cases referred to Civil Action Mediation in 1998, over 445 settled within 3 months of the mediation. [216] In small claims cases the numbers are higher, with over 83 percent resolving via mediation. [217] Combined, these face-to-face mediations are more successful than litigation, but perform at a lower resolution rate than the 90 percent enjoyed by eBay's SquareTrade ODR success. [218]

J. *Blind Bidding: Monetary Issues Only*

Blind bidding ODR tools are useful when, "all issues except a single monetary issue have been resolved." [219] Cybersettle's success has been niched to positional-based bargaining found often in insurance settlements and other quantitative disputes.

[*388] K. *Online Reputation: The Superhuman Motivator*

Making discrete transactions relational by way of online "ratings" encourages participants in online agreements to participate in ODR. Without this relational incentive, ODR would surely fail. "On eBay, all you have is your reputation." [220] The success rate of eBay and SquareTrade relates directly to eBay's formulated rating system. An eBay seller's bottom line rides on the feedback from customers in his transparent wake, complete with percentages and comments from previous transactions available at a single click. While often ADR involves parties who want to work together in the future, eBay's highly discrete [221] model of sales is counterbalanced by the long-lasting effects of a rating system. Rather than building a relationship with one person, the service provider/seller (or buyer) is building a transparent reputation for everyone to see.

The potential for the motivation to act in hyper-good faith in such a transparent environment will revolutionize globalization. [222]

VIII. CONCLUSION

Technology has exploded the field of what is possible in ADR. In the future, we can expect ADR strategies to be complemented by this wealth of new resources and strategies in the growing field of ODR.

> The Internet is an extraordinary achievement and the challenge, as we see it, is not to

use the Internet to duplicate the offline dispute resolution environment but **[*389]** to expand our thinking and look for ways that dispute resolution expertise can be of value online. [223]

The value and strengths of the brainstorming processes in ODR are simple: instead of being buried, disputes get heard. While efficiency has demanded the termination of fledgling business relationships plagued by disputes or logistical challenges, ODR brings the sinking barge of smaller issues and far-flung global participants back to the marketplace surface. Like a corner bookstore or library that is marginalized under the wake of online resources, ODR will *not* eliminate ADR, but will open up more means for dispute resolution, where 20/20 hindsight used to be the sole resolution.

> Cyberspace was a place where powerful tools were being developed for communicating, storing, and processing information. We knew that these activities were also at the heart of dispute resolution. As capabilities for working with information and managing information online improved, we thought that opportunities for directing these capabilities and dispute resolution would also improve. [224]

A. *Credit Card Chargebacks: A Successful ODR Model*

The bottom line of large companies such as insurance and credit card companies is highly indicative of noteworthy trends. "Currently, credit card chargebacks are the most common form of ADR." [225] Interestingly, "'[m]ost major credit card networks extend chargeback protection internationally,' even though the protection is not required outside the United States." [226] *This is important because it suggests that credit card issuers know that fairness and strong relations make for strong earnings.* "There are no reported cases in regular courts on the **[*390]** subject, which is evidence that ... users found the [Online Dispute Resolution] process more convenient or effective than traditional forums." [227]

Credit card procedures for resolving disputes are the strongest call for attention to ODR, because the credit card companies have shown that going beyond the law's requirement to attain customer satisfaction yields a healthy profit. All companies should take heed. *Relational ODR tools are worth considering for any company that wants to make money.* Likewise, the use by credit agencies of "automatic forms" for dispute information helps to settle issues promptly by facilitating open discussions. These problems could otherwise cost credit card companies many man hours of input and phone intercourse, a cost that would inevitably be passed on to the consumer and contribute ultimately to a lower global standard of living.

B. *ODR's Success Depends on Online Reputations*

A transparent reputation will increase sales and also draw a demand for ODR as people become comfortable with discrete (one-time) transactional partners who have a relation with the community at large (e.g., eBay). [228]

Through global Better Business Bureau-styled organizations, international business will soon sport eBay-like ratings. Ken Hunter, president and CEO of the Council of Better Business Bureaus (CBBB) reports, "Fully half of all BBB business reliability reports are now issued over the web and two-thirds of the complaints BBBs handle are filed online." [229] But while the BBB has gone online, there is nothing said about the resolution of those issues. It will not take long, however, for companies to realize that if their customers are filing online, it would be most efficient to offer ODR before a dispute becomes a matter of public record.

C. *Mediator Ratings Coming?*

Reputations are gained and lost on referrals, and like a good dentist or mechanic, mediators should be mindful of their reputation as reputational transparency increases. Will mediators be rated online? I believe they should. **[*391]** Our success will depend on our ability to adapt the tools in our ADR tool belt to our new ODR one.

D. *VOIP Will Bring Brainstorming Back to ODR*

> VOIP, or Voice Over Internet protocol. It's not a catchy name, but get used to it all the same. At the very least, telecom experts say, most business phone systems eventually will convert to VOIP for cost savings and the wide range of new features the technology offers, like improved conference calling, and combining voice and e-mail messages on one directory, and, eventually, video phones. [230]

The adaptation of ODR to online videoconferencing will be quick, but the lessons learned in the temporary sojourn with textual, asynchronous ODR should be pondered. There are benefits to asynchronous ODR that will likely be lost with videoconferencing. These consist of: a delayed response helpful not only for cool-off/reflection periods but also for the opportunity to research responses; the ability to attract talented neutrals who are more easily accessible for asynchronous disputes; and finally, the avoidance of the general frustration associated with scheduling and attending a live meeting. Regardless of the advantages of asynchronous ODR, I believe that videoconferencing will lead to a continual decrease in face-to-face ADR, with negligible decrease in ODR as accessibility to VOIP increases.

E. *ODR Going Global?*

In 2001 the BBB,

> [T]he largest consumer-focused dispute resolution organization in the United States, announced a partnership to... build a transatlantic ODR system for handling business-to-consumer disputes. Since this announcement in early spring 2001 several other countries in Asia and South America have signed on to participate in the network. [231]

ODR is going global, [232] and there is nothing technophobic ADR professionals [233] can do to stop it.

[*392] F. *ODR's Dark Side*

Portability and omnipresent access to information is a strong advantage of ODR. Unlike chalkboards and paper easels where conversations and ideas evaporate with the stroke of an eraser or clunk of a trash can, there is a powerful permanency in smartboards where brainstorming is digitally stored and recalled from any computer worldwide. Additionally, when ODR is used as a tool for visual image communication, the charts, pictures, images, icons, figures, graphs, scales, tables, diagrams, maps, sketches, blueprints, and even the digital conversations of face-to-face meetings can be stored, sorted and recalled by a keystroke on the web.

The dark side to ODR is associated with its portability. Like the anti-social Blackberry or text-message on the cell phone at the dinner table, connectivity is both a blessing and a curse of today's society. With legal issues listed as one of the most emotionally volatile issues today, there is a need to

compartmentalize these intense emotions and set boundaries on the grip that such disputes take on in a disputant's life. Judge Learned Hand commented: "I must say that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death." [234] With all this technology, accessibility, and power comes a price of peace. Like many other new technological advances that bring a curse as well as a blessing, however, to this author, the blessing of ODR outweighs the manageable curse of its haunting omnipresence. And to use Justice Hand's own famed "BPL" formula, [235] ODR's "burden" outweighs the probable losses. The choice is in the hands of the user: is this technology bringing disputes to an inappropriate place or is ODR the key to freeing you from the chains of your fluorescent-lit office and adversarial face-to-face meetings?

1. *Can you Still Pick your Battles?*

In today's fast-paced society, most deal with disagreeable issues by picking battles carefully and releasing inconsequential issues. Do we have the emotional energy for each one? No one does. Very often the answer to "Would it be better to **[*393]** spend the emotional energy on something else?" is a hearty "Yes"! There is a healthy fatalism [236] in letting many disagreements go unresolved.

2. *Possibly Lower Level of Compliance.*

I have not seen corroborating studies, but I suspect that resolution of online agreements will not see the compliance rates that have been enjoyed by face-to-face ADR. This will improve as videoconferencing brings back many personal communication elements found in face-to-face communication.

G. *ODR--Not a Replacement, but a Supplementary Tool*

Will ODR replace or complement ADR? It will do both. The present growth in the industry will give an overall benefit to the existing face-to-face mediators. I agree with Katsch and Rifkin in their conclusion that "ODR may not replace face-to-face meetings but it may displace them in the sense that the perceived need for them may change..." [237]

While not entirely replacing face-to-face meetings, the "pie" may be expanded [238] for ADR opportunities using ODR. Understandably, those in the alternative dispute resolution field do not want to have ODR assume too large a presence. [239] While they would like to have another strong force that would complement their efforts and champion the cause of alternative dispute resolution, many discount ODR's validity and relegate it to transactions where their pocketbooks will not be affected. Yet I believe that ODR will overlap, having not only powerful applications in small cases that were once not cost-effective for anyone to pursue, but effective applications in cases historically suited to traditional, face-to-face ADR.

H. *Attention All Mediators: Your Cheese Is Moving*

What will you do if someone moves your cheese? "[You must] admit that the biggest inhibitor to change lies within yourself, and nothing gets better until you **[*394]** change." [240] Like a tired PowerPoint presentation, the example of "who moved my cheese" has the potential to bore, yet still serves as a reminder for those of us who have let our eyes fall down to the beaten path instead rising to the changing horizon.

The year was 2000: "When videoconferencing on the Internet becomes about as easy to use as the telephone, online mediation will come into its own." [241] With the recent investments by the big telephone companies in VOIP/SIP [242] technology, the time for internet mediation to make its case is here. "Being able to have a video chat over the TV is not out of the realm of possibility," says Dave Watson, an executive vice president of Comcast. [243] If the taxes are ruled out for the FCC on the VOIP, this will break all the rules and hasten videoconferencing's arrival.

"We will have to wait to assess where videoconferencing falls in effectiveness between face-to-face meetings and teleconferences until more experience with videoconferencing becomes available." [244] People don't change overnight; they make baby steps. New mediators will be more adaptable than the present vanguard of ADR mediators who often consist of retired judges [245] and venerable tenured practitioners.

VOIP developments will mainstream videoconferencing and pave the way to ODR. The other required elements are all here:

> Online mediation will not manifest fully until videoconferencing becomes commonplace and the following apply: (1) video cameras and microphones are built into computers; (2) videoconferencing software is bundled with computers; and (3) modems are fast enough (*i.e.,* "broadband" or 512 kilobytes per second and greater) to accommodate videoconferencing. [246]

Katsh and his coauthors are cited as endorsing videoconferencing as an "obvious solution to the lack of face-to-face encounters [in internet mediation]." [247] Beal emphasizes videoconferencing as he is especially concerned about the mediator's online ability to demonstrate a "serious demeanor, professional **[*395]** presentation, occasional humor, and just plain charisma." [248] While there are many challenges to working in an online format for ODR, the requisite technology that was lacking three years ago is now here. Technology has adapted. Mediators must either adapt or suffer Darwinian consequences.

I. *ODR: Tool to Forestall War*

"[S]killful diplomacy may forestall war." [249] And this author would add, skillful use of effective brainstorming and ODR techniques will forestall the "war" of courtroom adjudication.

Legal Topics:

For related research and practice materials, see the following legal topics:
Civil Procedure > Parties > Fictitious Names

Computer & Internet Law > Internet Business > Internet & Online Services > General Overview

Energy & Utilities Law > Administrative Proceedings > General Overview

FOOTNOTES:

n1 Alex Frankel, *Name-o-rama,* 5(6) WIRED MAGAZINE (June 1997).

n2 The ubiquitous "80/20 rule" could be used to say that consumers are doing 80% of their transactions at the lower 20% level of prices they face. Globalization and international Business-to-Consumer commerce has increased avenues to global transactions unavailable to yesteryear's consumer.

n3 Colin Rule, *Online Resolution, available at* http://www.mediate.com/articles/odredit1.cfm (last visited February 19, 2004).

⬆n4 *See* LEONARD L. RISKIN & JAMES E. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 13 (1987).

⬆n5 "When parties are at a distance or when the need is for a cheaper and faster process than can be provided by a court, the whole process may take place online." ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 8 (2001). The authors designed ADR services for www.eBay.com.

⬆n6 "Synchronous communication software includes new online technology developments such as instant text messaging, java-enabled chat rooms, and web cam video conferencing that enable real-time communication and collaboration between parties. Asynchronous communications such as e-mail and web boards, on the other hand, allow parties to post their comments and questions in password-protected areas at their convenience." Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal,* 7 J. TECH. L. & POLICY 1 (Spring 2002).

⬆n7 *Id.* at 14. "...With the advent of wireless e-mail and web browsing, users with products such as the RIM Blackberry or a PCS phone could conceivably resolve their cases while waiting at airports..."

⬆n8 "B2B" -- Business-to-Business; "B2C" -- Business-To-Consumer.

⬆n9 *See* Zavaletta, *supra* note 6.

⬆n10 With the wide variety of ADR practitioners and minimal accreditation standards, we can imagine broad losses to ADR credibility now that we are adding the "online" element to ADR. Without uniformity, ADR's new sibling, ODR, will suffer a black eye and its usefulness will be stunted.

⬆n11 Webster defines brainstorm as "any transitory agitation or confusion of mind." "Unfortunately, his less-than-glorious definition is probably a more accurate description of the trial lawyer's brainstorming process than any of us would like to admit. We all brainstorm our cases. We stand around the coffee pot in the office, lift a glass together after work, collar one another in the hallways of the courthouse, and talk about our cases ad nauseaum." Cathy R. Kelly, *Trial By Design: Brainstorming The Criminal Defense Case,* 26 CHAMPION 18, 18 (2002).

⬆n12 *What Life Means to Einstein: An Interview by George Sylvester Viereck,* THE SATURDAY EVENING POST, Oct. 26, 1929.

⬆n13 Katharine Rosenberry, Professor, California Western School of Law, Creative Problem Solving Lecture, January 2003.

⬆n14 To find hidden assumptions, we would suggest using an Osborn's SCAMPER method, Kipling's WWWWWH, or another checklist. Kipling's WWWWWH is short for Who, What, When, Why, Where, and How. SCAMPER is an acronym for Sub/Simplify, Combine, Adapt, Modify, Put to other uses, Eliminate, Reverse.

⬆n15 BERENICE BLEEDORN, AN EDUCATION TRACK FOR CREATIVITY AND OTHER QUALITY THINKING PROCESSES 122 (2003).

⬆n16 SCIENTIFIC AMERICAN, May 8, 2003 -- Referred to in Lecture by Dean Emeritus Edward A. Dauer, University of Denver, College of Law, 2nd International Creative Problem Solving Conference [hereinafter 2nd Int'l Conference] Lecture, "Barriers of Perspective and Problem Finding" at California Western School of Law, March 5, 2004, and see http://www.law.du.edu/dauer. SCIENTIFIC AMERICAN article, Vilayanur S. Ramachandran & Edward M. Hubbards, *Hearing Colors, Tasting Shapes, available at* http://www.sciam.com/article.cfm?chanID=sa006&articleID=0003014B-9D06-1E8F

8A5809EC5880000 (last visited September 25, 2005). "Synesthesia (from the Greek roots syn, meaning "together," and aisthesis, or "perception") is a condition in which otherwise normal people experience the blending of two or more senses."

🔼n17 *Id.*

🔼n18 MORRIS STEIN, STIMULATING CREATIVITY, Vol II: GROUP PROCEDURES 25 (1975).

🔼n19 Even the Bible tells of "Abraham [discussing] with God over the destruction of Sodom, 'Lord would you spare the city if there were... [a certain number] of righteous people.' Jesus also pleaded with God in the Garden of Gethsemane, brainstorming with the Father, 'Isn't there some other way?'" E-mail interview from Dr. Jere Webb DMin (Feb. 4, 2004) (on file with author). The Sodom negotiation example is the short version of the brainstorming and negotiation process that happens today at www.cybersettle.com. Regardless, the formal rules of brainstorming are attributed to Osborn. *Id.*

🔼n20 PAUL E. PLSEK, CREATIVITY, INNOVATION AND QUALITY 123 (1997).

🔼n21 Brainstorming, *i.e.,* "Synetics."

🔼n22 "Nelson, Petelle and Monroe found that brainstorming processes produced a higher quantity and quality of ideas than did other methods of discussion." So go ahead, brainstorm on W. Nelson, J. Petelle, & C. Monroe, *A Revised Strategy For Idea Generation In Small Group Decision Making,* THE SPEECH TEACHER, 23, 191-205 (1974).

🔼n23 And new looks at old perspectives! When trying to think out of the box, many lamentably forget about what works within the box. Dr. Donald J. Treffinger, *infra* note 69.

🔼n24 RICHARD FOBES, THE CREATIVE PROBLEM SOLVER'S TOOLBOX 95 (1993).

🔼n25 BEVERLY R. MOORE, BRUCE E. RODGERS, STEPHEN R. GROSSMAN, INNOVATION, INC.: UNLOCKING CREATIVITY IN THE WORKPLACE 170 (1988).

🔼n26 J.P. Guilford, *Creativity,* AMERICAN PSYCHOLOGIST 5, 444-45 (1950), *available at* http://www.westga.edu/ psydept/arons-creativity.html (last visited April 9,2004) (this was the Presidential Address to the American Psychological Association, written before Guilford became associated with publishing).

🔼n27 *See* http://www.srds.ndirect.co.uk/tot/brainsto.htm (last visited January 27, 2004).

🔼n28 "Six or seven such (experienced at brainstorming) people will produce ideas at a rate which is about as fast as can be comfortably recorded... [O]n the other hand, a larger group is often convenient for introducing trigger sessions, or when the general level of brainstorming experience is low (which reduces the speed of idea production)." TUDOR RICKARDS, PROBLEM-SOLVING THROUGH CREATIVE ANALYSIS 65 (1974).

🔼n29 MOORE ET AL., *supra* note 25 at 168. This would not be a limitation for text-based ODR, because larger online groups can record their ideas as fast as they can type.

🔼n30 Throughout the paper I will use the term adversarial when there is an exception to the rule that the subject matter would apply to both facilitative and adversarial settings. By "adversarial" I mean to suggest settings where two (or more) teams are seeing things from a distinctly different point of view, often with different motivating interests. By "facilitative" I mean a group process where the motivating interests are (generally) common to all members in the brainstorming session.

n31 "This Committee will consist of equal numbers of members of the European Parliament and of the parliaments of the EFTA Member States." John P. Fitzpatrick, *The Future of the North American Free Trade Agreement: A Comparative Analysis of the Role of Regional Economic Institutions and the Harmonization of Law in North America and Western Europe,* 19 HOUS. J. INT'L L. 1, 94 (1996).

n32 GERALD NADLER & SHOZO HIBINO, BREAKTHROUGH THINKING AND CREATIVE SOLUTION FINDING (1999).

n33 GOH BEE CHEN, LAWS WITHOUT LAWYERS, JUSTICE WITHOUT COURTS 10 (2002).

n34 *Id.*

n35 The challenge for the Chinese would be not to lose the perspective that we are mired in, the rights-based perspective.

n36 JAMES L. STERN & JOYCE M. NAJITA, LABOR ARBITRATION UNDER FIRE 220 (1997).

n37 MOORE ET AL., *supra* note 25, at 176.

n38 *Cf,* "During the meetings, the influential person must excuse themselves." Dr. Susan C Jarboe, 2nd Int'l Conference Lecture, "Puzzles of Communication" at California Western School of Law, March 5, 2004. This author believes recusal is required only in three scenarios: 1) a sensitive topic where personal matters are at stake; 2) adversarial issues; 3) where the leader lacks discussion-leading skills and has not been adequately trained in mediation. Otherwise, the power of having the owner of the problem lead the discussion can lead to a substantially higher level of understanding and communication among all involved.

n39 In recent literature it is also well noted that brainstorming processes and resolution of issues will be inhibited without a neutral moderator. Lamentably, "Davd Lewin found that 80 percent of nonunion ADR systems rely on senior management for a final decision." STERN, *supra* note 36, at 225.

n40 PLSEK, *supra* note 20 at 127; ARTHUR B. VANGUNDY, IDEA POWER 17 (1992).

n41 Even going so far as to change topics to brainstorm might be helpful: "I know some of you have more to write on stage 1, but please move immediately to stage 2." John Wade, *Special Issue Mediation 2000: Training Mediators For The 21st Century: Reinventing The Pyramid: A Process For Teaching And Learning In Mediation Courses,* 38 FAM. & CONCIL. CTS. REV. 87, 94 (2000).

n42 WALTER A. MAGGIOLO, TECHNIQUES OF MEDIATION 141 (1985).

n43 Dr. Donald J Treffinger's process for problem solving starts with sensitivity to knowing there is a problem so you can find the mess. (*see infra,* at note 69).

n44 Charles F. Kettering, *available at* nunic.nu.edu/ ckettemb/WhitePapers.html (last visited April 9, 2004).

n45 The converse is true as well, freedom to do something, gives freedom not to do it.

n46 Christophe Reymond, *Institutions, Decision-making Procedure and Settlement of Disputes in the European Economic Area,* 30 COMMON MKT. L. REV. 449, 463 (1993).

n47 SALLY F. MOORE, LAW AS PROCESS: AN ANTHROPOLOGICAL APPROACH 58 (1983).

n48 MATTHEW MCKAY, MARTHA DAVIS, PATRICK FANNING, MESSAGES: THE COMMUNICATION SKILLS BOOK 152 (1983).

n49 BATNA/WATNA/MLATNA=Best/Worst/Most Likely Alternative To Negotiated Agreement.

n50 ROGER FISHER & WILLIAM URY, GETTING TO YES 14-16 (1991).

n51 West New Guinea would ultimately pass to Indonesia, and the Netherlands would receive face-saving guarantees with respect to Papuan free choice, Christopher J. McMullen, *Mediation of the West New Guinea Dispute, A Case Study,* Institute for the Study of Diplomacy, Georgetown University 74 (1962).

n52 Problem Solving Lecture, "Negotiation," Fall 2003, Professor Thomas Barton, California Western School of Law.

n53 "At the crucial stage of the forming of the European Economic Area (EEA), the parties stipulated that the decision-making parties 'would be represented on an equal footing and where decisions were taken by consensus.'" Reymond, *supra* note 46 at 452.

n54 PEG PICKERING, HOW TO MANAGE CONFLICT 99 (2000).

n55 MAGGIOLO, *supra* note 42 at 22.

n56 STERN & NAJITA, *supra* note 39 at 203.

n57 "Boulwarism...as developed by Lemuel R. Boulware when he was principal negotiator for the General Electric Company... is when a company makes only one basic proposal." This is simply a "take it or leave it" method. WILLIAM E. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 169 (1971). There is the danger of working with someone who has an unequal bargaining power where the incentive to come to bargaining table is low. It is better to know your WATNA!

n58 "In the event the Parties are unable to agree upon a solution through consultation within certain time limits, usually between 30 and 45 days, any Party may request in writing that the Commission meet." J.L. Siqueiros, *NAFTA Institutional Arrangements and Dispute Settlement Procedures,* 23 CAL. W. INT'L L. J. 383, 388 (1992-1993).

n59 Charles J. Dunlap, Jr.& Paula B. McCarron, *Negotiations Goes to War,* 12 U.S. A.F. ACAD. J. LEG. STUD. 1, 5 (2003).

n60 ROBERT H. MNOOKIN, BEYOND WINNING 11-17 (2000).

n61 "Why not brainstorm the case at lunch? Or you can take the associate and his spouse to dinner. (If he and his spouse get a free dinner because he is working with you on a case, you can bet he won't be "too busy" next time.) Or go for a walk, a drive or a hike together where the two of you can brainstorm the case without interruptions. Maybe you both like jogging or horseback riding. There are many activities which a partner and associate can engage in that take the drudgery out of the day-to-day grind and toil." Albert G. Marquis, *Successful Deligation is to Everyone's Benefit,* 9 NEVADA LAWYER 6 (2001)

n62 Terri Morrison & Wayne A Conway, *Global Business Basics,* Industry Week.com (Nov. 11, 2000), *available at* http://www.industryweek.com/Columns/ASP/columns.asp?ColumnId=563 (last visited February 19, 2004).

n63 RICKARDS, *supra* note 28 at 67-68.

n64 MAGGIOLO, *supra* note 42 at 131.

n65 Sam Harrison, *Best Practices, available at* http://www.daretochange.com/ columnb.html and Carole Kanchier, *Dare to Change, available at* http://www.cornerbarpr.com/spikedarticles/index.cfm?catid=1001 (last visited February 19, 2004).

n66 Robert Epstein lists games as a great way to lower inhibitions and find creative answers to challenges. ROBERT EPSTEIN, CREATIVITY GAMES FOR TRAINERS: A HANDBOOK FOR GROUP ACTIVITIES FOR JUMPSTARTING WORKPLACE CREATIVITY 257 (1996). Inhibitions hamper free thought in brainstorming sessions.

n67 RICKARDS, *supra* note 28 at 67-68.

n68 FOBES, *supra* note 24 at 35.

n69 *Id.* at 30. I believe this is a good exercise, but would side closer to believing that throwing away an existing paradigm before close examination is overly rash. "Explorers are [also] interested in thinking inside the box, using existing paradigms to see what fits in existing scenarios." Dr. Donald J. Treffinger, 2nd Int'l Conference Lecture, "Creative Problem Solving: Yesterday, Today, and Tomorrow" at California Western School of Law, March 4, 2004.

n70 Dean Emeritus Edward A. Dauer, *supra* note 16.

n71 FOBES, *supra* note 24 at 156.

n72 NADLER & HIBINO, *supra* note 32.

n73 FOBES, *supra* note 24 at 83.

n74 PLSEK, *supra* note 20 at 128.

n75 Examples of closed-ended questions are quantitative or binary questions that require a yes/no or numerical answer or a limited response and can even include some qualitative questions that inhibit free discussion.

n76 Treffinger, *supra* note 69.

n77 Evaluation inevitably happens via silent body language that shows approval or disapproval for an idea.

n78 "If one group repeats responses already suggested by another group, this repetition can be reflected by checkmarks next to existing points on the board." Wade, *supra* note 41 at 88. This is seen by some as evaluative, and not ideal as the new idea will have some possible variation and evaluation in the slightest form so that this is viewed by some brainstorm purists as stifling.

n79 PETER LOVENHEIM, BECOMING A MEDIATOR 90 (2002).

n80 "Toro, the big lawn mower and snowblower manufacturer, has figured out one way to make apologies count. In 1991, it quit litigating suits brought by injured customers. Now, it engages in a mediation process that always begins with an apology from the company regardless of who's at fault. You lost a finger cleaning grass out of a running lawnmower? Toro is very sorry. 'People are frequently quite surprised,' says Drew Byers, Toro's corporate product integrity manager. The

company hasn't been to trial since 1994, and 95% of its cases are settled on the day of mediation or shortly thereafter. 'But that's not the aim,' says Byers. 'Often those people just want to be listened to.'" Linda Tischler, *The Art of the Anti-Apology,* FAST COMPANY, Sept. 2003, at 31.

⬆n81 "How to Get Plenty of Good Ideas," *available at* http://www.srds.ndirect.co.uk/tot/brainsto.htm (last visited January 27, 2004).

⬆n82 Maslov's hierarchy of human needs, *available at* www.conferenceboard.ca/education/pdf/case-39.pdf (last visited April 11, 2004).

⬆n83 Many women lawyers, for example, have a need "to personalize and contextualize problems," according to Professor Menkel-Meadow. Shirley S. Abrahamson & Michael J. Fischer, *All The World's a Courtroom: Judging in the New Millennium,* 26 HOFSTRA L. REV. 289 (1997). So, with that in mind, knowing the needs of the other parties and the attorneys in a situation might be very helpful in analyzing what types of questions might be better suited. This is a generalization, and, like any generalization, it must be carefully weighed for usefulness in specific circumstances.

⬆n84 SquareTrade is eBay's ODR service provider, so while this is an online sample quote, the same could be applied in person.

⬆n85 KATSH & RIFKIN, *supra* note 5 at 83.

⬆n86 FISHER & URY, *supra* note 50 at 83. Alternatively, "one of the key things to do in any situation is to separate idea-generation from idea-evaluation." Dr. Susan C. Jarboe, *supra* note 38.

⬆n87 RICKARDS, *supra* note 28 at 109.

⬆n88 *Id.* at 87. I would replace the polite word "consider" with "do." A derogatory attitude rarely helps any creative process.

⬆n89 FOBES, *supra,* note 24 at 277, 288.

⬆n90 Dr. Susan C. Jarboe, *supra* note 38.

⬆n91 MAGGIOLO, *supra* note 42 at 135.

⬆n92 Dr. Loren Dickinson, Walla Walla College, Speech Communication lecture, Spring 1997.

⬆n93 *E.g.,* a room full of people shaking their heads side to side in Bulgaria and Greece means that they agree. ROGER E. AXTELL, Do's AND TABOOS AROUND THE WORLD 44 (1985).

⬆n94 PICKERING, *supra* note 54 at 99.

⬆n95 PHILIP A. JONES, LAWYERS' SKILLS 230 (1998).

⬆n96 GREGORY TILLETT, RESOLVING CONFLICT: A PRACTICAL APPROACH 108 (1999).

⬆n97 MAGGIOLO, *supra* note 42 at 127.

⬆n98 COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 78 (2002).

⬆n99 MORTON DEUTSCH & PETER T. COLEMAN, HANDBOOK OF CONFLICT RESOLUTION 364 (2000).

⬆n100 Dean Emeritus Edward A. Dauer, *supra* note 16.

⬆n101 PETER LOVENHEIM, BECOMING A MEDIATOR 23 (2002). Other questions suggested include: If you were in the other person's shoes, how would you feel? What do you think is the strongest part of the other side's position? What is the weakest part of your position? What will you do if you do not reach an agreement? Do you think someone who didn't know you would see you as being entirely without fault in this dispute? If this case went to trial, is it realistic to think a jury would find the other side 100 percent in the wrong? I've heard you say what you want out of the case, but what do you really need? If the other side were to agree to your last proposal, how workable do you think it would be in the long run? How much will not reaching an agreement today cost you? If this case doesn't settle, how long might it take to get to court? If you won in court, could the other side appeal? How long might that leave you in a state of financial uncertainty? What are some fair ways of settling this problem--fair to you and to the other side? How would it feel to walk away just now, with this whole matter settled? What if your opponent did X? Would you do Y?

⬆n102 VANGUNDY, *supra* note 40 at 250.

⬆n103 TILLETT, *supra* note 96 at 31.

⬆n104 *See* http://www.edumentor.com/assets/media/pdf/confident_communication.pdf (last visited February 5, 2004).

⬆n105 VANGUNDY, *supra* note 40 at 155. (emphasis added).

⬆n106 PLSEK, *supra* note 20 at 128.

⬆n107 RICKARDS, *supra* note 28 at 124 (emphasis added).

⬆n108 GERALD W. FAUST, RICHARD I. LYLES & WILL PHILLIPS, RESPONSIBLE MANAGERS GET RESULTS: HOW THE BEST FIND SOLUTIONS--NOT EXCUSES 109-112 (1998).

⬆n109 *See* http://www.sitepoint.com/print/1150 (last visited January 19, 2004).

⬆n110 FOBES, *supra* note 24 at 89. For example, a woman invented the circular saw when she saw two men cutting wood with a "two-person saw and wondered if the rotary motion of her spinning wheel could be combined with the cutting teeth of a saw blade." *Id.* at 108.

⬆n111 PLSEK, *supra* note 20 at 128.

⬆n112 *See* www.vanderbilt.edu/vsvs/inheritance.pdf (last visited February 6, 2004).

⬆n113 This is similar to looking up mileage on a map that includes a grid of miles from point to point.

⬆n114 RICKARDS, *supra* note 28 at 124.

⬆n115 BLEEDORN, *supra* note 15 at 83.

⬆n116 "Use of matrices to find overlooked combinations -- take two independent characteristics of what you are trying to fix and make a grid." FOBES, *supra* note 24 at 83.

⬆n117 Combined from www.thinkingcorner.com/item15.htm and http://www.Medium bold.com/04_thinking/visualize/mind_maps.html (last visited February 6, 2004).

⬆n118 "Explorers are [also] interested in thinking inside the box, using existing paradigms to see what fits in existing scenarios." Treffinger, *supra* note 74.

⬆n119 FOBES, *supra,* note 24 at 43.

⬆n120 *See also* JOHN FABIAN, CREATIVE THINKING & PROBLEM SOLVING 170 (1990): "Imaging the Future: Conjuring up mental images full of future potential."

⬆n121 "A useful variation is to have individuals make a personal list (*e.g.* a minimum of three items) to share with a small group and then for the groups to report in plenary to generate a master list. This system has the advantage of forcing everyone to make a contribution." *See* SRDS, *Interactive Mind Mapping* at http://www.srds.ndirect.co.uk/tot/brainsto.htm (last visited January 28, 2004).

⬆n122 Dr. Susan C. Jarboe, *supra* note 38.

⬆n123 "Consensual knowledge is defined as 'a body of beliefs ... that is widely accepted by the relevant actors, irrespective of the absolute or final "truth" of these beliefs,' and represents accumulated expertise and knowledge..." Mamiko Yokoi-Arai, *Regional Financial Institutionalization and the Creation of a Zone of Law: The Context of Financial Stability/Regulation In East Asia,* 35 INT'L LAW. 1627, 1664 (2001).

⬆n124 VANGUNDY, *supra* note 40 at 150.

⬆n125 Wade, *supra* note 41 at 90.

⬆n126 *Id.* at 92.

⬆n127 However, for facilitative sessions, where building group dynamics for a longer relationship is important, trigger sessions should be used in moderation. This is because, as opposed to trigger sessions, group brainstorming helps group dynamics, team spirit and importantly, feelings of control and buy-in on future plans. In addition, it helps personal development, builds trust and inspires more powerful ideas. Paraphrased from RICKARDS, *supra* note 28 at 67-68.

⬆n128 If used incorrectly, STS could also foster individual evaluation for prevention of ideas that might reflect poorly on inter-group evaluation.

⬆n129 Wade, *supra,* note 41 at 94.

⬆n130 "[I]ssues arise which can be more expeditiously handled by divorcing them from the main bargaining table and permitting a subcommittee to explore possible solutions." MAGGIOLO, *supra,* note 42 at 207.

⬆n131 *Id.*

⬆n132 "Where discomfort could be sensed in a larger brainstorming group because of sensitive topics, a 'cracker barrel'" could be used, where "a basket is placed on the table and participants write their ideas on pieces of paper and toss them into a 'barrel.'" AUSTIN J. FREELEY & DAVID L. STEINBERG, ARGUMENTATION AND DEBATE: CRITICAL THINKING FOR REASONED DECISION MAKING 74 (2000). This encourages creativity and open expression of ideas--especially at the opening of an idea meeting; however, if the idea is recognized in the evaluation stage as being a strong suggestion, the person should be given the credit in order to feel the reward of his contribution. Freeley's basket concept is nearly identical to the Battelle Institute's pool method. VANGUNDY, *supra* note 40 at 17.

⬆n133 Dr. Susan C. Jarboe, *supra* note 38.

⬆n134 GERALD F. SMITH, QUALITY PROBLEM SOLVING 148 (1998).

⬆n135 TILLETT, *supra* note 96 at 109.

⬆n136 WILLIAM E. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 93 (1971).

⬆n137 MAGGIOLO, *supra* note 42 at 240.

⬆n138 "[Telling the press] 'No Comment' is a death knell, so say something more meaningful like, The parties have met since   o'clock this morning. They have engaged in intensive bargaining on a number of key issues. While no agreement was reached, the discussions were constructive in giving them a better understanding of each other's position. We plan to reconvene at   o'clock tomorrow morning. I am not at liberty to comment further on any specific issues." *Id.*

⬆n139 "[Know] when to move on -- if you get stuck or run out of steam, try to find a new path or try thinking about the concept in a new way (for example, map the antonym of your keywords). Once you've exhausted an idea completely, move on." *See Mind Maps,* at http://www.mediumbold.com/04_thinking/visualize/mind_maps.html (last visited February 6, 2004).

⬆n140 Dr. Susan C. Jarboe, *supra* note 38.

⬆n141 To brainstorming's detriment, silence can be used to communicate disapproval if done immediately following a comment by allowing the idea to waft through the air with no apparent receiver. This would be especially detrimentally evaluative if the moderator were to stop writing and fail to note the idea.

⬆n142 VANGUNDY, *supra* note 40 at 17.

⬆n143 Dr. Susan C. Jarboe, *supra* note 38.

⬆n144 Videoconferencing - synchronous transfer of video information. Video/Audio Streams - asynchronous transfer of recorded messages.

⬆n145 Our human culture, while becoming more and more steeped in textual communication, will likely see ODR flourish when it recaptures many of the communication tools that the general public is comfortable using. Yet with videoconferencing's thundering approach, the growth of textual communication via e-mail and text messages are likely to be stamped out quickly as the comfortable visual communication element is re-introduced into the communication mainstream.

⬆n146 KATSH & RIFKIN, *supra* note 5 at 21.

⬆n147 Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions,* 12 ALB. L.J. SCI. & TECH. 441, 467 (2002).

Under 28 U.S.C. § 1332, the amount in controversy required for a federal court to have jurisdiction is $ 75,000. Beyond the basic requirements, there are also logistical constraints of bringing a case -- attorneys, filing fees, court reporter costs, transportation, witnesses, depositions and discovery costs stifle many potential plaintiffs from bringing cases in traditional court systems. The formality of our court system is rights-driven, and is not rigged for efficiency or far-flung international disputes between people with a small amount in controversy. Yet this is the segment of law where most of the public's transactions and energies are being spent. The participants are too far from each other, the

remedy is outweighed by the costs in time and money, and often, for the growing constituency of international disputes, the jurisdictional questions are a quagmire.

n148 Colin Rule, *Introduction to Online Dispute Resolution for Business, available at* http://mediate.com/ articles/ rule2.cfm (last visited February 7, 2004).

n149 RISKIN & WESTBROOK, *supra* note 4 at 13.

n150 Leonard L. Riskin, *Mediation and Lawyers,* 43 OHIO ST. L.J. 29, 29 (1982).

n151 Siqueiros, *supra* note 58 at 394.

n152 eBay has solved the jurisdiction dilemma with its rating system. "In cyberspace, e-consumers with purchasing problems have no clear means of redress for their concerns because cyberspace has no uniform laws and no unified court system. The global nature of the Web challenges national sovereignty and traditional court authority and amplifies concerns about choice of law and the enforceability of court judgments. The lack of well-established and credible online conflict resolution mechanisms dampens consumer confidence in the online marketplace and hurts e-tailers involved in cross-border transactions." Lucille M. Ponte, *supra* note 147 at 442-43.

n153 Tischler, *supra* note 80.

n154 Synchronous-- at the same time. The most popular IM tools are Yahoo! Messenger, AIM by AOL, MSN by Microsoft and ICQ.

n155 Asynchronous -- not at the same time.

n156 RULE, *supra* note 98 at 51.

n157 *Id.*

n158 *Cf. id.* at 52. "There is an incentive to make one's points short, as the other side can start responding before the prior message is sent. Chat interactions quickly deteriorate into short clipped, back-and-forth exchanges as opposed to more well thought out, fully developed exchanges." *Id.* I would argue that both of these are likely, so the user must take into account the other party's online habits and chances for best modes of communication. Similarly, you would not choose to Instant Message the grandmother whose computer is nothing more than a large dust magnet.

n159 *Id.* at 50.

n160 *Id.* at 75.

n161 *Id.* at 56-57.

n162 *Id. See e.g.,* MicroTouch: on the Web at www.microtouch.com (last visited April 11, 2004).

One of the challenges of problem-solving and brainstorming is that your conscious mind can only hold a handful of thoughts at a time. Recording your ideas in a visual format enables you to capture a large number of thoughts and their relationships in a tangible form in front of you. In addition, the combination of words and shapes engages both the left and right hemispheres of your brain, which helps you to be more creative.

See www.innovationtools.com/tools /software details.asp?a=103 (last visited January 25, 2004).

⬆n163 "The term alternative dispute resolution is somewhat of a misnomer. In reality, fewer than five percent of all lawsuits filed go to trial; the other 95 percent are settled or otherwise concluded before trial. Thus, it is more accurate to think of litigation as the alternative and ADR as the norm." *See* http://www.wld.com/conbus/weal/wadr.htm, 'Cache' form on Google.com (last visited March 9, 2004).

⬆n164 RULE, *supra* note 98 at 32.

⬆n165 *See supra* note 163.

⬆n166 Lynn A. Epstein, *Cyber E-mail Negotiation vs. Traditional Negotiation: Will Cyber Technology Supplant Traditional Means of Settling Litigation?,* 36 TULSA L. J. 839, 842 (2001).

⬆n167 RULE, *supra* note 98 at 80. (possible governmental factors might include: favorable government treatment in the form of lower loan rates, better bid rates for government contracts, etc.).

⬆n168 E-mail interview with Bob Compton, San Diego Technological Guru, visionary and trusted friend. VidConf@Test-Site.org. (on file with author). *See* note 184 *infra.*

⬆n169 Dan Bricker, San Diego County Bar Association presentation, March 12, 2004. Technology Director for Nuvue Interactive. VidConf@Test-Site.org.

⬆n170 Joseph W. Goodman, *iBRIEF COMMERCE: The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites,* 2003 DUKE L. & TECH. REV. 4, 27 (2003).

⬆n171 JOHN FABIAN, CREATIVE THINKING & PROBLEM SOLVING 154 (1990).

⬆n172 The increasingly routine use of e-mail was evident most recently in the Microsoft antitrust case. Before U.S. District Court Judge Thomas Penfield Jackson issued his ruling that Microsoft has violated antitrust laws he appointed Federal Court of Appeals Judge Richard Posner to try to mediate a settlement. In late March 2000, it was reported that Judge Posner "peppered both sides with faxes, e-mails and phone calls about proposals and counterproposals. The parties have not dealt face to face, but instead have been working through Posner, who has been acting in the role of an electronic shuttle diplomat." KATSH & RIFKIN, *supra* note 5 at 119.

⬆n173 Goodman, *supra* note 170 at 8. "[A]ny effective ODR program must be willing at a minimum to use a mix of more accessible and cost-effective traditional modes of communication (telephone, fax or standard mail) and more basic technology, such as e-mail, to handle disputes." Lucille M. Ponte, *supra* note 147 at 471.

⬆n174 KATSH & RIFKIN, *supra* note 5 at 24.

⬆n175 Zavaletta, *supra* note 6.

⬆n176 eBay charges descending percentage commissions of the total transaction cost.

⬆n177 KATSH & RIFKIN, *supra* note 5 at 123.

⬆n178 Although it might be tempting for a mediator or arbitrator to distribute files as e-mail attachments, or send separate e-mails to all parties whenever something needs to be done, it becomes much more efficient to have a central place which can serve as a filing cabinet, scheduler, drafting table and so on. KATSH & RIFKIN, *supra* note 5 at 121.

⬆n179 *Id.* at 91.

🔺n180 *Id.* at 123.

🔺n181 *Id.* at 120.

🔺n182 For planning an event with open dates, participants and details, I have used www.evite.com. This helps by letting people vote on proposed dates, gives people lists of things to bring, maps of how to get to the event, and even reminds them of the event. Same for www.myevents.com made by collabrio-- an online interactive calendar, rolodex and reminder for my southern California sales & installation team, (yahoogroups.com, intranets.com, webex.com, eproject.com).

🔺n183 Catherine J. Lanctot, *Attorney-Client Relationships in Cyberspace: The Peril and the Promise,* 49 DUKE L.J. 147, 149 (1999).

🔺n184 E-mail interview with Bob Compton, February 6, 2004. "After an SSL certificate is installed and configured to run https, all one need do is allow secure file uploading and clients and attorneys can collaborate remotely on any or all of the documents and messages required in a litigation or transaction." (on file with author) Additionally,

I've *always* told people that *anything* sent in an e-mail should be considered to be shouted over a loud-speaker in a public arena. There is *no* privacy to e-mail transmitted via the internet and thus *no* privacy can be expected. If you want absolute privacy, you MUST ensure end-to-end strong (>4,096 bit) encryption. The level of privacy expected is commensurate with the level of encryption employed. SSL is the least secure of available encryptions as it uses private/public key encryption methods which have proven to be fairly simple to break. Hardware IP tunneling protocols tend to be the *most* secure available at a substantial cost and inconvenience. I would expect most legal communication should find an acceptable platform somewhere between those two.

🔺n185 RULE, *supra* note 98 at 49.

🔺n186 Another possible solution I propose would be to have segments of the text voted upon with screens for the proposed changes.

🔺n187 Cooling distance can be invaluable if not essential to helping the parties maintain a respectful dialogue. RULE, *supra* note 98 at 65.

🔺n188 *Id.* at 64.

🔺n189 *Id.* at 67.

🔺n190 Zavaletta, *supra* note 6; RULE, *supra* note 98 at 65.

🔺n191 WILLIAM E. SIMKIN, MEDIATION AND THE DYNAMICS OF COLLECTIVE BARGAINING 79 (1971).

🔺n192 This independent research during synchronous ODR could happen simply by opening another application (an excel spreadsheet, a calendar, or an online directory) to research the next proper response.

🔺n193 The first steps eBay took towards ODR efforts were dismal, yet they persevered and attained an incredible resolution level of 80 percent before the point of inserting a human mediator into what begins as an automated process. eBay only attained this after persevering past discouraging statistics that started with "...only about 46% of the mediated disputes reached settlement with less than 25% of disputants refusing to participate in the free mediation service." Lucille M. Ponte, *supra* note 147 at

492. *See also* Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of "eBay Law,"* 15 OHIO ST. J. ON DISP. RESOL. 705, 726 (2000).

⬆n194 Margaret E. Anderson, *Intellectual Property Mediations: Special Techniques For A Special Field +,* 3 TEX. INTELL. PROP. L.J. 23 (1994).

⬆n195 Stephen J. Ware & Sarah Rudolph Cole, *Introduction: ADR in Cyberspace,* 15 OHIO ST. J. ON DISP. RESOL. 589, 594 (2000).

⬆n196 *Id.* at 594.

⬆n197 *See* http://ascend.comm.uic.edu/ amarkham/Lectures/comm.pdf (last visited March 9, 2004).

⬆n198 RULE, *supra* note 98 at 77.

⬆n199 KATSH & RIFKIN, *supra* note 5 at 9.

⬆n200 "Negotiation essentially involves the parties to the dispute exchanging their view points and, where considered desirable, making compromises with a view of resolving that dispute. It is a process which entails direct discussion between the parties, which may occur face-to-face or through communication in one form or another. Negotiations may also occur through 'shuttle diplomacy,' which Henry Kissinger raised to an art form during his tenure as the United States' Secretary of State." NII LANTE WALLACE-BRUCE, THE SETTLEMENT OF INTERNATIONAL DISPUTES 38 (1998).

⬆n201 Professor, attorney and practicing mediator Gregg Relyea, founding member of the Mediator Court Panel Requirements Committee.

⬆n202 RULE, *supra* note 98 at 74.

⬆n203 *Id.* at 73.

⬆n204 Lucille M. Ponte, *supra* note 147 at 459.

⬆n205 For more information on the concept of the global motivation for transparent reputations, *see* Webb at note * *supra.*

⬆n206 KATSH & RIFKIN, *supra* note 5 at 130.

⬆n207 Beatrice Baumann, *Technology and Legal Practice Symposium Issue: Electronic Dispute Resolution (EDR) and the Development of Internet Activities,* 52 SYRACUSE L. REV. 1227, 1236 (2002).

⬆n208 KATSH & RIFKIN, *supra* note 5 at 31.

⬆n209 *See* http://www.squaretrade.com (last visited February 4, 2004).

⬆n210 Bruce Leonard Beal, *Online Mediation: Has its Time Come?,* 15 OHIO ST. J. ON DISP. RESOL. 735 (2000).

⬆n211 RULE, *supra* note 98 at 62.

⬆n212 *Id.* at 78.

⬆n213 *Id.* at 77.

🔼n214 Beal, *supra* note 210 at 743.

🔼n215 Binding arbitration applies if you are suing eBay, not an online seller/buyer. For disputes with another eBay user, there is mediation via squareTrade.com.

🔼n216 http://www.courtinfo.ca.gov/reference/documents/adreport.pdf90 (last visited February 2004).

🔼n217 *Id.* Of 124 municipal and justice courts that responded, the 33 who used mediation had the 83% resolution rate.

🔼n218 http://www.squaretrade.com/cnt/jsp/prs/sd_tribune_111101.jsp?
vhostid=daffy&stmp=squaretrade&cntid=worismmazl (last visited Sept. 23, 2005).

🔼n219 KATSH & RIFKIN, supra note 5 at 129.

🔼n220 MARSHA COLLIER, EBAY FOR DUMMIES 326 (1999). So when rolling out the new SquareTrade dispute resolution site for eBay, the authors asked,

Why would most eBay users be willing to participate with us? Whether or not they actually wished to reach a mutually acceptable outcome, they typically had concerns about further participation and involvement in eBay and about how the dispute might affect their future in eBay. eBay was important to them, and eBay ran its site in such a way that a user's eBay future could be affected by disputes that arose. If they ignored eBay law, they did so at some risk to their future online life and even to their economic well-being.

Ware & Cole, *supra* note 195 at 594 (2000).

🔼n221 Parties on eBay rarely work with the same vendor twice. This is what I would term a discrete transaction, leading to the need to depend on the recommendations of others for a strong harbinger of business efficacy. This discrete transaction is compared to a relational transaction, where the reputation of the party is stored by the participants themselves.

🔼n222 *See* Lenden Webb, *International BBB a la eBay,* 35 CAL. W. INT'L L.J. 127 (2004), *available at* http://cisgw3.law.pace.edu/cisg/biblio/webb.html.

🔼n223 KATSH & RIFKIN, *supra* note 5 at 91.

🔼n224 *Id.* at 8.

🔼n225 "[I]n the United States, under the Fair Credit Billing Act, credit card issuers are required to investigate alleged billing errors claimed by cardholders." While they are required to investigate, they go much further than that. They often issue an immediate credit to the complainant. Why? Because it maintains their relationship! "When cardholders claim non-acceptance or non-delivery, a card issuer can only allow the charge if it is proven that 'goods were actually delivered, mailed or otherwise sent to the obligor.'" Victoria C. Crawford, *A Proposal to Use Alternative Dispute Resolution as a Foundation to Build an Independent Global Cyberlaw Jurisdiction Using Business to Consumer Transactions as a Model,* 25 HASTINGS INT'L & COMP. L. REV. 383, 393-94 (2002).

🔼n226 *Id.*

🔼n227 *Id.*

🔼n228 I predict that eBay will make an option available for dealings with equally rated partners.

Discrete transaction relations increase the possibility of fraud. The challenge is that while eBay has seemed to protect the public, if people are able to attain a valid eBay rating (20 or so positive transactions) with dummy sales or fake transactions, mass problems could still take place with larger transactions even with an identity that seems to have a solid rating and a relatively worthwhile history of transactions.

⬆n229 http://www.bbb.org/alerts/article.asp?ID=57, (last visited Feb 10, 2004).

⬆n230 Peter Grant, *Ready for Prime Time: A New Internet-Based Phone Technology has an Un-Catchy Acronym: VOIP,* WALL STREET JOURNAL, Jan. 12, 2004 at R7.

⬆n231 RULE, *supra* note 98 at 31.

⬆n232 Melissa Conley Tyler & Di Bretherton, *76 and Counting: An Analysis of ODR Sites,* Dept of Justice, Victoria, Australia, *available at* http://www.odr.info/unece2003. (HTML version viewed on Jan. 26, 2004).

⬆n233 Emotional attachment is to face-to-face interactions and subsequently, face-to-face apologies are loosening as we become a wireless society. One of the most important things is to be able to be heard and understood--while first mail and then telephones have changed the way we accept an apology, face-to-face resolution of a dispute seems unlikely to be replaced by online apologies and emotional quieting that takes place in a mediation.

⬆n234 RISKIN & WESTBROOK, *supra* note 4 at 13.

⬆n235 United States v. Carroll Towing Co., Inc. 160 F.2d 482 (2nd Cir. 1947).

⬆n236 "Healthy fatalism" is a term introduced to me by California Western School of Law Professor Thomas Barton who was pivotal to inspiring this paper.

⬆n237 KATSH & RIFKIN, *supra* note 5 at 9.

⬆n238 URY & FISHER, *supra* note 50.

⬆n239 The toughest and most important question is whether ODR makes such a splash that it brings in enough cases from adjudication such that mediators can sustain a greater living from the cases that land in the ADR arena because of ODR's newfound fame and notoriety, than from what ODR takes from the face-to-face arbitrators in groups such as JAMS and the AAA.

⬆n240 SPENCER JOHNSON, WHO MOVED MY CHEESE? (1998).

⬆n241 Beal, *supra note* 210 at 737.

⬆n242 SIPhone is a local San Diego company (Michael Robertson of MP3.com and Lindows.com), with better support, technology and a lower price than Vonage.

⬆n243 Grant, *supra note* 220.

⬆n244 Beal, *supra* note 210 at 737.

⬆n245 Over 50 percent of the neutrals listed at the JAMS website were either present or retired judges. http://www.jamsadr.com/neutrals.asp (last visited March 10, 2004).

⬆n246 Ware & Cole, *supra* note 195 at 593-94.

n247 *Id.* The views of Beal and of Katsh, Rifkin, and Gaitenby provide a nice contrast to the views of Thiessen and McMahon.

n248 *Id.*

n249 McMullen, *supra* note 51 at 76.

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