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TWO ROADS DIVERGED¹: A TALE OF TECHNOLOGY AND ALTERNATIVE DISPUTE RESOLUTION

Amy S. Moeves & Scott C. Moeves*

INTRODUCTION

Each year Americans spend over \$160 billion on litigation.² While footing this massive legal bill, hopeful litigants anxiously wait more than thirty months for a

¹ This title is taken in part from Robert Frost's poem "The Road Not Taken":
Two roads diverged in a yellow wood,
And sorry I could not travel both
And be one traveler, long I stood
And looked down one as far as I could
To where it bent in the undergrowth;

Then took the other, as just as fair,
And having perhaps the better claim
Because it was grassy and wanted wear,
Though as for that the passing there
Had worn them really about the same,

And both that morning equally lay
In leaves no step had trodden black.
Oh, I marked the first for another day!
Yet knowing how way leads on to way
I doubted if I should ever come back.

I shall be telling this with a sigh
Somewhere ages and ages hence:
Two roads diverged in a wood, and I,
I took the one less traveled by,
And that has made all the difference.

Robert Frost, *A Group of Poems*, THE ATLANTIC MONTHLY, Aug. 1915, available at <http://www.theatlantic.com/unbound/poetry/frost/rfpoems.htm> (last visited Jan. 22, 2004).

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² Brochure, available at <http://www.clicknsettle.com/brochure.pdf> (last visited Jan. 22, 2004).

court date in most jurisdictions.³ Yet, despite the expense and time required to complete a jury trial, only 1.5% of all lawsuits filed actually result in a jury verdict.⁴ Furthermore, litigation is highly combative and, consequently, easily can exacerbate an already hostile relationship between opposing parties.⁵ In short, litigation can be extremely expensive, highly time consuming, and, often, destructive to the relationships of the parties.⁶

In the wake of these drawbacks, alternative dispute resolution (ADR)⁷ is quickly becoming the method of choice in America to address conflict.⁸ Negotiation, mediation, and arbitration have replaced litigation in many contexts because these methods of dispute resolution are more efficient, less costly, and less combative than litigation.⁹ ADR allows parties to save time and money, gives parties more open and flexible processes, permits them to achieve results tailored to the parties' needs, enhances community involvement in the dispute resolution process, and broadens societal access to justice.¹⁰ ADR essentially enables parties to resolve their dispute in a confidential setting, establish their own deadlines and procedural rules to govern the proceedings, select the presiding official, contain litigation costs, and maintain ongoing business and personal relationships.¹¹ In contrast to litigation, ADR processes are not characterized by set rules. ADR processes allow the parties themselves to control the entire process as well as the outcome, and, generally speaking, are more collaborative than combative.¹²

³ See *id.*

⁴ See *id.*

⁵ LEONARD L. RISKIN & JAMES E. WESTBROOK, *DISPUTE RESOLUTION AND LAWYERS* 1-2 (2d ed. 1998) (discussing the five motives behind the increased interest in alternative dispute resolution).

⁶ *Id.*

⁷ "ADR can be defined as encompassing all legally-permitted processes of dispute resolution other than litigation." STEPHEN J. WARE, *ALTERNATIVE DISPUTE RESOLUTION* 5 (2001). As it increases in popularity, alternative dispute resolution is more commonly referred to as dispute resolution, or simply "DR." See Janet Stidman Eveleth, *Dispute Resolution Comes of Age*, 36 MD. B. J. 3 (2003). Nevertheless, this paper will employ the traditional term "ADR."

⁸ See RISKIN & WESTBROOK, *supra* note 5.

⁹ See *id.* (discussing the five motives behind the increased interest in alternative dispute resolution).

¹⁰ See RISKIN & WESTBROOK, *supra* note 5; Eveleth, *supra* note 7, at 3-4.

¹¹ See Eveleth, *supra* note 7, at 3-4; Nicole Pedone, *Lawyer's Duty to Discuss Alternative Dispute Resolution in the Best Interest of the Children*, 36 FAM. & CONCILIATION COURTS REV. 65, 69 (1998).

¹² Some of the advantages that ADR has over litigation include: lower cost; greater speed; more flexibility in process and outcome; less adversarial; more informal; solution rather than blame-oriented; more private; and ADR has fewer jurisdictional problems. ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION* 25 (2001); Eveleth, *supra* note 7, at 3-4.

There are three basic types of ADR: negotiation, mediation, and arbitration.¹³ Negotiation, the most frequently used alternative dispute resolution process, is commonly defined as “communicat[ing] . . . with another to arrive at the settlement of some matter.”¹⁴ Negotiation serves as the foundation for other ADR processes, particularly mediation.¹⁵ Mediation is essentially facilitated negotiation, in which a mediator helps the parties in a neutral fashion to engage in negotiation and cooperative problem solving.¹⁶ Mediation is particularly useful in cases involving ongoing relationships and emotional concerns.¹⁷ Finally, in arbitration, parties can select a decision maker or panel of decision makers, often with subject matter expertise.¹⁸ Parties agree on rules and procedures and decide whether the decision will be binding or merely advisory.¹⁹ Arbitration is the ADR process that most resembles traditional litigation. Each of these processes can be combined or modified to form a myriad of hybrid ADR processes.²⁰

Accompanying the rise of ADR processes, such as those mentioned above, is the dramatically increased use of technology in legal settings.²¹ Technology is currently used to file tax returns electronically,²² to file pleadings and briefs in court electronically,²³ to file real estate deeds electronically,²⁴ to conduct video

¹³ For a survey of resources on alternative dispute resolution, including organizations, Web sites, articles, books, journals, listservs, and the use of ADR in particular legal fields, see Jennifer E. Shack, *Resources on Alternative Dispute Resolution*, ILL. INST. FOR CONT. LEGAL EDUC., ALT. DISP. RESOL. 31-1 (2001).

¹⁴ WARE, *supra* note 7, at 6 (quoting WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1514 (Merriam-Webster 1971)).

¹⁵ *Id.*

¹⁶ MARK D. BENNETT & MICHELE S.G. HERMANN, *THE ART OF MEDIATION* 8 (1996).

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ RISKIN & WESTBROOK, *supra* note 5, at 275–336 (discussing “mixed” ADR processes).

²¹ See, e.g., COURTROOM 21 PROJECT, LEGAL TECHNOLOGY TRAINING AND SUPPORT, at <http://www.courtroom21.net/training/training.html> (last visited Jan. 20, 2004).

²² See, e.g., ALA. CODE § 40-30-4 (2003); ARK. CODE ANN. § 26-18-311 (Michie 2002).

²³ See, e.g., ARIZ. REV. STAT. ANN. § 12-119.02 (West 2003); CAL. CIV. PROC. CODE § 1010.6 (West 2003); GA. CODE ANN. § 15-10-53 (Lexis 2001); MISS. CODE ANN. § 9-1-53 (West 2003); OKLA. STAT. ANN. tit. 20, § 3004 (West 2002).

²⁴ See, e.g., TENN. CODE ANN. § 8-13-108 (2002); Charles N. Faerber, *Book Versus Byte: The Prospects and Desirability of a Paperless Society*, 17 J. MARSHALL J. COMPUTER & INFO. L. 797, 801 (1999) (noting that the Canadian province of Ontario allows attorneys to electronically file real estate deeds); see also IND. CODE ANN. § 26-2-8-101 cmt. (Michie 2003) (discussing the lack of justification for leaving out real estate transactions from the definition of transaction under Indiana's Uniform Electronic Transactions Act).

depositions electronically,²⁵ to prepare trial transcripts electronically,²⁶ to present video testimony electronically,²⁷ and even to conduct trials by video.²⁸ The development of the Internet in particular has led to a society where administrative procedures and the traditional court system are often inadequate.²⁹ There are clearly many benefits to the use of technology in the courtroom and in the practice of law generally; and these benefits have been the subject of several articles in recent years.³⁰ What remains to be seen is the extent to which technology will impact specifically the burgeoning field of ADR.³¹ Increasingly, technology will be seen not as part of the future of ADR, but as a realistic option in today's world.³²

²⁵ Federal Rule of Civil Procedure 30(b)(2) specifically provides for the taking of depositions by video.

²⁶ See, e.g., IND. CT. R. APP. P. 28(c) (2003); KAN. SUP. CT. R. 363 (2001).

²⁷ See, e.g., 725 ILL. COMP. STAT. ANN. 5/106B-5 (2003) (allowing the use of closed circuit television to take testimony of a child victim under the age of eighteen); 725 ILL. COMP. STAT. 5/106D-1 (2003) (discussing when a defendant may appear by closed circuit television); OHIO REV. CODE ANN. 2945.481 (West 2003) (providing for videotape testimony and out-of-court testimony of a child victim).

²⁸ See Diane M. Hartmus, *Videotrials*, 23 OHIO N.U. L. REV. 1 (1996) (discussing the history, advantages and disadvantages, and legal issues of the use of video at trial).

²⁹ See Henry H. Perritt, Jr., *Dispute Resolution in Cyberspace: Demand for New Forms of ADR*, 15 OHIO ST. J. ON DISP. RESOL. 675 (2000). Mr. Perritt suggests that the three factors encouraging the use of technology-augmented dispute resolution in today's society are: the Internet's low economic barriers to entry that invite participation in commerce and politics by smaller entities and individuals, leading to a larger number of small transactions by those who cannot afford the transactional costs of traditional dispute resolution; the greater likelihood of stranger-to-stranger transactions; and the globalization of the Internet. *Id.*

³⁰ See generally Fred Galves, *Where the Not-So-Wild Things Are: Computers in the Courtroom, the Federal Rules of Evidence, and the Need for Institutional Reform and More Judicial Acceptance*, 13 HARV. J. L. & TECH. 161 (1999) (providing an in-depth discussion of the use of computer-generated exhibits); Samuel A. Guiberson, *The Challenge of Technology in the New Practice of Law*, 25 OHIO N.U. L. REV. 563 (1999) (giving recommendations for how attorneys can integrate technology into their practices); Fredric I. Lederer, *The Road to the Virtual Courtroom? A Consideration of Today's — and Tomorrow's — High-Technology Courtrooms*, 50 S.C. L. REV. 799 (1999) (discussing developing technologies with respect to case management, court documents, evidence, and witness testimony).

³¹ See generally Gregory P. Ewing, *Using the Internet as a Resource for Alternative Dispute Resolution and Online Dispute Resolution*, 52 SYRACUSE L. REV. 1217 (2002) (reviewing various online dispute resolution services); Louise Ellen Teitz, *Symposium: Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of On-Line Dispute Resolution*, 70 FORDHAM L. REV. 985 (Nov. 2001) (discussing the practical and ethical implications of online dispute resolution, particularly in the realm of e-commerce).

³² See sources cited *supra* note 31.

This paper will discuss the potential application of technology for ADR purposes.³³ Central to the paper is a hypothetical legal situation involving a property acquisition. The paper will follow the hypothetical transaction from start to finish, witnessing the need for all three ADR processes at various stages in the purchase. There is a twist to this tale, however, as the fictional buyers will experience the transaction and its associated difficulties twice: first with little more than a telephone to assist them, and then again with a vast array of modern technology at their disposal. The latter road to a purchase will not be without its problems, as will be readily apparent. But it will at least emerge as an illustration of the great potential that exists for technology and ADR quite possibly to revolutionize twenty-first century dispute resolution.

I. THE PROPERTY

On a crisp, early-October Saturday morning, Hannah and Adam awoke inside the small cabin of Water Lily, their twenty-five-foot sailboat. Following coffee on the deck and a quick walk to the Chestertown general store for some bagels and the latest edition of the *Washington Post*, the couple was on their way, maneuvering the precious craft down the Chester River and, eventually, into the more intimidating waters of the great Chesapeake Bay. The thirty-something attorneys treasured these weekend sails, delighting in the hours away from their bustling big-city law practices.

Two hours into their trip, the sun was high above the Water Lily. As she gracefully glided south through the chilly autumn waters of the mid-Chesapeake, Hannah happened to glance over her left shoulder toward the eastern shore of the bay and noticed a structure rising above the surrounding trees. She called to Adam, pointing to the intriguing ruins that now had her undivided attention. Adam opined that the structure they saw must be an old plantation house, and suggested that they sail over toward the land to get a closer look. Ten minutes later, the Water Lily was anchored only feet away from the shore. An engraved rock bore the inscription: "Serendipity, Founded 1784." Hannah and Adam had always talked about

³³ This paper will not discuss the development of specific technology-augmented ADR systems, but will focus on a representative sample of what is currently available to one seeking to use technology, particularly the Internet, to enhance ADR. For a discussion of the initial Internet-based ADR systems, see Frank A. Cona, *Application of Online Systems in Alternative Dispute Resolution*, 45 BUFF. L. REV. 975, 986-99 (1997) (discussing the Virtual Magistrate Project and the Online Ombuds Office); George H. Friedman, *Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities*, 19 HASTINGS COMM. & ENT. L.J. 695, 700-06 (1997) (discussing the Virtual Magistrate Project, the BBB Online Project, and the Online Ombuds Office); Lan Q. Hang, *Online Dispute Resolution Systems: The Future of Cyberspace Law*, 41 SANTA CLARA L. REV. 837, 845-49 (2001) (discussing, among others, the Virtual Magistrate Project and the Online Ombuds Office).

establishing a bed-and-breakfast on the Eastern Shore, the management of which would be an ideal retirement project.

Upon returning to their urban townhouse on Sunday evening, Hannah quickly found herself seated at her desk in the third-story study the couple shared. After plugging in her laptop and dialing into her Internet service provider, Hannah ran a search with the terms "Talbot County Maryland," "Serendipity," and "1784." Two hours of online investigating, including several virtual tours of the Maryland Historical Society archives, revealed that Serendipity was indeed an old plantation house, founded in 1784 by Jeremy Chase as a tobacco and horse farm. The property still belonged to descendants of Jeremy Chase, but had fallen into disrepair in the last decade. Eighty-year-old Ann Chase and her ailing husband William still resided in the house. Adam agreed with Hannah that purchasing and restoring the house and property would be a great investment for the adventuresome duo. Furthermore, the couple would gain a permanent weekend retreat where they could store their sailboat, entertain, and one day retire.

An Internet search uncovered a month-old article from a local paper detailing the demise of the property. Despite her emotional attachment to her husband's ancestral home, Ann Chase was desperate for money to fund William's healthcare. In addition, the massive house and grounds were simply too much for frail Ann to maintain. Hannah's heart leapt as she read the last line of the article: "At the recommendation of her son and only child, a computer science wiz teaching at Cal Tech, Ann Chase has agreed to auction the property through eBay. Her son, Zach Chase, who maintains power of attorney for his elderly parents, will handle all aspects of the auction."

II. THE DEAL: NEGOTIATION

Hannah immediately logged on to eBay to examine the particulars of the property she had seen the day before. Lucky for Hannah, with her ambition for preservation, the house had fallen into grave disrepair and simply was not appealing to many other prospective buyers. Unbeknownst to Hannah, the eBay policy for real estate sales provides that winning a bid for property online simply puts the winner in touch with the seller; it is not a binding contract in and of itself.³⁴

³⁴ The eBay Web page on Real Estate Rules reads:

Due to the wide variety of laws governing the sale of real estate, eBay Real Estate auction-style advertisements of real property do not involve legally binding offers to buy and sell. Instead, eBay Real Estate's auctions are simply a way for sellers to advertise their real estate and meet potential buyers eBay Real Estate offers two auction formats for real estate advertisements, "NonBinding" and "Binding," each involving different procedures and expectations on the part of both seller and buyer "Nonbinding" auctions . . . are simply a way for sellers to advertise their real estate within the

Determined to have the property, Hannah and Adam persevered and eventually won the bid. Several days later, Zach Chase phoned the couple to discuss the details.

A. Traditional Negotiation

Hannah and Adam were so excited to win the eBay bid that they neglected to click the link explaining the eBay real estate sales policy indicating the limited legal significance of their winning bid. Consequently, when Zach Chase called to discuss the acquisition of Serendipity, Adam was stunned to learn that the issue of price had not been resolved as he originally had thought, but was again open for discussion.

"I thought we had already set a price," stated Adam during the phone call.

"Your eBay bid just got me in touch with you," explained Zach. "It's my family's home. After they die, I'm the only remaining Chase with ties to the property. I'm newly married to a California girl, and my career is here. It's simply impossible for me to keep the property and run it on my own. But I will get a fair price for it, which is why I called. When can you fly out to California to do the deal?"

"What! Are you kidding? I'm an attorney at a prominent law firm. I don't have time to jet off to California to settle this. I already gave you a fair price. Can't we do this over the phone?"

"Absolutely not. I'm selling a piece of my heritage here. I know we don't have time to become best friends, but I at least want to know that I am getting *the* best price for Serendipity and that I'm selling it to a good human being. This is a very emotional transaction for me. I can't just seal the deal without discussing it further."

Recognizing that Zach would not budge on his position, and knowing that Hannah would not stand to lose the property she already thought she had won, Adam agreed to take a long weekend and fly to California to negotiate the sale with

auction-style environment familiar to eBay's user community. At the close of the auction, the seller is expected to contact the high bidder to discuss entering into a contract for the real estate property . . . [By contrast,] "[b]inding" auctions of real estate are designed to more directly result in the sale of the property to the highest bidder. In this format, users are asked not to bid unless they intend to complete the purchase of the listed property, subject to customary diligence and contingencies. While eBay Real Estate cannot guarantee consummation of the sale to either the seller or a potential buyer, our rules require the seller and the final selected buyer to follow through in good faith. Hence, these auctions are "binding" strictly insofar as this good faith requirement, like the eBay User Agreement more generally, is binding on each eBay user, and insofar as a user's disregard of the required good faith intent can result in negative feedback.

See Real Estate Rules, at <http://www.pages.ebay.com/help/policies/real-estate-rules.html> (last visited Mar. 7, 2004).

Zach Chase. Finding the property on the Internet and "winning" the eBay auction seemed so easy; the entire process took only a few hours and was "completed" from the comfort of Adam's own home. The thought of a long, expensive flight, several nights in a hotel, hours of negotiating in a closed conference room, and the potential that the negotiation would go on for days beyond the allotted weekend, possibly causing problems for Adam at work, all contrasted strikingly to the simplicity and efficiency that had characterized the deal up to this point.³⁵ Bereft of any other viable options, Adam arranged to take off a Friday from work, foregoing nine billable hours, and bought a plane ticket. To make matters worse, the airlines were booked solid for the next few weeks. The most reasonable ticket he could find was for nearly a month from the initial eBay auction and cost several hundred dollars more than Adam had hoped to spend. On the bright side, at least Adam himself was an attorney. He shuddered at the thought of having to pay another attorney to travel with him to California to assist in the negotiation.

*B. Technology-Augmented Negotiation*³⁶

"I thought we had already set a price," stated Adam during the phone call.

"Your eBay bid just got me in touch with you," explained Zach. "Serendipity is my family's home. After they die, I'm the only remaining Chase with ties to the property. I'm newly married to a California girl, and my career is here. It's simply impossible for me to keep the property and run it on my own. But I will get a fair price for it, which is why I called. We have several options to negotiate this deal, all of which should be relatively quick and painless. We could do this by phone, but I am sure we'd both have huge long distance bills. Do you have a minute so I can explain my ideas to you?"

Zach first explained that recent advances in technology provide the opportunity to carry out a transaction, such as this one, by email, instant-messaging, chat rooms,

³⁵ Participants in a negotiation who put artificial time constraints on themselves to resolve the dispute often end up rushing to make a deal, and make a deal that is not satisfactory, or fail to negotiate essential terms by failing to present a total argument. See Danian Zhang & Kenji Kuroda, *Beware of Japanese Negotiation Style: How to Negotiate with Japanese Companies*, 10 J. INTL. L. BUS. 195, 208-09 (1989) (discussing a typical Japanese negotiation strategy that calls for setting tight time schedules on negotiations in order to prevent an opposing party from presenting his complete argument). Technology-augmented negotiation via the Internet can occur at any time, at any place, resulting in fewer external time pressures, such as the need to travel to another city or attend another meeting, that could adversely affect an adequate resolution to a dispute.

³⁶ For a detailed look at a hypothetical negotiation using the Web-based support system OneAccord, now called SmartSettle, see Ernest M. Thiessen & Joseph P. McMahon, Jr., *Beyond Win-Win in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 643 (2000).

facsimile, teleconference, and videoconference.³⁷ Zach opined that the most practical option among these seemed to be one of the several existing online negotiation services. Although negotiation has traditionally been conducted in person, by mail, by telegram, or by telephone, these online services allow two parties to negotiate from the comfort of their respective homes or offices, or even a coffee shop.³⁸ Online dispute resolution services offer a neutral place for gathering information and "discussing" a mutually satisfactory agreement.

The first online dispute resolution service Zach recommended was SquareTrade.³⁹ SquareTrade is eBay's online dispute resolution provider, and therefore was particularly germane to the Serendipity deal, which was initiated through eBay.⁴⁰ SquareTrade allows parties to resolve their dispute either on their own at no cost, or, if an independent negotiation fails, through a mediator for a minimal fee.⁴¹ The first step in the SquareTrade process is for one party to file a complaint online.⁴² Once the complaint is filed, SquareTrade will contact the other party, who will then be able to respond to the complaint. Upon receiving the opponent's reply, SquareTrade places all correspondence in a secure, password-protected area where only the parties have access. This provides a neutral, confidential forum to communicate issues and resolve disputes. A majority of the disputes brought to SquareTrade in this manner are resolved through negotiation without the need to resort to a mediator.⁴³

Zach then offered a second online negotiation option: Cybersettle, the first company to feature an online, computer-assisted method to decide disputes.⁴⁴

³⁷ See generally Claudine Schweber, *The Use of Technology in Conflict Resolution*, Paper Presented at the European Conference on Peacemaking and Conflict Resolution, San Sebastian, Spain (Oct. 1994), at <http://www.batnet.com/oikoumene/arbtadr.html> (last visited Jan. 22, 2004) (explaining how phones, faxes, and computers are becoming part of the conflict resolution process in the United States).

³⁸ Stephen J. Ware & Sarah Rudolph Cole, *Introduction: ADR in Cyberspace*, 15 OHIO ST. J. ON DISP. RESOL. 589 (2000) (discussing how arbitration, negotiation, and mediation can best be adapted to the new technology of cyberspace).

³⁹ SquareTrade, at <http://www.squaretrade.com> (last visited Jan. 22, 2004); see also Ewing, *supra* note 31, at 1222–23.

⁴⁰ See Dispute Resolution Overview, at <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited Jan. 20, 2004).

⁴¹ See *id.*

⁴² For a discussion of how online dispute resolution providers should develop complaint forms and establish and use their online dispute resolution system, see KATSH & RIFKIN, *supra* note 12, at 93–116.

⁴³ See Online Dispute Resolution, at <http://www.squaretrade.com/cnt/jsp/abt/services.jsp;jsessionid=wxzt1pn491?vhostid=tomcat4&stmp=squaretrade&cntid=wxzt1pn491> (last visited Jan. 22, 2004) ("A majority of completed cases are resolved in the initial phases of mediation.").

⁴⁴ Cybersettle Fact Sheet, at <http://www.cybersettle.com/about/factsheet.asp> (last visited Jan. 23, 2004); see also Ewing, *supra* note 31, at 1219–21.

Cybersettle, founded in 1996, is the exclusive settlement tool of the Association of Trial Lawyers of America, has handled over 75,000 transactions, and has facilitated over half a billion dollars in settlements.⁴⁵ Cybersettle employs a three-round, double-blind bid method.⁴⁶ After logging in and reviewing the claim information, attorneys for each party may enter up to three minimum demands, round-by-round.⁴⁷ The minimum demand represents the lowest amount for which the claim can settle during the respective round. For each party's minimum demand, Cybersettle adds twenty percent, thus creating a "range" of settlement between the minimum demand and the calculated maximum settlement amount.⁴⁸ If, in any given round, the maximum offer is greater than or equal to the minimum demand, the claim will settle for the average of the two amounts.⁴⁹ Should the parties not reach agreement, neither side is harmed because neither the adversary, nor the employees of Cybersettle, ever learns the bid amounts.⁵⁰

As a third option, Zach suggested SmartSettle.com, a "more sophisticated negotiation software [program] than the blind bidding systems."⁵¹ SmartSettle is more suitable for complex cases, including multi-party issues with quantitative or qualitative facets.⁵² The SmartSettle Web site allows parties to download the necessary negotiation software in just a few minutes, provided the parties meet certain minimum computer requirements and have a printer.⁵³ The software lets the disputants communicate electronically through several negotiation stages, each of which further clarifies what remains at issue, how the parties feel at the different stages, the ranges of acceptable outcomes, and even suggests possible solutions of which the disputants might not be aware.⁵⁴ The site also recommends that parties establish instant messaging capabilities to supplement the software "for brief communications and long distance support where high security is not a concern."⁵⁵

⁴⁵ See Cybersettle Fact Sheet, at <http://www.cybersettle.com/about/factsheet.asp> (last visited Jan. 23, 2004).

⁴⁶ See How it Works, at <http://www.cybersettle.com/demo/generaldemo.asp> (last visited Jan. 23, 2004).

⁴⁷ See *id.*

⁴⁸ See *id.*

⁴⁹ See *id.*

⁵⁰ See Attorney FAQ, at <http://www.cybersettle.com/faqs/attyfaq.asp> (last visited Jan. 23, 2004).

⁵¹ KATSH & RIFKIN, *supra* note 12, at 63; see also SmartSettle, at <http://www.smartsettle.com> (last visited Jan. 23, 2004).

⁵² See Advantages, at <http://www.smartsettle.com/html/adv.html> (last visited Jan. 23, 2004).

⁵³ See Download, at <http://www.oneaccordinc.com/html/dwnld.html> (last visited Jan. 23, 2004).

⁵⁴ See Process, at <http://www.smartsettle.com/html/process.html> (last visited Jan. 23, 2004).

⁵⁵ Download, *supra* note 53.

Zach referred to one final option, WebMediate. This Web site offers “secure and confidential Online Dispute Resolution (ODR) services for resolving insurance claims and business-to-business disputes.”⁵⁶ “WebMediate offers a variety of proprietary services that are tailored to the needs of business parties and to the nature of particular kinds of disputes.”⁵⁷ Provided Zach and Adam could qualify their property dispute as a “business” dispute, the parties could use WebMediate’s WebSettlement process to negotiate the price of Serendipity.⁵⁸ Zach explained the gist of WebSettlement as follows:

Using an effective, secure, technologically-advanced online settlement program, parties may enter what they alone determine to be fair demands and offers for the resolution of their dispute without disclosing these settlement proposals to the other party. The WebSettlement system compares the parties’ offers and demands on a double-blind basis and reports to the parties immediately when there is a settlement amount that both parties accept. The parties may participate in as many rounds of WebSettlement as they choose, and offers and demands are only compared within a given round.⁵⁹

As to the potential value of WebSettlement to the parties’ immediate property dispute, Zach opined: “WebSettlement is an effective, secure, technologically-advanced, proprietary online settlement program that allows parties to cut through the posturing that often scuttles face-to-face negotiations by directly comparing their true assessments of a claim’s value.”⁶⁰

Zach explained that two of the chief advantages of online dispute resolution are the increased speed and decreased expense of the process.⁶¹ Often, disputes can be settled online within a number of days and weeks; online dispute resolution companies promote settlement by providing a limited period of time for the dispute to settle, greater transfer of information and improved communication.⁶² Further, the online dispute resolution sites provide the service twenty-four hours a day, seven days a week, 365 days a year.⁶³ This means that from anywhere in the world,

⁵⁶ Introduction, at <http://www.webmediate.com/intro.html> (last visited Mar. 2, 2004).

⁵⁷ *Id.*

⁵⁸ See *id.* (noting WebSettlement “is appropriate for any dispute involving money or money damages”). To qualify their dispute as “business-to-business,” Hannah and Adam could point to their intent to use the property as a bed-and-breakfast.

⁵⁹ *Id.*

⁶⁰ Frequently Asked Questions, at <http://www.webmediate.com/faq.html#whatisset> (last visited Mar. 2, 2004).

⁶¹ See Cybersettle Fact Sheet, *supra* note 44.

⁶² See KATSH & RIFKIN, *supra* note 12, at 116.

⁶³ See *id.* at 31–32 (discussing “virtual spaces”).

at any time of the day, so long as both parties have access to a computer and a telephone line, they have the ability to resolve the dispute. Moreover, disputes can be resolved relatively inexpensively compared with the costs of litigation and traditional mediation.⁶⁴

A third benefit of Internet-based dispute resolution is that it focuses on the bottom line, which avoids posturing.⁶⁵ Neither side will suffer prejudice or harm, because the bids often are blind and the other side never knows what exactly was offered. The confidentiality of bids prevents the participants from locking themselves in, should they ultimately decide to go to trial.⁶⁶ Negotiating parties do not have the pressure of meeting face-to-face. In-person negotiation can at times generate tension and force parties into a positional, and sometimes destructive, style of negotiation.⁶⁷ By having the time to sit and reflect on a proposed settlement that has been offered online, the parties are more likely to agree to a mutually satisfactory deal, a deal with which they are more likely to comply.⁶⁸

Zach added that in situations such as their property deal, in which face-to-face meetings are not feasible, online dispute resolution allows the parties to participate in a dispute resolution process anyway.⁶⁹ Furthermore, online negotiation has the added advantage of preventing already-crowded court dockets from becoming more congested.⁷⁰ Online dispute resolution also avoids the problem of personal jurisdiction that can exist in disputes that arise over the Internet.⁷¹

Zach concluded the conversation by reiterating what he had said initially about doing the negotiation over the phone: a negotiation conducted over the phone would

⁶⁴ See Common Filing Concerns, at <https://www.squaretrade.com/odr/jsp/fil/filing.jsp?vhostod=tomcat4&stmp=ebay&cntid=ijxtja97r1> (last visited Jan. 24, 2004).

⁶⁵ See ROGER FISHER & WILLIAM URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 40–55 (1981).

⁶⁶ See KATSH & RIFKIN, *supra* note 12, at 84 (stating that because of confidentiality in online dispute resolution, if there is no agreement, no party will be any worse off than if the process had not been used).

⁶⁷ In their monumental book, *Getting to Yes*, Roger Fisher and William Ury state that positional bargaining involves each negotiator asserting what he will and will not do: "Each side tries through sheer will power to force the other to change its position." FISHER & URY, *supra* note 65, at 6. By contrast, principled negotiation focuses on basic interests, mutually satisfying options, and fair standards. *Id.*

⁶⁸ See KATSH & RIFKIN, *supra* note 12, at 84.

⁶⁹ See *id.* at 9.

⁷⁰ See RISKIN & WESTBROOK, *supra* note 5.

⁷¹ For example, a dispute that arises over the Internet between parties who are residents of two different states concerning a company that is based in a third state could cause problems of personal jurisdiction. Resolving the dispute online using ADR avoids this issue entirely. For a discussion of the need for a new legal theory of personal jurisdiction in the Internet age, see Susan Nauss Exon, *A New Shoe Is Needed to Walk Through Cyberspace Jurisdiction*, 11 ALB. L.J. SCI. & TECH. 1 (2000).

result in enormous long-distance bills, and, perhaps more significantly, could more easily become a hostile shouting match.

Although Adam was enthused by the option of negotiating the deal online, Zach offered a final alternative to traditional negotiation: negotiation by videoconference. Zach explained that in order for such an arrangement to be successful, both he and Adam would have to gain access to videoconference equipment. Adam offered that he had attended a Legal Seminar by videoconference at the University of Maryland, and could attempt to see if he could rent the equipment to conduct the meeting. In addition, it would likely be cheaper than flying to California. Finally, through videoconference, each party would be able physically to see the other, and therefore pick up on subtleties in body language and facial expression, as well as other visual clues that are often unconsciously observed.⁷²

Further, Adam was going to be in Williamsburg, Virginia the following week, and remembered from a recent article that the College of William and Mary School of Law in Virginia had the most technologically advanced courtroom in the world.⁷³ Adam decided to investigate the opportunity of using the videoconferencing equipment at William and Mary, and a quick perusal of the *Courtroom 21* Web site found that the courtroom did indeed have videoconferencing equipment. The use of videoconference, the Web site pointed out, would allow for the review of documents and exhibits, allow for witness interviewing and expert consultation, and was often used in settlement discussions.⁷⁴ Adam, however, did not know if he could gain access to the use of the videoconferencing equipment at William and Mary. Videoconferencing rooms are also increasingly available for rent by the hour at many office supply stores throughout the country.⁷⁵

Adam agreed to think about these options, although his initial impression was that online mechanisms seemed the most promising. There were certainly

⁷² See KATSH & RIFKIN, *supra* note 12, at 8–9.

⁷³ The Courtroom 21 Project is a joint project of the College of William and Mary and the National Center for State Courts. The campus of William and Mary's School of Law is home to the world's most technologically advanced courtroom. Courtroom 21 studies the effects and interplay of technology and the legal system. The Courtroom employs electronic transcription equipment, document and photo/video display devices, electronic filing software, and videoconferencing devices. Other courtrooms affiliated with Courtroom 21 include the Connecticut Supreme and Superior Courts, District of Columbia Superior Court, Ninth Judicial Circuit Court of Florida, Superior Court of California, Supreme Court of Delaware, and the United States District Courts for the District of Oregon, Eastern District of Michigan, and Eastern District of Virginia. For more information on the Courtroom 21 Project, see www.courtroom21.net (last visited Jan. 24, 2004).

⁷⁴ See Remote Conferencing, at <http://www.courtroom21.net/conferencing/index.html> (last visited Jan. 24, 2004) (discussing the videoconferencing available from Tandberg, Inc.).

⁷⁵ Richard L. Marcus, *Confronting the Future: Coping with Discovery of Electronic Material*, 64 LAW & CONTEMP. PROB. 253, 272 n.99 (2001); Hope Viner Samborn, *Click Onto World Wide Web Deps*, 86 A.B.A. J. 72 (2000).

drawbacks to Zach's technology-based negotiation proposals. First, the lack of actual in-person contact prevents a negotiator from using the valuable, non-verbal clues we generally unconsciously observe, such as demeanor and body language of the other side.⁷⁶ In ADR, often "a wink can be more meaningful than a word, and something said in a soft voice may mean something very different from the same words spoken in a loud voice. In terms of communication, therefore, [the face-to-face meeting] is an extremely rich, flexible, and interactive environment."⁷⁷ Another problem is that in many of the online negotiations, one never knows what the other side has proposed, and a party does not have access to these clues about the amount for which a person might be willing to settle. Also, Adam had no idea about the expense of renting videoconferencing equipment. Although an increasing number of law firms were purchasing videoconferencing equipment, it was not yet standard. Further, Adam did not know whether this videoconferencing equipment was available for public use, or whether possible technological glitches in a relatively new technology might make the process of negotiating from the house even more frustrating.

In the end, Adam weighed the cons of extensive cross-country travel, which included flight delays, costs, and the discomfort of cramped airplane travel, with the cons of online negotiation or a negotiation conducted through videoconference. Adam decided that, all things considered, it was in everyone's best interest to negotiate the price online.

III. THE RESTRICTIVE COVENANT: MEDIATION

Zach and Adam successfully negotiated the transfer of title for Serendipity, or so they had thought. A few days after finalizing a price, Adam received the paperwork in the mail from Zach. Zach designated a lawyer friend from Washington, D.C. to represent him at a closing in Baltimore. Prior to the scheduled closing, Adam showed the documents to one of his colleagues who specialized in real estate to be absolutely sure that Adam, as a corporate lawyer untrained in real estate matters, did not miss anything. Adam was disappointed to learn that what failed to surface during the course of the negotiations and resultant phone conversations was the existence of a restrictive covenant designating that Serendipity may only be used for residential purposes. Hannah and Adam had dreamed of turning the dilapidated estate into a restored bed-and-breakfast with ten or so bedrooms. In short, their venture was in great part a commercial one, for which they now learned the property could not be used. A phone call to Zach revealed that he was particularly attached to his mother and her wishes to keep the deed as it had been since the very beginnings of Serendipity. It seemed that yet another obstacle had surfaced.

⁷⁶ See KATSH & RIFKIN, *supra* note 12, at 8-9.

⁷⁷ *Id.*

Hannah, whose law firm had a strong mediation practice, opined to Adam that mediation would probably be the most cost-effective way to resolve this dispute. She and Adam did not want to lose the property that they were so close to obtaining. Furthermore, as she restored the house and land to their original glory, Hannah wanted to maintain a relationship with Zach and his parents so that she could gain access to any family records describing the original details of Serendipity. There was, in short, a relationship to be preserved. Finally, this particular land transfer was emotionally-charged; Serendipity was the legacy of the Chase family, one that Zach was less-than-enthusiastically relinquishing to a stranger. Hannah phoned Zach and explained her opinion, and was relieved when Zach agreed that this emerging dispute was ripe for mediation. Zach noted that because Hannah's firm had a mediation practice group and she presumably had some ties to the mediation community, he would be amenable to Hannah selecting a mediator, providing that neutrality was assured and the amount of travel and cost involved would be split evenly between the parties.

A. Traditional Mediation

Hannah asked one of her colleagues at the law firm for advice about mediation. The colleague advised Hannah to contact a community mediation center, where she could view a list of mediators, both local and national, and make an appointment for a mediation. During her lunch hour one day, Hannah visited the mediation center and perused a list of local mediators. Much to her disappointment, most of the mediators on the list were local attorneys with practices focusing on other areas of the law; mediation was something they did on the side. Knowing firsthand the busy agenda of an attorney, Hannah wondered how quickly and efficiently this route would resolve her dispute. After reading the mediators' credentials and making some phone calls, Hannah was able to secure a mediation date in the next two weeks. However, one problem still remained: Zach lived in California. Either Hannah and her mediator would fly to California or Zach would fly to Maryland (perhaps with a co-mediator⁷⁸ of his choice). Both of these prospects evoked the costliness and time-consuming nature of the negotiation in which Adam had participated in California. Nevertheless, they did not seem to have any other choice.

⁷⁸ BENNETT & HERMANN, *supra* note 16, at 15:

There may be one mediator, or a pair of co-mediators, or even a group of mediators who work together as a panel. The composition of co-mediator pairs or panels may be random, or it may be structured to bring in professional expertise. The makeup of the mediation team may also neutralize potential power imbalances by providing specific gender, ethnicity, or other diverse representation.

B. Technology-Augmented Mediation

Impressed by the extent to which technology successfully supplemented the negotiation over price, Hannah did some research regarding the potential application of technology to the impending mediation. She was pleased to learn that there were in fact numerous uses of technology in mediation.

First, and most simply, technology could be a source for finding a mediator to conduct a mediation in the traditional sense.⁷⁹ One site enabling this endeavor is FindLaw.⁸⁰ Hannah discovered that this extensive search engine could assist her in locating attorney mediators in cities nationwide who not only focused primarily on ADR, but specialized in different substantive areas of the law.⁸¹

Second, the Internet could be a conduit through which the actual mediation is conducted. At the most basic and least effective level, an online mediation can be carried out entirely through email.⁸² At more complex levels, online mediation can utilize high-bandwidth Internet connections, a microphone, and even a video camera.⁸³ Further, chat rooms and instant messenger services allow the parties to have instantaneous and confidential discussions with one or multiple parties, as well as the ability to have confidential communications with the mediator that cannot be discovered by the adverse party.⁸⁴ Often, these online services are free, and documents can be encrypted to ensure the information transfer remains confidential.

As was the case with negotiation, there are several Web sites that are dedicated to the resolution of disputes through mediation.⁸⁵ One such site, MediationNow,

⁷⁹ See Ewing, *supra* note 31, at 1218–19 (discussing information about mediators who are available on the Internet); Schweber, *supra* note 37.

⁸⁰ FindLaw, at <http://www.findlaw.com> (last visited Jan. 24, 2004).

⁸¹ Visitors to the FindLaw site can find mediators through the site's Lawyer Search. A search can be run by state and city, or by the practice area "Dispute Resolution, Arbitration and Mediation." A completed search results in a detailed list of area attorneys who specialize in mediation, including a list of their credentials and contact information. *Id.*; see also Locate a Mediator Directory, at <http://www.mediate.com/mediator/search.cfm> (last visited Jan. 24, 2004); Martindale-Hubbell's Dispute Resolution Directory, at <http://www.adr.martindale.com> (last visited Jan. 24, 2004); Mediation, at <http://www.clicknsettle.com/mediation.cfm> (last visited Jan. 23, 2004).

⁸² See Technology, at <http://www.mediationnow.com/online/frameTechnology.asp> (last visited Jan. 24, 2004). The Web site cautions against email-only online mediation, as "email used by itself tends to exacerbate emotionally charged conflicts." *Id.*

⁸³ See *id.*

⁸⁴ See *id.*; see also Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4 (2003) (examining and evaluating the numerous Web sites available to help resolve disputes arising from Internet commerce), available at <http://www.law.duke.edu/journals/dltr/articles/2003DLTR0004.html>.

⁸⁵ The Online Ombuds Office of the University of Massachusetts Center for Information Technology and Dispute Resolution is a dispute resolution service for persons and

provides a directory of mediators willing to mediate online.⁸⁶ The site also provides worksheets for the participants to complete that will equip the mediator with the vital background information every mediator needs to assist in the resolution of the dispute.⁸⁷ Once a mediator has been selected and provided with all necessary documents, the participants will choose a mutually agreeable date and time to conduct the mediation online.⁸⁸

WebMediate, whose component WebSettlement was referenced above as an option to facilitate the parties' negotiation, also offers WebMediation software designed for "more complex matters involving non-monetary business issues."⁸⁹

Accessing [WebMediate's] network of preeminent neutrals, parties may choose to involve an experienced online WebMediator to facilitate the discussion of their dispute and assist in identifying and assessing options for resolution. All communications between the parties, or between any party and the WebMediator in private session, are conducted via WebMediate's secure resolution forums. The WebMediator provides feedback to the parties, identifies issues, helps the parties to "reality test" their respective positions, and guides the parties where appropriate in creating their own durable and mutually-acceptable resolution to the dispute. By assisting the parties to reach a fair compromise quickly and informally, WebMediation fosters ongoing business relations between the parties, strengthens their reputations, and enhances trust and confidence in the online marketplace or claims-processing system in which their dispute originated.⁹⁰

Zach pointed Adam to the extensive terms of use, procedures, and rules accompanying the WebMediation process, which address issues such as confidentiality, security, and the role of the mediator.⁹¹ He also noted that the parties could submit supporting documentation electronically through the software.⁹²

institutions seeking a mediator to offer an online mediation in a dispute arising from some online activity. For a detailed discussion of this project, see <http://www.ombuds.org/center/ombuds.html> (last visited Jan. 24, 2004).

⁸⁶ See *Selecting a Mediator*, at <http://www.mediationnow.com/online/index.htm> (last visited Jan. 24, 2004).

⁸⁷ See *Preparing for Mediation*, at <http://www.mediationnow.com/online/index.htm> (last visited Jan. 24, 2004).

⁸⁸ See *id.*

⁸⁹ Introduction, *supra* note 56.

⁹⁰ *Id.*

⁹¹ WebMediate Terms of Use, at <http://www.webmediate.com/terms.html#med> (last visited Mar. 2, 2004).

⁹² Frequently Asked Questions, *supra* note 60.

Finally, SquareTrade,⁹³ which provides online negotiation as discussed above, also offers online mediator services to be used if the parties cannot reach an amicable resolution through an independent negotiation. For a fee, the online mediator will provide the disputants with:

the tools they need to solve their own problems effectively. This involves helping each party see the other's perspective, and guiding the parties toward the goal of finding a resolution. The mediator will ask the parties questions and give the parties information that helps them look at each other's needs and interests, generate their own options for settlement; [sic] and try to reach a mutually acceptable agreement.⁹⁴

The cost of online mediation varies depending on the mediator, the complexity of the dispute, and the amount of preparation time required by the mediator.⁹⁵ The costs of online mediations, however, are generally cheaper than traditional mediations.⁹⁶ Online mediation will save on the costs of physical conference and meeting space; the parties and the mediator do not have to travel to a central location; and, because extensive written communication is involved, the parties may be more deliberate and efficient in their communication, and it may be easier to memorialize the agreements reached.⁹⁷

As the styles of mediators vary, the online mediation can take one of several forms.⁹⁸ Nevertheless, online mediations provide the opportunity to make available the basic rules of the mediation to the participants simultaneously.⁹⁹ The mediator will also have the opportunity to have confidential discussions with each party, and will have the ability to monitor any discussion among the parties.¹⁰⁰ Putting ideas

⁹³ See Frequently Asked Questions, Mediation, at <http://www.squaretrade.com/cnt/jsp/hlp/odr.js?vhostid=chipotle&stmp=squaretrade&cate=4> (last visited Jan. 24, 2004).

⁹⁴ *Id.*

⁹⁵ See Fees, at <http://www.mediationnow.com/online/index.htm> (last visited Jan. 24, 2004).

⁹⁶ *Id.* eResolution offers online mediators who carry on electronic communication with all parties in domain name disputes. Most disputes are usually settled within forty-five to sixty days, at a cost for the entire mediation process of \$750. See Domain Name Administrative Decisions, at <http://www.disputes.org/eresolution> (last visited Jan. 24, 2004); Sandra Mingail, *Settling in Cyberspace: Alternative Dispute Resolution Goes Virtual*, available at http://www.canadalawbook.ca/headlines/headline49_arc.html (last visited Jan. 24, 2004).

⁹⁷ See Fees, *supra* note 95.

⁹⁸ See Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEG. L. REV. 7, 8–13, 17–38 (1996) (providing a system for categorizing and understanding approaches to mediation).

⁹⁹ See *id.*

¹⁰⁰ See *id.*

in writing may be counterproductive and the mediator may decide that all "conversation" be directed toward the mediator.¹⁰¹

Online mediation has all the advantages of online negotiation, plus the additional advantage of having an active third party with whom to settle the dispute. Online mediation also has the advantage of traditional mediation, but allows for greater ease of information delivery. The parties and mediator do not have to be in the same location, state, or even country; the mediation can occur at any time; and the parties can participate from any location.¹⁰² Online mediation may be particularly appealing to those who conduct business online and have a multi-state customer base because online mediation provides a forum for their employees and customers to resolve disputes without the matter getting out of hand.¹⁰³ Of the three principal types of ADR, negotiation and mediation may be best suited for the Internet because they are less formal methods of dispute resolution — in particular, less formal than arbitration and litigation.¹⁰⁴

The final technology-augmented option for mediation is mediation by videoconference.¹⁰⁵ Although Adam's firm had videoconference equipment, personal use of the equipment was not allowed. The firm recently had technological problems with the equipment, which required expensive repairs. Even if Adam were able to use the equipment, Zach and the mediator would also have to gain access to the technology in order to complete the mediation. On the plus side, if such technology were available for all three parties, the parties could videotape the proceedings, thus creating an accurate record of the entire proceeding, helping to memorialize the deal and prevent fraud.¹⁰⁶ In addition, video technology allows for preconference among the parties.¹⁰⁷ Furthermore, as in trials, where

¹⁰¹ See *id.*

¹⁰² See Introduction, at <http://www.mediationnow.com/online/index.htm> (last visited Jan. 24, 2004).

¹⁰³ See *id.*

¹⁰⁴ See Bruce Leonard Beal, *Online Mediation: Has Its Time Come?*, 15 OHIO ST. J. ON DISP. RESOL. 735, 735 (2000).

¹⁰⁵ Mediation is extremely appropriate in cases in which the parties would like to maintain a relationship, and in which the substantive issues may be emotionally charged. BENNETT & HERMANN, *supra* note 16, at 12. For these reasons, mediations are not rushed, but tend to take some time. A prolonged mediation by phone would be not only expensive, but conceivably emotionally draining. See *id.*

¹⁰⁶ As noted above, Internet Neutral offers videoconferencing as forum parties may select for mediation.

¹⁰⁷ See Robert Gordon, *The Electronic Personality and Digital Self*, 56 APR DISP. RESOL. J. 8, 11–12 (2001) ("Online ADR is particularly well-suited to help settle complex commercial disputes involving numerous pesky procedural details that must all be agreed to prior to the commencement of actual mediation. Often such procedural matters can be ironed out via IRC chat and/or similar Internet conferencing methods."); see also Christine Lepera & Jeannie Costello, *New Areas in ADR*, PLI/LIT 593, 602 (1999) ("[C]onducting the ADR,

expert witnesses are often allowed to testify by videoconference,¹⁰⁸ if witnesses are necessary, videotaped testimony of experts, such as real estate specialists, would save time and money.¹⁰⁹ Finally, mediation by videoconference has the advantage of allowing "face-to-face" communication, with the virtual nature of the communication preventing more dominant personalities from controlling other parties.

IV. THE BREACH: ARBITRATION

After a successful mediation, because of which the deed to Serendipity was amended to permit limited commercial use, Adam, Hannah and Zach finally closed on the property. Two weeks after closing, Hannah and Adam sailed the Water Lily down the Chesapeake to visit their new property. Mr. and Mrs. Chase, who now lived in a retirement community, had moved all of their belongings out of the house. Hannah and Adam were thrilled to see their dreams finally falling into place. As Hannah walked behind the large house, she was startled by what she saw: Zach, or someone, had ordered the removal of several beautiful, historic outbuildings.¹¹⁰ Where there once stood a large barn and the original kitchen, there was nothing but grass, dirt and a few scattered trees. Hannah fumed; those buildings, she thought, were to be included in the deal. She ran down the dock and onto the boat to call Zach. Zach explained that his mother had made arrangements to sell those buildings to one of her friend's daughters who wanted to move the buildings to her new Eastern Shore farm. Zach was sure he had mentioned this to Adam. As Hannah hung up the phone, she told Zach that this was a breach of contract, one that would definitely trigger the mandatory arbitration clause that they, as lawyers, were wise enough to include in the contract.¹¹¹

both pre-hearing conferences and hearings, electronically will eliminate time-consuming, expensive travel and other logistical expenses . . .").

¹⁰⁸ See, e.g., CAL. CIV. P. CODE § 2025 (2003); D.C. R. CIV. P. § 32 (2003).

¹⁰⁹ While it may be more frequent to use videoconference for trial purposes, the use of videoconference to present witnesses in ADR does not face the same constitutional issues that might be present when video testimony is used in criminal proceedings. See *Maryland v. Craig*, 497 U.S. 836 (1990) (discussing the constitutionality of the use of closed circuit testimony); *United States v. Gigante*, 971 F.Supp. 755 (E.D.N.Y. 1997) (discussing the constitutionality of the use of closed circuit television for testimony), *cert. denied*, 528 U.S. 1114 (2000); Siobhan C. Murphy & Daniel Gilman, *Twenty-Ninth Annual Review of Criminal Procedure: Sixth Amendment at Trial*, 88 GEO. L.J. 1442 (2000) (discussing the use of closed circuit testimony and the confrontation clause).

¹¹⁰ The removal of these outbuildings might give rise to breach of contract actions and actions regarding the removal of fixtures from the property at issue. The resolution of this dispute by litigation might take several months or years to be resolved.

¹¹¹ See KATHERINE V.W. STONE, *PRIVATE JUSTICE: THE LAW OF ALTERNATIVE DISPUTE RESOLUTION* 303-04 (2000) (discussing the use of mandatory arbitration clauses).

A. Traditional Arbitration

Adam and Hannah realized that they now had one more hurdle to jump before Serendipity would become their property. Fortunately, the mandatory arbitration clause they included in their contract would ensure that the issue not explode into combative litigation. Through his law firm connections, Adam was able to generate a list of arbitrators who specialized in property disputes with a particular emphasis on historic properties. Adam and Zach compared their notes and were able to find a common name on their respective lists. The only problem was that the arbitrator practiced in Boston. Although the arbitrator frequently conducted business in the Washington, D.C. area, the problem remained that Zach lived in California. This entire transaction was becoming much more costly and time-consuming than either party had ever imagined. Somehow, a simple eBay auction had escalated into a prolonged deal that had required a negotiation, a mediation, and now an arbitration. Each of these required extensive funds, as well as hours of personal and professional time. Hannah and Adam's only consolation was that this time they were, certainly, almost at the end of their acquisition.

B. Technology-Augmented Arbitration

Exhausted from the enormity of the transaction, Adam was at least pleased that he had learned a great deal about how technology could enhance the dispute resolution process. From his previous research on ADR and technology, Adam remembered that the National Arbitration and Mediation (NAM), formerly clickNsettle, maintains a roster of 1,500 former judges and specialists in all fifty states and major cities throughout the world to provide a qualified arbitrator to disputants.¹¹² In addition to providing an extensive list of arbitrators, NAM also offers actual arbitration services, allowing the parties to choose from either an in-person or videoconference arbitration mechanism.¹¹³

In the written arbitration procedure, the arbitrator decides the case solely on the documents the arbitrator has received from the participants.¹¹⁴ The parties in the written arbitration are required to submit a memorandum outlining the facts of the dispute and a case summary, the legal arguments in support of that position, and any and all evidence that supports this position.¹¹⁵ The Hearing Officer, selected and

¹¹² See About Us, at http://www.clicknsettle.com/why_cns.cfm (last visited Jan. 23, 2004).

¹¹³ See Dispute Resolution (USA), at http://www.clicknsettle.com/usa_dispute.cfm (last visited Jan. 23, 2004).

¹¹⁴ See Written Arbitration, at <http://clicknsettle.com/paperarb.cfm> (last visited Jan. 23, 2004).

¹¹⁵ See *id.*

agreed to by both parties, will set a date by which the exchange of information must take place and will then review the documents and make a decision based on the applicable law.¹¹⁶

In addition to offering written arbitration procedures, NAM offers arbitration procedures by videoconference.¹¹⁷ Videoconference arbitration cases are often completed in a matter of hours and decisions are rendered shortly thereafter.¹¹⁸ A neutral third-party, often a judge or former judge, presides over the arbitration. The disputants have the ability to select the arbitrator they feel has the most expertise and knowledge to settle their dispute, and to call witnesses to testify either by videoconference or by email and data transfer.¹¹⁹ The Web site provides information about the software options available to participate in videoconference arbitration facilitated by NAM.¹²⁰

A second Web site aimed at facilitating arbitration is the aforementioned WebMediate, which employs WebArbitration software, in addition to WebSettlement and WebMediation.¹²¹

Parties who prefer to submit their disputes for resolution by a third-party sitting in the role of private judge may choose WebArbitration either directly or after exhausting their WebSettlement and WebMediation options. In a somewhat more formal process than WebMediation, parties are encouraged to make their "case" in a secure resolution forum to a WebArbitrator selected from WebMediate's network of experienced online arbitrators. Each party is given ample opportunity to present arguments and to rebut positions taken by the other side. At the conclusion of these presentations, the WebArbitrator issues a decision to the parties in written form.¹²²

¹¹⁶ See *id.* An option within this written arbitration is High/Low Arbitration. In High/Low Arbitration, the parties agree in advance on monetary parameters where the award decided by the Hearing Officer will stand only if it falls within the predetermined parameters. The Hearing Officer does not know, in making the decision, what parameters the parties have established. See *id.*

¹¹⁷ See Videoconferencing, at <http://www.clicknsettle.com/video.cfm> (last visited Jan. 23, 2004). The Virtual Magistrate Arbitration Program is a pilot project for disputes that arise on worldwide computer networks about online messages, postings, and files. The project randomly selects an arbitrator from a pool of qualified and trained arbitrators. Complaints and communications are filed by e-mail. Each arbitrator attempts to make a decision within seventy-two hours of the acceptance of the complaint. See The Virtual Magistrate Project, at <http://www.vmag.org/docs/concept.html> (last visited Jan. 24, 2004).

¹¹⁸ See Arbitration, at <http://www.clicknsettle.com/arbitration.cfm> (last visited Jan. 23, 2004).

¹¹⁹ See About Us, *supra* note 112.

¹²⁰ See Videoconferencing, *supra* note 117.

¹²¹ Introduction, *supra* note 56.

¹²² *Id.*

Zach added that “[t]he parties may also submit supporting documentation and affidavits electronically,”¹²³ and again referred Adam to the extensive terms of use, procedures, and rules which govern all WebMediate processes.¹²⁴

As to non-Internet processes, an arbitration by phone conference would be particularly undesirable. The parties would have to fax all relevant documents to the arbitrator in advance, enormous long-distance bills would be generated, and the actual “argument” portion of the arbitration, during which each party presents its side, could lapse into a shout-down, with each party attempting to talk over the other.

The final technology-augmented arbitration option for Hannah and Zach would be an arbitration by videoconference. As was the case with a negotiation and mediation by videoconference, this option has the drawbacks of expense and technological unavailability. If local law schools were to run a technology-augmented community ADR project, Hannah and Adam could participate through their center and Zach through his. An arbitrator from a commercial, technology-augmented arbitration center would be available to arbitrate the dispute. Again, having three different participants at three different locations increases the likelihood of technological glitches, such as poor reception and disconnection.

V. ASSESSING ALL OF THE POSSIBILITIES

This paper intentionally has not always made clear what technology Hannah and Adam ultimately may have elected to supplement each ADR process. This is realistic in that often, parties will not be presented with an option that is clearly the *best* option. Nevertheless, it is worth discussing briefly which options really might have worked and why.

First, online dispute resolution services would, in most instances, be the most practical option. This is primarily because there are so many well-developed Web services catering to dispute resolution, the most prominent of which are mentioned above. In the United States in 2004, there is increasing access to the online world, if not in one’s own home, then through sources such as public libraries. It is relatively simple to get online, and therefore to tap into the online dispute resolution environment. To be sure, ADR processes take time, and one cannot sit at a public library computer for hours engaging in a settlement. But increased access to the Web can, at a minimum, provide disputants with an informational starting point — a source for reading about what online dispute resolution sites offer and, at the very least, a source for finding more information about non-technology-augmented ADR. For those many millions of Americans who do have access to the Web at home, actually proceeding with the resolution of the dispute online would not be different

¹²³ Frequently Asked Questions, *supra* note 60.

¹²⁴ WebMediate Terms of Use, *supra* note 91.

from the many activities that are already conducted online. The minimum monthly cost of an at-home online subscription¹²⁵ pales in comparison to the hourly rate charged by mediators and arbitrators.¹²⁶

ADR by videoconference is the least practical solution at this time. As discussed in the final section of this paper below, there is room for change in this area. But at present, with technological availability as it stands, access to the technology required for video-enhanced ADR is too remote to be feasible for most people. In addition, such access may be feasible at this point only through the enlisted help of a law firm. Paying for "big firm" legal representation in order to use a firm's equipment may defeat the cost-effective rationale for choosing ADR in the first place. In short, on the levels of availability and cost, online ADR is a clear winner over ADR augmented by videoconference.¹²⁷

Despite the practical feasibility of online dispute resolution services, and the seeming downfalls of the videoconferencing option, a more human factor may complicate the matter. In short, disputants are people with feelings. Online dispute resolution removes the face-to-face aspect of alternative dispute resolution that many disputants may find satisfying, or even healing.¹²⁸ Resolving a dispute behind a computer screen, and never having the opportunity to see the body language or hear the tone of voice of the other party, may be a hindrance to settling a dispute with emotional overtones. Indeed, "[e]lectronic communication is no substitute for the ability of face-to-face conversations to foster important process values of [ADR]."¹²⁹

For example, in the scenario presented in this paper, Zach raised the concern that Serendipity was his family's property, one that carries with it a long and emotional history. Given these circumstances, would Zach likely opt to negotiate the price online, without meeting, or at least seeing, the potential new owner of his family's cherished property? Perhaps the added cost of traveling to negotiate in person, or paying to utilize a law firm's videoconferencing technology, would be

¹²⁵ For example, as of January 2004, the Internet service provider Netzero charged \$9.95 per month for its unlimited Platinum Service. See Netzero, at <http://www.netzero.net> (last visited Jan. 24, 2004).

¹²⁶ For example, The McCammon Group, a respected dispute resolution service provider in Virginia, will charge between \$200 and \$390 per hour for mediation and arbitration services, depending on the amount at stake in the case. Mediation and Arbitration Fees, at http://www.mccammongroup.com/fees/mediation_arbitration_fees.htm (last visited Jan. 24, 2004).

¹²⁷ See Goodman, *supra* note 84 (discussing the cost savings and convenience associated with online mediation).

¹²⁸ See BENNETT & HERMANN, *supra* note 16, at 10–11 (noting that ADR can address issues such as "understanding, an apology, a change in attitude, or an offer of assistance," which are not brought about in traditional adjudication processes).

¹²⁹ Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYUL REV. 1305, 1308 (1998).

worth the emotional satisfaction and the peace of mind he might receive. The other argument, of course, is that Zach is a busy man, willing to trust a fellow businessman who would agree to pay a pretty penny for the property. If this were the case, online negotiation may be perfect.

Lastly, consider that for large disputes with much at stake, the average person will lack the sophistication to engage in self-initiated resolution, let alone technology-augmented self-initiated resolution. Two of the characters in this paper were lawyers and the other was a computer science “wiz.”

VI. THE FUTURE OF TECHNOLOGY IN ADR — THE HIDDEN PATH

This paper has thus far discussed a hypothetical real estate transaction and its corresponding disputes from two perspectives: that of participants using traditional, non-technology-augmented dispute resolution methods, and that of participants who are privy to more technologically sophisticated, yet still realistic and accessible, processes. It has also considered the practical pros and cons of each of the choices presented. There is, however, one more road to travel. Suppose Hannah, Adam, and Zach had access not only to the technology described above to resolve their dispute, but also to even more sophisticated tools. This final section will address an “ideal” environment for technology-augmented alternative dispute resolution. Some day technology will progress to the point where the virtual environment will be just as interactive as the real environment — *and that may make all the difference*.¹³⁰

The first component of an ADR “utopia” would be several regional technology dispute resolution hubs, with the most sophisticated technology and extraordinary resources for applying technology to ADR processes. These hubs would most logically be associated with universities or think tanks. For example, the Courtroom 21 Project in Williamsburg, Virginia, a joint program of the William and Mary Law School and the National Center for State Courts, could serve as the regional hub for the Southeastern United States.¹³¹ These hubs, perhaps five or six nationwide, would serve as the “nerve centers” for all technology-augmented ADR occurring at any given time in their respective region. The hubs could serve as help centers for all technology questions that may arise from an ADR session occurring nearby. In addition, each hub would have all of the cutting-edge technology available for use in trial and ADR processes, thus enabling constant research and laboratory

¹³⁰ Two roads diverged in a wood, and I,
I took the one less traveled by,
And that has made all the difference.

Frost, *supra* note 1 (emphasis added).

¹³¹ Marshall-Wythe School of Law, Courtroom 21, at <http://www.wm.edu/law/courtroom21/index.shtml> (last visited Jan. 23, 2004).

efforts to hone the use of technology in the law. Furthermore, practitioners on staff could be available to use the technology, such as high-tech phones or videoconference systems, to serve as mediators or arbitrators for disputes occurring at a local communication ADR center (discussed below) where the disputants would be located.

The second component would be community dispute resolution centers with comprehensive technology capabilities. These centers could also be a part of a university, or even a law firm. There would be substantially more community dispute resolution centers than regional hubs. Each community center would be linked to the nearest regional hub. The centers would have the capabilities to host technology-augmented ADR processes on-site. They would also provide case evaluations to determine the suitability of each individual case for not only ADR generally, but also for technology. Counselors at the centers would discuss all options for the parties and recommend the most cost-effective and efficient option, which may simply be an in-person negotiation with attorneys. The centers would further provide a docket for all of the ADR processes it would sponsor; this docket would be linked electronically to the database of the affiliated regional hub.

The third component would be a nationwide network of judges and law practitioners with specialized training in the application of technology to ADR. Each member of the network could be linked to the nearest community center (described above), providing office hours on-site as a counselor to give case evaluations to parties who come to the centers. These individuals would have to undergo a certain number of hours of technology training to earn affiliation with a community dispute resolution center.

The idea that all legal practitioners should be well-trained in the legal applications of technology has become central to the required Legal Skills curriculum at the William and Mary School of Law. In the third semester of this four semester, nine credit legal research, writing, and practice course (in which students become associates of a simulated law firm and handle all aspects of several simulated cases), teams of two students take a simulated case to trial. Beginning in January 2001, each team was required to incorporate technology into its trial:

Every trial team in every trial, whether civil or criminal, is required to make effective use of technology during the presentation of their case. Courtroom technology training will be provided to second year students in the fall semester, and students will be required to file with Courtroom 21 a technology intent form, selecting the technology they will utilize at trial.¹³²

¹³² Marshall-Wythe School of Law, *Legal Skills: Policies, Procedures and Rules* 29 (Aug. 2002), available at <http://www.wm.edu/law/academicprograms/legalskills/doc/2002%20original%20format%20Final%20Policies,%20Procedures%20&%20Rules%20>

In short, upon graduating from William and Mary Law School, every student will have received training in the use of courtroom technology and will have actually used some aspect of courtroom technology in a simulated trial. In addition, in the Spring of 2002, William and Mary began to offer a technology-augmented trial advocacy clinic to second and third year students.¹³³ Finally, William and Mary has for years offered a Legal Technology Seminar, in which students develop and carry out a simulated, technology-augmented trial.¹³⁴

One difficulty with which this model would be confronted is funding. Clearly, the technology required to facilitate the resolution of complex cases successfully is extremely expensive. There are several ways in which funding could be obtained.

First, the hubs and community centers could become affiliated with pre-existing institutions, such as schools or local governments. The pre-existing entities could devote a portion of their budgets to the centers. The advantage of this setup would be that the name recognition attached to the pre-existing institution would likely carry over to the new subsidiary ADR hub or community center. Furthermore, the institutions would already have donors and established fundraising departments in

20WITH%20TOC.doc (last visited Jan. 23, 2004).

¹³³ The course description for Trial Advocacy — Technology Augmented, reads: An advanced litigation course intended for those students who have a substantial interest in litigation. The course is designed to develop the student's skill as a trial lawyer for both civil and criminal cases. Trial Advocacy will deal with trial strategy, jury selection, opening statements, presentation of evidence, including the examination of witnesses, closing arguments, and preparation of jury instructions. Evidence presentation and related technologies will be fully integrated into all aspects of the course. A trial will be required.

College of William & Mary, Marshall-Wythe School of Law, *Curriculum, Trial Advocacy—Technology Augmented*, at <http://www.wm.edu/law/academicprograms/curriculum/experiences/law720.shtml> (last visited Jan. 23, 2004).

¹³⁴ The course description for Legal Technology: Legal and Policy Implications Seminar, reads:

An exploration of the possible implications of legal high technology to law and the legal system with an emphasis on courtroom and litigation related technologies. Using Courtroom 21 based technology, the seminar will consider the probable ethical, procedural, evidentiary, and systemic effects of technological innovations such as multi-media court records, remote witness testimony, imaged documents, computer based courtroom information and evidence display. A paper or technology related project is required; interdisciplinary projects are encouraged. Interested students may apply to have their product published via the Courtroom 21 web page. All students will jointly participate in or observe a single experimental high technology trial and will submit an evaluation of the impact of the technology use in the case.

College of William & Mary, Marshall-Wythe School of Law, *Curriculum, Legal Technology: Legal and Policy Implications Seminar*, at <http://www.wm.edu/law/academicprograms/curriculum/seminars/law575.shtml> (last visited Jan. 23, 2004).

place, eliminating the need to start from scratch when looking to secure funding for the new subsidiary. Finally, the host institution would have a vast pool of professionals on all levels that would be available as resources for the start-up centers.

Second, the hubs and community centers could gain independent recognition as nonprofit, tax exempt 501(c)(3) organizations. The advantages of this structure would be that the ADR hubs and centers would gain status as institutions in their own right, worthy of incorporation. This would greatly enhance the significance of the idea of technology-augmented community ADR centers in the eyes of the public. Nevertheless, as such, the centers would be a much more risky venture, lacking the financial and institutional support of an established "parent."

VII. CONCLUSION

Technology worked particularly well in this case because the parties lived so far apart. Admittedly, parties who live in the same city may not benefit to the same extent from technology-augmented ADR. It could be argued that there is enough value to in-person contact that if it is possible to be in-person, why not do it? But even if Zach and Adam had been next-door neighbors, perhaps they would want an arbitrator with a special knowledge of historic preservation. Suppose that person lived 200 miles away; an online or videoconference arbitration might be perfect.

Technology-augmented dispute resolution will most likely be successful in the e-commerce arena because parties who conduct business online will probably be more willing to conduct their dispute resolution online.¹³⁵ Technology-augmented dispute resolution might be particularly effective in "large scale consumer and business-to-business disputes."¹³⁶ Further, dispute resolution via email has the added advantage of the participants being able to communicate at their convenience, because participants do not even have to be connected to the Internet at the same time.¹³⁷ This eliminates the pressures of having to make decisions quickly.¹³⁸ As an increasing number of e-commerce transactions need dispute resolution, and technology-augmented dispute resolution becomes more frequent, the use of technology-augmented dispute resolution will become more prevalent throughout the business world. Small businesses may also take advantage of online dispute

¹³⁵ See generally Friedman, *supra* note 33, at 707–11 (suggesting that particular online transactions are particularly amenable to online ADR, such as: Internet service provider agreements, software purchases, electronic commerce, and domain name registration).

¹³⁶ William K. Slate II, *Envisioning the Future*, 56 DISP. RESOL. J. 1 (2001) (noting that precautions against certain types of risks, such as confidentiality, privacy, and party confidence in the system of dispute resolution, need be taken before an effective system of online ADR is developed).

¹³⁷ See Gordon, *supra* note 107, at 11.

¹³⁸ See *id.*

resolution because of the savings on time and cost as compared with litigation.

A drawback to the use of technology to conduct mediations and arbitrations is that the parties may not have equal access to sophisticated videoconferencing equipment, high-bandwidth connections or video and document cameras.¹³⁹ Another potential drawback is that the parties may not be as familiar with the technology as needed, and practice with the technology is necessary.¹⁴⁰ Therefore, the use of technology would have to be scaled back to the technology common to both parties. Another disadvantage is that with traditional ADR parties could judge body language and voice inflections, but those same opportunities are not present when ADR is carried out over the Web.¹⁴¹ It has been argued that online ADR "is best reserved for cases involving a straight-forward discussion of numbers and nothing else," and that participants may be too direct in electronic ADR, and say things they would not say if meeting face-to-face.¹⁴²

While technology-augmented ADR is not without its critics,¹⁴³ the potential advantages outweigh the disadvantages. Technology-augmented dispute resolution is gaining in popularity, as it has recently been used in employment discrimination disputes, worker's compensation disputes, and in disputes that have begun in a state court system.¹⁴⁴ As technology continues to progress and become more readily available, the opportunity to use technology in ADR will increase. Through projects like the Courtroom 21 Project, and numerous Web-based alternative dispute resolution providers, the benefits of technology in the legal dispute resolution fields and non-legal dispute resolution fields will become more widely known. As the public becomes aware of the options available to resolve disputes, as the use of technology becomes more widespread and more efficient, and as the

¹³⁹ See Technology, *supra* note 82.

¹⁴⁰ See *id.*

¹⁴¹ See Mingail, *supra* note 96.

¹⁴² See *id.* (quoting Graeme Mew, a partner in the Toronto office of Smith Lyons Barristers and Solicitors). For a discussion of the disadvantages of online mediation, see Eisen, *supra* note 129.

¹⁴³ One scholar, in referring to electronic ADR, has written:

These [Internet] sites [that offer online mediation and arbitration], however, have scanty dockets and are unlikely to serve as general-purpose systems for dispute resolution The value added from using the Internet to provide such voluntary referrals, however, seems insignificant [W]hile Internet-based arbitration might prove useful when contracting parties agree in advance to resolve any disputes through such arbitration, it seems unlikely to develop into a truly decentralized adjudicative system.

Michael Abramowicz, *Cyberadjudication*, 86 IOWA L. REV. 533, at 574-75 (2001).

¹⁴⁴ See KATSH & RIFKIN, *supra* note 12, at 117.

public gains more confidence in the security of the Internet,¹⁴⁵ the public will likely choose the path by which it previously traveled less. It is only natural that when technology-enhanced ADR is faster, cheaper, more convenient, and more efficient than traditional ADR, there will be an increase in both public demand and value,¹⁴⁶ and that will make all the difference.¹⁴⁷

¹⁴⁵ See generally M. Ethan Katsh, *Dispute Resolution in Cyberspace*, 28 CONN. L. REV. 953 (1996) (providing an analysis of some elements of the online environment that suggest the need for new online dispute resolution institutions).

¹⁴⁶ See KATSH & RIFKIN, *supra* note 12, at 2.

¹⁴⁷ See Frost, *supra* note 1.