

No finish line: The future of family law mediation

By CHRIS MACTURK

In *Tomorrow's Lawyers*, Richard Susskind writes, "It is exciting and yet disconcerting to contemplate that there is no finishing line for IT and the Internet."

Susskind's observation is equally applicable to the future of family law mediation. Like the Internet itself, there are ever-expanding and seemingly endless options to consider — options born of rapidly evolving applications of new and developing technology and clients' desires for more access to a greater diversity of dispute resolution opportunities at a lower cost.

Online Dispute Resolution (ODR) has existed for many years, with perhaps its origin and infancy credited to eBay's ODR process through SquareTrade which began in 1999. SquareTrade's technology provides the opportunity for parties to resolve disputes concerning eBay purchases with or without the aid of a mediator.

A staggering number of disputes have been resolved using ODR. Modria, a newer ODR provider, states on its website, "Our founders created the online dispute resolution systems at eBay and PayPal which have processed hundreds of millions of disputes, 90 percent through automation — without human intervention." While technology can increase access to justice at a lower cost, resolving a dispute over whether a Cabbage Patch doll was really "like new" doesn't seem to compare to the difficulties presented in disputes involving real children. Even so, ODR is currently being offered and attempted for family law matters.

Online mediation

While many of the current ODR providers focus on internet-based commercial matters, companies such as FamilyResolve, based in Australia, provide ODR for family law disputes.

Australia's Family Law Act 1975, as amended by the Family Law Amendment (Shared Parental Responsibility) Act of 2006, provides that all persons who have a dispute about children must make a "genuine effort" to resolve that dispute by family dispute resolution before they can litigate.

The potential benefits of such a law aside, FamilyResolve allows parties to participate in a live, three-party videoconferencing session using a link sent via e-mail in satisfying this requirement. Further, with the use of technology, the mediator has a considerable range of options to help control the mediation session, options which would not otherwise be available in a face-to-face meeting. According to FamilyResolve's website, "The mediator has the technical capability to allow both parties equal speaking time, to mute a party, so the other party can speak uninterrupted, as well as hide [a] participant's visual webcams."

This is quite a shift from face-to-face mediation and begs the question if a mediator should be able to press the "mute" button or "hide" one of the parties to a mediation.

Susan L. Brooks offers an assessment of ODR in her article "Online Dispute Resolution and Divorce: A Commentary" published in the ABA's Winter 2015 edition of *Dispute Resolution Magazine*. Brooks observes that "ODR seems like



caucusing, in that the parties are separated by distance and the mediator is dealing with them one at a time. When used excessively, caucusing eventually becomes something other than mediation and bears similarities to traditional adversarial processes."

Brooks says that, "even if the parties think, perhaps accurately, that being in different rooms or having time and space between their communications would be more comfortable or less emotional for them, the lack of face-to-face contact may nevertheless detract from their opportunity to have the mediation process work in a transformative way."

How participants and the mediator should interact with each other online is but one question to answer when it comes to ODR for family law disputes. Many others exist, such as what about Artificial Intelligence (AI)?

IBM's Watson is seen participating in a group therapy session in a recent television commercial featuring Star Wars' actress Carrie Fisher. While Fisher, the human, plays the part of the therapist who runs the group and Watson and other robots are the group members, the inverse could soon be with us — and it could be more effective for us humans.

Tell it to the avatar

We are being primed for the next stage in the human-machine interface. What happens when we humans speak with a computer — through an "avatar" — may not be exactly what we expected.

In a research study described in *The Economist*, half of the participants were told (truthfully) they would be interacting with an artificially intelligent virtual human. The others were told (falsely) that the avatar (named Ellie) was not truly artificially intelligent, but controlled by a human being, "a bit like a puppet, and was having her strings pulled remotely by a person." The study was discussed in "The Computer will see you now," in the Aug. 16, 2014, issue of the magazine.

Remarkably, those who thought they were really dealing with another human were less forthcoming. Thinking they were truly speaking with an artificially intelligent avatar, however, made them more open, honest, and willing to disclose personal information.

Could this happen in mediation of a family law dispute? Could an AI avatar mediator enable more open and honest discussion between humans, creating improved chances of finding that "win-win" solution?

Technology is — and will continue to be — "disruptive" and "transformative," forcing changes to current methods and established norms. Its effect on family law mediation will be no different.

As of 2014, online dispute resolution has its own international journal, surely a milestone in development of this problem-solving tool.

"Over time, it will be clear that ODR is not simply a more efficient process than ADR," just as practitioners realized that alternative dispute resolution was not simply a more efficient approach than what happened in court, according to a contribution by Orna Rabinovich-Einy & Ethan Katsh to the 2014 inaugural *International Journal of Online Dispute Resolution*. "ADR involved not only new tools and techniques, but different assumptions, principles and values, and so will ODR," the authors said.

Even without a "finish line" to struggle toward, lawyers can look to the principles and values that continue to motivate them to serve their clients, in order to make the best use of this developing technology.

Christopher H. Macturk, who practices with Barnes & Diehl, is a past president of the Henrico County Bar Association and the Metro Richmond Family Law Bar Association, and a Fellow of the American Academy of Matrimonial Lawyers. He can be reached at cmacturk@BarnesFamilyLaw.com.