

Closing the Distance with Technology

Report on Phase I of the Technology-Assisted Family Mediation Project



December 2007

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EXECUTIVE SUMMARY

I. Introduction

Many small, remote communities in British Columbia are isolated by distance — and by forests, mountains, water, or weather for at least some portion of the year. How best to communicate and bring people together to provide services in these regions has long been a conundrum in the province, with the result that many people living in these communities have simply accepted that some services will not be available to them.

But the computer age has opened up new possibilities for linking people to one another, in spite of distance and other physical barriers. It was with a view to discovering just what new possibilities technology has made available in respect of family mediation that the British Columbia Mediator Roster Society (the Society) initiated the *Technology-Assisted Family Mediation Project*. The project's overall objective is:

To explore the feasibility of providing British Columbians in remote, non-urban areas with access to competent, qualified family mediators through the use of current information technology ("IT").

This report presents the results of the first of two phases of the project, involving research into the applicability of current technologies to long-distance family mediation. It also discusses the feasibility of a second project phase in which a pilot would test the use of selected technologies to provide mediation services to families in remote, non-urban communities.

The project is thought to be particularly timely as governments and citizens around the world grapple with finding ways of delivering services with less reliance on fossil fuels. Additionally, the province's Ministry of Attorney General is currently piloting a new Notice to Mediate process for family cases. The Notice to Mediate (Family) Regulation allows a person to participate in mediation by telephone or other communications medium when authorized by the mediator. It is of critical importance that mediation professionals be available and be familiar with providing the necessary services under this regulation.

II. Overview of Applicable Technologies

For the purposes of this first phase of the project, information and communication technologies (ICTs) were explored on the basis of three dominant communication mediums in which they operate: audio-based, text-based, and integrated audio-visual/audio-text mediums.

Of the three, the most familiar and longest in use are audio-based mediums — especially the telephone. Although the telephone has probably been used in mediation for some time — particularly in the form of "shuttle mediation" — little has been written about it. In British Columbia, teleconferencing is employed quite widely in mediating Small Claims matters, and in dealing with disputes before various administrative boards and commissions.

Text-based computer mediums, particularly e-mail, are the next most familiar ICT to be used by mediators. There are, essentially, three types of computer text-based mediums:

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- asynchronous, or consecutive-time text messaging
 - synchronous, or simultaneous “real time” text messaging, and
 - “artificial intelligence”, involving the application of computer software which performs tasks, provides solutions, or solves problems in the absence of a human agent.

Although e-mail is asynchronous, it continues to be the major text-based medium in use around the world. Early experiments in on-line dispute resolution (ODR) were structured around this medium, which facilitated a kind of shuttle diplomacy between the parties.

Since then, an array of more flexible asynchronous and synchronous methods have evolved — including “instant messaging” and “on-line chat” systems, some of which may include “threaded discussion” or “bulletin boards” to organize the discussion into specific topics. “On-line platforms” and “segments” are also available — which provide all the features of the instant messaging and on-line chat options, but which also allow links to the Internet for instructions and information. Artificial intelligence systems are less prevalent, but they are continuing to evolve in the field of dispute resolution. They include computer software programs that impose a certain structure on communication between the parties and offer solutions, such as blind bidding and other electronic settlement systems, or which help people to arrive at their own solutions, such as brain-storming software.

The last ICT category, integrated audio-visual and audio-text mediums, are the technologies with which practitioners in dispute resolution have the least experience. Yet they are thought to be truly on the cusp of some new and exciting applications in ODR. Beginning with the audio-visual mediums, there are essentially two types applicable in this field:

- video/audio streams - asynchronous transfer of recorded audio and visual data, and
- videoconferencing - synchronous transfer of audio-visual data.

Video/audio streams are a non-interactive medium, involving the transmission or broadcast of previously recorded information. Videoconferencing, on the other hand, is interactive and allows for the simultaneous transmission of audio and visual information. Traditionally, videoconferencing has used expensive television technology, transmitting digital data over telephone lines. Now, however, less expensive videoconferencing is becoming available over the Internet. There are, in fact, many different software options that combine various audio-video-text applications, to varying degrees and with differing emphases.

Because the visuals for some of the less expensive software options are less reliable, however, some opt for software that integrates audio and text communications only. This provides mediators with the ability to have what might seem like an enhanced teleconference experience — permitting them to speak with both parties at the same time, and permitting the mediator and the parties to look at an agenda or edit a document together on the computer screen as they speak.

Perhaps because of the newness and ever-changing character of these technologies, the professional literature about their application in dispute resolution is largely descriptive rather than evaluative. As well, the research suggests that ICTs remain largely untried in the area of family mediation. Although there are some reservations with respect to family conflict, commentators in this field are largely enthusiastic about their use in every kind of dispute for which mediation is appropriate.

III. The Advantages of Technology-Assisted Dispute Resolution

Most commentators — even the most prominent advocates of ODR — agree that disputes are generally best resolved face-to-face. When distance or some other factor prevents the parties from meeting, however, some of the most commonly cited advantages of technology-assisted mediation include:

- time flexibility
- avoidance of travel
- cost savings
- time to reflect
- perspective taking
- reduction of emotional content
- comfort and convenience
- concurrent caucusing
- stored or recorded communication
- artificial intelligence benefits, and
- invisible mentoring.

Again, family mediation is generally not discussed in the professional literature about technology-assisted dispute resolution. Some of the benefits that have been identified specifically in this context, however, include: the positive effects of asynchronous communication, the ability to modify documents and craft agreements from a distance, facilitated communications between sessions, the empowerment of participants through access to information and resources, and the physical safety of the long-distance mediation environment. In all contexts, the benefits of ICTs in dispute resolution have been associated with a larger, more comprehensive objective — increasing access to justice.

IV. Disadvantages and Ways to Address Them

So that practitioners can be aware as they begin to apply these technologies, it is useful to catalogue both the concerns about using ICTs in this field and their possible solutions. The disadvantages of using ICTs in dispute resolution seem to fall broadly into four categories: specific method and/or distance-related issues; communication issues; technology issues; and legal/philosophical issues. Some that have been documented by commentators in this field include:

- flaming, inattentiveness, and other method-specific disadvantages
- walking away
- breaking ground rules
- impersonal nature of technology-assisted communication
- reduction/elimination of non-verbal cues
- difficulties in giving weight to emotion
- difficulties in conveying serious or professional demeanour
- accessibility
- security, confidentiality, and privacy

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- issues of identity and trust
 - band width and other technology-specific hazards
 - confusion of mediation with arbitration or adjudication
 - legal or jurisdictional issues, and
 - limits on the broader benefits of mediation.

While these concerns are significant, the research nevertheless suggests ways of mitigating them. Some of the ways to address the disadvantages of technology-assisted mediation include:

- To deal with a problem of “flaming” between the parties in a computer text-based medium such as e-mail, a caucus-style format can be imposed on the mediation in which all communication is transmitted through the mediator. In this format, it is possible to coach the parties about reframing their positions into interests and help them eliminate inflammatory language.
- To ensure that parties are actively engaged on the telephone and in web-based audio-text mediums, mediators can continually solicit input from the parties — periodically probing to ensure that silence at the other end is indicative of listening or thinking and not inattentiveness or, worse, withdrawal from the process.
- The suggestions for overcoming the problems of walking away and breaking mediation ground rules tend to rest in the realm of thorough pre-mediation groundwork — testing the commitment of the parties to mediation, and to the ground rules established. A facilitative style of mediation can be employed if the parties appear to have a relatively low commitment to the process. With respect to breaking the ground rules, a time out can be imposed for a specified time period, or the mediator can suggest that mediation be ended if the rules are not followed.
- To compensate for the lack of non-verbal cues or the impersonal nature of audio or text-based technologies, some mediators exchange pictures with the parties prior to mediation. Being able to visualize the other person speaking or writing — and even the room they’re occupying — tends to personalize the exchange. Particularly in a text-based medium, some find punctuation and emoticons to be a useful way of personalizing text and conveying emotion. Combinations of methods — such as personal phone calls before e-mail sessions — can also help to put a voice to the written word.
- To deal with difficulties in weighing emotion in technology-assisted mediation — that is, assessing the degree of importance the parties attach to one issue or another — commentators suggest expending more effort in solicitous inquiries and holding more caucus sessions in order to fully appreciate the parties’ orientation on different subjects.
- Ensuring that both parties have regular and cost-effective access to the technology being utilized is considered a first step in deciding to use a particular technology. Determining the degree to which the parties have experience communicating by the medium chosen, and using the associated equipment, is also a key consideration.
- For Internet applications, systems in which user identification numbers and passwords are assigned to provide only authorized access to a web site can be a way to address security, confidentiality, and privacy concerns. Other options include digital signatures, encryption, and a range of similar techniques that involve electronically coding and decoding data. For the protection of stored data, firewalls and virus detection software can be considered, as well as careful policies around backing up data. These different ways of protecting web communications should be explored and set in place before offering mediation services by this medium.
- The security of telephone conversations can be addressed by using a “land line” connection rather than a wireless connection. For confidentiality and privacy purposes,

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- the parties should also be warned about using the telephone — or an audio-video medium — in places where bystanders might overhear their conversations.
- To attend to the confidentiality and privacy of e-mail communications, these concerns may be addressed in the Agreement to Mediate. Topics to consider here include: how e-mail and the Internet is to be utilized during the mediation; what communications may or may not be copied to anyone other than the participants and the mediator; and, how long records of the communications are to be maintained by all holders of those records — which may include the participants, the mediator, a mediation program, and Internet service providers.
 - More particularly a concern in computer text-based mediation, issues of identity and trust can be partially addressed through electronic signatures or codes that identify a specific person. A combination of methods, however — such as telephone and e-mail, or a web-based option that combines at least audio and text, if not audio, video, and text — may be the best solution to questions of identity and trust.
 - Confusing mediation with arbitration or adjudication is thought to be more common in mediation using a computer text-based medium. Mediators may therefore need to reiterate the goals of mediation and ensure they are clearly distinguishing their role as a mediator from that of a judge or an arbitrator.

V. The Feasibility of a Pilot Project in Technology-Assisted Family Mediation

There are both advantages and disadvantages to using various technologies in mediation and other types of dispute resolution. It can be said, however, that the advantages are compelling, and that most of the disadvantages can either be overcome or they can be compensated for in some way. The concerns that have been expressed by some commentators should not be disregarded, however. For example, there are questions about how to acquire some of the broader benefits of mediation by these means — such as enhancing relationships, and building communication and conflict management skills. There are also concerns regarding the “digital divide”, or the accessibility of these technologies and peoples’ capacity to use them.

There are, as well, concerns that technology-assisted family mediation could become an “urban solution” — one that could discourage the development of locally-based family mediation services within remote, non-urban communities. It may be, however, that the wider exposure to and awareness of the process of mediation as can be brought by improved access to such a service will increase the demand for mediation services generally in these communities. It is also possible that technology-assisted mediation will prove to be a particularly useful tool for mediators living in and serving areas where distance is a particular challenge. The research suggests, in any case, that it is feasible to conduct a pilot project in technology-assisted family mediation — provided these concerns are addressed within the project’s design.

The Society’s original conception of a pilot project to test the application of ICTs in family mediation was one that involved two pilot sites, both in remote and non-urban communities in the province. A location-centred model of this type, however, appears to be challenged by a number of factors, including:

- low broadband accessibility in small, isolated communities
- inadequate case volumes
- facility access and technical support issues
- unanticipated complexities resulting from distance, and
- the character of information and communication technologies.

As these various complications to a location-centred model were considered, the conception of a pilot project that could accommodate cases with variable configurations of both parties and technologies began to take shape. It was determined that a pilot project could be designed in such a way that technology-assisted mediation wasn't delivered to any specific physical location. Rather, in a different "client-centred" pilot project, these services could be delivered to clients residing anywhere in the province by specially trained, qualified mediators — who can also be located anywhere in the province. A client-centred conception of a pilot project would largely circumvent the barriers associated with a location-centred model.

To summarize, the key factors that recommend such a project, along with some considerations of which to be mindful in designing it, include the following:

- While there is a lack of information about and experience with applying ICTs in the resolution of family disputes, there is sufficient evidence that conducting mediations using these technologies is both appropriate and effective in other fields of dispute resolution. There is considerable confidence, therefore, that it can apply to family disputes, especially with mediators whose competency in family mediation is already proven.
- Although there would need to be formal training in applying these technologies in the context of a pilot project, there is already a sufficient pool of qualified family mediators in the province who have shown great interest in technology-assisted mediation — many of whom already have some experience with ICTs.
- The anecdotal experience of the Society office indicates that non-urban client demand exists. Developing an awareness of the services offered through a pilot is likely to be a challenge, however, and should be anticipated in the design of the pilot project.
- While there is no firm commitment as yet, considerable interest has been expressed by organizations that could potentially partner with the Society in a pilot project. Once a pilot design is known — and possibly developed in collaboration with interested partners — partnering to provide referrals and promote the pilot to generate a sufficient caseload should be a significant focus of the project's implementation plan.
- There appears to be increasing sophistication amongst clients in both their knowledge and use of applicable ICTs. Nevertheless, the design of the project should allow technologies to be selected on the basis of the needs and capabilities of the client.
- Although access to preferred technologies might still be a challenge for some very small and remote locations — particularly in the northern regions — there is sufficient technological infrastructure to support families and mediators in most communities in the province who may wish to participate in the project.
- As ICTs are changing at an astounding rate, documenting best practices and engaging in research in the context of a pilot project that mimics true-to-life applications will help mediators to apply these technologies as they evolve.

VI. In Closing

Improvements in applicable technologies — and the much wider access to and experience with those technologies as has been seen in recent years — suggests that the time is simply right to explore technology-assisted family mediation services. The advancements, both in the technologies themselves and in the body of knowledge about applying them in dispute resolution, have laid the groundwork for their application in the family context.

The computer age has overcome obstacles to communication in ways that were unimaginable a short time ago. Such solutions are clearly very timely — as governments and citizens search for ways of accessing services without contributing to the large carbon footprint that has seemingly accompanied modernity in other respects. A pilot project in long-distance family mediation may contribute, then, even to this much larger objective. But on a lesser scale, it is positioned to enhance the lives of families in small, remote communities around the province.

I. Introduction and Background

A. *This Report*

British Columbia, and indeed much of Canada, is characterized by distance — vast regions of sparsely-populated wilderness in which people are either geographically isolated by forests, mountains, or water, or they are “meteorologically challenged” because of weather conditions for at least some of the year. How best to communicate and bring people together to provide services in these regions has long been a Canadian conundrum, and many people living in these isolated communities have simply accepted that some services will not be available to them.

But the computer age has opened up new possibilities for linking people to one another, in spite of distance and other physical barriers. The world is, indeed, becoming a much smaller place, as people “talk” or text, play games, and conduct business with one another over vast distances — often across national boundaries, time zones, and sometimes even in different languages. The Internet has brought people together in a way that planes, trains, and automobiles have never done.

It was with a view to discovering whether technology has opened up any new possibilities in respect of family mediation that the British Columbia Mediator Roster Society (the Society) initiated the *Technology-Assisted Family Mediation Project*. The project’s overall objective is:

To explore the feasibility of providing British Columbians in remote, non-urban areas with access to competent, qualified family mediators through the use of current information technology (“IT”).

The first phase of the project was undertaken over a six-month period between May and December 2007, and involved research into the applicability of current technologies to long-distance family mediation. This report presents the results of this research. It also discusses the feasibility of a second project phase in which a pilot would test the use of selected technologies to provide mediation services to families in remote, non-urban communities.

Applicable information and communication technologies are discussed in this report largely in terms of three dominant mediums in which these technologies typically operate: audio-based, text-based, and integrated audio-visual/audio-text mediums. The report begins with an overview of some key terms and concepts of which the reader should be mindful in considering any technological aide in mediation. Subsequent sections go on to explore each technological medium, and their advantages and disadvantages in the context of mediation. Lastly, having explored the technologies and their application to mediation in this way, the feasibility of conducting a pilot study in technology-assisted family mediation is discussed.

B. *Background Notes and Project Scope*

It is an unfortunate reality in the delivery of many key services that there is a shortage of qualified professionals living in small, remote communities. Generally, the means of resolving this problem has been through travel — either on the part of the non-resident professional, or on

the part of the client. This project was initiated with the intention of learning how today's information and communications technologies might aid in the provision of quality family mediation services in isolated communities — with limited or no travel. Indeed, this is becoming of critical importance today when reducing the carbon imprint of our activities is a major pre-occupation. Developing ways of delivering services in a more environmentally friendly way is of vital concern to governments and citizens around the world.

The project is also particularly timely from a justice system perspective. The province's Ministry of Attorney General is currently piloting a new Notice to Mediate process for family cases in the Nanaimo registry of the Supreme Court. The Notice to Mediate (Family) Regulation allows a person to participate in a pre-mediation meeting or mediation session either by telephone or some other communications medium when authorized by the mediator. If the results of that pilot project leads to the Notice to Mediate being implemented province-wide, it will be critical that mediation professionals be available and know how to provide the necessary services — whether in the more traditional face-to-face mode, or by some other means assisted by available technology.

The primary emphasis in this first phase of the project was in gathering details about how information and communication technologies have been or are now being used in the field of dispute resolution — particularly in mediation. Of most interest, of course, were those technologies that could be used in long-distance family mediation. In undertaking this research, the focus was not so much in the specific technical features of the technologies examined, but rather in the factors that influenced their use and application. Electronic technology is evolving at an astonishing pace — what was state of the art yesterday, is simply passé today. Therefore, it was important to understand more about the general conditions under which different technologies have some application, rather than about the technical specifications for the way they work. Additionally, it was important to recognize the procedural, skill, and public safety issues that may be relevant to the mediation process when they are in use.

In respect of the feasibility of conducting a pilot test, the analysis undertaken resulted in something of a change from the original project plan. Initially it was proposed that the technological capacity of two possible pilot locations — remote and non-urban in character — be profiled. Through the consultations conducted and the information gathered, however, there was a change in the thinking about how a pilot project would work. The subsequent analysis has revolved around the idea of a pilot involving any community — in any remote, non-urban location in the province — served by mediators located in selected regions around the province. This would, seemingly, reflect more the way in which long-distance family mediation would actually operate in the long run.

In summary, the primary orientation of this research has been practical rather than theoretical — to the extent that it has concentrated on teasing out those factors that impact the practical application of information and communication technologies in mediation. Yet, as this is a new and emerging field — it being little more than a decade since there was formal recognition of “on-line dispute resolution” — the research also canvassed those concepts and principles that help us to understand how these technologies affect mediation practice.

C. Research Methods

In this research phase of the project, the major portion of the effort was in reviewing and analysing what is quickly becoming a large body of literature about the use of various information and communication technologies in dispute resolution. Not surprisingly, given the topic under consideration, the vast majority of this literature is accessible on the web — with the result that Internet research was a significant focus of the research activity. Some excellent sources were additionally found in books, periodical journals, and instructional CDs. Up to date information was also gathered through on-line forums and web casts during *ODR Cyberweek 2007*, an on-line conference sponsored by the National Center for Technology and Dispute Resolution, at the University of Massachusetts, during the week of October 15th to 19th, 2007. As well, information was gathered at a workshop sponsored by the Institute of Public Administration of Canada on December 7th, 2007 — titled *Digital State at the Leading Edge: How is Information Technology Transforming Government?* — in which the impact of information technology on government was examined.

In addition to these sources, information about the practical experiences with these technologies was acquired through consultations with mediators on the Society's Civil and Family Rosters and with subject matter experts. Consultations with Roster members stretched over approximately a two-month period, beginning with the best practice teleconference *On the Question of Distance* sponsored by the Society in early June 2007. Consultations with experts in this field were conducted either by phone or e-mail over the full six-month period as specific questions arose in the research.

Finally, the analysis in connection with a possible pilot project in technology-assisted family mediation involved, initially, the analysis of the technical capacity and mediation needs of small, non-urban communities around the province. As a result of this work, it was expected that two remote, non-urban communities could be identified as suitable for a pilot project. Travel to these two remote communities was also anticipated, in order to document the extent to which those communities could accommodate the project. But with the change in the conception of the pilot to one potentially providing family mediation services to clients in any remote, non-urban communities — not just two — travel to remote locations during this phase of the project was not necessary. Rather, the emphasis in the work shifted to the issues and concerns associated with a project of this nature. □

II. General Observations

A. Definitions and Concepts

Technology — specifically, electronic technology — seems to permeate almost every aspect of our lives today. This is no less so in the world of dispute resolution. Telephones, cell phones, e-mail, wireless handheld devices such as Blackberries and Palm Pilots, and a host of other electronic communication aids are now simply taken for granted in the way people work. But before delving into the way different technologies have been used in dispute resolution, and more specifically in mediation, some clarity around the types of technologies of interest in this project may be helpful.

For the purposes of this project, the field was narrowed to information and communication technologies (ICTs) that support mediation outcomes, rather than those that support more administrative mediation tasks, such as scheduling and spread sheet software. These technologies can be anything from a telephone, cell phone, or radio to e-mail, videoconferencing, and web meetings. Even software programs that make use of mathematical algorithms, mind maps, or other such tools to assist people in settling their disputes are of interest in this project, to the extent that they contribute to an outcome of the dispute resolution process.

Additionally, for this project, there was an interest particularly in the advantage these technologies bring to overcoming the problem of distance or geographic barriers to bringing people together. Their benefits are also noted, nevertheless, in respect of helping people challenged by traditional office or meeting settings, or who have a physical or mental health issue that prevents them from attending mediation in such settings. This project is, then, specifically oriented to those technologies that support the process of mediation itself, and which are capable of doing so from a distance.

A common term for the use of these technologies in dispute resolution is “on-line dispute resolution” or ODR. Initially, the term ODR was used in reference solely to the use of Internet applications in dispute resolution. Some still define it that way — for example, the *Glossary of Dispute Resolution Terms* published by *Mediate.ca* defines it as follows: “ODR takes existing dispute resolution mechanisms, applies technical resources and expertise over the Internet and can be delivered from any distance. All or part of the process can be online”.¹

More recently, however, the term ODR has come to be used in connection with any ICT that is used in dispute resolution — whether or not they are accessed over the Internet. Even the use of technologies entirely unrelated to computers — such as telephones and videoconferencing — have been captured by the term “on-line”. This may be a result of the technology used in cell phones and other wireless hand held devices, and the fact that many of the functions that used to be available only by computer are now also available by these means. Additionally, the transmission of audio and visual data over the Internet now makes the computer more like telephone or videoconference technology. In any case, since many of the experts and quotations from authoritative texts in this field use it in this way, the term ODR will be used in this report to reference the use of any and all types of ICTs in the resolution of disputes. “Technology-

¹ “Glossary of Dispute Resolution Terms”. *Mediate.ca*. Toronto, last modified Dec. 8, 2005. <http://www.mediate.ca/glossary.htm>, searched 30 May 2007.

assisted” or “ICTs” are also terms that will be used to refer to all these technologies. Where a specific technology is being referred to, however, it will be identified by name — such as telephone or e-mail — or by the communications medium in which they operate, such as audio-based or text-based.

Some people view ODR — particularly computer text-based applications of it — as a distinct and separate field of dispute resolution. In other words, they believe the “medium is the message” — that the technology isn’t a tool, but rather a modality in and of itself. Indeed, so absorbed are some writers in this field that they speak of the world of mediation being divided into two types: on-line mediation and off-line mediation. Off-line mediation is, of course, the name given by on-line aficionados to the more traditional, face-to-face form of mediation. For most practicing mediators, however, there is no such clear dichotomy. Some form of ICT, if only in the form of the telephone or e-mail, is usually in use at some stage in the mediation process. It is, then, really a matter of degree.²

To avoid confusion, the various technologies that were found to have some application in long-distance family mediation have been divided into three categories in this report: text-based mediums, audio-based mediums, and audio-visual or integrated mediums that use audio, visual, and sometimes text. Each has strengths and weaknesses when utilized in mediation, and may play out differently over the course of the mediation process.

This “playing out” in the mediation process is also of considerable interest in this project. The research in this area discloses that ICTs are not just passive instruments — they are sometimes a “presence” to contend with. In their article *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, Llewellyn Gibbons and his colleagues observed:

“Initial decisions concern purely technical matters such as availability of hardware/software, cost, ease of use, and bandwidth. As the mediator moves beyond establishing the basic ability to communicate at a distance, the mediator must also plan to achieve higher order needs of the mediation, i.e., how the particular technology will affect the mediation process. The mediator must consider whether technology should be used to distance the parties psychologically, to bring the parties together, to speed the process up, or slow the process down. Technology is a variable that may manipulate the mediation. Using technology, the mediator may selectively filter out cues that detract from the mediation or add cues incrementally as needed to facilitate mediation. The mediator may also slow down communications by using asynchronous technology (e.g., email) or speed up response using synchronous technology (e.g., instant messaging).”³

The idea that technology is a “presence”, or that it adds value to the mediation process that is more than can be brought by the mediator and the parties alone, gave rise to the concept of technology as a “4th party”. The term was first coined by two leaders in this field, Ethan Katsh and Janet Rifkin, in their book *Online Dispute Resolution: Resolving Disputes in Cyberspace*.⁴ It

² Julia Hornle, *Online Dispute Resolution*. London, UK: Joint Information Systems Committee - Legal, 12 October 2004. JICS Legal Briefing Paper, p.2.

³ Llewellyn Joseph Gibbons; Robin M. Kennedy; and Jon Michael Gibbs. “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*. 32 N.M.L. Rev. 27, Winter 2002, p. 8.

⁴ Ethan Katsh and Janet Rifkin, *Online Dispute Resolution: Resolving Disputes in Cyberspace*. San Francisco: Jossey-Bass, 2001.

implies that technology is like another being — that it is another set of variables, and imposes a certain structure on the communication and information environment. But, at the same time, it lifts the limits imposed by the need to be physically present. And it may even offer some additional mechanisms for resolution that are not otherwise available — such as when there is access to software that can assist in identifying and evaluating interests, or suggest different options or solutions such as is done in blind bidding and other electronic settlement systems.⁵

“The value of the fourth party metaphor is that it focuses attention on capabilities that machines have that humans might not have.” — *Katsh and Gaitenby, 2003, p.2.*

It is important, then, in reviewing the three types of technology mediums as they have been classified for this report, that one is mindful of what might be called “the 4th party factors” — those factors that either structure the mediation process in a certain way, or extend the potential of mediation by adding new and different opportunities to resolve disputes.

It is also important to be mindful of what writers in this field have identified as “contextual factors”. The choice of which technological aid to employ in which case is, of course, affected by many factors, but perhaps most significantly by context. Once again, Ethan Katsh writes authoritatively on this topic, noting that the context in which a dispute takes place very often is the major determinant of which of many dispute resolution techniques will be most appropriate for resolving the conflict. Questions such as where and when the dispute arose, the nature of the relationship between the parties (past, current, and ongoing), the need for public standard-setting or private resolution, and so on, are all important contextual features that influence modality.⁶

“... context can influence the approach of the neutral, the choice of process, and the behaviour and attitudes of disputants”. — *M. Ethan Katsh, 1996, p. 13.*

Context is particularly intriguing when it comes to text-based computer applications in mediation. Katsh observes that “what is noteworthy about context in cyberspace, particularly in the current early phase of cyberspace, is its fluidity and ambiguity. ... there may be uncertainty about whether people are who they say they are. In addition, ambiguity results because familiar physical elements of context are missing. Physical cues, such as ‘body language’ and tone of voice, may be missing, and race and gender may be absent as well.”⁷

The task is, therefore, a little more than determining what technologies best bridge the distance in family mediation. It is also a case of understanding how that technology affects the process of mediation itself, and the way people interact with one another as a result. Ultimately, if there is no value added — or worse, if the 4th party is a hindrance rather than a help — then family mediators should not embrace it as an alternative, even if there is no other way to provide a mediation service. In this case, better than nothing simply will not be good enough.

⁵ Ethan Katsh and Alan Gaitenby, *Introduction: Technology as the “Fourth Party”*. Proceedings of the UNECE Forum on ODR 2003, p.2.

⁶ M. Ethan Katsh, “Dispute Resolution in Cyberspace”. *The Connecticut Law Review*. 28 Conn. L. Rev. 953, 1996, pp. 6 and 13.

⁷ *Ibid.*, p. 13.

B. A Brief History of Technology-Assisted Dispute Resolution

Although the use of the telephone can really be thought of as the first foray into technology-assisted dispute resolution, few writers in this field have formally recognized the telephone as more than an administrative tool — for initial contact, making appointments, client follow up, and so on. Indeed, as a specific delivery method for mediation, British Columbia has perhaps more experience than most (as discussed later, under: *Audio-Based Mediums: Telephone and Teleconference Mediation*).

“Shuttle mediation” by telephone no doubt went on, at least informally, much before this time. Videoconferencing may also have been tried, although largely by commercial arbitrators. Until recently, mediators have tended not to use this technology — perhaps because of the expense and technical complications associated with its use. There is, in any case, little in the professional literature that documents or evaluates either of these methods. Formally, the history of technology-assisted dispute resolution begins with the Internet — and its story is, of course, very recent history, largely occurring over the last decade.

Most early experiments in ODR focussed on Internet-related disputes. In 1996, the National Center for Automated Information Research (NCAIR) in the United States organized a conference on on-line dispute resolution, and additionally provided funding for three ODR experiments: the Virtual Magistrate Project, the University of Massachusetts On-line Ombuds Office, and — of particular interest in this case — the University of Maryland’s project on ODR in distance family disputes.

Briefly, the Virtual Magistrate Project involved a neutral on-line adjudication panel, acting on behalf of Internet service providers, that would evaluate the strength of allegations that there had been Internet copyright infringements, defamatory statements, and the like. The University of Massachusetts’ On-line Ombuds Office made on-line ombudspersons available to people involved in web-based disputes that arose in the university context. Lastly, the University of Maryland’s project on ODR in distance family disputes sought simply to bring people together “virtually” where they were otherwise prevented from doing so because of distance. This objective is, of course, very similar to the project that is the subject of this report.

Both the Virtual Magistrate Project and the On-line Ombuds Office involved the resolution of on-line disputes. The University of Maryland’s project, however, was designed to make use of on-line resources — largely e-mail at that time — to resolve disputes that arose off-line. In the end, the project on ODR in distance family disputes did not go forward. The lessons learned from the preliminary analysis are nonetheless instructive for British Columbia for the purposes of developing a pilot project along similar lines. No formal documentation of Maryland’s attempts with their project is available. Some of the barriers mentioned, however, included the difficulties people had with the technology at that time and the poor access to broadband Internet service. Additionally, although alleviating the problem of distance in family disputes was the focus, the early tests were observed to have worked best for people who resided in the same community, but simply didn’t want to be in the same room together.

The NCAIR sponsored the 1996 conference and the ODR experiments out of a perceived need for a more substantial or formalized ODR response in light of the growing number of disputes

involving Internet activities. But it is not clear that this kick-start was necessarily needed — a fledgling industry had already germinated. Since that time, a company called *SquareTrade*, through its affiliation with *eBay*, and numerous other companies that specialize in ODR services to e-commerce customers, have gone on to mediate millions of disputes on-line. Additionally, there have been six International Forums on On-line Dispute Resolution, held in various locations around the world — the most recent in Hong Kong in December 2007. A seventh is to be held in British Columbia — at Royal Roads University in Victoria — in June 2008.

Essentially, ODR has evolved in step with the exponential growth in the volume of Internet transactions and e-commerce over the last decade. Additionally, ODR methods have strengthened and improved as Internet technology has advanced. Ethan Katsh and Leah Wing list the following changes in Internet infrastructure that have launched the use of ODR techniques, and that have occurred between the mid-1990s and the present⁸:

- Dial-up connectivity to wired broadband to wireless
- Desktop to laptop to PDA to mobile/smart phone
- Hard drive storage costing more than \$1/megabyte to storage costing \$.0007/megabyte
- Disk storage capacities in megabytes to storage in gigabytes/terabytes
- Costly telephony to free (almost) telephony
- Reliance on paper money to reliance on money in electronic form
- An Internet focused on accessing and publishing information to an Internet employed for processes (e.g. e-commerce, games, gambling, and education).

“The most radical shift in the context for ODR, and one that holds promise for developing new tools for ODR since it will increase the potential market and usability for such tools, involves ... use of ODR in traditional offline contexts.” —
Katsh and Wing, 2006, p. 11.

As these technologies have evolved, we’ve seen an evolution in ODR from largely a shuttle-diplomacy style, using e-mail, to something that imitates the more traditional styles of dispute resolution, but using web-based synchronous communication methods. Early ODR efforts were most successful in resolving disputes that arose over the Internet. More and more, however, ODR methods are now used in resolving disputes that arise in the outside, off-line world of human conflict. It is in this familiar old world of “cut and parry” that current experts in this field believe ODR will show its greatest potential. □

⁸ Ethan Katsh and Leah Wing, “Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future”, *The University of Toledo Law Review*. University of Toledo College of Law, Volume 38, Number 1, Fall 2006, p. 26.

III. An Overview of Applicable Technologies

A. Audio-Based Mediums: Telephone and Teleconference Mediation

The telephone is, of course, the ICT with which professionals in all dispute resolution fields — including mediation — are most familiar. Surprisingly, however, there is very little about it in the professional literature. In British Columbia, mediation by telephone has been commonplace for the last decade. Attendance at mediation by teleconference for Small Claims matters has, for example, been possible for some time under the Court Mediation Program. Some boards and commissions in the province are also very familiar with teleconferencing in their sessions.

Pre-mediation and pre-arbitration meetings of the Mediation and Arbitration Board of the Ministry of Energy Mines and Petroleum Resources are held by teleconference. As well, the Property Assessment Appeal Board has been conducting appeal management conferences — which operate much like settlement conferences — by teleconference since about 1997. Additionally, hearings of landlord and tenant disputes are now routinely conducted by telephone, as a result of a concentrated effort in this area by the provincial government's Residential Tenancy Branch in the last year or two. Even in this province, however, there has been little documentation or evaluation of telephone techniques in dispute resolution. It has simply been thought of as an appendage of traditional face-to-face methods — not a modality on its own.

Among the few to describe a mediation program specifically designed around the use of the telephone were Laurie Coltri and Joan Hunt, in an article that appeared in the *Family and Conciliation Courts Review* in 1998.⁹ The program existed from 1989 to 1991, in an unidentified area in the United States described generally as an “east coast suburban county”. It involved primarily shuttle-style mediation, with sessions conducted separately with each party by phone. Although a formal evaluation was not conducted of the program they described, Coltri and Hunt concluded that “the types of concerns expressed by callers, the experiences of the mediators, and reactions of users to the service suggest that telephone mediation of parenting issues fills a useful and important niche in the delivery of assistance to children and their families”.¹⁰

Coltri and Hunt's observations are clearly relevant to a potential pilot project in this province because they are applied in a family mediation setting. Unfortunately the program they described did not experiment with other formats besides shuttle mediation. In Canada, in an evaluation of *Family Justice Services Western in Newfoundland*¹¹, there is brief mention of telephone mediation among a range of services offered to families. Two models were described: the first in which one party is physically present and the other is on the phone, and the second in which both parties are contacted by phone but not simultaneously. Unfortunately, the evaluation results do not address the telephone portion of the services provided as distinct from the service overall, so no particular assessment is provided of telephone mediation *per se*.

In another recent evaluation, this one of a Small Claims pilot project in Manchester County Court in England, outcomes were measured specifically for telephone mediation — or telephone

⁹ Laurie S. Coltri and Joan E. Hunt, “A Model for Telephone Mediation”, *Family Court Review*. Vol. 36, Issue 2, April 1998, pp. 179 – 194.

¹⁰ *Ibid*, p. 193.

¹¹ *Family Justice Services Western: Final Evaluation*. Department of Justice Canada, Research Report, 2004-FCY-8E.

“facilitation”, as it is called in the context of their project. Although they express an interest in offering services by teleconference as is done in British Columbia — making it possible for both parties and the mediator to attend sessions together, at the same time — the pilot project in Manchester allowed only shuttle mediation. The mediator met separately on the telephone with each party, sometimes over a period of weeks or months. It was, nevertheless, very successful, with a settlement rate of 89% recorded for telephone mediation participants.¹²

It seems, however, that we may no sooner be starting to pay more attention to the telephone as a tool in mediation than the telephone itself will become an outdated instrument. Cell phone technology is opening up an entirely new range of possibilities for dispute resolution. Now that the lines are blurred between telephone technology and digital data transmission — so that we use our phones to talk, take pictures, and send text messages — there are new and intriguing ways of using the technology in dispute resolution. Their portability makes it possible to take ODR into places where it was previously inconceivable to bring it — even into settings of war and high conflict.

“... disputants in developing countries do not have access to the land-lines and the steady electricity necessary for ODR which depends primarily on personal computers (PCs). Instead, innovations in ODR are occurring with non-PC technologies, such as cell phones, radios, Blackberries, and other wireless technologies. In fact, it is likely that lessons learned from [developing] countries may be transferred to the economically more developed countries in the future, rather than flowing in the other direction.” — *Raines and Conley Tyler*, 2007, p. 3.

Commentators such as Sanjana Hattotuwa, in his paper titled *Mediation from the palm of your hand: Forging the next generation ODR systems*¹³, and Susan Summers Raines and Melissa Conley Tyler, in their paper *From eBay to Eternity: Advances in Online Dispute Resolution*, call to mind the innovative ways that developing countries have adapted to their lack of access to land-lines and electricity by using cell phones and other wireless technologies for “on-line” dispute resolution”.¹⁴ They speculate that these countries will have much to teach us about the future of ODR because of their experience with these technologies.

B. Text-Based Mediums: On-line Dispute Resolution (ODR) and Other Computer Text-Based Mediation

As noted previously in the section on the history of technology-assisted dispute resolution, the early experiments in ODR were largely centred on the use of e-mail as the technology to facilitate the resolution of disputes. Similarly, it was through e-mail that the first companies specializing in ODR began delivering their services a little over a decade ago. With the exception of the telephone, then, e-mail and other computer text-based mediums are the ICT with which mediators and other dispute resolution practitioners have had the longest experience.

¹² Margaret Doyle, *Evaluation of the Small Claims Mediation Service at Manchester County Court: Final Report*. U.K.: Better Dispute Resolution Team, Department for Constitutional Affairs, 6 September 2006.

¹³ Hattotuwa, Sanjana. “Mediation from the palm of your hand: Forging the next generation ODR systems”, ICT for Peacebuilding, blog, undated paper.

<http://sanjanah.googlepages.com/thoughtsonictandpeacebuilding>, searched 22 May 2007.

¹⁴ Susan Summers Raines and Melissa Conley Tyler, *From e-bay to Eternity: Advances in Online Dispute Resolution*. Legal Studies Research Paper No. 200. Melbourne: Melbourne Law School, University of Melbourne, January 2007, p. 3.

There are, really, three categories of text-based mediums that are characterized by their means of communicating or interacting with the parties involved:

- asynchronous, or consecutive-time text messaging
- synchronous, or simultaneous “real time” text messaging, and
- “artificial intelligence”, involving the application of computer software which performs tasks, provides solutions, or solves problems in the absence of a human agent.

Although asynchronous, e-mail permits text messages to be transmitted almost immediately upon composition. It continues to be the major text medium in use today around the world. In consultations with mediators in our province, e-mail is also a familiar tool in mediation here — although more typically in an administrative or pre-mediation context.

As an in-session tool for mediation, e-mail facilitates a kind of shuttle diplomacy in which issues are canvassed and words are honed with the parties separately before bringing them together to ascertain areas of agreement. Early experiments based on this method were criticized as not comparing favourably to the richness of face-to-face sessions. But they were, nevertheless, thought to be adequate for disputes that could not otherwise be dealt with because of distance, cost, or some other barrier to personal attendance.¹⁵

“In some specific situations ... sequential, broken up and relatively slow communication can be a success, as other research revealed that typing and the resulting time lag caused persons to pay more attention to the substantive content of messages, lessened the emotional stress brought up by conflict resolution and made it easier to overcome barriers of socio-economic differences.” — *Schultz et al, 2001, p. 36.*

Since that time, an array of more flexible text messaging options have presented themselves that are both asynchronous and synchronous. These include “instant messaging” and “on-line chat” systems, such as are available through ‘icq’ and ‘MSN’¹⁶, which are similar to e-mail but perform the function instantaneously so that parties can “talk” with text. “Threaded discussion” or “bulletin boards”, such as Yahoo groups and listserves, are also available, and which — while not providing synchronous or real time communication — are organized into specific topics, permitting parties to read-digest-and-respond in a more directed way.

There are, additionally, on-line “platforms” and “segments” which allow links to the Internet for instructions and information, but which also allow parties to post statements, view postings, and respond to postings. On-line segments, in particular, permit a platform to be divided into spaces or “rooms” to which access can be controlled. This enables both private caucus meetings and joint meetings to occur over the Internet. On-line platforms and segments can permit either synchronous or asynchronous messaging, documents can be posted, and messages may be either threaded or not threaded.¹⁷

¹⁵ Ethan Katsh and Alan Gaitenby, *Introduction: Technology as the “Fourth Party”*. Proceedings of the UNECE Forum on ODR 2003, p.1.

¹⁶ “icq” — short for ‘I seek you’ — is an instant messaging computer program owned by AOL (American Online Inc.). “MSN” is an abbreviation for ‘Microsoft Network’.

¹⁷ For a useful overview of these technologies and their application to mediation, evaluation, and arbitration, see: Julia Hornle, *Online Dispute Resolution*. JICS Legal Briefing Paper, 12. London, UK: Joint Information Systems Committee - Legal, October 2004.

Finally, there are “artificial intelligence” options — computer software that imposes a certain structure on communication between the parties and offers solutions, such as blind bidding and other electronic settlement systems, or which help people to arrive at their own solutions, such as brain-storming software. In British Columbia, the Abbotsford-based company *Smartsettle* is an example of a firm that uses specialized computer software employing mathematical algorithms to produce fair optimal solutions.¹⁸ The use of brainstorming software is in a rather newer stage of development as it applies to mediation, with one of the most recent experiments using specially designed software called STORM. This software was developed using data that mapped the actual brainstorming processes of mediators with the National Mediation Board in the U.S. — a body that resolves disputes that arise in connection with the airline and railroad industries.¹⁹

“Blind bidding processes work even better on the Internet than they do face-to face. In a courtroom or mediation, the mediator can give information away by their facial expressions, or even a meaningful sigh.” — *Rule*, 2000, p. 7.

What is significant about artificial intelligence software is that “4th party factors” truly play a role in these more sophisticated computer applications. They are not just the regular processes of dispute resolution applied in the electronic environment, but rather they are truly value-added technologies — that is, they are tools that enhance the process in a way that is not possible with a third party acting alone.

Because of the newness of the technology — and its rapid-change character — the professional literature in this area is largely descriptive rather than evaluative. There is very little available on the question of outcome measures for these methods, for example. Even settlement rates are rarely reported. Of 76 on-line dispute resolution sites surveyed by Melissa Conley Tyler and Di Bretherton on behalf of Australia’s Department of Justice in 2003, only eight reported settlement rates. For these eight sites, however, they found the rates to be roughly comparable to settlements for alternate dispute resolution (ADR) generally, which are thought to be between 60% and over 80%. User satisfaction was also rarely tracked, with the exception of *SquareTrade* which reported as many as 80% saying they would use the service again. Finally, Conley Tyler and Bretherton found any assessment of the durability of (or compliance with) ODR settlements and cost effectiveness comparisons to be largely absent as well. As they point out, however, this kind of information is not generally available for traditional ADR methods either.²⁰

Nevertheless, ODR proponents are very excited about the potential of computer text-based methods, particularly in e-commerce settings. Many claim that ODR is suitable for almost any kind of dispute for which mediation is suitable — with some reservations, or, at least, limitations, in the area of family disputes. These reservations have to do with the view that ODR is best

¹⁸ For a brief description of how the *Smartsettle* software works, and a short overview of technologies applicable to mediation, see: Kathryn Munn, “Tailored Tool or Techno-Toy?: Dispute Resolution in the Online World”, *Common Ground: Conflict Resolution News*. Munn Conflict Resolution Services, Fall 2002, p. 1. http://www.munnrcs.com/COMMON_GROUND/fall2002.html, searched 7 May 2007.

¹⁹ See discussion of STORM in the article by Ethan Katsh and Leah Wing: “Ten Years of Online Dispute Resolution: Looking at the Past and Constructing the Future”, *The University of Toledo Law Review*. University of Toledo College of Law, Volume 38, Number 1, Fall 2006, pp. 33 – 37.

²⁰ Melissa Conley Tyler and Di Bretherton, *Seventy-six and Counting: An Analysis of ODR Sites*. A Report of Research Conducted for the Department of Justice, Victoria, Australia. Proceedings of the UNECE Forum on ODR, 2003, p. 10.

suited to resolving disputes where there is no continuing relationship²¹ — and a continuing relationship is, of course, a significant characteristic of most family disputes (see additional discussion on this topic under *Disadvantages and Ways to Address Them*). Perhaps because of these reservations, computer text-based methods remain largely untried in family mediation.

C. Integrated Audio-Visual and Audio-Text Mediums: Videoconferencing and Integrated Computer Technologies in Mediation

The mediums that are thought to be truly on the cusp of some new and exciting applications in ODR are integrated audio-visual and audio-text mediums, typically videoconferencing and like technologies. As it was noted in a recent webcast during *ODR Cyberweek 2007*, “video is transforming the web”²². Indeed, of all the ICTs, this is the technology that most reads like a science fiction novel!

There are, essentially, two types of audio-visual mediums applicable in this field:

- video/audio streams - asynchronous transfer of recorded audio and visual data, and
- videoconferencing - synchronous transfer of audio-visual data.

“... persons with good typing skills and a connection with high data flow can easily dominate chat-room meetings. The preferred real-time communication tool should be videoconferencing or at least teleconferencing.” — Schultz et al, 2001, p. 36.

The first of these, involving the transmission or broadcast of previously recorded information, is probably most applicable in a pre-mediation context. It can be used, for example, for relaying information that is not unique to each case but applies to all cases — such as explaining the process of mediation, and the role of each of the players in that process. Computer savvy mediators convey this information through Internet links on their websites. Alternatively, it can be passed on in a CD or DVD format. These modes are not, however, interactive, and so do not allow for any simultaneous exchange of ideas or question and answer opportunities.

Videoconferencing, on the other hand, is interactive and does allow for the simultaneous transmission of audio and visual information. Traditionally, videoconferencing has used television technology, transmitting digital data over telephone lines, and it has been quite expensive. Now, however, less expensive videoconferencing is becoming available over the Internet. Videoconferencing allows participants to see and hear each other with the use of video cameras, microphones, monitors, speakers, and — more recently — computers.

The use of these mediums is probably more familiar to commercial arbitrators — particularly in international arbitration. As Julia Hornle observes:

²¹ T. Schultz, G. Kaufmann-Kohler, D. Langer, and V. Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*. Geneva: E-Com Research Project of the University of Geneva, 2001, p. 25. See also: Amy Koltz, “Innovative Solutions Through Technology-Based Dispute Resolution”, *Alternate Dispute Resolution*. Wisconsin Law Journal, 2006, p. 1.

²² “The Real Opportunity for Neutrals to Build Business in the Global Marketplace”, webcast during *ODR Cyberweek 2007*. Amherst: National Center for Technology and Dispute Resolution, University of Massachusetts, 16 October 2007.

“It is now common in international arbitration to examine and cross-examine a witness by two-way video link, for example, where it is impractical for the witness to travel to a hearing venue. This allows the evidence to be given directly to the tribunal without the witness having to travel far. Also the rules of civil procedure, for example in England and Wales and the US, allow for this under certain circumstances.”²³

In the survey of ODR sites conducted by Melissa Conley Tyler and Di Bretherton in 2003, thirteen of the 76 sites they surveyed offered videoconferencing.²⁴ Videoconferencing is not uncommon in British Columbia either. For example, some members of the Society’s Civil Roster have experience with arbitration hearings by videoconference — including international arbitration. Additionally, video remands in the criminal courts are now used quite extensively, with videoconferencing facilities available in 34 court locations and in 14 correctional centres around the province. Colleges and Universities here also have widespread experience with it in connection with their distance learning initiatives.

Because of the expense of the technology and complications in operating it — usually involving a dedicated room with special wiring, a particular room configuration, and camera operators — videoconferencing has previously been the preserve of large corporate bodies or institutions. But this is changing through the magic of the Internet. With webcams, microphones, and free instant messenger programs, people can see, speak, and exchange notes or documents with one another over their personal computers at relatively low cost.

“There are bandwidth issues for broadcast-quality videoconferencing, which also requires specialized facilities; however lower quality videoconferencing is becoming more affordable and may be the next phase in technological development.” — *Conley Tyler and Bretherton, 2003, p. 8.*

The Internet variety differs from traditional videoconferencing not only in a technical sense in the way data is transmitted, but also in the sense of the audience to whom it most appeals — it is geared to individuals rather than groups. Examples of this technology are some increasingly popular web software applications — such as *Skype*, Apple’s *iChat*, and Microsoft’s *Net Meeting* — that have “talk, write, and see” features, as well as platform and conferencing abilities. These and similar low-cost or free video software applications available over the web suffer some quality deficits; however, this is improving as the technology advances. And their broad appeal to the general public, not just corporate users, may well make these applications as common as the telephone within the foreseeable future.

Some software for videoconferencing is rather more expensive but is of a higher quality. Examples include *WebTrain* — which has been experimented with in British Columbia by a member of the Society’s Civil Roster — and *Elluminate Live* as is used by Learn@Home, a distance learning program provided through the province’s schools. In mediation courses offered at the University of British Columbia Law School, software called *Saba Centra* has been used and is thought to have great potential for mediators.

²³ Julia Hornle, *Online Dispute Resolution – More Than the Emperor’s New Clothes*. Proceedings of the UNECE Forum on ODR 2003, p. 12.

²⁴ Melissa Conley Tyler and Di Bretherton, *Seventy-six and Counting: An Analysis of ODR Sites*. A Report of Research Conducted for the Department of Justice, Victoria, Australia. Proceedings of the UNECE Forum on ODR, 2003, p. 8.

There are, in fact, many different software options that combine various audio-video-text applications, to varying degrees and with differing emphases. Because the visuals for some of the less expensive software options are not entirely reliable, some opt for software that integrates audio and text communications only. This can be accomplished, for example, by using the telephone along with an instant messaging system, or web conferencing software such as *Skype* that offers both audio and text editing options. This provides mediators with the ability to have what might seem like an enhanced teleconference experience — permitting them to speak with both parties at the same time, and to look at an agenda or edit a document together on the computer screen as they speak.

But practitioners in the dispute resolution field still yearn for some of the benefits of full face-to-face meetings — they want to see the non-verbal, visual cues that are so much a part of human communication. And perhaps the technology is not so far from giving this to them. Words such as *virtual reality*, *tele-immersion*, and *tele-presence* in the cyber lexicon now refer not only to the imaginary world of video games, but also to the real world of business meetings and videoconferencing. They refer to technologies that make participants feel as though they are occupying the same physical space.

Some of this technology is being developed in Canada. For example, University of Alberta researchers are currently experimenting with three-dimensional holographic imaging that they believe will make it look and feel like people at a “virtual meeting” really are, physically, in a room together. They expect that “... the technology will be so realistic users will be able to see an eye twitch or a bead of sweat”.²⁵

Until such time as tele-immersion is truly possible, however, today’s videoconferencing technology still has some limitations. Some practitioners in the dispute resolution field are particularly troubled by the inability to make eye contact — something that occurs because the camera and the display screen cannot be located in the same position. “This leads to a deadened and form affect in interactions, eye contact being a nearly ubiquitous subconscious method of affirming trust. Furthermore, participants aren't able to establish a sense of position relative to one another and therefore have no clear way to direct attention, approval, or disapproval.”²⁶

Videoconferencing is also criticized for sometimes delivering miscues in communication. For example, Llewellyn Gibbons and his colleagues, in their article *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, reference a study in which subjects were rated for their ability to detect deception in radio, television, and newspaper messages. Radio listeners were found to detect deception 73.4% of the time, newspaper readers 64.2%, and

“The future of video conferencing for creating virtual reality is unlimited. Tele-immersion is a new medium of videoconferencing.

[Tele-immersion] approximates the illusion that the user is in the same physical space as other people, even though the other participants might be hundreds or thousands of miles away. It combines the display interaction techniques of virtual reality with new vision technologies that transcend the traditional limitations of a camera. The result is that all participants, however distant, can share and explore a life-size space. — *Gibbons et al, 2002, p. 8.*

²⁵ “Star Trek tech will let people meet virtually, researchers say”, *CBC News*, Cbc.ca. Copyright © CBC 2007. <http://www.cbc.ca/canada/edmonton/story/2007/06/28/holodeck-tech.html>.

²⁶ Llewellyn Joseph Gibbons; Robin M. Kennedy; and Jon Michael Gibbs, “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*. 32 N.M.L. Rev. 27, Winter 2002, p. 7.

television viewers 51.8%.²⁷ Although this study was not specifically undertaken in a mediation or other dispute resolution setting, the authors observe that this study does not support videoconferencing as the superior alternative for mediation. “Credibility is a key element in building trust. Therefore, a mediator selecting among computer mediation communications media must weigh the value of the additional visual cues against the interfering noise caused by current videoconferencing technology. Whether it is better to have fewer but more accurate cues, or more cues and a greater sense of communication without consciousness of possible miscommunication is a decision for the mediator.”²⁸

Unfortunately, apart from applicable studies in communications research such as Gibbons and his colleagues used, the professional literature about integrated audio-visual or audio-text mediums in dispute resolution is very limited — and largely descriptive rather than evaluative. As with computer text-based mediums, this is likely occurring because of the newness and chameleon-like quality of this technology. Nevertheless, it is not too early for practitioners in this field to begin to document best practices, and to engage in research that helps us to apply the technology as it evolves. To be pioneers in such a new and exciting sphere of endeavour is surely a worthy undertaking. □

“Just as there is no limit to how and where conflict can arise, there is no limit to the human capacity to solve problems in innovative ways. Computers, the internet, cell phones, teleconferences, radio, and other mediums for communication will increasingly be used to improve the process of dispute resolution and to make these processes more accessible to all. Chronicling and evaluating these efforts will be an ongoing task that will make possible the dissemination of these advances and enable increased access to ADR practitioners and services.”
— *Raines and Conley Tyler, 2007, p. 7.*

²⁷ Richard Wiseman, *The Megalab Truth Test*. As referenced in: Llewellyn Joseph Gibbons; Robin M. Kennedy; and Jon Michael Gibbs, “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*. 32 N.M.L. Rev. 27, Winter 2002, p. 7.

²⁸ Llewellyn Joseph Gibbons et al., *Ibid.*

III. Discussion: the Pros and Cons of Technology-Assisted Dispute Resolution

A. General Observations

Pioneers are, of course, best equipped to cultivate in a new field if they know something of the lay of the land before they begin. It is therefore important to know more about what factors recommend technology-assisted dispute resolution, and what factors detract from it. On the whole, it is fair to say that most commentators familiar with both traditional and technology-assisted methods in mediation believe that traditional face-to-face methods are — in most cases — superior. In other cases, however, the matter is not so clearly decided. Proponents on both sides of the argument accuse the other of not fully appreciating the benefits of the other way of doing things.

For example, the early projects in ODR were criticized for having, in effect, copied off-line models of mediation and arbitration, and therefore for having failed to take advantage of the value-added features of on-line dispute resolution — that is, the special information processing and information management features of the “4th party”.²⁹ Yet, other writers note that one of the main failings of many on-line mediation service providers is that they have not fully incorporated the processes of traditional off-line mediation into the structure of their on-line processes. On-line procedures are sometimes overly simplified, and therefore don’t take full advantage of some of the communication mechanisms that the technology offers. Additionally, synchronous or real-time discussion is often not offered, and common and private communication rooms are not always available.³⁰

In online mediation, real space is replaced by virtual space, i.e. cyberspace. A priori at least, this is the only fundamental difference between offline and online mediation, with the result that all other aspects should remain unchanged, subject of course to adjustments to technology.” —
Schultz et al., 2001, p. 9

On the other hand, some on-line techniques are not easily transferred into off-line settings, and vice-versa. As Daewon Choi noted in his paper delivered at the UNECE Forum on ODR in 2003, “... some of the techniques that worked well in the online context could not be readily translated back into face-to-face contexts without compromising their basic effectiveness. This led many ODR scholars to abandon the notion that ODR techniques should simply mirror face-to-face techniques. ... The complexities of cross-border communication, language, and time difference required new solutions, and it became increasingly clear that ODR could offer effective answers.”³¹

It is no longer useful, then, for purists in either camp to dominate the field. Once again, as discussed earlier under *Definitions and Concepts*, context appears to be the most important factor upon which to decide the technique that best applies. How, when, and where the dispute arose, the nature of the relationship between the parties, and other contextual factors such as these are of most use in deciding what tools should be used to resolve which disputes. Context is, at least, a

²⁹ Katsh, Ethan, “Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace”, *Lex Electronica*. Vol. 10, no. 3, Winter 2006, p. 4.

³⁰ T. Schultz, G. Kaufmann-Kohler, D. Langer, and V. Bonnet, *Online Dispute Resolution: The State of the Art and the Issues*. Geneva: E-Com Research Project of the University of Geneva, 2001, p. 9.

³¹ Daewon Choi, *Online Dispute Resolution: Issues and Future Directions*. Proceedings of the UNECE Forum on ODR, 2003, p.2.

useful way of categorizing and appreciating the various advantages and disadvantages that have been articulated for technology-assisted dispute resolution.

B. Advantages

Of all the contextual factors that characterize the disputes in which ICTs have been used, of course, distance is the factor that stands out the most as being relevant in their use. Although some of the benefits of technology-assisted techniques have been espoused even when distance is not a factor, it is generally thought to be preferable — particularly in mediation, if not in most other forms of dispute resolution — for the parties to meet face-to-face to resolve their differences. When distance is a factor, however, the following benefits of technology-assisted methods are most often noted:

- time flexibility
- avoidance of travel, and
- cost savings.

In fact, all three of these benefits are inter-related. Because travel is unnecessary in technology-assisted mediation, there is greater time flexibility around

scheduling and even the time it takes to resolve the dispute. For example, “there isn’t the same pressure as found in face-to-face mediations of getting the matter settled in one day. Parties have the opportunity to explore the topic fully, consult with others, and make an informed decision to settle or walk away.”³² This — in addition to there being no need for a meeting room, avoiding the costs associated with travel for the parties and/or the mediator, and so on — all adds up to greater cost savings.

“While it is true that mediation is usually conducted in a face-to-face setting, the distance is not imposed on the parties as a result of being on the Internet. Rather, the distance is imposed by the parties’ physical locations. In this sense, online mediation imposes or offers an electronic nearness for the parties. It is this proximity that is the starting point for facilitating communication online.” — *Gibbons et al., 2002, p. 14.*

For the same reasons, technology-assisted mediation may be better able to accommodate multiple parties — particularly if some or all are distant parties. There is no need for them all to travel to the same location, and no need to book a large meeting room to accommodate them. It is, as well, a way to avoid the opportunity cost — that is, the cost in time that might productively be spent doing something else — that the parties experience as they wait for others engaged in a caucus session. And, particularly in the case of computer text-based applications, there may even be cost savings in comparison to other types of ICTs. For example, with these methods, there are savings in connection with long distance telephone or teleconference calls. Eventually, this may also be a benefit experienced with web-based videoconferencing. At the moment, however, high quality videoconferencing can be a very expensive option.

At this point in the modern era, it is not just time and money that is saved by avoiding travel. As the world’s scientists gather evidence about climate change, there is an even more pressing impetus to find ways of reducing the carbon emissions that contribute to the conditions bringing it about. Delivering public services electronically — e-government, as it has come to be called — is one of many ways that a reduction in carbon emissions can be effected. “E-mediation”, as part of the justice services delivery system, is entirely consistent with those efforts.

³² Amy Koltz, “Innovative Solutions Through Technology-Based Dispute Resolution”, *Alternate Dispute Resolution*. Wisconsin Law Journal, 2006, p. 2.

Besides these more logistical considerations, contextual factors that have to do with the presentation or communication style of both the parties and the mediator clearly come into play when employing ICTs. These factors are not so easily described in terms of case characteristics, but rather characteristics of both the parties and the mediator. Depending on a person's demeanour and problem-solving approach, the following benefits of technology-assisted mediation may accrue:

- time to reflect
- perspective-taking
- reduction of emotional content, and
- comfort and convenience.

Because of the asynchronous nature, particularly, of computer text-based mediums, the benefit that is most often quoted is the fact that participants have time to pause and reflect on their communication when using this technology. They can review, edit, and seek other resources (such as legal or other advice) to craft their responses — the answer needn't be blurted out as it often is with the spoken word. This has also been noted as a benefit to mediators who have not yet mastered the art of the “poker face” — their surprise or shock at a party's response isn't displayed in writing the way it can be on their face in a face-to-face mediation setting.³³

ICTs have also been found to be effective in facilitating the process of reflective thinking or perspective-taking in mediation. Asking for the parties to provide a written or voice-recorded explanation of the way they feel, and the reasons behind their expectations or demands, can be a very helpful tool in assisting each to see things from the other's perspective. Reframing expressions that might be misconstrued or inflammatory is made much easier — once again, particularly in a text format.

Even beyond a controlled exchange between the parties, the communication technology being utilized can sometimes seem to have a moderating effect on the tenor of the discussion. Many members of the Society's Civil and Family Rosters who have conducted mediations by teleconference commented on how its use seemed to “take the tone down” in their experience. Not being physically present may help the parties to deal with their differences more dispassionately³⁴.

Finally, there is the simple comfort and convenience of these methods. Particularly for those who may be inhibited in traditional office or meeting settings, being able to participate in a mediation session from the comfort of their own home or office is an especially attractive feature. Additionally, the mechanics of note taking and consulting files and documents — all without the concern of appearances or even breaking eye contact with the parties — is facilitated when employing ICTs.

“Everyone may be in his or her own comfortable surroundings during the process. The practitioner and parties may take extensive notes, spread out documents, and consult a list of questions, without concern of appearances to others. Participants can engage in the process from home, office or even vacation.” — *Koltz, 2006, p. 2.*

³³ Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*. Kennesaw State University, 2004, pp. 4 - 5.

³⁴ Tania Sourdin, *ODR — An Australian Perspective on the Digital Divide*. Victoria, Australia: La Trobe University, 2004, p. 16.

As well as the benefits that are associated with either distance or contextual/communication factors, there are also the benefits associated with 4th party factors — those that cannot really be realized without the assistance of technology. These include:

- concurrent caucusing
- stored or recorded communication
- artificial intelligence benefits, and
- invisible mentoring.

The first of these, concurrent caucusing, is specifically a benefit of on-line segments — a text-based computer platform that allows the parties to converse in text in different “rooms”, some of which may be reserved for private discussion and some for joint discussion (see earlier description under *Text-Based Mediums*). With the help of this technology, it is possible for the mediator to carry on a private text conversation — with either or both parties — at the same time they are engaged in a joint discussion.

Another benefit, particularly of computer text-based technologies, is that communication is stored or archived — that is, there is a record of the discussion over the course of the mediation. This assists the mediator in helping to clarify issues, or in revisiting statements made in an earlier exchange. Of course, this can be a disadvantage as well, for instance if inflammatory language is repeatedly re-visited. Provided the exchange is positive, however, it can be used again with beneficial results. Particularly if the mediation evolves over days or weeks, this ability to refresh and summarize can be very helpful to the mediator. At the end, when an agreement is being drawn up, it is a simple matter to retrieve the words already agreed to from previous sessions.

Some of the benefits of artificial intelligence have already been alluded to under the section on *Text-Based Methods*. Blind bidding and other on-line settlement systems — such as those that apply mathematical algorithms to produce optimal solutions — as well as brainstorming and other problem solving applications, simply expand the repertoire of tools in the dispute resolution tool kit. Some believe that these instruments work even better on-line than do their off-line counterparts. Blind bidding, for example — a technique borrowed from auctioneers, sometimes called “sealed envelope” or “closed fist” auctions, in which bidders don’t know the amount of each others’ offers — is thought to be enhanced by the Internet because of its objectivity. The mediator’s facial expressions or body language can sometimes be a give away in face-to-face sessions.³⁵

Lastly, for those concerned with training mediators, Colin Rule noted the benefit of “invisible mentoring” in his paper *New Mediator Capabilities in Online Dispute Resolution*. “Online dispute resolution environments allow observers and mentors to be in a room monitoring the goings on, and even communicating with the mediator in a caucus closed to the parties, without the parties feeling uneasy because of the presence of a stranger.”³⁶ Rule notes that the parties should, of course, approve this practice in advance. Once approved, however, the silent unobserved presence in the background is generally less obtrusive on-line than it is in a traditional face-to-face mediation setting.

³⁵ Colin Rule, “New Mediator Capabilities in Online Dispute Resolution”, *Mediate.com: Solutions for Conflict*. mediate.com: copyright 1996-2007 Resourceful Internet Solutions, Inc., December 2000, p.7.

³⁶ *Ibid*, p. 6.

Once again, there are few writers who have ventured specifically into the field of family mediation to espouse the advantages of on-line dispute resolution. One exception is James Mulamed who particularly notes the positive effects of asynchronous communication, the ability to modify documents and craft agreements from a distance, facilitated communications between sessions, and the empowerment of participants through access to information and resources. He also points out that it is a relatively safe environment in which to conduct family mediation, “perhaps because it is impossible to receive a bloody nose over the Internet and because Internet communications are memorialized, which creates a measure of accountability”.³⁷

“Adapting Internet technologies to mediation is not accidental. Increased use is based upon the effectiveness, convenience and affordability of various Internet strategies. In addition to enhanced communication capacities, the Internet offers mediators and participants a vast knowledge base and discussion communities. The Internet is for many a comfortable, if not preferred, and empowering means of research and communication.” — *Mulamed, 2002, p. 1.*

On a larger, more universal scale, the benefits of ICTs in dispute resolution have been associated with a more comprehensive objective — increasing access to justice. Any tools that advance that objective are, to be sure, worthy of consideration. As Daewon Choi observes: “ODR is ... a critical issue for e-policy in advancing the Internet economy, not only as a pre-occupation of the judiciary with rights management, physical or digital, but as a global preoccupation of the cyber-judiciary community whose ultimate aim should be lowering barriers and increasing access to justice.”³⁸

C. Disadvantages and Ways to Address Them

As already noted, technology is changing at an exponential pace and, naturally, new concerns — and new solutions — arise with every change. Although it may seem like a moving target, it is nevertheless useful to catalogue both the concerns and their possible solutions so that practitioners can be aware of them as they begin to apply these technologies. The disadvantages seem to fall broadly into four categories: specific method and/or distance-related issues; communication issues; technology issues; and legal/philosophical issues.

Once again, the contextual factor of distance is useful in characterizing some of these issues. There is some evidence that “virtual nearness” sometimes does not sufficiently compensate for the physical distance between the parties and the mediator. For example, the following problems have been observed:

- flaming, inattentiveness, and other method-specific disadvantages
- walking away, and
- breaking ground rules.

“Flaming” — the tendency for people to feel less inhibited specifically in an e-mail, chat, or other computer text-based medium, and consequently saying things they would never say in person — is not an uncommon phenomenon. There is a similar distancing from normal social behaviour sometimes observed when people are in their cars — familiarly known in that setting as “road

³⁷ James Mulamed, “Divorce Mediation and the Internet”, *Mediate.com: Solutions for Conflict*. mediate.com: copyright 1996-2007 Resourceful Internet Solutions, Inc., January 2002, p. 1.

³⁸ Daewon Choi, *Online Dispute Resolution: Issues and Future Directions*. Proceedings of the UNECE Forum on ODR, 2003, p. 3.

rage”. During mediation, the web-based version of this behaviour can escalate the conflict and cause the receiving party to retaliate in kind. It is suggested that this problem is best dealt with by imposing a caucus-style format on the mediation, in which all communication is transmitted through the mediator. In this way the mediator can decide which messages to forward to the other party. As well, they can work with each person to reframe their positions into interests, or help them to modify inflammatory language so that the content is more positive and conducive to problem solving.

Of course, there can also be emotional outbursts on the telephone, and this can be difficult to manage. The bigger problem in mediation by this medium, however, appears to be one of drifting away or disengaging from the process. During consultations with the Society’s Civil and Family Roster members for this project, several experienced in teleconferencing spoke of the need to continually solicit input from the party on the phone — periodically probing to ensure that silence at the other end of the phone is indicative of listening or thinking and not inattentiveness or, worse, withdrawal from the process.

Similar methods could be employed when using a web-based audio-text medium to ensure that all participants are actively engaged. With videoconferencing, it’s easier to see whether or not a person has disengaged in some way from the process. Nevertheless, solicitous queries on the part of the mediator may help to overcome the problems associated with the lack of eye contact and communication miscues in videoconferencing (as discussed earlier under *Integrated Audio-Visual and Audio-Text Mediums*).

Walking away and breaking mediation ground rules are also problems that arise because of the difficulty of managing or controlling exchanges between the parties from a distance. The first of these, “walking away from the table”, is very much easier when the parties are not physically present at that table. A party can simply hang up the telephone, stop reading or responding to text messages from the mediator, or shut off the audio-video feed if they no longer want to participate. Similarly, breaking the ground rules seems that much easier if distance stands in the way of calling the violator to account at a face-to-face meeting. Ground rules should normally include prohibitions against communicating outside of mediation, and may include directing any e-mails and other communication through the mediator first. But angry phone calls, flaming e-mails, and prank calls can be exchanged between sessions, and seriously undermine the progress in mediation.

In part, the suggestions for overcoming these problems tend to rest in the realm of thorough pre-mediation groundwork. It is important to test the commitment of the parties to mediation, and to the ground rules established.

Susan Summers Raines, in her paper *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*, recommends employing a facilitative or transformative style of mediation if the parties appear to have a relatively low commitment to the process, because of its emphasis on the positive qualities of

“Like it or not, it is much easier for a party to “leave the negotiating table” when they are taking part in an online mediation process than in a traditional process. They simply stop reading and responding to messages from the mediator. Because it is so easy to end one’s participation in online mediation, the mediator needs to be sensitive to the parties’ signals concerning their levels of commitment to the process.” — Raines, 2004, p. 3.

mediation, such as empowerment and recognition.³⁹ With respect to breaking the ground rules, she suggests that the mediator propose a time out for a specified time period — or even ending mediation if the rules cannot be followed. Alternatively, the mediator can coach the parties individually to reframe their comments, remove inflammatory language, and otherwise work to diminish the level of conflict between them.⁴⁰

Another set of disadvantages can largely be categorized as communication problems. Establishing an environment in which effective, constructive communication can take place between the parties is a key objective for a mediator. Unfortunately, some characteristics of ICTs can stand in the way of creating such an environment. The following criticisms or disadvantages have been noted in this context:

- impersonal nature of technology-assisted communication
- reduction/elimination of non-verbal cues
- difficulties in giving weight to emotion, and
- difficulties in conveying serious or professional demeanour.

While some authors extol the virtues of creating a virtual nearness through ICTs, others complain of electronic distance. For example, Joel Eisen observes “the great paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact”⁴¹. A certain amount of the “psychological distance” Eisen refers to, of course, is simply a result of the physical distance between the parties. Nevertheless, it is also a result of the less personal nature of communication by way of a technological device. Not only is it not possible to bring in home baking or shake hands to personalize the exchange or make the atmosphere less formal, there is a stiltedness that makes personal “connectedness” difficult and sometimes elusive. Humour is also difficult to convey on-line.

One way of helping to overcome the impersonal nature of these technologies is to have the parties exchange pictures with the mediator prior to mediation. Being able to visualize the other person speaking or writing — and even the room they’re occupying — tends to personalize the exchange. Even in the absence of a picture, one mediator interviewed for this project intimated that she has found it useful to visualize a television or movie personality with a pleasant and congenial disposition (someone she smilingly referred to as a George Clooney personality!). Another mediator commented on

“Initiating and motivating discussion is another challenge for ODR. The face-to face interactions of traditional and narrative mediation rely on social cues to spur discussion. These social cues subtly indicate who is paying attention, if individuals take turns when speaking, and when someone has a question. These social cues do not appear in the text-based chat environment of most ODR providers.” — *Johnston, 2004, p. 4.*

³⁹ In making this recommendation, Raines references the transformative approach as discussed by Baruch Bush and Joseph P. Folger, in their book *The Promise of Mediation: Responding to Conflict Through Empowerment and Recognition* (Jossey-Bass Publishers, 1994). The authors discuss this approach as emphasizing empowerment and recognition as fundamental goals of mediation, rather than settlement.

⁴⁰ Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*. Kennesaw State University, 2004, pp. 3-4.

⁴¹ Joel Eisen, as quoted by Joseph Goodman, “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites”, *Duke Law & Technology Review*. Vol. 004. 18 February 2003, p. 10.

her method of describing the room from which she is speaking, and how she asks for the teleconferencing parties to do the same. Particularly in a text-based medium, some find punctuation and emoticons to be a useful way of personalizing text and conveying emotion. Combinations of methods — such as personal phone calls before e-mail sessions — can also help to put a voice to the written word.

A related issue is the reduction or, as in the case of text-based mediums, total elimination of non-verbal cues. This is, perhaps, the problem most often mentioned by commentators in this field. Feelings are more readily transmitted — that is, both expressed and interpreted — if they are communicated both orally and visually. And, in the absence of a visual medium, they are more easily transmitted orally than in a written form.

Yet Joseph Gibbons and his colleagues, in their paper *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, go to some length to point out that there is little agreement on the specific effects of the absence of non-verbal cues. Various points of view seem to depend on the various theoretical perspectives of the commentators.⁴² Perhaps as a result of this lack of agreement on its effects, it is difficult to devise solutions for the absence of non-verbal cues. In any case, some of the suggestions mentioned in connection with overcoming the impersonal nature of the technology — such as sharing pictures, punctuation and emoticons in a text-based medium, or combined methods such as phone calls and text — may be helpful in this respect as well.

A problem related to technology being both impersonal and devoid of “body language” is the difficulty in giving weight to emotion in technology-assisted mediation — more specifically in a text-based format. It is more difficult to assess the degree of importance the parties attach to one issue or another in this medium. This results in the mediator having to expend more effort in solicitous inquiries — and perhaps holding more caucus sessions — in order to fully appreciate the parties’ orientation on different subjects.

“... communications online do not express the variable tone, pitch and volume of the participants and cannot transmit personalities or physical cues. ... In this way, it is more difficult to evaluate the flexibility of a particular party, or the strength of a party’s feelings or confidence on particular issues.” — *Goodman, 2003, p. 11.*

Some mediators complain of the inability to convey a serious or professional manner on the telephone or in text communications. Some of the solutions for other problems mentioned above — such as the use of punctuation marks and emoticons — may actually undermine a professional presentation or serious demeanour. In the end, however, the mediator must consider the importance of this in choosing the techniques that best suit their personal style of mediation. As already observed, some aspects of human interaction simply do not translate well to the ICT environment.

Indeed, commentators such as Joel Eisen are pessimistic about the ability of mediators to adapt to this medium at all. His conclusion is that, “[g]iven the profession’s current orientation to listening and processing oral information, mediators would find it largely impossible to translate

⁴² Gibbons et al discuss various communication theories in connection with this topic, such as: cues-filtered-out theory, social information processing theory, and social influence and communication media theory. See: Llewellyn Joseph Gibbons; Robin M. Kennedy; and Jon Michael Gibbs. “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*. 32 N.M.L. Rev. 27, Winter 2002, pp. 18-20.

their skills to the online setting.”⁴³ But, as these methods are becoming more and more commonplace in all walks of life — including in dispute resolution — Eisen’s pessimism about the ability of mediators to adapt is likely to be proved wrong. In fact, to a certain extent, he has already been proved wrong, as mediators are already using their skills in this setting.

In any case, as time goes on, it will not be just the people adapting to the technology, but the technology adapting to the people. But with the solutions, there are always new technological problems to overcome. The technological issues that have remained largely constant over the last number of years, and which are still worthy of consideration in technology-assisted mediation, include the following:

- accessibility
- security, confidentiality, and privacy; and
- identity and trust.

Access to the technology is a critical issue. In British Columbia, for example, there are remote locations that do not yet have telephone access — let alone access to high-speed Internet connections. And, even if there is access, there can be incompatibility problems with either the hardware or the software, or both. Alternatively, one party may not be familiar with the technology, or they may simply be more familiar with it than the opposing party. Ensuring that both parties have regular and cost-effective access to the technology being utilized must, therefore, be the first step in considering the use of a particular technology.

The question of accessibility includes a concern not only about access to hardware or software, but also about the capacity of individuals to use that equipment if it is available (see later discussion about the “digital divide”, under *The Feasibility of a Pilot Project in Technology-Assisted Family Mediation*). The reality is that many mediation clients — and many mediators — still suffer from a lack of skills and a degree of comfort with some of the technological tools that are available. It would seem, then, that determining the degree to which the parties have experience communicating by a medium chosen, and using the associated equipment, is also an important part of a pre-mediation assessment.

As well, access to a particular technology is a consideration when there are parties with special needs. For example, problems have been identified in connection with teleconference sessions when a person’s first language is not English — working through an interpreter on the phone can be very difficult. Persons with hearing impairments also have difficulty on the phone. In respect of persons who require interpreters, it is suggested that mediation sessions be conducted in person. For persons who are hearing impaired, however, it may be preferable to conduct the sessions in a text-based format.

Security, confidentiality, and privacy are all related concerns in technology-assisted mediation. Beginning with security, this issue relates to the extent to which communication between the parties in mediation are protected from being unintentionally shared with others. For Internet applications, there are some technical solutions available and which — although not completely foolproof — are difficult for intruders to circumvent. For example, one option is a system in which user identification numbers and passwords are assigned to provide only authorized access

⁴³ Joel Eisen, as quoted by Joseph Goodman, “The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites”, *Duke Law & Technology Review*. Vol. 004, 18 February 2003, pp. 11-12.

to a web site. Other options include digital signatures, encryption — involving scrambling and unscrambling data so that it is not easily read by unauthorized parties — and a range of similar techniques that involve electronically coding and decoding data. Protecting stored data usually involves the use of security systems such as firewalls and virus detection software, as well as careful policies around backing up data. These different ways of protecting communications electronically should be explored and set in place before offering mediation services by this medium.

The security of telephone conversations, on the other hand, is not so easily acquired with technical solutions. Eavesdropping on cell phones, for example, is easily done and can create problems in a mediation setting. Now that party lines are no longer common, a phone with a “land line” connection — rather than a wireless — is preferable from a security point of view. It is possible to use encryption on cell phones, but this is generally a less practical solution than switching to a regular phone. The parties should also be warned about using the telephone or an audio-video medium in places where bystanders might overhear their conversations.

In the case of e-mail, mediators may want to look into the feasibility of protecting communications by encryption. On the other hand, the greater risk with e-mail is that it may be forwarded — either unintentionally or intentionally — to unauthorized persons. The intentional sharing of e-mail and other communications in mediation falls more properly into the categories of confidentiality and privacy. These issues can, generally, be addressed in the context of the Agreement to Mediate. Topics to consider here include: how e-mail and the Internet is to be utilized during the mediation; what communications may or may not be copied to anyone other than the participants and the mediator; and, how long records of the communications are to be maintained by all holders of those records — which may include the participants, the mediator, a mediation program, and Internet service providers.

Identity and trust are also two related issues that are more particularly a concern in computer text-based mediation. Identity in this medium is difficult to confirm — the author of a text message may not necessarily be who s/he says they are. Additionally trust — in this case knowing the integrity of a message, or ensuring that it has not been altered in some way — is also difficult to confirm. Electronic signatures, which involve electronic marks or codes that identify a specific person, have been used to address this problem. Still, however, the electronic solutions to these problems are not yet fully satisfactory. A combination of methods — such as telephone and e-mail, or a web-based option that combines at least audio and text, if not audio, video, and text — may be the best solution to questions of identity and trust.

“Improvements in building trust, protecting privacy, preventing fraud and providing ODR, however, have been far fewer than expansions in technological capabilities. The lack of attention to trust building is of particular concern since the pace of technological innovation may not only be increasing but increasing at an accelerating rate. New technological advances, in other words, are not simply occurring rapidly but are occurring more rapidly each year.” — *Katsh and Wing, 2006, p. 8.*

Finally, there are methodological difficulties associated with technology-assisted mediation that might be characterized as issues of a philosophical or legal character. These include:

- confusion of mediation with arbitration or adjudication
- legal or jurisdictional issues, and
- limits on the broader benefits of mediation.

The first of these, confusing mediation with arbitration or adjudication, is common in traditional face-to-face mediation as well. But it is thought to be even more common in mediation using a computer text-based medium. It is not clear why this is so, although communication style may be partially responsible. The communication styles in written communication "...may be more polemic and oppositional, as conciliatory or inclusive statements tend to be ignored. This may also reflect a more 'masculine' communication style on the Internet."⁴⁴ In any case, given this tendency, mediators may find themselves needing to reiterate the goals of mediation — as collaborative problem solving and forward focused — and ensure they are clearly distinguishing their role as a mediator from that of a judge or an arbitrator.⁴⁵

Other difficulties with methods using ICTs fall into the category of legal jurisdictional problems. On the one hand, the avoidance of complex jurisdictional issues is sometimes noted as one of the advantages of these methods, as the parties can include the question of jurisdiction as a binding component of their agreement.⁴⁶ On the other, the difficulty of subsequently enforcing these agreements in one jurisdiction or another has been noted — particularly if proper recording mechanisms or security systems have not been used.⁴⁷ Of course, these jurisdictional problems occur with traditional methods as well. However, they are more frequently encountered in ODR because it usually involves distance — and often distance across jurisdictional boundaries. Unfortunately, not many solutions to this problem are presented in the literature. Perhaps, then, it remains an issue for legislators — and good fodder for discussion in areas of inter-jurisdictional collaboration.

Lastly, some commentators in this field worry that technology-assisted mediation — of all types — may limit the broader benefits usually associated with mediation in a traditional face-to-face format. These broader benefits may include preserving or enhancing relationships, building communication and conflict management skills, and empowerment through independent decision making. Other commentators do not find this to be so, however. As Susan Summers Raines observes, "[t]he process is much more important than the medium through which it is delivered. Whether through teleconferencing, videoconferencing, online, or face-to-face, the mediation process itself can make the space needed for people to resolve their dispute cooperatively."⁴⁸ □

⁴⁴ National Alternative Dispute Resolution Advisory Council, Online ADR – Background paper (Canberra, Australia: Department of the Attorney General, January 2001), p. 6, as quoted by Tania Sourdin in: *ODR — An Australian Perspective on the Digital Divide*. Victoria, Australia: La Trobe University, 2004, p. 3.

⁴⁵ Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*. Kennesaw State University, 2004, p. 4.

⁴⁶ Joseph Goodman, "The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites", *Duke Law & Technology Review*. Vol. 004, 18 February 2003, p. 5.

⁴⁷ Julia Hornle, *Online Dispute Resolution – More Than the Emperor's New Clothes*". Proceedings of the UNECE Forum on ODR, 2003. p. 8.

⁴⁸ *Ibid*, p.1.

IV. The Feasibility of a Pilot Project in Technology-Assisted Family Mediation

A. General Considerations

Certainly, there is a wealth of information, both about the experiences and the aspirations of practitioners in using technology in the dispute resolution field. There are, it would seem, both advantages and disadvantages to using various technologies in mediation and other types of dispute resolution. It can be said, however, that the advantages are compelling, and that most of the disadvantages can either be overcome or they can be compensated for in some way. Overall, commentators in this area are largely positive about technology-assisted dispute resolution — indeed, some are enthusiastic about its future!

But what of technology-assisted family mediation specifically? Is it feasible to undertake a pilot project in long-distance family mediation using these technologies? The research suggests that ICTs have been largely untried in the area of family mediation — with the exception of the telephone, and this only to a limited extent. Some commentators have reservations about their application in this area — particularly the computer text-based methods, which are thought to perform best when there is no continuing relationship between the parties.

Others have no such reservations, however. For example, Susan Summers Raines believes that all the broader benefits of mediation — including enhancement of ongoing relationships — are accessible when using any of these technologies.⁴⁹ Additionally, James Mulamed writes that family mediators are increasingly using ICTs, even if their use is not yet well documented. He observes that “[t]he Internet is changing the way divorce mediation is practiced and experienced. The Internet is becoming an ever more integral part of effective and affordable divorce mediation services and programs. The following uses of the Internet are common and increasing:

- participants seek mediators through Internet search
- mediators and programs describe their services through professional web sites
- participants and their attorneys exchange information about possible mediators by exchanging links to mediator web sites
- mediators distribute information to clients by e-mail with attachments and web page links
- mediators and participants correspond separately or jointly by e-mail
- mediators use e-mail mailboxes as a filing system
- mediators receive faxes as attachments to e-mail
- draft agreements may use 'track changes' features showing changes
- mediators utilize web resources to obtain information and educate participants
- participants and mediators obtain statutory, regulatory, child support, and other information on-line
- participants and mediators perform child support calculations on-line

“Current utilization of the Internet in the divorce arena is evolving more as an augmentation than replacement of face-to-face discussions. One can, however, envision a day when the context and medium for mediation discussions may in fact become primarily electronic, with face-to-face meetings being the augmentation, perhaps even the exception.” — *Mulamed, 2002, p. 1.*

⁴⁹ Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*, (Kennesaw State University, 2004), p. 1.

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- mediators engage in professional education on-line
 - mediators and participants utilize secure discussion environments
 - participants may utilize on-line resources to help them implement their agreement.”⁵⁰

Mulamed made these observations five years ago, and it is likely that there is even greater familiarity with these tools now — amongst both family mediators and their clients. Certainly, in British Columbia there appear to be a growing number of mediators with experience using at least some ICTs. Additionally, many of the technological barriers to success in this area — such as ease of use, band widths, and hardware/software availability — have been addressed to a large extent over the intervening years. It may be, then, that the University of Maryland’s plans for a project in long-distance family mediation may well have proceeded — and succeeded — had it been implemented today. Perhaps they were simply ahead of their time.

Even though, as might be argued on the basis of Mulamed’s and others’ observations, the timing is now right for a similar project to test the use of ICTs in delivering family mediation services, there are perhaps other considerations that should be explored specifically in the British Columbia context. For example, the take up rate⁵¹ for technology-assisted dispute resolution is usually affected by factors relating to what has been called the “digital divide”. The digital divide refers to the “haves and have nots” in the world of modern information and communications technologies — those people who both have access to these technologies, and are capable of using them, and those who do not. Roughly seven categories of digital divide issues have been documented as impacting on the degree to which any new technology will be usefully employed⁵²:

- culture and preference
- broadband issues
- age
- disability
- income
- geographical factors, and
- education.

Some experts in this field, however, believe that the digital divide is quickly becoming a non-issue — suggesting that the Internet is becoming nearly as common as the telephone.⁵³ Indeed, as of December 2006, there were 7.7 million broadband subscribers in Canada, or 23.8% of the population. At this rate, Canada is thought to have the highest broadband penetration of any of the G8 industrialized countries.⁵⁴ Broadband connection is, of course, still a challenge in this province, as the geography of British Columbia presents peculiar hurdles for broadband installation with mountains, ocean, trees and weather in its way. However, through an initiative of the provincial government’s *Network BC*, nearly 92% of British Columbians now have access

⁵⁰ James Mulamed, “Divorce Mediation and the Internet”, *Mediate.com: Solutions for Conflict*, (mediate.com: copyright 1996-2007 Resourceful Internet Solutions, Inc., January 2002), p. 1.

⁵¹ The “take up rate” is a term used to refer to the number of people likely to access or take advantage of a service or program.

⁵² Tania Sourdin, *ODR — An Australian Perspective on the Digital Divide*. (Victoria, Australia: La Trobe University, 2004), p. 6

⁵³ James Mulamed, *Op Cit*, p.2.

⁵⁴ David Pye, “Breaking down the video walls”. *Technology Quarterly Magazine*, (Toronto: The Globe & Mail. Volume 2, No. 2, Summer 2007.), p. 35.

to broadband Internet services.⁵⁵ Additionally, Workplace Technology Services — a division of the government’s Shared Services BC that provides information technology infrastructure services for the provincial government and other public sector organizations — has recently announced plans to establish 20 high definition and 20 tele-presence sites in various locations in the province.

It would seem, then, that broadband availability either has been or will be largely resolved for most communities around the province (although some issues still exist, see discussion in next section). The other digital divide issues, however, remain a concern for any pilot project. Unfortunately, it is difficult to ascertain the extent to which these issues might interfere with accessing a technology-assisted mediation service. Tania Sourdin suggests that the digital divide is even wider in the ODR field than in other applications of the technology as a result of a certain amount of self-selection on the part of ODR users. Her concern is that those who employ ICTs do so because they are comfortable and familiar with that environment, and that it is not clear how well they would serve people in the general population.⁵⁶

“ ... clearly online processes are not available or accessed by the entire population. In fact there is evidence that a digital divide exists. There are concerns that conclusions relating to the efficacy of online services do not reflect the experiences of ordinary disputants. In this regard regular online users may have a preference for electronic communication, may be less likely to resort to litigation and may have a commitment to a global virtual community.” — Sourdin, 2004, p. 16.

The other non-technical digital divide factors are those that could conceivably interfere with accessing a more traditional mediation service as well. There is, nevertheless, an attitude of “if you build it, they will come” associated with technology projects. For example, with *Network BC*’s initiative to extend broadband access around the province, the benefits they expect to accrue include: improved access to health care, improved access to education, electronic access to government services, enabling and encouraging economic development activity, and better access for First Nation communities to other members of their nations.⁵⁷ The expectation is, then, if a technology is available, demand will follow. In any case, rather than anticipating the impact of digital divide factors in advance of a pilot project, it is recommended that the research design for such a project include an assessment of the effect of these factors on the rate of uptake for the project’s services.

In addition to questions of timing and digital divide, the take up rate might also be affected by limits on the types of cases that can be accepted into a pilot project. For example, there may be limitations on case characteristics such as: only two parties (multiple parties at different locations may present technical difficulties), single-issue or non-complex matters, and cases in which the nurturing of an on-going relationship is less critical. Susan Summers Raines stipulates that at least one or more of the following conditions should be present before choosing a method other than traditional face-to-face mediation:⁵⁸

⁵⁵ “Working with Communities”, *NetworkBC*. (Copyright: Government of British Columbia, 2007. <http://www.network.gov.bc.ca/communities/>, searched 21 November 2007.), p.1.

⁵⁶ Tania Sourdin, *ODR — An Australian Perspective on the Digital Divide*, (Victoria, Australia: La Trobe University, 2004), p. 16.

⁵⁷ “Benefits of Broadband”, *NetworkBC*. (Copyright: Government of British Columbia, 2007. http://www.network.gov.bc.ca/communities/broadband_benefits.htm, searched 21 November 2007.), p.1.

⁵⁸ Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*, (Kennesaw State University, 2004), pp. 1-2.

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- Disputants are geographically distant from each other and/or from the neutral and travel for a traditional mediation is not possible or is cost prohibitive.
 - Jurisdictional issues make it unclear as to which jurisdiction should prevail and/or would make enforcement of a court decision difficult.
 - None of the parties are seeking to set judicial precedent or to clarify existing laws.
 - ...
 - Scheduling difficulties make it impossible for the parties to attend a traditional mediation session.
 - Concerns about violence or intimidation between the parties makes a traditional mediation setting inappropriate, but the parties wish to move forward with mediation.
 - For other reasons, a traditional mediation is not feasible, yet the parties want the assistance of a third party neutral to help resolve their dispute.

The bullet, above, regarding violence or intimidation between the parties brings to mind one other critical issue for the project — how to detect a violent or abusive relationship using these methods. It is one thing to utilize technology in the place of traditional mediation where such a relationship has already been detected, but nothing in the professional literature suggests the means by which such detection should be undertaken on a long-distance basis. Perhaps the more immediate safety concerns of the parties are addressed if distance already separates the parties in a family matter. Assessing the degree to which self-determination in mediation is threatened by a previously violent or abusive relationship is, however, a different matter. Unfortunately, there is little that gives us guidance in this respect. There is, similarly, a lack of guidance in the literature about how to assess an individual's capacity to mediate using ICTs.

It does not appear, however, that this issue would pose an insurmountable problem for a pilot project. Commentators such as James Mulamed and Colm Brannigan point out that some of the benefits of technological methods — such as reducing power imbalances and physical dangers — can provide a particularly safe environment for mediation.⁵⁹ The lack of knowledge about screening for violence or assessing capacity should not, therefore, prevent such a project from exploring these positive outcomes of a mediation process. It does mean, on the other hand, that very precise practice guidelines for screening and assessment should be crafted and followed in the context of such a project. It should, as well, be an aspect of the pilot project that is isolated for special study and evaluation.

“... ODR can empower weaker parties by taking away obvious gender issues and by providing a means to avoid face-to-face interaction, thereby reducing power imbalances and physical dangers. Individuals with disabilities can resolve disputes without having to reveal these difficulties. In this way, ODR can provide a “safe” place to mediate.” — *Brannigan, 2004, p. 15.*

Finally, assessing the feasibility of a pilot project includes ascertaining the degree of support such a project would have from the dispute resolution community and other players in the family justice system. During the research, it became clear that there is a sufficient pool of qualified family mediators in the province — many of whom already have some experience with ICTs — to conduct a pilot. It was determined, however, that developing protocols or establishing the

⁵⁹ See: James Mulamed, “Divorce Mediation and the Internet”, *Mediate.com: Solutions for Conflict*, (mediate.com: copyright 1996-2007 Resourceful Internet Solutions, Inc., January 2002), p. 1.; and Colm Brannigan, “Beyond E-Commerce: Expanding the Potential of Online Dispute Resolution”, *Interaction Magazine*, (Conflict Resolution Canada, March 2004), p. 15.

degree of collaboration that may take place with other family justice agencies or organizations in connection with a pilot project was premature. They have, understandably, expressed a wish to study the details of the planned project and the research in support of it. Nevertheless, it is fair to say that there is great interest in a pilot project of this nature — both from within the mediation community and outside it amongst professionals in the broader family justice arena. During this research, there was a tremendous response to requests for feedback and information, with mediators and others in the dispute resolution field eagerly coming forward to share their experiences and offer observations in aid of the project.

B. Orientation of a Possible Pilot Project

Although the full details of a proposed pilot project await the next phase of study, assessing the feasibility of conducting such a project necessarily requires at least a rudimentary understanding of how such a project might be designed. The Society’s original conception of a pilot project to test the application of ICTs in family mediation was one that involved two pilot sites, both in remote and non-urban communities in the province. In addition to the review of the professional literature in this area, then, this first phase of the project was also to include an assessment of the capacity — both human and technological — of those two chosen communities.

As the analysis progressed in connection with this “location-centred” model of a pilot project, it became clear that the selection of two remote locations to conduct a test was complicated largely by the following key factors:

- low broadband accessibility in small, isolated communities
- facility access and technical support issues
- inadequate case volumes
- unanticipated complexities resulting from distance, and
- the character of information and communication technologies.

First of all, the research disclosed that distance and isolation still has its challenges, in spite of advances in technology. Through the work of the provincial government’s *Network BC* and *Telus*, its private sector partner, broadband service to most communities in the province is already available. However, the service levels in many of the smaller, more remote communities in the province are not yet able to sustain the Internet speeds required of some of the web software options that might be considered for mediation purposes.

In some larger, but still non-urban and distant locations, it was determined that there is broadband access of a sufficient width to support most web applications, and some even have videoconferencing equipment and facilities. Unfortunately, it appeared that the videoconferencing equipment might not be made available for the purposes of a pilot project, or there were usage or technical support limitations in those communities. Similar issues emerged with certain facilities with suitable computer systems.

Additionally, it was found that, even in those communities where the Internet service levels are sufficient, they may not be of a size to produce the numbers of family mediation cases required to adequately test the use of ICTs in a pilot project. For example, a minimum of twenty mediation cases — ten in each location — was initially considered necessary to assess technology-assisted

mediation in the context of a pilot project. In very small locations, it would be difficult to attract this number of cases even to a traditional mediation program within a reasonable time period, let alone one involving ICTs. This is so particularly if the types of cases selected for the pilot project are restricted.

Other complications related to complexities resulting from distance, which were unanticipated in the Society's original pilot project conception. The nature of family break up is such that restricting a pilot to two locations is potentially problematic. Parties are often scattered, for example, one party may be in Prince Rupert, one party in Fort Nelson, and the preferred mediator elsewhere. Furthermore, in some remote areas considered in the research, distance inevitably poses a challenge — if a pilot were to be restricted to specific locations, parties might have to travel great distances to access the program. While this could pose a difficulty in any pilot design, it would be greatly magnified in a location-centred model.

Finally, a location-centred model is, quite simply, challenged by the character of information and communication technologies. The rapid-change nature of ICTs make it less than ideal to restrict a pilot to specific locations. Over the course of the pilot alone, it is not inconceivable that there will be technological advances that will render obsolete some of the ICTs currently housed in certain locations — or that a new ICT that is particularly applicable to family mediation will emerge but not be available in a specific location. During the research it also became increasingly apparent that one of the key attributes of ICTs is that they supplant physical space for virtual space. The sender and receiver needn't be in any specific physical location — they simply need to be able to communicate. A pilot project that confines the use of ICTs to a specific location would seem, therefore, to be counter intuitive — ICTs bring freedom from the bonds of physical space.

As these various complications relating to a location-centred model were considered, the conception of a pilot project that could accommodate cases with variable configurations of both parties and technologies began to take shape. It was determined that it would be feasible — in fact, possibly preferable — if a pilot project could be designed in such a way that the delivery of technology-assisted mediation wasn't limited to any specific physical location. Rather, in a different "client-centred" pilot project, these services could be delivered to clients residing anywhere in the province by specially trained, qualified family mediators — who could also be located anywhere in the province.

A client-centred conception of a pilot project would largely circumvent the barriers associated with a location-centred model. It could, as well, be designed to emphasize the original orientation of the project as one of serving families in remote, non-urban locations in the province. Additionally, to the extent that some of the disadvantages to using some types of ICTs can be overcome by using a multi-media approach, the project could be designed with the expectation of using one or several different technologies as the need arises. Indeed, this may be necessary, depending on the degree of access the different parties have to a particular technology and their particular comfort and skill levels. Or a particular dispute may simply be better suited to the use of one technology over another — or to combinations of techniques. To use an oft-quoted phrase first coined by the Harvard professor Frank Sanders in 1976, it is best to "fit the forum to the fuss".

"... ODR is not necessarily an exclusively on-line process. By combining intense face-to-face sessions with the "cooler" on-line component, we may be able to enhance both traditional methods of dispute resolution and the ODR process." —
Brannigan, 2004, p. 16

Therefore, the mediators involved in such a client-centred project would likely need to have the full range of available techniques at their disposal. This means that a certain amount of investment in everything from telephone services to web videoconferencing software would be necessary for the project. Additionally, project mediators would need to be well trained in the use of all the technologies. There would, as well, need to be a training component available to clients who may be unfamiliar with a particular technology or type of software, but who are nevertheless eager to use it.

The training of mediators would need to go beyond specific training in the use of technology, however. As Dan Rainey commented in a Cyberweek Friday discussion forum:

“... the far more interesting, and difficult, aspect of teaching about ODR comes when one begins the discussion about how using technology can and must change the practice of dispute resolution — from mundane things like how to craft an agreement to mediate or an opening statement, to more complicated things like how to establish which set of mediator ethics and/or confidentiality guidelines to use based on the location of the parties and the third party. And then there’s the entire question of whether/how work online affects mediator ethics in the first place.”⁶⁰

A challenge with a multi-media approach, and one involving clients from anywhere in the province, is that it presents some research and evaluation hurdles. When a program is delivered in one or two specific communities, it is easier to identify and monitor those factors that impact on the success of a particular service or program. For example, when examining the factors identified earlier as related to the “digital divide”, it is much more difficult to examine the influence of these factors on the uptake of a program when the potential clients come from disparate parts of the province. Similarly, when there are multiple types of technology involved, it is much more difficult to understand what works, what doesn’t, and why.

On the other hand, this is very much the experience of social science research. Rarely can fully experimental conditions be applied in an experiment that involves human subjects. Moreover, a project designed along client-centred lines best imitates the way long-distance family mediation would actually work when used later by practitioners in British Columbia. It is important, clearly, that the pilot test be as close as possible to what the real world application is going to look like.

Another challenge most likely to be presented by a project of this description is that marketing the service will be rather more complex than it would be if potential clients were drawn from just one or two locations. While the anecdotal experience of the Society office indicates that client demand from small communities in the more remote areas of the province exists, developing an awareness of the services offered through a pilot will be necessary. On a smaller scale, marketing can be much more personal — perhaps involving visits to a community by mediators or Society staff to promote the project with the people living there. On a province-wide scale, the marketing is more public and less community-specific — perhaps involving a larger scale information campaign, and relying more heavily on other players in the justice system to connect potential clients with the program.

⁶⁰ Dan Rainey, comments during: “What might ODR training look like?”, Online discussion forum during *ODR Cyberweek 2007*, (Amherst: National Center for Technology and Dispute Resolution, University of Massachusetts, 19 October 2007).

Finally, a challenge for such a pilot will be to ensure that it does not evolve into an “urban solution”. In the course of the research, concerns were raised about the compatibility of technology-assisted family mediation with another very important objective in mediation service delivery in British Columbia — the objective of nurturing the development of locally-based family mediation services within remote, non-urban communities. It is, of course, important that this objective not be obstructed because of the availability of a long-distance mediation service.

On the other hand, it is entirely possible that the wider exposure to and awareness of the process of mediation as can be brought by improved access to such a service may well increase the demand for mediation services generally in these communities — and therefore lay the foundation for professionals in those communities to develop their business. In fact, technology-assisted family mediation — which has the capacity of expanding the “toolbox” of all mediators — may well be particularly useful for those mediators who live in remote communities or who are delivering their services in areas where distance is a particular challenge. It will be essential, in any event, that a pilot be designed in such a way that it enhances rather than discourages the development of locally-based mediation services.

These cautionary notes are not intended to dissuade decision makers from embarking on a pilot project. Rather, they are presented as aspects of the undertaking that should be factored into the design and delivery of the project. The results of the research during this phase of study indicate that a pilot project to test the viability of delivering long-distance family mediation services is entirely feasible. To summarize, the key factors that recommend such a project, along with some considerations of which to be mindful in designing it, include the following:

- While there is a lack of information about and experience with applying ICTs in the resolution of family disputes, there is sufficient evidence that conducting mediations using these technologies is both appropriate and effective in other fields of dispute resolution. There is considerable confidence, therefore, that it can apply to family disputes, especially with mediators whose competency in family mediation is already proven.
- Although there would need to be formal training in applying these technologies in the context of a pilot project, there is already a sufficient pool of qualified family mediators in the province who have shown great interest in technology-assisted mediation — many of whom already have some experience with ICTs.
- The anecdotal experience of the Society office indicates that non-urban client demand exists. Developing an awareness of the services offered through a pilot is likely to be a challenge, however, and should be anticipated in the design of the pilot project.
- While there is no firm commitment as yet, considerable interest has been expressed by organizations that could potentially partner with the Society in a pilot project. Once a pilot design is known — and possibly developed in collaboration with interested partners — partnering to provide referrals and promote the pilot to generate a sufficient caseload should be a significant focus of the project’s implementation plan.
- There appears to be increasing sophistication amongst clients in both their knowledge and use of applicable ICTs. Nevertheless, the design of the project should allow technologies to be selected on the basis of the needs and capabilities of the client.
- Although access to preferred technologies might still be a challenge for some very small and remote locations — particularly in the northern regions — there is sufficient

technological infrastructure to support families and mediators in most communities in the province who may wish to participate in the project.

- As ICTs are changing at an astounding rate, documenting best practices and engaging in research in the context of a pilot project that mimics true-to-life applications will help mediators to apply these technologies as they evolve.

As a final note, the orientation of the pilot project can and should be one of contributing to both the practice and the knowledge about technology-assisted mediation. For example, it will be important that the pilot project be designed to be mindful of the 4th party and contextual factors that come into play in using ICTs in family mediation. Gathering a greater appreciation of how these factors play a part in successful outcomes in family mediation will make a real contribution to the body of knowledge about ICT applications in this field. □

V. In Closing

In conclusion, it is indeed feasible to conduct a pilot project using information and communication technologies to deliver family mediation services — with a specific emphasis on delivering those services to British Columbians living in remote, non-urban areas in the province. Experts in this field have so far approached technology-assisted family mediation with some caution, and there is little in the professional literature about its application in this area. Nevertheless, improvements in the applicable technologies — and the much wider access to and experience with that technology as has been seen in recent years — suggest that the time is simply right to properly explore this means of providing long-distance mediation services.

The early impression of using these tools was that mediation by this means was better than no mediation at all — if the parties were unable to meet together in a traditional mediation setting. The research in technology and dispute resolution has since shown, however, that there are some clear benefits to its use. Advancements, both in the technologies themselves and in the body of knowledge about applying them in dispute resolution, have laid the groundwork for their application in the family context. “Better than nothing” was simply not a high enough standard — at least, not in family conflicts where vulnerable parties must also be protected. Now we’re in a position to learn about the ways in which it is just as good, different, or even better than mediation in a traditional mediation setting.

The research in the area of technology and dispute resolution continues to grow and enlighten us. In this field, however, the practitioners seem to be ahead of the knowledge builders. The delivery of justice services is not usually so entrepreneurial — but in ODR, no sooner is a new application made available than those tilling in the field are already employing it. Yet, it is important to take the time to properly build and share the wisdom if we are to understand the principles that apply to new technologies as they become available. A pilot in British Columbia would be well positioned to make a real contribution in this respect.

The computer age has overcome obstacles to communication in ways that could never have been foreseen. Certainly, the appearance on the scene of such solutions is very timely — as governments and citizens struggle to find new ways of accessing services without the large carbon footprint that has seemingly accompanied modernity in other respects. A pilot project in long-distance family mediation may contribute, then, even to this much larger objective in the delivery of public services. On a smaller, more personal scale, however, it is likely to enhance the lives of families in small, remote communities around the province. □

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