

# Technology's Impact: The Quest for a New Paradigm for Accountability in Mediation

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## INTRODUCTION

In the annals of the online universe, eBay's rise from an obscure website for the exchange of collectibles to a flourishing business and community with over one hundred million registered users in one hundred-fifty countries<sup>1</sup> is a familiar story. However, there is a lesser known side to eBay's success—the company's decision to endorse and offer to its users, early in its development, the services of SquareTrade, an online dispute resolution (ODR) provider, for the resolution of grievances among eBay users.

The SquareTrade story is significant for several reasons: it underscores the need for effective online dispute resolution systems in a connected society; it provides a demonstration of one context in which ODR has proven successful despite initial skepticism; and most significantly for the thesis of this Article, it affords fresh insights into what has seemed like an insoluble dilemma in the mediation world—how to reconcile the need for accountability with mediation's core features of confidentiality and flexibility.

On one level, SquareTrade reflects the need for effective mechanisms for resolving online disputes, given the increasing number of activities, commercial and social, that take place on the Internet. E-commerce has grown exponentially over the last decade, expanding

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1. eBay Global Trade, <http://pages.ebay.com/globaltrading/seller> (last visited Jan. 9, 2005).

well beyond the small-scale, niche items sold through the Internet in the 1990s to include transactions that involve a wide variety of products and services among an ever more diverse base of Internet users. In addition, the Internet has become a central arena for social interaction and the exchange of ideas. Intensive commercial and social activities inevitably result in some level of conflict. When such activities take place among strangers, the potential for misunderstandings, mistakes, and fraud is augmented. In addition, mechanisms for the swift unmediated resolution of disputes, such as ongoing relationships or reputations, are often absent.

Aware of the risks associated with one-shot online transactions, eBay has been committed to ensuring its users a safe experience from the very beginning. It offers a range of tools to its millions of users, including insurance for transactions, a feedback-rating system for buyers and sellers,<sup>2</sup> and SquareTrade's dispute resolution services. In providing ODR services through SquareTrade, eBay recognizes that its users have no real alternatives for pursuing grievances. This is because the costs associated with litigation or alternative dispute resolution (ADR) are prohibitive, given that many of the disputes are over small sums of money and that parties are often geographically distant from one another. In fact, much of the discussion in the literature has focused on this aspect of the eBay-SquareTrade effort—its importance for boosting consumer confidence and enhancing e-commerce.<sup>3</sup>

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2. Feedback ratings are given by sellers and buyers to one another as part of a mechanism developed by eBay to overcome anxiety by its users about transacting with complete strangers. Through the rating system, eBay was able to create long-term reputational stakes for buyers and sellers that have often proved more important to parties than the disputed sum in a given transaction. eBay Feedback Forum, <http://pages.ebay.com/services/forum/feedback.html> (last visited July 4, 2005).

3. See David E. Sorkin, *Payment Methods for Consumer-to-Consumer Online Transactions*, 35 AKRON L. REV. 1, 3 (2001); Lucille M. Ponte, *Boosting Consumer Confidence in E-Business: Recommendations for Establishing Fair and Effective Dispute Resolution Programs for B2C Online Transactions*, 12 ALB. L.J. SCI. & TECH. 441, 441–45 (2002); John MacDonnell, *Exporting Trust: Does E-Commerce Need a Canadian Privacy Seal of Approval?*, 39 ALBERTA L. REV. 346, 347 (2001); Miriam R. Albert, *E-Buyer Beware: Why Online Auction Fraud Should Be Regulated*, 39 AM. BUS. L.J. 575, 632–34 (2002); Richard Birke & Louise E. Teitz, *U.S. Mediation in 2001: The Path that Brought America to Uniform Laws and Mediation in Cyberspace*, 50 AM. J. COMP. L. 181, 209 (2002); Mary S. Martin, *Keep it Online: The Hague Convention and the Need for Online Alternative Dispute Resolution in International Business-to-Consumer E-Commerce*, 20 B.U. INT'L L.J. 125, 150–58 (2002); Louise E. Teitz, *Providing Legal Services for the Middle Class in Cyberspace: The Promise and Challenge of Online Dispute Resolution*, 70 FORDHAM L. REV. 985, 996 (2001); William Krause, *Do You Want to Step Outside? An Overview of Online Alternative Dispute Resolution*, 19 J.

On a second level, SquareTrade demonstrates the ways in which ODR—though significantly different from traditional ADR—can nevertheless be an effective means for addressing the types of disputes handled by SquareTrade in the eBay context. The term ODR encompasses several forms of dispute resolution, such as negotiation, mediation, and arbitration, which are offered on the Internet and are conducted through written digital communications. This contrasts with ADR services, which are typically conducted orally, in a face-to-face setting. The in-person quality of ADR has been considered essential for two reasons: (1) it allows for rich communication that includes body language, tone of voice, and silence (all of which are absent from the written format), and (2) it ensures confidentiality (while written digital communications have permanence and hence the potential to be disseminated). Both elements—the richness of communications and confidentiality of the proceedings—are among the cornerstones of ADR.<sup>4</sup>

All the same, ODR has proven successful in specific contexts, as illustrated by SquareTrade.<sup>5</sup> SquareTrade's "docket" mostly consists of discrete contractual disputes in which the parties are strangers to one another. Many of these are, as has been noted, monetary disputes over low-dollar-value transactions. As such, they tend to be less emotionally charged, and disputants tend to be relatively indifferent to confidentiality. In other cases, even where emotion runs

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MARSHALL J. COMPUTER & INFO. L. 457, 462–63 (2001); Susan Block-Lieb, *E-Reputation: Building Trust in Electronic Commerce*, 62 LA. L. REV. 1199, 1219 (2002).

4. See *infra* notes 40–55 and accompanying text for a discussion of the essential role confidentiality and flexibility occupy in mediation.

5. Other contexts in which SquareTrade is often cited include the debate over the possibility of conducting mediation online (in general or in particular contexts), the analysis of its pros and cons, and the discussion of the growth of ODR. See, e.g., Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber-Mediation Websites*, 2003 DUKE L. & TECH. REV. 4, \*3–8 (2003); Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 736 (2002); Janice Nadler, *Rapport in Legal Negotiation: How Small Talk Can Facilitate E-mail Dealmaking*, 9 HARV. NEGOT. L. REV. 223, 227 n.14 (2004); Nancy N. Dubler, "MEDISPUTE: Resolving Health Care Conflicts": *Resolving Conflicts Over Covered Services*, 5 J. HEALTH CARE L. & POL'Y 479, 491 (2002); Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal*, 7 J. TECH. L. & POL'Y 2, \*7–10 (2002); Ethan Katsh, *Online Dispute Resolution: Some Lessons from the E-Commerce Revolution*, 28 N. KY. L. REV. 810, 813–14 (2001); Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, \*4–10 (2004); Gregory P. Ewing, *Using the Internet as a Resource for Alternative Dispute Resolution and Online Dispute Resolution*, 52 SYRACUSE L. REV. 1217, 1222–24 (2002); Beatrice Baumann, *Electronic Dispute Resolution (EDR) and the Development of Internet Activities*, 52 SYRACUSE L. REV. 1227, 1232–36 (2002).

high or confidentiality is a pertinent concern, the de facto lack of alternatives for the pursuit of such grievances, combined with incentives created by both eBay and SquareTrade, render ODR an attractive choice for disputes that originated on eBay.

Lastly and most importantly, the SquareTrade experience points to new possibilities for addressing one of the most difficult problems in the mediation world—the accountability dilemma. This dilemma stems from the fact that accountability hinges on transparency and structure,<sup>6</sup> while mediation’s strength is drawn, to a large extent, from its confidentiality and flexibility.<sup>7</sup> Traditionally, flexibility and confidentiality have been perceived as preventing the collection of real-time information on mediation proceedings and producing vague and overly broad standards for mediator performance. Therefore, it has been difficult to direct mediator performance *ex ante* and monitor the quality of mediation services delivered *ex post*—elements essential for generating accountability.

This Article addresses SquareTrade’s contributions to the longstanding accountability dilemma in mediation. Much of the literature on ODR and accountability has overlooked technology’s potential for enhancing accountability<sup>8</sup> and has viewed the delivery of dispute resolution services online as creating an accountability deficit because of the absence of regulation and accepted standards in the field.<sup>9</sup> However, as explained further below, the existence of regulation or the adoption of voluntary standards does not guarantee accountability in mediation. What is required is a paradigm shift.

In the Parts that follow, I will describe the SquareTrade system, elaborate on the nature of the accountability problem, and briefly sketch traditional approaches for addressing it. I will then examine the features of the SquareTrade system that have allowed it to deal with the dilemma in a different, more effective manner. I will conclude with some thoughts on the potential and limitations of the

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6. See *infra* note 30 and accompanying text.

7. See *infra* notes 40–50 and accompanying text.

8. This is not to claim that technology necessarily enhances accountability. However, technology makes information recording and analysis inexpensive and effortless and introduces an element of structure that can set limits on decision-maker discretion (see *infra* Part I.C).

9. See Lucille M. Ponte, *Throwing Bad Money After Bad: Can Online Dispute Resolution (ODR) Really Deliver the Goods for the Unhappy Internet Shopper?*, 3 TUL. J. TECH. & INTELL. PROP. 55, 87–88 (2001); Ponte, *supra* note 3, at 479–81 (2002); Teitz, *supra* note 3, at 1009–16 (2001); Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J.L. & TECH. 71, 86–93 (2004).

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SquareTrade accountability paradigm for other contexts, on- and off-line, focusing on a recent initiative by Safe Horizon, a leading New York-based community mediation center.

I. THE SQUARETRADE EXAMPLE: TESTING OUR CURRENT  
FRAMEWORK OF ACCOUNTABILITY

A. *The SquareTrade Dispute Resolution System*

SquareTrade is a private, for-profit ODR provider established in 1999. It views its role as establishing trust in online transactions by providing an effective means for the resolution of individual disputes.<sup>10</sup> Even though SquareTrade's services are not offered exclusively to eBay users, eBay disputes have been by far the most numerous among SquareTrade's impressive caseload:<sup>11</sup> over one million disputes spanning one hundred-twenty countries to date.<sup>12</sup>

SquareTrade deals with "disputes involving non-delivery of goods or services, misrepresentation, improper selling practices, un-honored guarantees or warranties, unsatisfactory services, credit and billing problems, unfulfilled contracts, etc."<sup>13</sup> These disputes typically arise out of discrete contractual transactions, i.e., transactions that are short-lived and terminate upon the performance of clearly defined and planned obligations.<sup>14</sup> In such exchanges, there is little interdependence between parties, risks and benefits are sharply divided, and parties' relationships involve limited aspects of their personalities.<sup>15</sup> Since parties to discrete transactions typically have little long-term stake in the transactions (such as reputation or an ongoing relationship with their counterpart), they usually focus on uncovering the source of the problem and identifying conditions under which the agreement can either be completed or revoked

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10. About SquareTrade, <http://www.squaretrade.com> (follow "About Us" hyperlink) (last visited Apr. 5, 2005).

11. SquareTrade does not handle disputes between users and eBay, only between sellers and buyers on eBay.

12. See About SquareTrade, *supra* note 10.

13. What Types of Disputes Does SquareTrade Handle?, <http://www-stage.squaretrade.com/cnt/jsp/hlp/odr.jsp;jsessionid=2kv0enfn32?vhostid=tornado&stmp=squaretrade&cntid=2kv0enfn32&apid=2am5w9pch1&cate=1&ques=7> (last visited Jan. 9, 2006).

14. See Ian R. Macneil, *Economic Analysis of Contractual Relations: Its Shortfalls and the Need for a "Rich Classificatory Apparatus"*, 75 NW. U. L. REV. 1018, 1027 (1981).

15. See *id.* at 1031–36.

rather than on seeking a creative resolution. This is even more pronounced when they are transacting globally and the amounts in dispute are small. However, in the eBay-SquareTrade case, some of the characteristics of discrete transactions are blunted by a variety of tools that create long-term stakes for eBay users—tools that transform users from mere one-time buyers and sellers to members of a virtual community.<sup>16</sup>

The first stage of SquareTrade's dispute resolution system consists of an automated negotiation platform, offered to eBay members free of charge. A party initiates the automated process by filling out an online complaint form.<sup>17</sup> The complainant can choose from one of several descriptions of the type of problem she is facing and/or fill out an open-space box with a description of a problem that is not captured by the pull-down menu options. In addition, the complainant is asked to select one or more solutions to which she would be amenable. Again, there is both a pull-down menu and an open-text box. The system then e-mails the other party, providing basic information regarding the complaint and SquareTrade's ODR services. The respondent is invited to pick a solution by choosing one of several options presented on the response form or by suggesting an alternative. The product, thus, is a technological hybrid of negotiation and mediation. Technology intervenes in the negotiations between the parties and, by allowing parties to formulate and reformulate the problem and the solution, performs some of what would be associated with a mediator's role, moving the parties from a problem mode to a solution stance.<sup>18</sup> The automated negotiation process has proven highly successful, resolving eighty percent of the disputes it has processed.<sup>19</sup>

In the second stage, those disputes not resolved through automated negotiation are referred to online mediation, a process in which an in-person mediator attempts to resolve the dispute through asynchronous e-mail communications with the parties. SquareTrade employs some two hundred mediators<sup>20</sup> from over fifteen countries in

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16. See *supra* notes 2–3 and accompanying text.

17. SquareTrade Dispute Resolution Overview, [http://www.squaretrade.com/cnt/jsp/odr/learn\\_odr.jsp;jsessionid=9dv3rzgq32?vhostid=chipotle&stmp=squaretrade&cntid=9dv3rzgq32](http://www.squaretrade.com/cnt/jsp/odr/learn_odr.jsp;jsessionid=9dv3rzgq32?vhostid=chipotle&stmp=squaretrade&cntid=9dv3rzgq32) (last visited Apr. 5, 2005).

18. Interview with Nate Lipscomb, former Project Manager and Mediator, SquareTrade, in N.Y., N.Y. (Jan. 27, 2004).

19. See Patrick Barta, *Web Forum Will Weigh Nasty Property Debates*, WALL ST. J., REAL ESTATE JOURNAL.COM (July 8, 2002), <http://www.realestatejournal.com/buy/sell/agentsandbrokers/20020708-barta.html>.

20. SquareTrade Mediators, <http://www.squaretrade.com/cnt/jsp/med/mediators.jsp;jsessionid=JNs9ofthy1?vhostid=chipotle&stmp=squaretrade&cntid=JNs9ofthy1> (last visited June 19, 2005).

this enterprise.<sup>21</sup> The mediation service is offered by SquareTrade for a nominal sum of approximately thirty dollars to eBay users.<sup>22</sup> Because SquareTrade mediations can be conducted from anywhere in the world at the convenience of the parties and the mediators, they are able to accommodate time difference and conflicting work schedules, making settlement more likely. The mediator does much of what a mediator would do offline—manage the process, uncover parties' underlying interests, and lead the parties toward a mutually acceptable resolution. However, an online mediator relies on written communications that are conducted with each party separately, while traditional mediators meet face-to-face with both parties usually present. SquareTrade's mediation services, like the automated negotiation process, also have been a success in terms of settlement rates.<sup>23</sup>

In addition to its ODR services, SquareTrade offers "Seal Membership" to eBay users.<sup>24</sup> The seal, to an even greater extent than SquareTrade's dispute resolution services, is a distinctive eBay service. Under this system, SquareTrade verifies the identity and address of eBay sellers, who, in return, commit to a specified set of selling standards and pay a low fee to SquareTrade. Among other things, seal members pledge to participate in SquareTrade's ODR system should a dispute arise between them and an eBay buyer and to make a good faith effort to resolve such disputes.<sup>25</sup> The seal is an icon that is displayed by the seller's ID on eBay but remains under the complete control of SquareTrade. SquareTrade can follow trends on buyer activities and habits since these patterns are recorded when buyers click on the seal. Also, SquareTrade can remove the seal icon at any time should a seller no longer meet the requirements.<sup>26</sup> A seal

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21. Interview with Cara Cherry-Lisco, Vice-President, Dispute Resolution Services, SquareTrade, in L.A., Cal. (Nov. 21, 2003).

22. eBay Mediation Fees, [http://www.squaretrade.com/odrvcs/odr\\_pricing.jsp](http://www.squaretrade.com/odrvcs/odr_pricing.jsp) (last visited Jan. 9, 2006).

23. SquareTrade Cases, <http://flavious28.tripod.com/square.htm> (last visited June 30, 2005).

24. Recently, SquareTrade has introduced a third function called the SquareTrade SideBar, which I do not address in this Article. SquareTrade SideBar, <http://sidebar.squaretrade.com> (last visited Jan. 9, 2005).

25. SquareTrade Help, Membership Features, <http://www.squaretrade.com/cnt/jsp/hlp/seal.jsp?jsessionid=40ni9d6sz1?vhostid=bliss&stmp=squaretrade&odrid=xfjq536t31&cntid=40ni9d6sz1&cate=2&ques=5> (last visited Dec. 7, 2005).

26. Interview with Cara Cherry-Lisco, *supra* note 21.

presumably enhances a buyer's trust in a seller. Indeed, the seal program has succeeded in drawing many eBay sellers, with the seal currently appearing on over five hundred thousand eBay listings at any given time.<sup>27</sup>

The chief characteristics of the SquareTrade conflict resolution system will be fully explored below. However, even this short description of SquareTrade's modus operandi (the gathering and recording of information in particular) suffices to suggest the prospect of fresh insights into one of traditional mediation's most important dilemmas, accountability.

### B. *The Accountability Dilemma in Mediation*

Accountability constitutes an obligation to explain how an assigned mandate has been discharged.<sup>28</sup> It implies both answerability to an authority and the prospect of consequences in the event of a breach of a duty or obligation under such mandate.<sup>29</sup> More broadly, accountability measures aim to ensure that decision-makers exert power in a fair and effective manner. Accountability mechanisms typically fall into one of two categories: (1) enhanced structure for decision-makers, which limits their authority and discretion *ex ante* through guidelines and standards, yielding more consistent decision-making across cases, and (2) transparency with respect to the actions of decision-makers and the outcomes of their decisions, thereby permitting *ex post* monitoring in light of the established guidelines, which, in turn, serve as criteria for evaluation.<sup>30</sup>

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27. SquareTrade Help, Seal Program Overview, <http://www.squaretrade.com/cnt/jsp/hlp/seal.jsp?jsessionid=QTy59r6r41?vhostid=BLiss&stmp=squaretrade&odrid=M9p2ye6xd1&cntid=QTy59r6r41&memid=HVdlbn6xa1&cate=0&ques=6> (last visited Dec. 7, 2005).

28. See generally Panel on Accountability and Governance in the Voluntary Sector, Final Report, *Building on Strength: Improving Governance and Accountability in Canada's Voluntary Sector* (Feb. 1999), <http://www.vsr-trsb.net/pagvs/Book.pdf>.

29. See Martha Minow, *Public and Private Partnerships: Accounting for the New Religion*, 116 HARV. L. REV. 1229, 1260 (2003) ("Accountability . . . means being answerable to authority that can mandate desirable conduct and sanction conduct that breaches identified obligations.").

30. See Michael C. Dorf & Charles F. Sabel, *Drug Treatment Courts and Emergent Experimentalist Government*, 53 VAND. L. REV. 831, 837 (2000) ("Detailed statutes or regulations provide a reliable yardstick against which to measure implementation so as to establish the accountability of agency officials."). See also Mark Hayllar, *The Importance and Attributes of Effective Accountability Relationships*, 12 ASIAN REV. OF PUB. ADMIN. 60, 68 (2000) (stating that "[t]ypically, accountability processes include: assigning responsibilities; agreeing on goals; establishing performance criteria and standards; controlling and monitoring; rendering accounts on and reviewing results; judging; answering and explaining; rewarding, sanctioning,



Accountability can be generated through formal mechanisms—those that are derived from a legal source (superimposed fixed rules, regulations or procedures that restrict authority or mandate information disclosure)<sup>31</sup> and/or through informal mechanisms—by relying on professionalism or market forces to curb decision-maker discretion and encourage voluntary information disclosure on actions and related outcomes.<sup>32</sup>

Accountability can be internal, external, or both. Internal accountability typically promotes self-evaluation and organizational development and enhances management practices and strategic planning through internal measures and review,<sup>33</sup> while external accountability usually involves evaluation of performance and outcomes by a credible external entity (private or public) in the context of predetermined boundaries.<sup>34</sup>

Since mediation is voluntary and any resolution reached must be acceptable to all parties, it is tempting to dismiss the need for vigorous accountability measures.<sup>35</sup> However, mediators, despite lacking formal decision-making authority, nonetheless exert power by affecting parties' perceptions of a dispute, setting the agenda, exploring

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mentoring; and so on," all of which seem to fall under the two rubrics of rules and procedures on the one hand and transparency on the other).

31. See Susan P. Sturm, *Second Generation Discrimination: A Structural Approach*, 101 COLUM. L. REV. 458, 475 (1998) (describing the rule enforcement approach as a "fixed code of specific rules or commands that establishes clear boundaries governing conduct").

32. See Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1991 (1997) ("ADR professionals seek to regulate themselves through a wide variety of internal and professional association standards and protocols.").

33. See Panel on Accountability, *supra* note 28.

34. Since under my definition of formal accountability the entity involved can be either public or private, a requirement for external accountability does not necessarily call for the regulation of the field, a requirement which could impose prohibitive costs—financially and to the nature of the process. The regulation and institutionalization of mediation has been the subject of vigorous debate. For a discussion of some of the major issues relating to ADR's institutionalization, see generally Carrie Menkel-Meadow, *Pursuing Settlement in an Adversary Culture: A Tale of Innovation Co-opted or "The Law of ADR"*, 19 FLA. ST. U. L. REV. 1 (1991).

35. See Joseph B. Stulberg, *Trainer Accountability*, 38 FAM. & CONCILIATION CTS. REV. 77, 78 (2000); Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-shaping Our Legal System*, 108 PENN ST. L. REV. 165, 188 (2003) ("[L]egislatures and courts do not feel that they need to regulate mediations or mediators closely."). In this context, the discussion of NGOs' informal power and therefore of the need for NGO accountability is instructive. See generally Debora Spar & James Dail, *Of Measurement and Mission: Accounting for Performance in Non-Governmental Organizations*, 3 CHI. J. INT'L L. 171 (2002); Paul Wapner, *Defending Accountability in NGOs*, 3 CHI. J. INT'L L. 197 (2002).

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possible outcomes, and drafting the precise wording of an agreement. Many of these interventions are appropriate and helpful, but at times a mediator's influence can be harmful, unfair, or ineffectual.<sup>36</sup> Inappropriate interventions could relate to the manner in which mediators run the process (applying pressure on a party to continue negotiating under adverse conditions or running the process ineffectually by failing to schedule appointments) or handle the resolution phase (exerting improper pressure on a party to agree to a settlement offer or condoning an incomplete agreement). Aside from the potential for mediator abuse, the mediation process, by nature, eludes pattern or consistency. Because mediation is conducted on a case-by-case basis, there is the danger that similar disputes will be handled differently or that errors will go unrecognized. This runs against the natural expectation that analogous grievances will be handled similarly. In as much as pattern and consistency are conducive to both efficiency and fairness, their absence raises concern in these contexts.

To that end, professional mediators must be held accountable to parties, providers that rely on their services, relevant regulatory authorities, and the general public for the delivery of procedurally fair mediation services that meet accepted standards of mediator performance and that lead to resolutions that are voluntary and entered into on the basis of informed consent.<sup>37</sup> A breach of these obligations should result in legal, disciplinary, monetary, or reputational consequences.<sup>38</sup> Similarly, mediation providers should be held accountable to disputants, dispute referral sources, and funders for the quality of mediation services rendered by mediators employed by them. Providers also must be held accountable for their own policies and practices being fair<sup>39</sup> and for permitting quality control. If providers

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36. See Michael Moffitt, *Suing Mediators*, 83 B.U. L. REV. 147, 149–51 (2003); Sara Cobb & Janet Rifkin, *Practice and Paradox: Deconstructing Neutrality in Mediation*, 16 LAW & SOC. INQUIRY 35, 60 (1991).

37. See Joseph B. Stulberg, *The Theory and Practice of Mediation: A Reply To Professor Susskind*, 6 VT. L. REV. 85, 86, 96 (1981).

38. See Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 4 (1981) (implying that mediators who fail to meet their obligations should be held accountable, i.e., someone should “chastise, sue or fire” them).

39. A policy that permits parties to choose a particular mediator may seem fair since it is applied consistently to all disputants, but in practice could provide repeat disputants such as corporations with an advantage over their counterparts who are one-time users of the system and have no preference with respect to choice of a neutral mediator. See Carrie Menkel-Meadow, *Do the “Haves” Come out Ahead in Alternative Judicial Systems?: Repeat Players in ADR*, 15 OHIO ST. J. ON DISP. RESOL. 34, 35 (1999).

do not meet these standards, they should be denied funding and future referrals.

Thus, accountability in the mediation context requires that standards for appropriate and fair mediator practice be established and that sufficient information be collected and analyzed to verify whether such criteria are being met. These responsibilities have been translated by mediators into internal accountability measures (such as devising standards and codes of conduct and instituting training programs that set standards for mediator conduct) or, as in the case of regulated mediation services, into a combination of internal and external accountability measures (such as auditing providers' data on their caseloads, requiring that providers institute training programs, and sitting in on random mediation sessions) that strive to ensure procedural fairness, effectiveness, and informed consent by parties.

In practice, two of mediation's core features—confidentiality and flexibility—have stood in the way of establishing effective formal and informal accountability mechanisms for mediators and providers. Confidentiality in mediation typically extends to all communications made during mediation proceedings and applies to all those present in mediation sessions; it involves both secrecy<sup>40</sup> and external anonymity.<sup>41</sup> The Uniform Mediation Act provides that mediation communications are confidential to the extent agreed by the parties<sup>42</sup> or provided by other laws<sup>43</sup> and assures parties' expectations regarding confidentiality protections in subsequent legal proceedings through a mediation privilege for mediation communications<sup>44</sup> granted to

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40. Secrecy means that the information exchanged remains confidential. Orna Rabinovich-Einy, *Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age*, 7 VA. J.L. & TECH. 4, at \*13 n.12 (2002) (citing Eben Moglen's distinction among secrecy, anonymity, and control of information, all three of which are elements of informational privacy).

41. External anonymity means that outsiders to the dispute are typically kept in the dark, not only with respect to the particulars of the dispute but also with regard to the identity of the disputing parties. *See id.* at \*18, \*67. In court-annexed mediation, the existence of the dispute and therefore the identity of the parties as well as a resolution, if one is reached, are made public.

42. Parties typically sign a confidentiality agreement upon entering a mediation.

43. *See* UNIF. MEDIATION ACT § 8 (2001), available at <http://www.law.upenn.edu/bll/ulc/mediat/UMA2001.htm>.

44. A mediation communication is defined in the Act as a statement (whether oral or in a record, or verbal or nonverbal) that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator. The protected communications do not include any underlying evidence, only statements made with respect to such pieces of

parties and the mediator.<sup>45</sup> The requirement for confidentiality has been translated into a set of practices that have substantially restricted the scope of information collected and the occasions on which it can be gathered by mediators and mediation service providers. Thus, information is collected only with respect to limited criteria (such as the type of dispute, whether it was resolved or not, etc.) and is gathered mostly after the fact rather than simultaneously with the mediation.<sup>46</sup> Under these circumstances, analysis and sharing of information collected are obviously limited. Mediated resolutions, as opposed to the proceedings themselves, can be confidential or not, depending on the parties' agreement. However, even when the resolutions are not sealed, there are typically no mechanisms for their aggregation and publication and, therefore, they tend to remain unknown to those external to the dispute.

Flexibility, also an essential feature of mediation, allows the mediator to handle a wide assortment of disputes with varying circumstances and diverse disputant needs and interests. Although a mediator may follow a general procedural framework and observe minimal substantive limits, she is free to devise the process as she and the parties see fit. Hence, the mediator plays a very different role than a judge or an arbitrator, even though all are neutral third parties facilitating communication between disputants, because the mediator operates in the context of a consensual process and is not a decision-maker.<sup>47</sup> In this environment, parties enjoy lax procedures and have the power to shape substantive resolutions, opening up possibilities that extend far beyond those provided by formal law.

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evidence, and no "fruit of the poisonous tree" doctrine applies to the mediation privilege. *See id.* §§ 4–6.

45. *See* UNIF. MEDIATION ACT § 4.

46. Typically mediators fill out rather sparse forms that list the dispute type (e.g., contractual, custody), the relationship between the parties (e.g., neighbors, landlord-tenant), and the ultimate outcome. This form does not capture the dynamics of the mediation, the mediator's interventions and their impact on the mediation proceedings, or how these interventions did or did not impact the resolution of the dispute. Capturing this type of information would require either a simultaneous recording of the proceedings, which is rarely done, or having an observer present whose role is to document such dynamics, also a rare practice. Party complaints and party satisfaction surveys, both of which are dependant on party initiative and are relayed after the mediation has taken place, can be additional sources of information. *See infra* note 143, describing current information gathering practices at Safe Horizon, a leading mediation center in New York that mediates court-referred cases and community disputes.

47. *See* UNIF. MEDIATION ACT, prefatory note (2001).

It is not surprising that broad confidentiality protections and procedural and substantive flexibility have become essential components of the mediation practice. Confidentiality creates a safe haven for disputants, allowing them to bring forth disputes that they may not have been willing to pursue through formal, public avenues<sup>48</sup> and encouraging disputants, once the mediation has begun, to participate wholeheartedly and abandon strategic conduct that is driven by a fear of subsequent litigation.<sup>49</sup> Confidentiality protections are the result of a concern that the disclosure of mediation communications in subsequent adjudicatory proceedings would not only diminish parties' candor, but would also reduce the general public's trust in the process and deter future disputants from using it.<sup>50</sup>

Mediation's flexibility has not only lowered costs for disputants in comparison to litigation,<sup>51</sup> but has also answered disputants' emotional needs in providing them an avenue for dispute resolution that does not rely on lawyers or legalese, which has often labeled litigants as victims and alienated them from their own stories.<sup>52</sup> Mediation's procedural flexibility allows parties to tell their stories freely, in an uninterrupted manner, while its substantive freedom permits parties to decide whether and how to resolve their dispute, resulting in substantial party control over the dispute and its resolution.<sup>53</sup> This flexibility makes mediated resolutions more satisfying<sup>54</sup> and longer lasting.<sup>55</sup>

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48. See Mary P. Rowe, *People Who Feel Harassed Need a Complaint System with Both Formal and Informal Options*, 6 NEGOT. J. 161, 165–66 (1990).

49. See UNIF. MEDIATION ACT, prefatory note (2001).

50. See *id.*

51. See Carol A. Wittenberg et al., *Why Employment Disputes Mediation Is on the Rise*, 578 PLI/LIT 747, 750–51 (1998).

52. See KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* 109 (1988) (describing how people who have received discriminatory treatment resist legal recourse because they fear being portrayed as victims within legal discourse).

53. See Tom R. Tyler, *Citizen Discontent With Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 888 (1997); John M. Conley & William M. O'Barr, *Litigant Satisfaction Versus Legal Advocacy in Small Claims Court Narratives*, 19 LAW & SOC'Y REV. 661, 662, 665–72, 684–90 (1985).

54. The spectrum of resolutions reached in mediation is substantially broader than that offered through litigation, allowing parties to agree on remedies that are not available by law (an apology, an agreement to treat one another with respect) and devise win-win solutions (that allow, for example, for ongoing cooperation) as opposed to the "all or nothing" character of a judicial decision. See Menkel-Meadow, *supra* note 34, at 7.

55. Some studies indicate that parties are more likely to fulfill their commitments when they have devised the resolution themselves. See STEPHEN B. GOLDBERG

Despite their appeal, confidentiality and flexibility have come at a cost in terms of accountability. One challenge for the field has been how to follow and analyze mediator performance without jeopardizing confidentiality or incurring unreasonable expenses. Confidentiality and the related practices regarding information collection and sharing on mediation proceedings preclude the inexpensive options of holding open proceedings or having a record made. At the same time, in order to evaluate the proceedings and mediator conduct, a method of tracking the course of the mediation in addition to “bottom lines” is essential. The outcome is rarely a sufficient tool for evaluating the quality of mediator performance. Aside from extreme cases in which the outcome clearly reflects a mediator’s poor performance (for example, if the agreement contains an illegal element or contradicts a mediation provider’s policy against mediating in cases of domestic violence), it is difficult to evaluate the outcome of a process that is driven by party satisfaction and allows for trade-offs between legal remedies and such outcomes as apologies. It is even more difficult to establish a causal link between a voluntary outcome and the mediator’s subtle interventions that might have indirectly driven such a resolution.

Another problem is that confidentiality of proceedings and flexibility impede learning from case to case in a manner that could improve mediator practices and provider policies. The erasing of “memory” with respect to mediation proceedings encourages a case-by-case approach, in which everything is done *de novo*, and experience is rarely used for future training or revision of practices. For mediation providers, the prevailing information collection practices prevent in-depth analysis of individual cases or examination across cases that would highlight patterns of either positive or troubling trends.<sup>56</sup> For external bodies that might assess mediator behavior or

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& FRANK E. A. SANDER ET AL., DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 182–83 (1999).

56. With respect to troubling patterns, see NO ACCESS TO LAW: ALTERNATIVES TO THE AMERICAN JUDICIAL SYSTEM 67 (Laura Nader ed., 1980) (“Confidentiality of complaints, in a market where it is impossible for the consumer to be adequately informed through word of mouth, prevents consumers from being able to learn from the experience of others.”); Sturm, *supra* note 31, at 468–69; NANCY N. DUBLER & CAROL B. LIEBMAN, BIOETHICS MEDIATION: A GUIDE TO SHAPING SHARED SOLUTIONS 217 (2004). As for positive trends, SquareTrade has also drawn on mediation records to identify exceptionally skillful mediators. SquareTrade has also, on occasion, requested that successful mediators contribute to its training materials. Interview with Cara Cherry-Lisco, *supra* note 21.

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punish sub-par performance—in other words, ensure accountability—the “erasure” of past mediation proceedings, along with the lack of enforceable standards, represents a crippling encumbrance.

The accountability measures that have emerged in the context of publicly funded community mediation centers and providers that handle court-referred disputes reflect these difficulties. Such providers and mechanisms are subject to external accountability through formal and informal measures, such as training and certification requirements, evaluation of mediation services by funders and referral sources, mediator liability, and reputation. However, these measures have been largely ineffective because they have been implemented in a confidential and flexible setting that has permitted only the collection of limited, after-the-fact information, thereby eschewing consistency, improvement, and learning from one dispute to another. Under these conditions, there have been few incentives for mediators and providers to deliver high-quality services or to improve them over time.

Even these limited formal measures are absent from the private arena, where mediators and providers are subject only to informal market accountability mechanisms. Interventions by such mediators often occur on a one-time basis, and there are insufficient “moral, legal and economic pressures”<sup>57</sup> to ensure their accountability.

Examples of the deficiencies of existing accountability measures in the mediation field are abundant. For instance, evaluations of mediation services—both internally (by providers) and externally (by funders)—typically revolve around the partial data that is available, namely resolution rates and party satisfaction surveys, both of which are of limited use in evaluating mediator performance. Parties, for a variety of reasons, can be poor evaluators of mediator performance,<sup>58</sup> and resolution rates do not necessarily reflect high-quality mediation services. To the contrary, in certain cases, it is actually preferable and fairer that an agreement not be reached.<sup>59</sup>

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57. See Susskind, *supra* note 38, at 5–6 (claiming that in the case of environmental mediators, as opposed to labor mediators, there are often insufficient pressures to ensure their accountability given the one-time nature of their interventions).

58. Parties are typically emotionally involved and are rarely familiar with the goals of the processes, which themselves differ across the field, and tend to be satisfied with processes that allow them more procedural freedom—such as mediation.

59. For example, disputes in which the parties are of unequal bargaining power and any agreement reached will recreate such power distribution. In those cases in which power differences between the parties cannot be balanced, it may be preferable not to reach a mediated resolution.

Nor have lawsuits been an effective tool for guiding mediator conduct. In many states, mediators enjoy immunity from lawsuits,<sup>60</sup> but even in those cases in which they do not, proving such cases is an arduous task. In light of extensive confidentiality protections that prohibit real time information collection, it is practically impossible for a party to substantiate a claim against her mediator because of the difficulty in proving (1) that the mediator acted inappropriately in the particular instance, and (2) that such mediator's behavior deviated from the acceptable standard of appropriate mediator conduct.<sup>61</sup>

Similarly, the effort to generate accountability through professional tools, such as educational prerequisites for mediators, training programs, and ongoing certification requirements, has been weak. Because mediation providers have failed to systematically evaluate their mediators and because their efforts typically lack formal, consistently applied decertification and complaint procedures with respect to mediators, these tools often fail to motivate mediators to perform better.<sup>62</sup>

Finally, where there are no clear criteria for the evaluation of mediator conduct and almost no transparency with respect to mediator practices, there is little reason to believe that an informal reputation market would be effective. Indeed, in practice, the fact that a mediator has a heavy caseload, or that her services are consistently sought by a reputable provider, is rarely indicative of the quality of her practice and may have more to do with her availability, or relations with a mediation center's staff, than with her performance.

Against this backdrop, the SquareTrade experience could offer the basis for an alternative to the prevailing framework for accountability in the traditional mediation world that relies on formal and/or informal accountability mechanisms—that of structural accountability.<sup>63</sup>

### C. *Rethinking Accountability: Features of the SquareTrade System*

#### 1. *Generating Structural Accountability*

In the following Parts, I will analyze the features of the SquareTrade system that enable it to reconcile confidentiality and flexibility

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60. See Scott H. Hughes, *Mediator Immunity: The Misguided and Inequitable Shifting of Risk*, 83 OR. L. REV. 107, 111 (2004) (asserting that the reasoning behind mediator immunity in statutes and case law is “unsound and the results are inequitable.”).

61. See Moffitt, *supra* note 36, at 172–73.

62. See *infra* note 144 and accompanying text.

63. See Sturm, *supra* note 31, at 463.



on the one hand with accountability on the other by collecting simultaneous information on ODR proceedings, designating caretakers of information, adopting a more nuanced view of confidentiality, implementing consistency-enhancing structures, working from an embedded position within eBay, and internalizing incentives.

The system of accountability produced by SquareTrade through these features, as demonstrated in more detail in the sections that follow, can be seen as an illustration, albeit incomplete, of structural accountability at work. Structural accountability is the term used to describe a system that produces accountability through bottom-up efforts. It is generated through internal structures that encourage broad information collection and analysis. It can curb discretion, promote consistency, allow for monitoring, and create incentives for high-quality performance. It is thus distinguishable from both the imposition of rigid, predetermined rules (formal measures) and the vague nature of reputational stakes (informal mechanisms) and so can be effective in confidential and flexible settings.<sup>64</sup>

Effective structural accountability incorporates both internal and external elements. Internally, goals are defined and targets are set, processes for measuring and monitoring performance are instituted, and improvement is sought. Externally, beyond setting the general framework, particular goals and performance evaluation are audited and questioned in an additional effort to detect and remedy poor performance, misconduct, inefficiencies, and deficient policies. The SquareTrade system lacks an element of external accountability and, as such, can be characterized as a case of incomplete structural accountability.<sup>65</sup>

## 2. *Elements of Structural Accountability in the SquareTrade System*

### a. *Collecting Simultaneous Information*

An essential component in SquareTrade's accountability system is its substantial database on resolution efforts. Such a database is unparalleled in traditional mediation, mostly because of the manner in which confidentiality has been interpreted in the offline arena.

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64. See Sturm, *supra* note 31, at 463.

65. See *infra* notes 123–24 and accompanying text for an explanation of the incomplete nature of the SquareTrade system.

SquareTrade, as will be explained in more detail in the following sections, has managed to gather extensive information internally without completely foregoing confidentiality externally.<sup>66</sup> Below is a description of the types of information SquareTrade collects and an assessment of the reliability and significance of such information to SquareTrade's quality control efforts.

SquareTrade collects a vast amount of information on the services it provides, much of which is gathered in real time, simultaneously with the act of participation in the ODR process. The information is gathered and remains accessible to SquareTrade, the mediator, and the parties for up to one year.<sup>67</sup> Because ODR is conducted through written digital communications, the act of participation in ODR results in the automatic preservation of all communications exchanged during the process. For example, when two parties negotiate with one another through the automated negotiation tool, all of their discussions and any resolution reached are documented. The same applies to parties who mediate their dispute through the service.

In addition to dispute resolution data, SquareTrade collects all other correspondence exchanged between disputants and SquareTrade, information that is publicly available on eBay, and information disclosed in seal applications (including each applicant's name, e-mail address, market ID number, sales revenue, credit card number, social security number, and business references) and in the user registration form (including such details as name, e-mail address, and market ID number).<sup>68</sup>

At the conclusion of the dispute resolution process, SquareTrade records "Resolution Behavior Information," which is comprised of information on whether a party participated in the process to completion, whether an agreement was reached, whether the party accepted or rejected a mediator's recommendation, and, with respect to a respondent, whether the person had been involved in multiple cases of this type.<sup>69</sup>

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66. See *infra* Part I.C.2.c ("Adopting a Nuanced View of Confidentiality").

67. E-mail from Cara Cherry-Lisco, Vice-President, Dispute Resolution Services, SquareTrade, to author (Apr. 4, 2005, 17:41:32 EST) (on file with author) (stating that generally, SquareTrade does not maintain case records which are more than one year old).

68. SquareTrade Privacy Policy, [http://www.squaretrade.com/cnt/jsp/lgl/user\\_conf\\_agree.jsp?vhostid=chipotle&stmp=squaretrade#conf\\_infocollect](http://www.squaretrade.com/cnt/jsp/lgl/user_conf_agree.jsp?vhostid=chipotle&stmp=squaretrade#conf_infocollect) (follow "Information We Get" hyperlink) (last visited Apr. 5, 2005).

69. *Id.*

Additionally, SquareTrade tracks and analyzes “user site usage”<sup>70</sup> (e.g., users’ behavior—how they navigate, whether they tend to drop out on certain pages) so as to improve the content and design of the site and customize SquareTrade’s services. All information gathered is stored in a secure database.<sup>71</sup>

Thus, SquareTrade’s information base is significantly richer and more credible than that of traditional mediation providers and mediators.<sup>72</sup> Offline, mediation providers generally collect information at the end of the mediation process. This method of gathering information is problematic for two reasons. First, parties’ and mediators’ ex post recollections of the proceedings can be unreliable and deficient as a source for assessing mediation dynamics, particularly when dealing with emotional disputants. Second, psychological dynamics affect disputants’ impressions of the process. Research has shown that disputants tend to be satisfied with proceedings that are flexible and allow them more voice and control (such as mediation), even if the outcome is to their detriment.<sup>73</sup> For this reason, parties may be content with the mediation process even in those cases where an external examination of the proceedings would detect improper mediator conduct or unfair procedures.<sup>74</sup> Many parties do not know enough about the mediation process and the standards of conduct for mediators to evaluate, as party satisfaction surveys sometimes request them to, whether the mediator’s performance was appropriate.<sup>75</sup> In addition, user satisfaction surveys and disputant complaints, one of the channels for information gathering in traditional mediation, are dependent on disputant initiative. Individuals who have a low probability of becoming repeat users of these services have little incentive to devote their time to filling out these forms. In contrast, real time information is broad enough to allow judgment of mediator interventions in the context in which they were made, and

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70. SquareTrade Privacy Policy, *supra* note 68.

71. *Id.* (follow “Security” hyperlink) (last visited Apr. 5, 2005).

72. Interview with Nate Lipscomb, former Project Manager and Mediator, SquareTrade, in N.Y., N.Y. (Nov. 4, 2003) (stating that parties and mediators can examine the “shared history, shared memory” of their dispute).

73. See Conley & O’Barr, *supra* note 53; Tyler, *supra* note 53.

74. See Jacqueline M. Nolan-Haley, *Court Mediation and the Search for Justice Through Law*, 74 WASH. U. L.Q. 47, 69–71 (1996).

75. For example, one survey distributed by Safe Horizon asks parties whether the mediator explained the process clearly, took sides, or pushed the party into entering the agreement (Mediation Client Survey, Safe Horizon (on file with author)). In egregious cases parties could detect such conduct, but in many instances these acts of misconduct are subtle moves, indiscernible to disputants (survey on file with author).

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it is reliable enough so as not to be shaped by memory lapses, emotional condition, or knowledge deficiencies.

b. *Designating Caretakers of Information*

The mere collection of information does not ensure accountability. It is the analysis of the information that allows mediation providers to detect problems, such as the incompetence of a particular mediator, major differences in the types of resolutions reached across similar cases, or inefficiencies. However, the analysis need not be limited to uncovering problems; it can also highlight effective ways of addressing deficiencies and bring to light successes. In SquareTrade's case, ongoing analyses of information, and a commitment to act on it, have enabled the company to improve its services and training program. From its inception, SquareTrade has employed a full-time employee devoted to data analysis,<sup>76</sup> and a regular part of the dispute resolution team's work has involved producing internal reports that are based on collected data. As the Vice President of Dispute Resolution at SquareTrade states: "[W]e've always looked at data at regular steps to analyze and figure out how to improve the product, so regular reporting has always been a feature of SquareTrade internal operations. Reporting on volume . . . reporting on the settlement rates, reporting on the utilization of mediators, reporting on the quality of mediators' work."<sup>77</sup>

Having caretakers of information has helped SquareTrade improve its mediation services as well as the design of its website and product. SquareTrade can study information per mediator<sup>78</sup> so as to detect patterns and to discern good from bad mediators and effective from unsuccessful interventions and techniques. New mediators always receive supervision and instruction during their first few mediations, which are closely monitored.<sup>79</sup> In the case of more experienced mediators, records are accessed if reports indicate that there might be a problem with a particular mediator or if complaints

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76. Telephone Interview with Cara Cherry-Lisco, Vice President, Dispute Resolution Services, SquareTrade (Oct. 23, 2003).

77. *Id.*

78. Interview with Nate Lipscomb, *supra* note 72.

79. Interview with Cara Cherry-Lisco, *supra* note 21 (describing SquareTrade's supervision practices over new mediators, under which such mediators "[will] get an initial batch of five cases and either our head mediator or we've had other trainers in the past will supervise those cases and check in on them daily and write messages to the mediators saying 'you missed this' or 'what about this' or 'what about the language that you chose' and then they'll answer questions. Very hands on, very closely supervised and at the end of that or during that we will identify whether we're comfortable with this person handling cases or we feel like they will pick it up").

are received from consumers.<sup>80</sup> In addition, automatic processes flag certain cases to SquareTrade's attention as part of its efforts to ensure adequate mediator performance.<sup>81</sup>

SquareTrade's caretakers of information discovered that its users experienced informational deficiencies regarding the nature of the mediation process (for example, expecting mediators to render a binding decision) as well as with respect to the technical aspects of the SquareTrade system (such as the procedure for having a mediator assigned to their case).<sup>82</sup> Typically, SquareTrade learned of these issues through its mediators, who had to deal with such misunderstandings repeatedly, or through direct communication from its users.<sup>83</sup> Also, by following user site usage, SquareTrade became aware that some of the site's content was unclear or complicated and caused users to drop off.<sup>84</sup> SquareTrade addressed these problems by clarifying content on its own website as well as by providing information and instruction on the eBay site.<sup>85</sup>

One of the most interesting examples of SquareTrade's learning process involves the refinement of its automated negotiation device. Initially, SquareTrade expected most of its disputes to be standard consumer-vendor disagreements of the kind seen in brick-and-mortar stores, and prefixed options in its automated process reflected this expectation. However, SquareTrade soon realized through its analysis of user input in its site's free-text boxes,<sup>86</sup> that it had completely missed one of the most frequent dispute types—feedback rating disputes. It was the information supplied by users that signaled to SquareTrade that a new case type existed and needed to be identified in the automated process options.<sup>87</sup> This is a good illustration of SquareTrade's ability to learn, through its institutionalized processes and designated caretakers for information analysis, how to improve its product and deliver better services to its users.

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80. Interview with Cara Cherry-Lisco, *supra* note 21.

81. Telephone Interview with Cara Cherry-Lisco, Vice-President, Dispute Resolution Services, SquareTrade (Sept. 25, 2003).

82. Interview with Nate Lipscomb, *supra* note 72. Telephone Interview with Cara Cherry-Lisco, Vice-President, Dispute Resolution Services, SquareTrade (Oct. 30, 2003).

83. Interview with Nate Lipscomb, *supra* note 72.

84. *Id.*

85. *Id.*

86. As mentioned above, complainants and respondents filling out the online forms that constitute the automated negotiation process can either choose one of the prefixed options for problem and solution types or fill out an open-text box. *See supra* note 17 and accompanying text.

87. Interview with Cara Cherry-Lisco, *supra* note 76.

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*c. Adopting a Nuanced View of Confidentiality*

In the traditional mediation world, confidentiality has been broadly interpreted. Confidentiality has been understood to cover all mediation communications. Applying to all those present, it prevents mediation providers from collecting information even for internal purposes and bans information sharing by providers with respect to the content of mediation proceedings, except for such aggregate statistics as number of cases handled and resolution rates—hardly satisfactory indicators of the quality of the services rendered.<sup>88</sup>

SquareTrade's approach reflects a more nuanced view of confidentiality, one that distinguishes between internal and external secrecy and, with respect to external secrecy, further distinguishes among the various participants in their freedom to disclose information. This approach has led to broad internal information collection, allowing caretakers to analyze that information as described previously.

SquareTrade has reserved the right in its privacy policy to share certain information with external individuals, entities, and the general public.<sup>89</sup> For example, SquareTrade may disclose dispute resolution and agreement information to a marketplace such as eBay for enforcement purposes as well as aggregate information that is not personally identifiable.<sup>90</sup> Furthermore, SquareTrade states in its privacy policy that it will disclose information if required to do so by a court or for criminal and fraud investigations.<sup>91</sup> Finally, since SquareTrade views building trust in transactions as essential, it may disclose to the public "Resolution Behavior Information" (but not the content of a mediation or its resolution). To date, SquareTrade has chosen to disclose very little information to the public, sharing only

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88. See *supra* notes 55–56 and accompanying text.

89. SquareTrade's Privacy Policy, [http://www.squaretrade.com/cnt/jsp/lgl/user\\_conf\\_agree.jsp?jsessionid=9dv3rzgq32?vhostid=chipotle#conf\\_disclosure](http://www.squaretrade.com/cnt/jsp/lgl/user_conf_agree.jsp?jsessionid=9dv3rzgq32?vhostid=chipotle#conf_disclosure) (follow "Our Use and Disclosure of Your Information" hyperlink) (last visited Apr. 5, 2005). It is difficult to compare SquareTrade's information collection and sharing practices with those of other ODR sites policies because privacy policies and approaches to confidentiality vary significantly. See Melissa Conley Tyler, *115 and Counting: The State of ODR 2004*, <http://www.odr.info/unforum2004/ConleyTyler.htm> (last visited Sept. 30, 2005) ("[M]ost ODR sites have explicit policies on privacy that tell users what use can be made of their personal information. Some sites delete all information on a case from their database once settlement has been reached (Bankers Repository Corporation) while others can store it in case of the disputant losing data (Intersettle).").

90. SquareTrade's Privacy Policy, *supra* note 89.

91. *Id.*

aggregate information—such as dispute volume and settlement rates—relating to its dispute resolution services.<sup>92</sup>

Several other characteristics of the SquareTrade system contribute to its fluid conception of confidentiality, resulting in more external and internal sharing of information. Externally, SquareTrade users, unlike parties in traditional mediation, are not restricted from sharing dispute resolution information.<sup>93</sup> Even though parties in offline mediation could breach their confidentiality obligation—or, if they did not enter into an agreement, could share such information—it seems that sharing written communications is more revealing than recounting oral conversations. Also, there is potentially more internal information sharing between parties on the SquareTrade system than offline. Since SquareTrade's mediation communications are always conducted with one party at a time, there is no distinction between joint and private sessions as exists in traditional mediation. SquareTrade mediators assume that a party's communications can be shared with the other side unless instructed otherwise.<sup>94</sup> Offline, a mediator generally checks in with a party at the end of a private session to determine what information can be shared with the other party.

Perhaps it is not surprising that SquareTrade operates on more relaxed notions of confidentiality. As stated above, the typical eBay dispute concerns technicalities and does not produce tensions and emotions that require a confidential setting for its resolution, as do, for example, disputes involving trade secrets or sexual harassment.<sup>95</sup> Also, it seems fair to say that parties' expectations for privacy when operating online are lower than in a private mediation room, given the nature of the respective media.<sup>96</sup> This phenomenon is enhanced

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92. Interview with Cara Cherry-Lisco, *supra* note 76.

93. E-mail from Cara Cherry-Lisco, Vice-President, Dispute Resolution Services, SquareTrade, to author (Nov. 4, 2004 15:28:56 EST) (on file with author).

94. *Id.*

95. Nevertheless, we can expect attitudes toward privacy to evolve and capabilities for richer online communications to develop as technology advances. Such developments would broaden the scope of ODR disputes (*see infra* Part II.A). It is important to note that ODR already handles various types of disputes that originated offline (real estate, neighbors, family, employment). *See* About SquareTrade, <http://www.squaretrade.com> (follow "About us" hyperlink; then follow "Partners" hyperlink) (last visited Sept. 30, 2005); Tyler, *supra* note 89. *See infra* Part II.A for a discussion of this potential limitation on the applicability of the SquareTrade example to a broader range of dispute types and arenas.

96. Given the proliferation of the Internet and the frequent reporting of the unintended spread of, and access to, e-mails and other information recorded online, users have generally become more aware of the fact that these communications can never be as protected as oral encounters. *See* Beth Givens, Privacy Expectations in a High

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by SquareTrade's disclosure of its policies and practices on information collection and sharing in its privacy policy and in its ODR user agreements, both of which are easily accessible on its site, are a precondition for using its services, and are written in plain, clear language. Finally, the low probability of these disputes ever reaching a court—both because these are conflicts over small dollar amounts and because they often span geographic borders, making them difficult and expensive to pursue through litigation—almost eliminates the concern over the information on mediation proceedings being made public in a future adjudicatory proceeding, a concern that has driven much of the fear of information collection in the traditional mediation world.

d. *Implementing Consistency-Enhancing Structures*

SquareTrade has introduced consistency to the practice of mediation through a variety of means that have included substituting some mediator interventions with automated processes and equipping mediators with a range of resolution templates. These means have enhanced structure—an essential component of accountability—with minimal cost to the process's flexibility, a combination that has seemed unworkable in the past.

SquareTrade's automated process has increased consistency by instituting an element of dynamic structure. The automated process is engineered to substitute for some of the functions traditionally performed by an in-person mediator through moving parties from a problem mode to a resolution-oriented one.<sup>97</sup> The preset options create a predetermined structure, and decision-making points are made evident.<sup>98</sup> In addition, choices, both procedural (who gets to speak next,

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Tech World, Opening Presentation at Santa Clara University Symposium on Internet Privacy (Feb. 11–12, 2000), <http://www.privacyrights.org/ar/expect.htm> (last visited Oct. 2, 2005) (describing how consumers avoided going online for “fear that massive amounts of data will be collected about them”). At the same time, even if people know or should know on some rational level that privacy is more vulnerable on the Internet than in a private room, their cognitive biases may prevent them from acting consistently with such knowledge by skipping over the fine print, clicking on the “I accept” button, etc.

97. See Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “eBay Law”*, 15 OHIO ST. J. ON DISP. RESOL. 705, 715 (describing how the mediator—currently SquareTrade's head mediator, Mark Eckstein—“had to struggle to structure a relationship with the parties,” but nevertheless attempted to “stop the cycle of blaming . . . paint these disputes, where appropriate, as not being ‘all or nothing’ propositions, [and] tried to keep all parties updated on the bulk of the communication”).

98. In mediation, “[p]arties generally do not know what mediation-related decisions a mediator has made, and often they are not even aware that she has made any



what action will be taken next) and substantive (how the issue is defined, exploration of possible solutions), are fixed by SquareTrade, though parties are allowed to deviate from the proposed substantive options through free-text boxes, thereby preserving the process's creative and tailored nature.

By limiting the procedural and substantive options available to parties, SquareTrade creates a potentially more accountable mechanism because it is applied consistently across cases. Importantly, the automated process does not compromise flexibility. Despite introducing an element of structure, the automated process has remained dynamic through the existence of institutionalized channels for information gathering and analysis, as evidenced by the refinement of the automated process with respect to eBay feedback disputes described above.<sup>99</sup>

Another means for generating consistency in the resolution process has been the creation of agreement templates that can be used by mediators at the resolution stage.<sup>100</sup> The templates seem to be particularly useful in the context of feedback removal disputes because, in those cases, it is preferable that feedback be removed only after all other terms of the agreement have been complied with. Since feedback—once removed through mediation—cannot be reinstated, SquareTrade mediators often structure the resolution of a feedback case in a manner so as to enable parties to monitor whether all preconditions have been fulfilled prior to having the feedback removed by the mediator.<sup>101</sup> This way, if parties detect a problem prior to the date on which the feedback is scheduled to be removed, they can alert the mediator and resume the mediation. Even though templates introduce structure, the ability to tailor the template to the specifics of a case ensures that flexibility is maintained and changes can be made when necessary.<sup>102</sup>

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particular decision at all.” Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1, 1–2 (1997).

99. See *supra* notes 86–87 and accompanying text.

100. Interview with Nate Lipscomb, *supra* note 18.

101. Interview with Nate Lipscomb, *supra* note 72.

102. Templates can obviously be used in the traditional mediation setting as well. See, e.g., Nancy Neveloff Dubler, *Mediating Disputes in Managed Care: Resolving Conflicts Over Covered Issues*, 5 J. HEALTH CARE L. & POL’Y 479, 495 (2002). However, structure is only one aspect of accountability. Absent a correlating change in the understanding of confidentiality, which has yet to take place in offline mediation, providers would not be able to monitor whether such templates have been employed, what their impact has been, whether templates should be revised, and under what conditions deviations from templates should be condoned.

The SquareTrade experience demonstrates that added structure need not make the mediation process rigid. On the contrary, SquareTrade's procedures have preserved flexibility by maintaining the ability to adapt to a variety of circumstances and needs.

e. *Being Embedded in a Larger Transactional System*

SquareTrade, despite having business relations with entities other than eBay, both on- and offline, has primarily handled eBay conflicts, and eBay has referred its users exclusively to SquareTrade through a link on its website. Thus, SquareTrade's position is practically that of an in-house dispute resolution provider that is embedded in the fabric of the organization to which it provides its services, and as such, offers some of the same possibilities but also raises similar concerns.

The phenomenon of embedded dispute resolution services is familiar from the traditional dispute resolution world where many federal agencies (such as the U.S. Postal Services)<sup>103</sup> and large private

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103. The nationwide program offers transformative mediation services to USPS employees for the resolution of employment disputes. For writing on the USPS internal dispute resolution program, see generally Cynthia J. Hallberlin, *Transforming Workplace Culture Through Mediation: Lessons Learned from Swimming Upstream*, 18 HOFSTRA LAB. & EMP. L.J. 375 (2001); Tina Nabatchi & Lisa B. Bingham, *Transformative Mediation in the USPS REDRESS™ Program: Observations of ADR Specialists*, 18 HOFSTRA LAB. & EMP. L.J. 399 (2001); James R. Antes et al., *Transforming Conflict Interactions in the Workplace: Documented Effects of the USPS REDRESS™ Program*, 18 HOFSTRA LAB. & EMP. L.J. 429 (2001); Jonathan F. Anderson & Lisa B. Bingham, *Upstream Effects from Mediation of Workplace Disputes: Some Preliminary Evidence from USPS*, 48 LAB. L.J. 610 (1997). Even though the design and evaluation of the USPS dispute resolution program constitutes a significant improvement compared to prevailing quality control efforts (described in Part I.B), the program has remained faithful to traditional confidentiality perceptions and, therefore, its impact remains limited. Designers of the program substituted the measurement of settlement rates with more nuanced quality control measures in order to better capture the quality of mediation services performed and their impact on workplace culture (see Hallberlin, *supra*, at 379–81). Since mediators mediate without a co-mediator or observer present, real-time information on mediator performance is extremely limited and is usually restricted to a mediator's first case. This is used to determine whether to include her in the USPS mediator roster (see Nabatchi & Bingham, *supra*, at 404–05). Research on consequent mediator conduct has not been conducted on an ongoing basis and the information that is available is filtered through the eyes of the mediator (see Antes et al., *supra*, at 430–32), for whom it is extremely difficult, if not impossible, to know and assess her own interventions, or through parties' recollections of the occurrences (see Nabatchi & Bingham, *supra*, at 426), which can also be unreliable as an evaluation tool. Interestingly, mediators, when interviewed on their practice, reported that they feel isolated and would welcome more feedback and guidance on their performance (see Antes et al., *supra*, at 464).

organizations (such as Intel)<sup>104</sup> have instituted this type of arrangement. There are several advantages to embedded systems. First, access to a high volume of disputes that arise in the context of a particular workplace or market can reveal patterns of disputes that occur repeatedly and indicate effective means for addressing such disputes. SquareTrade has, in addition to studying resolution rates,<sup>105</sup> studied such patterns as whether there are specific types of disputes that are more likely to settle than others (e.g., international disputes), whether there are particular types of dispute filers who are more likely to settle than others, and what the parties' feedback ratings are in cases that are more likely to settle.<sup>106</sup> In some instances, such evaluation has enabled SquareTrade to understand which mediators it should assign to specific cases and how to compensate mediators most fairly and cost-effectively.<sup>107</sup> SquareTrade's analysis of information collected also can affect its marketing and outreach efforts by leading SquareTrade to focus its efforts on those categories of cases in which it has been most successful and for which it can provide what it believes to be a more satisfying service to users.<sup>108</sup>

In addition, dispute patterns can reveal chronic deficiencies in the dispute resolution system itself, which can hamper the delivery of satisfactory services (such as the incomplete typology of disputes in SquareTrade's automated process described above).<sup>109</sup> SquareTrade's embedded position has enabled it to proactively gather information from a pool of eBay users on how to design and improve its

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104. See Sturm, *supra* note 31, at 499–509. Intel's dispute resolution system has challenged traditional ADR approaches to data collection and confidentiality. Its system for addressing workplace complaints and conflicts is designed to track all grievances and store data in its database in real time, allowing for individual case evaluation, pattern examination, and consequent investigation by specialists. It is not surprising that this system emerges in a technologically data-driven environment. Also, there are real advantages for organizations in developing internal dispute resolution systems that record data and have a "memory."

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105. SquareTrade analyzes settlement rates reached in the automated negotiation and mediation processes, settlement rates per dispute type, per mediator, and most common resolutions, etc. Interview with Nate Lipscomb, *supra* note 72.

106. Interview with Cara Cherry-Lisco, *supra* note 76.

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107. Interview with Cara Cherry-Lisco, *supra* note 82.

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108. *Id.*

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109. Disputes can also expose recurring problems in the marketplace in which dispute resolution services are offered. For example, repeated disputes over whether a buyer has committed to making a purchase or not may influence an unclear marketplace policy. A particular mediator may encounter several such disputes and report back to the dispute resolution team on the trend, or, alternatively, the dispute resolution team may pick up on the recurrence when performing routine data analyses. In the eBay-SquareTrade case, I have not received information on the extent of such

services.<sup>110</sup> Unlike external mediation providers, SquareTrade has access to its pool of potential users. These users have an interest in providing such information to SquareTrade since they have more of a stake in the SquareTrade system than the typical one-shot disputant in non-embedded mediation. Mediators also have been an important resource in revealing such trends. SquareTrade's dispute resolution team actively encourages them to think about issues systemically, identify patterns,<sup>111</sup> and provide feedback on the system.<sup>112</sup> Furthermore, internal dispute resolution services, particularly in the case of voluntary mediation services, enhance incentives for participation and enforcement of any resolution reached by tying such efforts to other long-term interests of the disputing parties. For example, in the case of embedded mediation services at the workplace, employees' or managers' participation in any dispute resolution effort and their ability to reach a resolution is tied to their interest in keeping their position, status and reputation, possibility of promotion, and maintenance of a healthy work environment.

In the context of e-commerce, long-term stakes in one-shot transactions between strangers are exceptional, but eBay has managed, most notably through its feedback rating system, to make its site a marketplace for repeat users in which there are financial and reputational repercussions for misconduct and benefits for good behavior. eBay has taken this a step further in the dispute resolution context by making the SquareTrade system one of the few avenues for revising feedback once submitted<sup>113</sup> and by providing a space on the eBay website for its users and SquareTrade personnel to provide guidance and explanations on SquareTrade's dispute resolution services. SquareTrade, on its end, has further strengthened this symbiosis through the seal program, which creates incentives for seal members

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analyses, but it seems that the scope of disputes SquareTrade handles for eBay would allow for this type of examination.

110. Interview with Cara Cherry-Lisco, *supra* note 82.

111. Interview with Nate Lipscomb, *supra* note 18.

112. *Id.* (describing how as opposed to traditional ADR, which often lacks efficient channels for mediator feedback to providers, SquareTrade mediators could easily contact the head mediator through e-mail when they would encounter repeat problems). One example in which mediators were able to uncover repeat problems had to do with users' misconceptions about the mediation process and the mediator's role, problems that were later remedied by eBay. Interview with Cara Cherry-Lisco, *supra* note 82 (stating that SquareTrade has shared only aggregate information on volume and settlement rates); Interview with Nate Lipscomb, *supra* note 72.

113. According to eBay policies, feedback that is posted can only be removed through mediation facilitated by a SquareTrade mediator or, under certain circumstances, through eBay. eBay Feedback Abuse, <http://pages.ebay.com/help/policies/feedback-removal.html> (last visited Apr. 5, 2005).

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to participate in the dispute resolution system and abide by resolutions reached.<sup>114</sup>

At the same time, being embedded can also take its toll. The internal delivery of dispute resolution services that are premised on neutrality can jeopardize their actual or perceived independence.<sup>115</sup> Thus, in this context, the impartiality of the dispute resolution team is particularly vulnerable, and the question of accountability becomes all the more pertinent, as demonstrated below in the discussion of the need for external accountability.<sup>116</sup>

f. *Internalizing Incentives*

The SquareTrade system creates a web of incentives for SquareTrade, its mediators, and its users, which results in increased accountability. The simultaneous documentation of all ODR communications serves to constrain mediator behavior *ex ante*.<sup>117</sup> This incentive is reinforced by mediators who can seek guidance from the SquareTrade dispute resolution team during the mediation without losing face. This differs from the awkwardness of having to interrupt a face-to-face session in order to seek advice. In addition, the fact that SquareTrade mediators are paid for their services,<sup>118</sup> motivates them to perform well and conform to guidelines, standards, and training instructions. Paying jobs are difficult for mediators to obtain; many offline mediators are retirees who volunteer their services, and the few paid mediator positions tend to be taken by former judges. SquareTrade mediator positions are even more attractive because the work involved can be carried out during flexible hours at home.<sup>119</sup>

On the users' end, the ability to effortlessly e-mail feedback directly to SquareTrade's customer service group and not have to do so indirectly through the mediator<sup>120</sup> serves as an incentive to convey such impressions. Not only is it easier to complain, but because users

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114. See *supra* notes 24–27 and accompanying text.

115. Employees may view such a unit as pro-management because its members ultimately depend on the organization for their remuneration, continued employment, and budget.

116. See *infra* Part I.C.3.

117. Interview with Nate Lipscomb, *supra* note 72.

118. Interview with Cara Cherry-Lisco, *supra* note 21.

119. Interestingly, the SquareTrade pool of mediators is diverse not only in terms of country of origin, but also in terms of race. See *id.*

120. Interview with Nate Lipscomb, *supra* note 18; Telephone Interview with Colin Rule, ODR Director, eBay (Jan. 28, 2004) (stating that at OnlineResolution, users would be assigned a contact person whom they could approach with any questions and concerns through e-mail).

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have a greater chance of using the SquareTrade system in the future than disputants relying on random ADR providers' services in the traditional mediation world, they have a stronger incentive to report their impressions.<sup>121</sup> Users' complaints can be verified easily, which enhances mediators' incentives to perform well. Conversely, offline, mediators and users often find it difficult to communicate their observations to providers<sup>122</sup> and any feedback conveyed is much harder to substantiate.

### 3. Summary: *The SquareTrade Accountability Framework*

As the analysis above demonstrates, SquareTrade has generated internal structural accountability by instituting structures for: (1) gathering broad and rich information on mediator interventions and party needs (much of which is collected in real time) and on ongoing efforts to evaluate the quality of services rendered; (2) monitoring mediator performance; (3) developing a more nuanced understanding of confidentiality; (4) devising fixed processes and limited substantive options for resolution, thereby promoting consistency and refining the meaning of flexibility; and (5) internalizing incentives for mediators to perform well and for the system as a whole to identify deficiencies and successes and learn from them.

As stated above, the SquareTrade effort does not, however, represent a complete exercise in structural accountability since it is wholly internal and does not include external accountability, i.e., oversight by a credible, independent entity.<sup>123</sup> External accountability is important for two reasons. First, external accountability can extend beyond an examination of whether performance has met the provider's preset goals by assisting the provider in questioning the adequacy of the goals themselves and the means used to achieve them. Thus, an external body or authority, drawing on the information revealed in the course of monitoring as well as its own experience and knowledge from other settings, can assist providers in improving and developing their organization. Second, external accountability provides an additional layer of credibility for the internal efforts at quality control by revealing those instances of poor performance missed in the internal examination, and by providing an impartial

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121. One study found that eighty percent of SquareTrade users say they would use the service again. Tyler, *supra* note 89. This statistic demonstrates an interest on the part of such users to provide feedback even if they in fact end up being one-time users.

122. Interview with Nate Lipscomb, *supra* note 18.

123. See Sturm, *supra* note 31, at 537–53 (describing incomplete structuralism in the context of workplace regulation and the case studies analyzed in the article).

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evaluation that can address concerns on potential conflicts of interests between providers.<sup>124</sup>

For example, in SquareTrade's case, a concern could arise with respect to the resolution of disputes involving seal members. SquareTrade presents its dispute resolutions services and seal program as complementary and, as has been demonstrated, in many aspects they are. However, there is also a potential for a conflict of interests between the two services. Seal members are, potentially if not in practice, repeat users of the dispute resolution system, and although they do not pay for mediation services (as one of the perks offered to them), they are vital to SquareTrade's financial viability and hence to its mediators' future employment. As explained above, mediators, even though they are not decision-makers, can influence the decision-making process, particularly when they can recommend a resolution to the parties. A concern could arise that, because seal members are repeat players, SquareTrade's dispute resolution services would favor them over their counterparts. Whether this potential conflict of interests has actually materialized is impossible to determine since individual resolutions and aggregate data on how seal members fared in comparison to non-members have not been made publicly available. Although there is no indication that this potential conflict of interests has been realized, absent external accountability, it remains an open question.

## II. PROMISE AND LIMITATIONS FOR LEARNING FROM THE SQUARETRADE EXPERIENCE

### A. *Applying the SquareTrade Experience in Other Online Contexts*

The significance of the SquareTrade experience is derived from the mitigation of the accountability dilemma in a single context, limited as it may be. A kindred application of some of the principles underlying SquareTrade's accountability framework can be found in eBay's internal ODR initiative. In late 2003, eBay hired Colin Rule as its ODR director to design and implement an internal, structured direct-negotiation process between disputing eBay users, as well as to rethink some of the current services provided to eBay users through

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124. See *supra* Part I.B. See also Menkel-Meadow, *supra* note 32, at 1922 (“[E]ven though dispute resolution professionals seek to create a creative, flexible, well-meaning, and self-regulating profession, it is now clear that increased use of ADR has raised these issues of quality control, ethical standards, accountability, and liability.”).

SquareTrade.<sup>125</sup> In eBay's negotiation tool, as in SquareTrade's automated negotiation process, code substitutes for third-party facilitation and thus enhances accountability by limiting discretion and making decision-making junctures and their consequences reviewable. eBay's process is currently offered for two types of disputes only—"unpaid item" and "item not received." Unlike SquareTrade's automated negotiation device, which matches problems to solutions, the eBay in-house processes focus on identifying the key information that needs to be exchanged between parties and implementing a procedure that guarantees the exchange of these data.<sup>126</sup>

The question arises whether the SquareTrade framework may handle disputes that are different from the typical eBay grievance while preserving the features of its system that promote accountability. There is reason to believe that SquareTrade and other ODR providers' "docket" will become more diverse as the technological means for performing ODR services become more advanced and societal perceptions about what can and cannot be performed online continue to evolve. It is clear that there are real limits to what a mediator can do in mediations like SquareTrade's that consist solely of written messages sent back and forth. As technology advances, we can expect richer modes of ODR communications that will allow for a broader range of disputes to be addressed online.<sup>127</sup>

But ODR's strength may ultimately be derived not from how well it is able to mimic traditional forms of ADR through advancements in the means of transmission of information (e.g., inexpensive video conferencing technologies), but in the evolution of new tools for information processing and management—like SquareTrade and eBay's

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125. Telephone Interview with Colin Rule, ODR Director, eBay (Jan. 21, 2004).

126. *Id.* In addition to referring its users to SquareTrade for the resolution of disputes, eBay has begun to internally develop certain online negotiation processes. For particular types of disputes, eBay's in-house processes offer avenues for the exchange of missing information that is necessary for the resolution of a grievance with respect to an item purchased on eBay. For example, with respect to an unpaid item dispute, if the buyer claims that payment has already been made, the buyer can, through this tool, provide details of the payment to the seller for review. eBay's Unpaid Item Process, <http://pages.ebay.com/help/tp/unpaid-item-process.html> (last visited Oct. 6, 2005). Similarly, in the case of an "item not received" dispute, if the item has already been shipped, the seller may provide the buyer with shipping details. See eBay's Item Not Received or Significantly Not as Described Process, <http://pages.ebay.com/help/tp/inr-snad-process.html> (last visited Oct. 6, 2005).

127. See Katsh et al., *supra* note 97, at 718. In ODR, richer communication could be created by substituting two-way video communication for e-mail and by leveraging unique online capabilities that are not available offline and enrich the mediator's "tool set." *Id.*



automated negotiation tools. These tools could make ODR an attractive option for many disputants, on- and offline,<sup>128</sup> often as a complementary service to traditional ADR, because of ODR's added efficiencies and its potential for generating accountability and trust.

One current experiment provides a demonstration of the range of settings to which ODR could be applied. The Center for Information Technology and Dispute Resolution at the University of Massachusetts Amherst recently received a National Science Foundation grant to develop ODR systems for government conflict management.<sup>129</sup> The Center is partnering with the National Mediation Board, an agency that oversees labor-management relations in the railroad and airline industries and administers a dispute resolution system to disputes over the interpretation or application of agreements in these industries.<sup>130</sup> The project explores the ways in which ODR can enhance and complement the existing dispute resolution system. Even at this early stage, the researchers have found opportunities for improving the system through adopting ODR tools.<sup>131</sup> This experiment signals the direction in which the ODR "docket" is likely to expand in the future. In a fashion reminiscent of the SquareTrade example, the introduction of ODR into other contexts, traditionally regarded as too sensitive or complex for such tools, carries a promise for increased accountability.

These trends are likely to be reinforced by broader developments and social changes.<sup>132</sup> As people spend more and more time online, the range of activities they perform online and their perception of what is appropriate and possible there will change and will include more complex disputes in which parties typically attach a higher degree of importance to confidentiality. This is not to argue that ODR will displace ADR; there will always be certain types of disputes, such as highly emotional divorce mediations, for which a system like SquareTrade's would not be the appropriate avenue. However, there is a body of disputes (among businesses with ongoing relationships or

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128. See Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 284–85 (2004).

129. The Center for Internet Technology and Dispute Resolution, <http://www.odr.info> (last visited Oct. 6, 2005).

130. Ethan Katsh et al., *Early Lessons from the Application of Process Technology to Online Grievance Mediation*, [http://diggov.org/library/library/dgo2005/egov\\_policy/katsh\\_early.pdf](http://diggov.org/library/library/dgo2005/egov_policy/katsh_early.pdf) (last visited Oct. 10, 2005).

131. *Id.* at 2.

132. See generally Rabinovich-Einy, *supra* note 40.

between individuals and government offices) that currently is not addressed through ODR but very well could be.<sup>133</sup> EBay's own expansion, in terms of the types of transactions conducted through its site—some of which were thought wholly inappropriate for the online context, such as car and real estate purchases—is a telling illustration of the ways in which the line separating on- from offline activities is constantly shifting, often in unexpected ways. Therefore, there is reason to believe that the scope of disputes handled by ODR systems (SquareTrade included) will expand in the future, while preserving at least some of the features of these systems that have been effective in generating accountability.

Another question concerns the applicability of the SquareTrade experience to non-embedded dispute resolution systems. It is clear that SquareTrade's quasi-embedded position has played a significant role in its success—first and foremost by supplying a steady flow of disputes, the lifeline of any dispute resolution system—but also by giving the system teeth and making patterns more readily discernible. A non-embedded service would clearly be less effective, particularly when it is an offline service—where the gathering of information is both more difficult and expensive. However, even for dispute resolution providers whose disputes come from a variety of sources, benefits, albeit more limited in scope, nevertheless exist and the costs related to information gathering can be controlled,<sup>134</sup> making the SquareTrade accountability system an instructive example.

#### B. *Applying the SquareTrade Lessons to Traditional Mediation*

In the traditional mediation arena, it is much more difficult and costly to collect real time information and confidentiality concerns are more prevalent. In the following section, I examine the potential for applying the lessons of SquareTrade by drawing on a recent reform proposal by Safe Horizon, a traditional mediation provider, to improve mediator quality assurance.

Safe Horizon Mediation Services is a community mediation center that operates in accordance with article 21-A of the New York Judiciary Law.<sup>135</sup> It handles community disputes and court-referred

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133. See Anita Ramasastry, *Government-to-Citizen Online Dispute Resolution: A Preliminary Inquiry*, 79 WASH. L. REV. 159, 168–72 (2004).

134. For example, costs can be controlled by relying on volunteer mediators or trainees for real time information gathering. Trainees are already required to observe mediation sessions for training purposes, but they could also be used for quality control purposes.

135. N.Y. JUD. LAW art. 21-a, § 849-a (2003).

cases<sup>136</sup> at no charge to disputants and is funded in part by the State and City of New York.<sup>137</sup>

Through the initiative of the then Director of Safe Horizon, Elizabeth Clemants, Safe Horizon has developed a novel program for reforming traditional, non-embedded mediation.<sup>138</sup> Frustrated by her own ignorance of what transpired in Safe Horizon-sponsored mediation, Ms. Clemants created an innovative way of broadening the scope of information she and other staff members could review. Under the new program,<sup>139</sup> which has yet to be implemented, all mediation sessions would be conducted with either a co-mediator or observer present. Both the mediator and her counterpart would fill out detailed logs on the dynamics of the mediation, and this information, together with any mediated resolutions reached, would be kept in individual mediator files. Once a year, the staff would meet with its mediators, review all the information in their individual files, and

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136. The Safe Horizon dispute load consists generally of harassment, noise, and minor criminal complaints; family conflicts; arguments between youth; parent/teen conflicts; child custody and visitation disputes; school concerns; special education disagreements; and property, housing, and financial disputes. SAFE HORIZON, COMMUNITY MEDIATION: SOLVING CONFLICTS QUICKLY, available at [http://www.safehorizon.org/files/Mediation\\_Brochure\\_Eng.pdf](http://www.safehorizon.org/files/Mediation_Brochure_Eng.pdf) (last visited Oct. 9, 2005).

137. The state funders collect the data reported by the various providers and produce an annual report that includes statistical data on all funded providers. The city's criteria for funding is quantitative and requires providers to have mediated a minimum number of cases, with a prescribed percentage of such cases scheduled for mediation, and also requires that there be a follow-up phone call for a percentage of cases that result in a written agreement. As part of its efforts to collect information pursuant to these and other requirements, Safe Horizon requires its neutrals to fill out paperwork regarding the cases they handle, covering such matters as the type of dispute (family, landlord-tenant, neighbor, etc.), name of mediator, number of sessions, length of each session, and outcome (agreement, no agreement, partial agreement). It also collects disputants' feedback through party satisfaction surveys. Mediated resolutions are not systematically reviewed by Safe Horizon for substantive fairness issues and have not been used, up until now, as a means for quality control over mediators. These practices are scheduled to change under the new initiative described below. See Interview with Elizabeth Clemants, *infra* note 143, and various Safe Horizon form samples supplied by Clemants (forms on file with author). **R**

138. There are several other programs delivering traditional ADR services whose systems represent novel approaches to accountability, one of which is Intel's internal dispute resolution system. See *supra* note 104 and accompanying text. Those efforts with which I am familiar take place within organizations and as such have built-in incentives for creating a system that records information and detects patterns. The Safe Horizon initiative takes place in a different environment—that of a non-profit community mediation service that provides mediation services mostly to one-shot disputants. **R**

139. Interview with Elizabeth Clemants, Director, Safe Horizon, in N.Y., N.Y. (July 13, 2004).

provide feedback. If warranted, Safe Horizon staff would provide further training and mentoring to mediators, and, if necessary, mediators would be decertified. Decertification procedures as well as other guidelines and standards would be clarified and systematically implemented.<sup>140</sup>

In addition to collecting this kind of information, Clemants wanted to expand the follow-up on cases that were handled by Safe Horizon in order to learn how mediation affected not only cases which resulted in written agreements, but also those which resulted in oral agreements or no resolutions at all.<sup>141</sup> By employing these tools, Safe Horizon could help ensure a stronger degree of accountability.<sup>142</sup>

Clemants's plan represents a radical departure from the current procedures at Safe Horizon,<sup>143</sup> where very little information is collected on mediation practices, and it is difficult to ensure consistency, internalize incentives, or conduct meaningful, qualitative evaluation of the services rendered. Most interesting for our purposes, the initiative displays some of the ways in which the principles of structural accountability can be translated into the traditional, non-embedded mediation context.

As reflected in the SquareTrade example, there is a need for real-time information on dispute resolution efforts—a need which would be met by Safe Horizon's proposal that an observer collect information simultaneously with the mediator. The proposal controls costs by relying on a volunteer mediator base and by having observers document the information on forms, thereby sorting out key elements in real time.<sup>144</sup> Obviously, the information is seen through the eyes of an observer and, as such, is never as objective as a simultaneous recording, but this lack of objectivity is counter-balanced, to a certain

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140. Interview with Elizabeth Clemants, *supra* note 139.

141. *Id.*

142. *Id.*

143. *See id.* and various Safe Horizon form samples supplied by Clemants (on file with author) (describing the limited types of information collected by Safe Horizon as part of its efforts to meet reporting requirements by its funders, New York State and New York City, by both filling out paperwork on the type of dispute, name of mediator, number of sessions, length of each session, and outcomes of its cases and by collecting disputants' feedback through party satisfaction surveys).

144. Other means for controlling costs could include relying on Safe Horizon's trainees, who are required to observe mediations as part of their certification process. Currently, they are not requested to formally summarize their impressions, and their feedback is not systematically gathered so that they can learn from it. Another method for economizing could be to institute a more targeted scheme for collecting broad information, which would only apply in some of the cases (where complaints have been made, in random cases, etc.).

extent, by the fact that this method minimizes the intrusion on parties' comfort level and reduces cost by prioritizing information.

In addition, the Safe Horizon plan, through its mediator review sessions, has recognized that mere information gathering is insufficient and that caretakers of information, responsible for analyzing and learning from the information gathered, must be designated if the organization is to improve. Furthermore, having more than one mediator present (particularly if co-mediators or observers are chosen at random) and conducting annual review sessions could promote consistency in mediator practice.

An additional step in this direction could be the development of criteria for effective mediation practice that would guide mediator conduct *ex ante* and allow for mediator evaluation *ex post*. Standards need not imply rigidity and can be devised and enforced in a dynamic manner that preserves mediation's flexibility. This was done in the transformative mediation context<sup>145</sup> in an experiment by Della Noce,<sup>146</sup> which demonstrates in detail how to convert general principles into specific mediator practices while preserving flexibility. For example, she explains that a transformative mediator should orient parties "to their own agency"; the mediator "support[s] the parties' decision-making process" by offering decision-points to the parties but giving only tentative suggestions with alternatives.<sup>147</sup> By deriving standards from data collected and constantly re-examining them in light of new information, the field can maintain its ability to accommodate the particulars of various situations while promoting consistency across cases and limiting, to some extent, mediator discretion.

Safe Horizon's plan also demonstrates an understanding of the need to internalize incentives for the various actors to improve their

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145. There are three main schools of practice—evaluative, facilitative, and transformative mediation. Transformative mediation views the process parties go through, and not the resolution of the dispute, as being at the center of the mediation process, while resolutions is clearly a goal of the other two schools. Transformative mediators strive for party empowerment and recognition of their own as well as their counterparts' interests and goals and seek to transform destructive and negative communication into constructive and positive interaction between parties. See ROBERT A. BARUCH BUSH & JOSEPH P. FOLGER, *THE PROMISE OF MEDIATION* 102–04 (1994); Leonard L. Riskin, *Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 HARV. NEGOT. L. REV. 7, 13 (1996).

146. Della Noce et al., *Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model*, 19 OHIO ST. J. ON DISP. RESOL. 1005, 1006 (2004).

147. *Id.* at 1049–54.

practice and the system. Its current system of quality control for certified mediators—relying on peer review of a mediator in action—has not been effective at weeding out substandard mediators, in part because the requirement has not been systematically followed and enforced.<sup>148</sup> Even when peer reviews are conducted, mediators tend to choose their friends as evaluators in peer reviews,<sup>149</sup> hardly an effective way to remove poor performers. By abolishing this system and always having more than one mediator present when conducting a mediation, Safe Horizon would create incentives for mediators to improve performance. The institution of annual reviews would establish an opportunity—perhaps not frequent enough—to convey feedback from Safe Horizon to its mediators and vice versa. Indeed, mediators can be a valuable conduit of information on individual problems and systemic issues, as demonstrated by the SquareTrade example.

Moreover, the willingness to gather more information than is currently collected internally represents a different, more compound view of confidentiality than has been typically held by traditional mediation providers. Like SquareTrade, the Safe Horizon plan recognizes the distinction between internal information gathering and analysis on the one hand and external disclosure of aggregate patterns on the other; in so doing, it distinguishes between secrecy and anonymity. By protecting the confidentiality of all mediation communications, New York law<sup>150</sup> ensures that the secrecy of mediation communications is not compromised by the internal collection of broad information by New York providers.<sup>151</sup>

Additional categorizations of dispute types by disputants' concerns about confidentiality could further broaden collection and external sharing of information by providers like Safe Horizon. One could identify particular types of disputes in which parties feel comfortable with transparency, which would allow for a higher degree of information collection and sharing. In this context, it is important to bear in mind that the disputes handled by SquareTrade resemble the substantial portion of disputes resolved through Safe Horizon and

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148. Interview with Elizabeth Clemants, *supra* note 143.

149. *Id.*

150. N.Y. JUD. LAW art. 21-a, § 849-b(6) (2003).

151. Although the mere existence of a record does give rise to the concern that it would be subpoenaed in the future or leak out in some other manner, the risk could be mitigated by eliminating the record within a relatively short time frame that nevertheless allows for analysis and monitoring to take place. Another concern involves the wide variance of confidentiality protections across the various states. See UNIF. MEDIATION ACT, prefatory note (2001).

other community dispute resolution providers—i.e., small claims. Even though the typical small-claim dispute often involves an actual or potential ongoing relationship (a purchase gone wrong at the local store), the availability of feedback ratings on eBay makes these disputes more similar than it would at first appear. Most importantly in our context, small claims disputes, like eBay grievances, tend to be less privacy-sensitive and would, therefore, allow for extensive information collection and sharing, as opposed to family disputes or harassment cases where a more conservative approach would be warranted.

Finally, unlike SquareTrade, Safe Horizon is subject to external accountability measures through regulation, funding, and professional alliances.<sup>152</sup> Safe Horizon, under the new plan, would be able to produce reports that extend beyond statistics on types of disputes, referral sources, and their ultimate disposition. Currently the State of New York tracks the number of cases handled by gender, age, and employment status.<sup>153</sup> However, this tracking does not allow for a scrutiny of the interplay between these demographics and particular mediator interventions and mediator styles on dispute outcomes. The Safe Horizon reform would allow for such analyses, but as long as the information underlying the aggregate trends could not be shared externally, it would be difficult to assess whether Safe Horizon was asking the right questions and whether it had taken full advantage of the information gathered. A creative way to overcome the difficulty of monitoring in the face of confidentiality has been through the use of mediating actors.<sup>154</sup> These actors have, in various contexts, fulfilled a complex role in which they have both vouched for the veracity of the aggregate information disclosed and participated in generating the norms according to which the information disclosed was evaluated and judged.<sup>155</sup>

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152. See Susan P. Sturm, *Lawyering for a New Democracy: Lawyers and the Practice of Workplace Equity*, 2002 WIS. L. REV. 277, 305–06, 313, 316, 319 (2002).

153. OFFICE OF INTERNAL DISPUTE RESOLUTION PROGRAMS, STATE OF NEW YORK, COMMUNITY DISPUTE RESOLUTION CENTERS PROGRAM ANNUAL REPORT 17–48 (2004), [http://www.courts.state.ny.us/ip/adr/Publications/Annual\\_Reports/AR03-04.pdf](http://www.courts.state.ny.us/ip/adr/Publications/Annual_Reports/AR03-04.pdf).

154. See Sturm, *supra* note 31, at 552.

155. See *id.* at 523–24. A useful example in this context is the successful administration of power plants by the Institute of Nuclear Power Operations (INPO). This body, which was created and funded by the plants themselves, establishes benchmarks, pools data on industry practices, and evaluates the individual plants accordingly. Although this regulating entity is a private body and the data it pools remains confidential, it has been “an unqualified success story” and has drawn—by maintaining confidentiality—widespread participation of utilities. Furthermore, the accountability of self-regulatory efforts is enhanced by the production of reports that

## CONCLUSION

At the core of this Article lies the apparently insoluble dilemma of mediation—the clash between confidentiality and flexibility on the one hand and accountability on the other. The Article demonstrates one context, an ODR system, in which this dilemma has been mitigated through the implementation of an incomplete structural accountability system. It has become apparent that neither private unregulated mediation services nor formal attempts to regulate community and court-referred mediation programs have been completely successful in ensuring accountability. The structural approach avoids some of the pitfalls associated with both formal mechanisms and informal market forces with regard to mediation. It has allowed, at least in the SquareTrade context, for a flexible and dynamic setting without foregoing the possibility for quality control and improvement.

A close scrutiny of the SquareTrade story reveals how contemporary technological innovation and the ensuing changes in values and attitudes can generate more nuanced concepts of confidentiality and flexibility and, through them, increased accountability. It is tempting to apply these developments to the traditional mediation milieu where the accountability dilemma has been most troubling. While our present ability to apply such developments in ODR directly to traditional mediation is limited, some of the principles embodied in the SquareTrade experience—refining flexibility to promote consistency, putting limits on discretion by internalizing incentives, and unpacking confidentiality to permit broader and richer information gathering, analysis, and monitoring—can be instructive in the design of more accountable dispute resolution systems offline.

In the coming years, ODR's influence over traditional mediation is likely to increase by the anticipated developments in the scope and effectiveness of online mediation. With new technologies and an expansion of the types of activities performed on the Internet, additional types of disputes, including more complex conflicts, are likely

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reach "important watchdog groups." In the mediation context, mediating actors such as professional associations and consumer organizations could fulfill this role by auditing reports prepared by providers for authorities and funders and examining the information underlying anonymous statistical data. In addition, by studying the raw information, these mediating actors could assist providers in generating and refining standards for their practice and in identifying trends and patterns relating to the disputes they handle. A particularly important role for these intermediaries could be the development of uniform categories, according to which various providers' efforts would be compared. See Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 371–73 (1998).



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to be addressed by such services as SquareTrade. These additional types of disputes will affect, directly and indirectly, the procedures and norms of traditional mediation. As the line separating the on- and offline worlds keeps shifting, even our most rigid convictions are challenged.

