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# Dot-Com Justice

CAN DISPUTE RESOLUTION WORK  
WITHOUT FACE TIME?

by Josh Brodesky

**A**s ecommerce weaves its way into the fabric of everyday business, it's not surprising that e-troubles quickly follow.

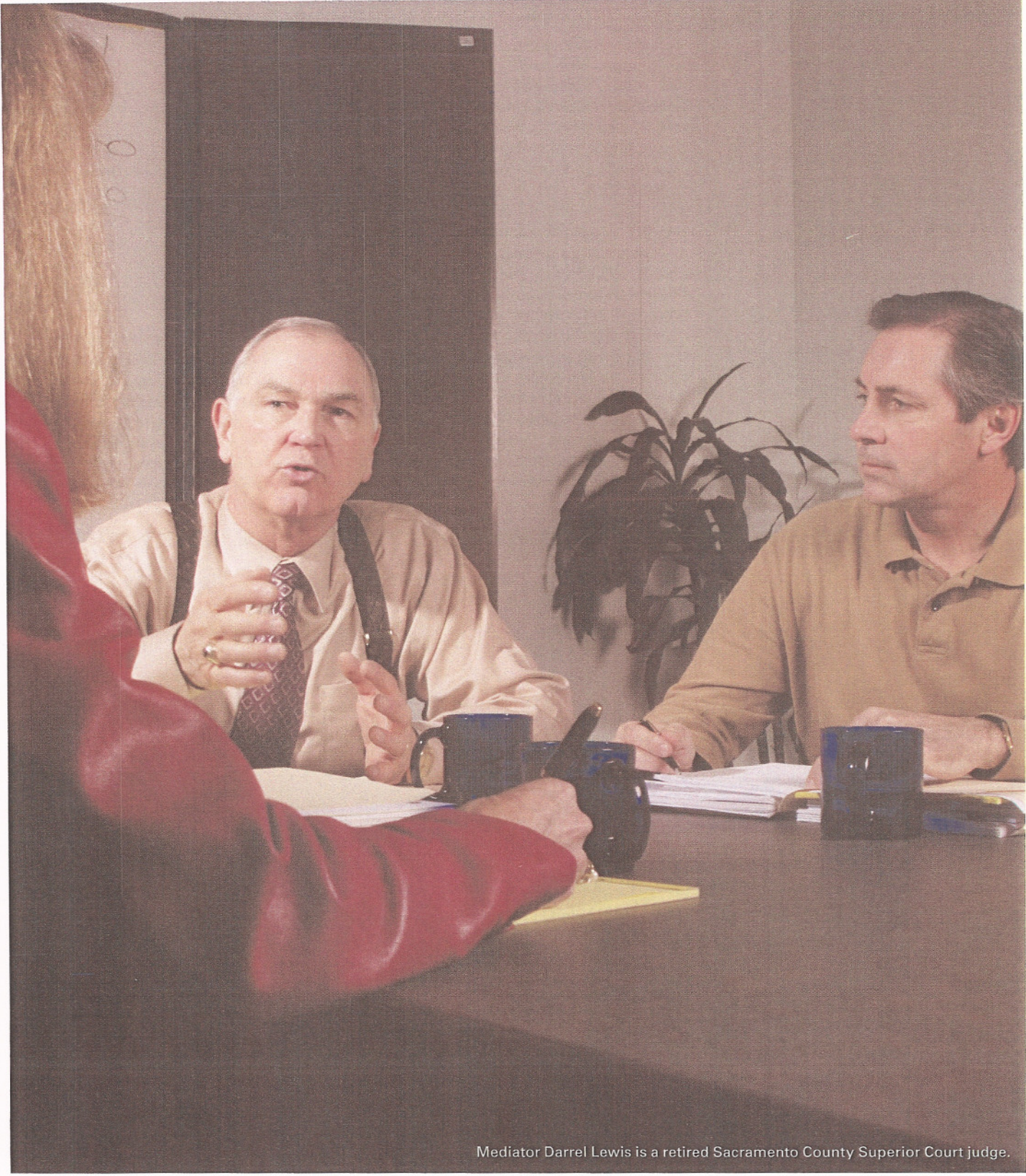
For years now, mega websites like San Francisco-based eBay have sought to provide affordable and quick settlements through online mediation for disputes between buyers and sellers. These disputes are generally small, ranging from complaints about shipping and product quality to damaging a seller's reputation by posting an inaccurate rating.

With buyers and sellers often in two different locales and most online purchases relatively minor — averaging about \$150, according to online payment company VeriSign — online dispute resolution provides an affordable way to serve justice. This is especially true for those disputes that aren't likely to see the inside of a courthouse, much less a traditional mediation firm.

But as online dispute resolution becomes a fast-growing business, some of its practices are finding ways into traditional arbitration and mediation settings.

In many arbitrations, documents are now shared on secure websites that the parties can access. Some mediators are now willing to communicate with parties





PHOTOS: TERENCE DUFFY

Mediator Darrel Lewis is a retired Sacramento County Superior Court judge.

“I would hate to have justice be conducted without a human being.”

— Daniel Yamshon, mediator and arbitrator

via email, chat rooms and even instant messaging.

Such methods save time and money, but a number of traditional mediators also worry these impersonal options undermine the mediation process. Here, parties can meet in person and listen to one another, thereby cutting to the psychology and emotions behind the dispute. This level of understanding, many experts say, is more important than the monetary outcome.

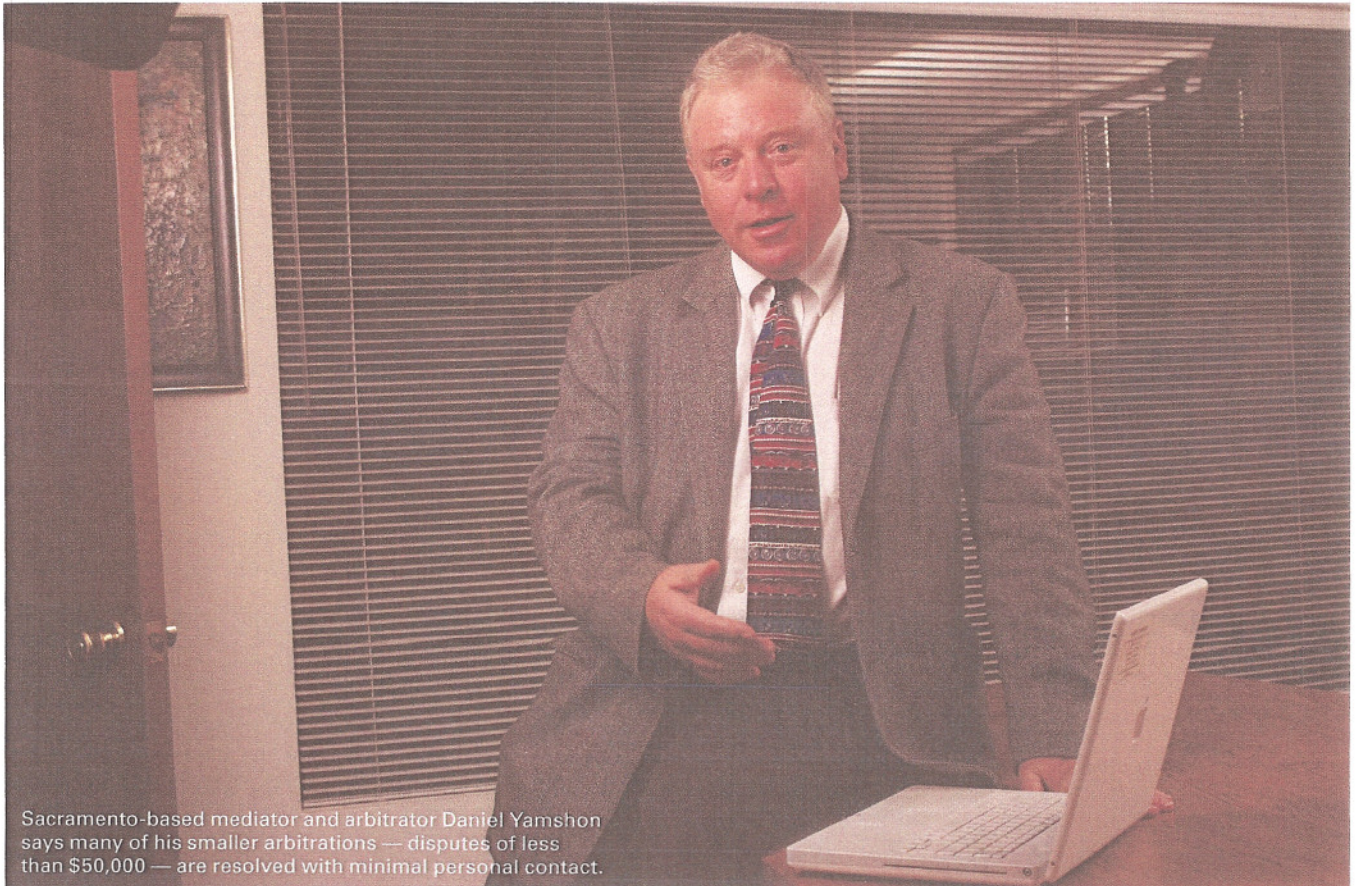
“What a good mediator brings to the table is an ability to communicate with different people of different backgrounds; being able to figure out what’s really going on; giving the parties an opportunity to vent, explain or be heard; then helping them to an agreement,” says mediator Darrel Lewis, who is also a retired Sacramento County Superior Court judge. “A computer just can’t do that.”

Such a perspective is one shared by a number of mediators, both in the Capital Region and across the U.S. But

In 2006, the American Arbitration Association handled 137,000 cases, including 3,100 Web-based filings that totaled \$900 million in claims. Online filings had more than doubled from the previous year. From 2001 to 2005, parties filed nearly 6,900 cases online with the association, totaling more than \$2.4 billion in claims.

Sacramento-based mediator and arbitrator Daniel Yamshon says, like it or not, the new technologies will be playing a role in the future of dispute resolution.

Already, he says, many of his smaller arbitrations — disputes of less than \$50,000 — are being done without much, if any, face-to-face contact. Documents and statements are filed to a



Sacramento-based mediator and arbitrator Daniel Yamshon says many of his smaller arbitrations — disputes of less than \$50,000 — are resolved with minimal personal contact.

secure website and then reviewed. Any needed testimony can be done by telephone conference — something that's particularly helpful for national and international disputes.

The American Arbitration Association, he says, has set up a secure website where parties can file documents for third-party review. "I think we will see more and more movement in that direction," he says. "As far as I'm concerned, it's a great leap forward in terms of documentation."

While he isn't necessarily a proponent of using tools like email and instant messaging for parties to communicate, Yamshon says he will use such 21st-century means of communicating if the two sides request it. For smaller disputes, these informal measures are a good fit. "I think you have to pick and choose the technology, according to the needs of a specific case," he says.

Eventually, Yamshon says he sees mediation and arbitration using Web cams as a way to bridge the gap between the expedience of technology and the power of personal testimony, which comes with seeing a person or hearing a crack in someone's voice. "The closer you get to a live presence, the more subtleties you get," he says. "There is no doubt about that."

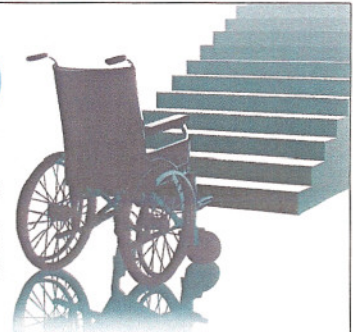
Online dispute resolution — a term that refers to Internet-based arbitration and mediation — has grown the past decade. Like so many other Internet niches, there are a handful of Web-based companies that dominate the business of settling e-disputes.

Many of these companies, like New York-based Cybersettle Inc., essentially take bidding offers from the two parties. Cases are usually settled when the demand is less than the offer. Or, if the offer and demand are within a certain range of each other, the difference is split.

But these settlement sites are also growing in complexity, gradually taking on the nuances that can be so crucial to larger disputes. SquareTrade — the San Francisco-based eBay — uses secure websites where the parties make their cases. These are monitored by professional mediators, so when either side

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“The key element here is the world is becoming more comfortable with technology.”

— *Ethan Katsh,*  
*director, National Center for*  
*Technology and Dispute Resolution*

needs to respond or provide more information, they get an email from a mediator to go to the confidential website.

“It’s all the things that a mediator would do in person, but utilizing the tools to their advantage to address the issue,” says Steve Abernethy, SquareTrade’s president and CEO.

Since SquareTrade went online in 2000, it has handled roughly a million disputes. Abernethy acknowledges the criticisms by traditional mediators — such as the parties not seeing one another — but says the form is perfect for disputes over Internet transactions. And the fact that people don’t see one another has advantages, such as less stress and emotion while also making for a quicker process. “It’s a proportional solution to the problem,” he says. “It’s all relative.”

While online mediation has been successful in the quick turnaround of settlements, it has done little to instill

buyer confidence, says Fred Galves, a professor at the McGeorge School of Law.

One of the reasons online purchases are relatively minor is the chances of getting hosed are much higher, he says. And while mediation can be successful, both parties still have to come to an agreement, so it’s not a guarantee that an agreement will be reached.

Consumers will continue to make smaller purchases on the Internet, Galves says. “They are sort of unsure. They lack assurances that the Internet is a place where contracts can be enforced.”

The solution, Galves says, is to take dot-com justice one step further than mediation, bringing online arbitration models to websites like eBay or Amazon, as well as to court systems.

Unlike online mediation, online arbitration would guarantee a third-party

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Nancy Cornelius, program manager, Sacramento Mediation Center

settlement because the two sides would agree to it before things go awry, Galves says. "The limitation of mediation is, in the end, the two parties still have to agree. If they don't, we are right back to square one," he says.

Galves is partnering with Sacramento attorney David Allen to create an online arbitration platform. The two

have had cursory talks with eBay, Galves says. Essentially, the buyer and seller would agree to arbitration before the sale, presumably when the relationship is fine. Knowing that a third party will ensure a settlement — whether the two parties like the outcome or not — would give buyers the confidence to make larger purchases.

"If you know there is a third-party arbitrator out there that you are both agreeing to, you are more likely to live up to your end of the bargain," Galves says. "So, hopefully, the idea is that there won't be as many disputes. To the extent that there is a dispute, it's sort of like insurance."

While online arbitration might be a way to handle disputes over larger sums, Galves says computers and artificial intelligence will be used more for minor disputes, such as transactions under \$25.

Essentially a program could be written that would ask a series of yes-or-no questions that would apply to nearly all online sales. The outcome would then be a matter of a formula. But that idea is a little too sci-fi for even the most cutting edge mediators and arbitrators to embrace.


"I'm sure you could make a program that would be set up with truth tables and tautologies," Yamshon says. "But the problem is you may have something that would be fair 90 percent of the time, but you have lost that human element. ... I would hate to have justice be conducted without a human being."

At this juncture, the field of dispute resolution — like many other industries — is caught between old and new technologies. And questions about what the application of new technologies means for the process of settling disputes and the quality of work it brings.


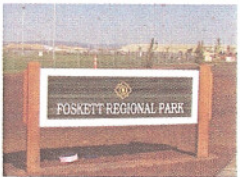

Not surprisingly, Abernethy of SquareTrade dismisses the idea that online arbitration could handle disputes better than online mediation. "We believe it's not going to work for the majority of cases, and it's going to be much more controversial about making judgments" because there is no mutual agreement between the two sides.

But that's the reason Galves sees online arbitration as useful — a forced settlement from an independent third party. And there is still the skepticism of traditional mediators, who say bringing two sides together is invaluable and irreplaceable.

*continued on page 60*



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"I love the Internet, and I love email. Don't get me wrong, but I don't think it would be appropriate," says Nancy Cornelius, program manager for the Sacramento Mediation Center, which handles two-party disputes for Sacramento city and county residents.

"I think mediation is really important, and it's becoming more and more important. It saves a lot of money, but I don't think it's there yet online," she says.

But these types of discussions may just be the signs of growing pains for

"The limitation  
of mediation is,  
in the end,  
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— Fred Galves,  
professor, McGeorge School of Law

a booming business. For Ethan Katsh, the director of the National Center for Technology and Dispute Resolution, the utility of online resolution is gaining traction. It's even moving into realms far beyond disputes over Internet transactions.

For example, he says, Cybersettle recently partnered with New York City to handle claims filed against the city. These claims cover traditional disputes like sidewalk and road repairs, traffic and personal injuries, property damage and even medical malpractice.

During a two-year pilot program, the system had a settlement rate of 67 percent for cases processed within two months, Katsh says, adding that a number of federal agencies were using similar systems to settle grievances. "I think the key element here is that the world is becoming more comfortable with technology." ©

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