The Ethical Dilemma for Cyberweek 2011 is an online mediation set out below. The parties resolved the case but did the mediator’s conduct raise any ethical concerns? Let the **ABA Section of Dispute Resolution’s Ethics Committee** know your thoughts. Submit an online analysis of the mediator’s performance, in 750 words or less, to **Cyberweek Ethical Dilemma** during Cyberweek, October 24-28th, 2011. Each submission will be read by two members of the **Ethics Committee**, scored, and the winning submission will receive $100.00 and will be published in an upcoming issue of the Sections eNewsletter **Just Resolutions**. Each participant will receive a certificate of participation upon submission of their analysis.

**ETHICAL DILEMMA**
**CYBERWEEK 2011**

Fannie Bloomer is an eighty three year old widow living in a condominium at Leisure World outside of Chattanooga, Tennessee. Her husband, Charlie, died three years ago. Charlie had handled all the finances and made most of the major decisions. Since his death, though, Fannie has found a community of friends and groups to be involved in at Leisure World and her two adult children, Mildred and Calvin, speak with her at least once a week. Calvin lives in Virginia and Mildred in Texas with their families. Calvin has been pretty good about visiting from Virginia every four to six weeks.

About a year and a half ago Calvin got his mother a lap top computer, set her up with an email account, and taught her the basics so she could communicate with her children and grandchildren. Through one of her groups at Leisure World Fannie learned about the internet and she began spending time on line. She found the web fascinating – so much information, and you could even do shopping online. The latter was a big plus because Fannie was finding it increasingly difficult to get around due to arthritis and her bad hip, and her eyesight was compromised by increasing macular degeneration. Even though she was one of the top bridge players in her group, Fannie’s friends and family were concerned that she was not as sharp as she once was and seemed at times a bit confused. Calvin, particularly, had begun suggesting that she might want to think about assisted living.

Fannie’s granddaughter’s sixth birthday was coming soon and Fannie thought it would be nice if she could find her a Madam Alexander doll like the ones she had herself so enjoyed as a child. Her web search proved successful and she bought a doll from the Dolls Online Company paying by credit card as the website required. When the doll arrived Fannie was shocked to learn that she had paid $1,000.00 and not the $100.00 she had thought and that the doll was an antique and not appropriate for her granddaughter. What had she been thinking? She realized that it had been late at night when she ordered the doll on line and that she had been having difficulty reading the information on the screen because of her macular degeneration and her very tired eyes.

When Fannie contacted the Dolls Online Company about returning the doll she was told that the company was exclusively on line and that all sales were final. “Hadn’t she read the information on the first page of the website?” If she wasn’t happy she should file a complaint with the online dispute resolution program that was also listed on the first page of the website and which she had accepted as the sole remedy for any disputes when she
clicked at the bottom of the first page of the website that she had read the conditions of ordering on this website and agreed to all the terms. Fannie remembered she had clicked yes at the bottom of the first page of the website without reading what she had agreed to but, then, who read all that small print anyway. Fannie felt trapped and confused and frightened that if her children, Calvin and Mildred found out about this they would become even more insistent that she move into an assisted living facility. Fannie agreed to resolve the dispute online and used an online form to state her reasons for being dissatisfied.

The online dispute resolution process provides that the ODR Company, an online dispute resolution service for a number of companies, will provide a mediator who will try to help the parties resolve the issues. If unsuccessful at resolving the issues in mediation the mediator will then, based on the mediation exchanges, decide the matter and the parties agree to be bound by the decision.

Once the ODR company received Fannie's complaint it assigned the case to one of its trained online mediators, Brian George, and informed the parties. Brian was 28 years old, a trained mediator, who had received eight hours of special training on how to resolve disputes online, and had been conducting mediations for the company for about nine months. He also mediated part time for the small claims court in his city. He was paid a flat fee by the ODR Company of $75.00 per mediation plus a success payment of $25.00 if the parties successfully reached their own solution and so far he had achieved settlement in all five of the cases referred to him. Brian sent e-mails to Fannie and the representative of the Dolls Online Company explaining that he was the mediator and knew nothing about the parties or this matter other than the information on Ms. Bloomer's complaint; that he was not going to provide advice to anyone, and that his role was to help them communicate about the issues and help them try to resolve the matter. He noted that the mediation would be conducted exclusively by e-mail; that unless you only wanted to communicate confidentially with the mediator you should include everyone's e-mail on what you send. To communicate confidentially with the mediator you should include in the heading the word “confidential” and only include the email of the person you wanted to see the e-mail. The parties agreed to set aside the following Monday afternoon at 4pm EDT for the mediation. Brian then e-mailed the parties asking if they had any questions before next Monday's mediation and Fannie e-mailed Brian back that she hoped everyone would be patient with her because she wasn't great at e-mail and besides her eyes were giving her some problems making it hard for her to see the screen and type.

Brian to Fannie: “I'm sure it won't be a problem. Take as long as you need.”

Brian began the mediation by asking Fannie to send an e-mail to everyone setting out why she had filed the complaint. Fannie e-mailed all that she believed she was entitled to a full refund for the reasons she had stated when she filed the complaint -- She had been confused by the Dolls Online website and misread the small print as stating the price of the doll as only $100.00 and not $1,000.00. Moreover she didn't know that there was a no-return/no refund policy. She certainly had been able to return some of the clothes she had purchased on line from other companies when she didn't like the product and was given a full refund.

Brian then asked the Dolls Online representative to email everyone how he saw the issue. The representative responded by e-mail that the company's policy was clearly stated
on the first page of their website, that “all purchases are final. No returns allowed.” They had
instituted this policy to avoid people changing their minds and the chaos of having to give
refunds. The representative said he was sorry Ms Bloomer had a problem, but the website
clearly stated the price of the doll and also told her to carefully check the amount and
purchase before clicking “buy” and sending in her credit card information. He also attached a
copy of the first page of the website and the page with the other information to his e-mail.

Fannie responded by e-mail to all that she needed time to look at the material. After
fifteen minutes when he hadn't received any e-mail from Fannie, Brian e-mailed both parties.

Brian to both parties: “Ms. Bloomer, have you had a chance to review Dolls Online's e-mail
and the attached documents?”

Fannie to everyone: “I had some trouble getting the attachments opened and now that I have
they are a little confusing.”

Brian to both parties: “What seems to be the confusion Ms. Bloomer?”

Fannie to everyone: “They look like the pages but I'm not sure and besides the “all purchases
are final no returns” is in the middle of the first page and people can miss it like I did, and the
price of the doll on the website still looks blurry to me and I really have to squint to tell it is
$1,000.00 and not $100.00. Besides I don't understand why they can't just return my money.”

Doll's Online representative to everyone: “We've never done this before, but we'll give you a
full store credit.”

Fannie to Brian, “Confidential”: “Can I talk to you? This isn't fair, is it? I deserve a full refund.”

Brian to Fannie, “Confidential”: “We can only talk by e-mail. You do seem to agree that what
the Dolls Online representative says is true and supported by the documents. If he is willing to
give you a partial cash refund and a store credit for the balance would you be happy?”

Fannie to Brian (after five minutes) “Confidential”: “This is so hard and I'm so confused. I
knew I should have told my son about this and had him here to help me.”

Brian to Fannie, “Confidential”: “Let me e-mail the Doll's Online representative and see what
he will do and get back to you.”

Brian to Dolls Online, "Confidential": “Ms. Bloomer isn't happy with a store credit. Can you
give her back any cash?”

Dolls Online to Brian, “Confidential”: “I haven't got all day to spend on this. I'll give her
$200.00 and a store credit for $800.00.”

Brian to Dolls Online, “Confidential”: “Make it $500 cash and $500 store credit and I think I
can persuade her to take the deal.”

Dolls Online to Brian,”Confidential” : “$400.00 cash, $600 store credit is the best I can do, and
I'll get her the check in a week.”
Brian to Dolls Online, “Confidential”: “Okay. I'll get back to you.”

Brian to Fannie, “Confidential”: “After a number of exchanges with Dolls Online's representative he has agreed to give you a cash refund of $400.00 and a store credit of $600.00. Is that something you can agree to?”

Fannie to Brian, “Confidential”: “I still think I'm entitled to a full refund. This is so unfair.”

Brian to Fannie, “Confidential”: “Dolls Online moved quite a bit to make this offer and they indicated to me that it was their last best offer. I'd hate us not to resolve this matter today because then I'd have to decide the case and I don't want to have to do that. Can you live with their offer?”

Fannie to Brian, “Confidential”: “I'm so confused. If my son ever finds out about this I don't know what he'll do. Oh dear, I guess I don't have any choice. Okay, I'll accept the offer.”

Brian to Fannie, “Confidential”: “Great. I think you've made a good decision.”

Brian to both parties: “I think you have an agreement. Dolls Online will send Ms. Bloomer a check for $400.00 within one week and give her a store credit for $600.00. Ms. Bloomer agrees to return the doll to Dolls Online within one week. If this agreement is acceptable please email me your acceptance.”

Both parties e-mailed their acceptance.
Winning Response to the Cyberweek 2011 ETHICAL DILEMMA
by Vanessa Hill

The first task of a mediator is to discuss and inform the parties about the process of mediation and help them decide if it is a process they would like to engage in. Here, the ODR system is somewhat flawed. ODR seemed to Ms. Fannie to be her only option because the Doll Company only gave her this option. Although there may have been others, she was not aware of them.

That being the case, and although the mediator did attempt to briefly explain what his role would be in the mediation, he did not inform either party about the nature of the mediation process including that it should be voluntary as stated in the preamble of the Model Standards of Conduct for mediators as well as Standard I, self determination. It is at this stage that Brian should inform both parties about fee arrangements. It was especially pertinent in this case where the fee was in violation of Model Conduct Rule VIII (B) (1) as [Brian’s] 25 $ “bonus” is contingent on settlement and VIII (A)(2) as it was nowhere in writing for the parties, and lastly it contravenes III C as the parties were not made aware of this potential conflict of interest and had no opportunity to agree or to object. In fact, despite Fannie informing him that she didn’t have very good eyesight and had a hard time typing, he did nothing to illicit any further information on how bad her eyesight was or seek to ascertain any information that could have been used to determine whether ODR was really the best process for her. This is also a violation of Rule VI (A) 10.

Fannie was unable to make an informed choice about the process and indeed made no choice at all since the ODC’s website provided this as her one option. In an effort to better understand her perspective he should have required more information (especially when it became even more obvious from her anxiety and confusion later in the dispute). If he had, he perhaps would have found out that the she had a severe medical condition, was unacquainted with finances, and not very familiar with computers. Furthermore, the spirit of mediation requires that each party be on equal ground with each other.

Her apprehension regarding the process; the fact that her unpracticed hand at computers; and [her] bad eyesight was partially what led to the dispute (Brian presumably would have been informed of this when he read the complaint) and are strong indicators that this may not be the best process for her and that she will be at a great disadvantage if the online mediation continues. Brian does nothing to address these issues. Also when it became apparent through Fannie’s own declarations that she was having trouble understanding and that she wished to have her son there to help her, Brian should have, by this point, understood that under VI(c) and VI(A)(7) that he should recommend another process.

After the Doll Company manager sent the web page documents, Brian gives her 15 minutes to reply. Perhaps, fifteen minutes was much longer than he believed was need for bad eyesight, but even after she replies that she had trouble getting them open, was confused, and asked to speak to Brian personally, Brian responds by declining to speak to her and immediately jumping into offering his own solution. This method of conducting the mediation does not [show] procedural fairness or party competency in accordance with Rule VI(A). Nor does it promote self determination.

He does not bother to inquire any further or clarify what her interests or issues really are and in fact goes against what she is saying she wants. This seems to go against a party’s right to self determination. In fact, by the end he seems to be on the side of ODC, pressuring Fannie to make the deal. This is reflected in Fannie’s reply that she “doesn’t have a choice.”
Again Brian’s behavior could be the result of lack of experience or it could have been due to two potential conflicts of interest; that of the contingency fee, and also the fact that he is employed by a company that was hired by ODC to resolve disputes, neither were disclosed to Fannie. In Conclusion, Brian’s handling of the mediation violated several ethical standards. He did not inform the parties, promote procedural fairness, he did not uphold the party’s right to self determination, or disclose conflicts of interest.