



## On-line Mediation—Press Delete

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As you might be aware, there is a LinkedIn Group dedicated to Online Dispute Resolution, featuring announcements of conferences on online mediation and blogs on new products that will revolutionize technology assisted dispute resolution. This group is just the latest example of a renewed interest in online or e-mediation as a means to resolve disputes. I say renewed because 10 years ago there were many websites offering such services (websites which are either no longer in existence or now serve to provide referrals to mediators, lawyers and legal services). Perhaps we only have a 10 year memory span and have forgotten why these cyber ventures failed and why, in my opinion, the current versions will as well.

There are two fundamental reasons why cyber mediation cannot work: 1) Decisions are emotionally driven; and 2) email, text, and Twitter posts do not effectively communicate emotion (after all, we resort to emoticons as a means of communicating our feelings in emails and text messages).

So why the renewed interest in cyber mediation? A few factors include cost, convenience (no more LA traffic!), and the ability to engage in the process whenever one has time to do so. These are attractive reasons that appeal to our natural desire (further enhanced by the internet) for the quick and easy. While I love the convenience of making a reservation at my favorite dinner spot via a few quick taps of the keyboard, this lack of interpersonal communication has no place in the mediation of litigated cases.

The reasons for e-mediation can be good ones and yes, perhaps a cyber mediation is better than no mediation at all. However, I believe that its usefulness, if any, is likely limited to small consumer disputes that arise from online transactions that cannot be resolved by customer service, or other small claims that do not justify the retention of counsel and the filing of a lawsuit.



Outside of this narrow market, online mediation is not now and will never be a substitute for a traditional mediation where the parties, counsel and the mediator assemble in the same location and commit to using the time allotted to settle the case. I don't want to sound old school -- I acknowledge that the internet has made many aspects of mediation easier and more efficient. For example, sending briefs and exhibits using email and setting up conference calls through an email or calendar request is infinitely better than snail mail and/or the phone. I can even see the benefit of using Skype as a substitute for pre-mediation calls and meetings, but when it comes to the mediation itself, old school is the gold standard.

However, the negotiation process is too personal and emotionally driven to resort to the written word. Parties need to have the opportunity to share their story with an empathetic mediator who can engage with them and work to steer the emotion into a constructive effort to resolve the case. A mediator's job is to interpret a party's position and communicate it to the other side in a way that facilitates a settlement. Again, this process is enhanced by face to face discussions and loses a lot if set forth in an email.

Emails and texts also do not provide the flexibility necessary to change course when the parties get to a sticking point in the negotiations. The conversation in the caucus room about moving from a traditional bargaining technique to ranges, brackets, and a discussion of valuation are common in most mediations, but very cumbersome if one can only resort to email. The parties and counsel need to be in the room working through the case and the negotiation so that they become vested in its success. This can only happen when all the necessary parties attend and participate in the mediation. A lengthy email is time consuming and can be easily misinterpreted. It removes the flow of the mediation which gains momentum as the parties approach a resolution.

In my experience, there is no substitute for a meaningful discussion of the factual and legal issues and how those issues may be resolved by a court or jury. No email exchange can substitute for the interaction of people in a meeting. It is just too easy to say no on the phone or in an email or text. Mediation is a process that all participants must experience in order to get to yes.

-- Bruce A. Friedman