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Options for cyber-med

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Editorial

Options for cyber-med

Laurence Boulle

'... all areas of law and dispute resolution, from defamation to mediation, will need to cope with the context of this new media; for example, an insult in hardspace may be just harmless fun in cyberspace, and so on.'

We've heard about cyber-banking, cyber-dating and cyber-sex ... and the latest use of the internet is in cyber mediation.

Two earlier issues of the *ADR Bulletin* published lists of web sites of potential interest to ADR practitioners, service providers and commentators (see vol 1.4 August 98 and vol 1.6 November 98).

One of them was that of the Online Ombuds Office (<http://www.ombuds.org>), a US based organisation which provides online dispute resolution services.

Recently the service published the full transcript of a dispute which was successfully mediated online and which reveals some of the challenges and implications of this kind of service.

About the mediated dispute

Interestingly, the dispute was itself over a copyright issue arising out of the use of the internet. The service was contacted by an internet enthusiast who had begun summarising local news and events and publishing the summaries on a web site. He was contacted by the local newspaper which claimed that he was in violation of their copyright and that they would institute court proceedings if he did not stop immediately. He stopped his project and sought assistance from the dispute resolution service.

Over the next month a series of communications took place by way of email, fax and phone. These were all directed through the dispute resolution service and there was no further direct contact between the disputing parties. As with many mediations, much of the time was spent getting the newspaper to the table (keyboard?) and once this had been achieved the mediation proceeded quickly.

An interesting escalation in the conflict occurred when the internet service provider (ISP), which was coincidentally used by both the newspaper and the individual, faxed a document entitled *Ten Big Myths About*

Copyright Explained to the individual. He thought it was instigated by the newspaper as a warning that what he was doing was wrong. It is not the first time that a party in dispute has interpreted an event in the way most detrimental to the other side. In reality the document was merely a reminder from the ISP about the rules of copyright, which had also been sent to the newspaper. As is to be expected, clarification of this issue was an important factor in the ultimate resolution of the dispute.

Implications for mediation

- A transcript of the exchanges in mediation is a rare species and a welcome consequence of this development. It allows outsiders to follow the course of a mediation, including factors such as the escalation of the dispute referred to above. Of course face to face mediation does not preclude the generation of a transcript and some mediation agencies in Australia video-record mediations for evaluation purposes. However, the internet provides an easy and unintrusive way of obtaining a record, subject to confidentiality requirements referred to below.
- New technology clearly has implications for the speed and efficiency of dispute resolution. While this relatively minor dispute took about a month to resolve, this was largely because of the difficulties in getting the newspaper to the table referred to above. However in other situations the ability to participate at the various parties' convenience and without the need for a time, venue, parking and the like has obvious potential benefits.
- The matter of confidentiality is always problematic with new technology. The dispute resolution service made the conventional commitment to confidentiality made by other mediators and from the transcript this appears to have been upheld. (Although one might wonder ➤



- about the following sentence in an email to the individual, 'The only tidbit I did gain from them [the newspaper] is that they are planning to have a website of some kind ...') The transcript was of course amended to provide anonymity to all parties but concerns over confidentiality remain.
- The pedantically inclined will be deeply disturbed by the dramatic evidence of poor spelling ('immediatly', 'dailey'), typos, and unmentionable breaches of syntax and grammar. This virtual stuff is not for the weak-kneed.

Future prospects for cybermed

Australian courts, tribunals and other dispute resolution agencies have not been slow to embrace new technology and to be innovative with the old. Computers, videos, faxes, emails and telephones are all used to some extent in these bodies for a range of different functions, and many mediators have been conducting tele-mediations for years.

Dispute resolution on the internet creates new opportunities and challenges. It obviously overcomes the tyranny of geography. Moreover, different time zones present no problem and mediating parties can attend to their emails whenever convenient or appropriate. Internet mediation has the other great advantage that in legal disputes there is no need to resolve the choice of law problem, as mediation does not require that determination — at least until a major problem arises and there is litigation around a problematic mediation.

On the other hand, mere use of email for mediation detracts from one of the main *process* values of the system in that it does not take place in real time and there is no immediate interaction — even through the blunt instrumentality of a keyboard. In this sense, e-med is a low technology exercise.

More immediate would be mediation through the mechanism of *internet relay chat*, which can be used for group conferences and the like. All that is needed is software to support separate conversations between the mediator and each party individually in order to be able to provide the joint and separate sessions

encountered in face to face mediation. While this provides immediacy it also lacks the personal touch.

Internet phone chats bring the immediacy of the telephone at a significantly reduced cost, plus the ability to exchange draft documents instantaneously, but at the moment has not reached the technical standards to provide any advantage over tele-mediation. The same applies to *internet video conferencing*, which will no doubt have mediation applications as it reaches new levels of technical perfection in the future.

And what about *virtual mediation*? Will artificial software be developed to the point where we have software that allows the machine to listen and acknowledge, define disputes mutually and neutrally, and reframe and encourage settlement? And will it know when to adjourn, when to raise the BATNA question, and when to take account of body language? Watch this space.

Adding feeling the cybermed way

One of the obvious objections to mediation through the internet is that it lacks the human interaction which mediation claims as an advantage over other dispute resolution processes. However the new technologies are not so easily defeated.

My colleague Pat Quirk of Bond University advises that email has now developed its own new language which allows for feelings to be added the cyber way. This means that there is now a toolbox of emoticons for every (well, at least some) occasion: for example :) [a smile] ;) [a wink] :P [a pant] and :< [a frown].

For example, try typing :) in a word document and you'll see that Microsoft automatically converts this to a more understandable 'smile' format. There might also be a keyboard formula for 'tongue in cheek'.

Professor Quirk's theory is that all areas of law and dispute resolution, from defamation to mediation, will need to cope with the *context* of this new media; for example, an insult in hardspace may be just harmless fun in cyberspace, and so on.

Also consider the opportunity to archive unlimited amounts of dialogue and

conversation between the parties and the excruciating detail this may lead to in presentation of a case for mediation. Consider also the ability to search this data with any number of search terms!

Show and tell

Readers who have experienced mediation and other forms of ADR through the new technologies, or who have ideas about future applications, are invited to submit their views and ideas to the editor. ●

For an interesting note on this topic see O'Hanlan and Blair 'A Unique Jurisdiction with Unique Possibilities' at <<http://www.wvjolt.wvu.edu/wvjolt/current/issue1/articles/ohanlon/jolt.htm>>.

For a more scholarly article see Almaguer and Baggott 'Shaping New Legal Frontiers: Dispute Resolution for the Internet' 13 (1998) Ohio State Journal on Dispute Resolution 711.

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contributions

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Contributions to The ADR Law Bulletin for 1999 are welcome.

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