MISMATCH.COM: ONLINE DISPUTE RESOLUTION AND DIVORCE

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I. INTRODUCTION

If love is a battlefield, divorce is a couple’s own private World War III. It is a crusade against a person you once loved to the point that you bound yourself “til death do us part.” It is a tug-of-war with one’s most basic instincts; a time when the emotional brain dominates, no matter how rational the rest of the brain would like to behave. Any lawsuit is emotionally straining;¹ but a divorce—a lawsuit against someone you thought you were going to spend the rest of your life with and whom you may have children with—is worse. In fact, the Social Readjustment Scale places divorce and marital separation at second and third place in terms of major life stressors, following the death of a spouse.²

“Divorce is a lawsuit. One of you must sue the other in order to dissolve the marriage. In doing so, you automatically become adversaries. The law says so.”³ Everyone has seen or read the sensationalized movies and headlines—the Kramer v. Kramer⁴-style child custody hearings; the New York Post headlines identifying Tiger Wood’s fourteenth mistress;⁵ the prenuptial agreement leaving the wife of twenty years in the dust as her ex-husband marries his girlfriend twenty years his junior.⁶ Of course, not all divorces are

¹ Even Judge Hand confessed: “After now some dozen years of experience, I must say, that, as a litigant, I should dread a lawsuit beyond almost anything else short of sickness and death.” Learned Hand, The Deficiencies of Trials to Reach the Heart of the Matter, in 3 Ass’n of the Bar of the City of N.Y., Lectures on Legal Topics 89, 106 (1926).
³ Paula James, The Divorce Mediation Handbook: Everything You Need to Know 1, 1 (1997).
⁵ 14th Women to be Linked to Tiger Indentified: Report, N.Y. Post (Dec. 14, 2009, 4:42 PM), http://www.nypost.com/p/latest_gal_is_th_to_be_linked_to_f4refs52DZRRh4suw8xh5L.
this spectacular.\(^7\) In fact, thanks in large part to alternative methods of dispute resolution (collectively, “ADR”) a majority of divorcing couples never even have to see the inside of a courtroom.\(^8\) This is not to say that mediated divorces are necessarily amicable; a mediation session may be just as acrimonious as a courtroom hearing.

This Note proposes that online dispute resolution (ODR) is a particularly therapeutic method of negotiating and settling a divorce, and in some circumstances may be a more appropriate method than traditional face-to-face mediation sessions. Part I will discuss divorce and its psychological and emotional consequences. Part II will discuss therapeutic jurisprudence and why it is especially beneficial as applied to the dissolution of marriages. Part III will discuss ODR in general, its development, and its application to a variety of legal fields. Part IV will discuss the advantages and disadvantages of ODR, particularly with regards to therapeutic jurisprudence and divorce mediation.

II. DIVORCE, GENERALLY

Roughly half of all first marriages end in divorce.\(^9\) The problem with divorce itself is not that it splits up the family unit; it is that it is often not a clean break.\(^10\) As of October 2010, all states have no-fault divorce statutes.\(^11\) This means divorcing couples no longer have to place fault on one party (or in some cases, both parties) in order to convince a court there are grounds for divorce. However, the auxiliary issues of property division, spousal support, child custody and child support have the potential to remain signif-

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\(^7\) But who would buy a newspaper with the headline “Couple of Fifteen Years Split Amicably?”

\(^8\) Rome Neal, The Divorce Process, CBSNEWS.COM (Nov. 5, 2002), http://www.cbsnews.com/stories/2002/11/04/earlyshow/living/main528027.shtml (“[O]nly five percent of divorce cases are settled in court, leaving 95 percent to be settled by other methods . . . including divorce litigation, mediation, arbitration or collaborative divorce.”).

\(^9\) This statistic is for the United States. See Marriage and Divorce, CENTER FOR DISEASE CONTROL AND PREVENTION, http://www.cdc.gov/nchs/fastats/divorce.htm (last visited Dec. 31, 2011).

\(^10\) A California study found that twenty-five percent of divorces involved either substantial or intense conflict and twenty-four percent required the involvement of a professional other than the parties’ lawyers. Robert Emery, David Sbarra & Tara Grover, Divorce Mediation: Research and Reflections, 43 FAM. CT. REV. 22, 23 (2005) [hereinafter Emery & Sbarra].

\(^11\) Bill S.3890 was enacted on October 12, 2010 in New York, making it the last state to legislate no-fault divorce. See N.Y. DOM. REL. L. § 170 (McKinney 2010).
significant sources of contention during and following the divorce process. Not helping the matter is that divorce is an intensely personal and emotional situation, thus making negotiation and settlement especially difficult. Authors and mediators Donald T. Saposnek and Chip Rose have identified five emotions inherent in the divorce process affecting a divorcing couple’s ability to negotiate rationally and settle quickly: grief, anger, guilt, worry and negative reconstruction of spousal identity.

Divorce is one of the few situations where your attachment figure, the person you would normally turn to in difficult situations, is the source of pain. To lose this person is a profound loss and it is physiologically difficult to hold the resultant sadness and grief. Furthermore, studies suggest that divorce is more often than not a unilateral decision. This non-mutuality results in a significant discrepancy in a couple’s respective emotional stages; this discrepancy may further hinder negotiations. Anger and vengeance, however, can be a wonderful temporary antidote. Thus, it is human nature that overloads the court system with divorcing couples arguing over who gets the house and kids. Anger may be healthy in the mediation process in that it signals a need to discuss and explore issues that may have not yet been approached. As family mediator Robert Emery and his colleagues point out, “conflict is not inherently ‘bad,’ something to be avoided at all costs.” That being said, there is a fine line between anger that aids the progression of mediation and anger that instills fear in the other party to the point of an inequitable settlement that will need to be revisited in the future.

12 John Ventura & Mary Reed, Divorce for Dummies 198 (2009) (“A successful negotiation requires hard work, a commitment to the negotiation process, and a willingness to behave like mature adults. That can be a tall order for many happily married couples, let alone those who are splitting up.”).
15 Id.
16 “[I]n seventy-five to ninety percent of all contemporary divorces, one spouse wants out of the marriage while the other does not.” Saposnek & Rose, supra note 13 (citation omitted).
17 This may also explain the general finding that about fifty percent of persons who file for divorce end up withdrawing their request and reconciling. Id.
18 “It is important to note that anger, as manifested in threats of all kinds, is most often a secondary emotion. That is, it is a feeling that covers up more primary feelings of hurt, fear, humiliation, loss, abandonment and powerlessness.” Id.
20 Id.
Guilt in one partner and pain felt by the other work together in a yoked system. Guilt may be derived from seeing the effects of breaking up the family, over leaving a spouse in misery, about the spouse’s ability to survive emotionally, about damaging the children’s psychological well-being, and any other consequences of essentially splitting one household into two. This could lead to waivers of property division, child support and custody rights, and even lead to the leaving spouse seriously questioning his or her decision to leave. Saposnek and Rose suggest that guilt, being a very powerful motivator of human behavior, can lead to what they refer to as “self-induced disempowerment” and must be relieved before negotiations can proceed or else they may lead to a feeling of resentfulness later in the divorce process or even post-settlement.

Anxiety over economic survival is often a central concern for both parties in a divorce and only mounts as time wears on and attorneys’ fees rack up. Uncertainty about the future and overall anxiety over costs and distribution is not alleviated by the often-exaggerated positions taken by attorneys during negotiations for leverage purposes. Concern over child custody and visitation can also be a major source of anxiety, especially considering that judicial determinations are guided by a vague “best interests of the child” standard. Men may have reason to be especially worried after reading studies showing contact between divorced, non-custo-

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21 Saposnek & Rose, supra note 13.
22 See Nehami Baum, “Separation Guilt” in Women who Initiate Divorce, 35 CLIN. SOC. WORK J. 47-55 (2006) (arguing that the gender specific processes of separation individuation and socialization that women undergo in childhood make them vulnerable to similar guilt feelings when they initiate divorce). See also Cheryl Buehler, Initiator Status and the Divorce Transition, 32 FAM. REL. 82-86 (1987) (finding that initiators actually experienced more change and disruption than non-initiators in the year after the divorce); Judith Wallerstein & Joan Kelly, Surviving the Breakup (1980) (observing that divorced individuals often feel guilty about both the damage of the divorce to their children and about their abandonment of culturally accepted definitions and roles).
23 Saposnek & Rose, supra note 13. For an illustrative case study see James, supra note 3, at 85-88.
24 Saposnek & Rose, supra note 13.
26 Saposnek & Rose, supra note 13.
27 Emery & Sbarra, supra note 10, at 29.
dial fathers and their children is “distressingly infrequent” and decreases as time passes after divorce.28

Finally, negative reconstruction of spousal identity is an emotional by-product particular to divorce, especially in situations where events leading up to divorce are not amicable.29 We live in a polarizing culture that favors the good-guy, bad-guy mentality.30 Vilifying the other person is an easy way to validate one’s own position on an issue. This not only creates tension and animosity during negotiations, but also can delay settlement by creating once non-existent issues. It may also be especially detrimental to children of the marriage, who may be pressured to take sides.31

Of course, these are not the only emotions at play during a divorce. However, they, along with a general distrust of the other party and with the process as a whole, can act as major roadblocks in negotiating a divorce. By containing and managing conflict through mediator-assisted discussions, divorce may be less emotionally and psychologically traumatic for the individuals. Furthermore, by presenting a unified front, detrimental effects on children

28 Judith Seltzer, Relationships Between Fathers and Children Who Live Apart: The Father’s Role After Separation, 53 J. MARRIAGE & FAMILY 79, 80 (1991). (“Studies of nonresident fathers’ with their children suggest that many fathers handle the pain of trying to maintain close bonds after separation by limiting their contact with children . . . Other nonresident fathers limit their contact with children to avoid conflict with the former spouse . . . Still other fathers gradually drift away from their children, remarry, and establish new families that compete for their time, attention, and income.”) (citations omitted).

29 Saposnek & Rose, supra note 13; see also JANET R. JOHNSTON ET AL., IMPASSES OF DIVORCE: THE DYNAMICS AND RESOLUTION OF FAMILY CONFLICT 62 (1988):

Our clinical experience leads us to conclude that the actual experience of separation for some couples was the crucible in which these negative views of each other are brewed and crystallized. Couples who experience particularly traumatic separations are prime candidates for generating negative images. Perceived experiences of being suddenly and unexpectedly left; abandoned after secret plotting and planning; left after a secret love affair with another person; left after uncharacteristic, explosive violence—all are separation modes that are typically traumatic and involve inordinate degrees of humiliation, anger, defeat, guilt, and fear, thus setting the stage for what is to come. A radical reconstruction of the identity of the ex-spouse can occur at the time of a traumatic separation. The desperate reactions and counter-reactions to the crisis are likely to crystallize new negative views of each other which subsequently become autonomous of these origins.

30 Katz, supra note 14.

31 Saposnek & Rose, supra note 13 (“Researchers and clinicians for years have interviewed and counseled countless adults who recall vivid childhood memories of their parents’ conflictual divorce experience as a living hell of divided loyalties, forced court-ordered examinations, pressure to take sides, and the absence of any sense of security, safety, trust, or sanity.”).
of the marriage during and after the divorce process may be easier to mitigate or avoid entirely.32

III. THERAPEUTIC JURISPRUDENCE

Therapeutic jurisprudence is defined as “the use of social science to study the extent to which a legal rule or practice promotes the psychological or physical well-being of the people it affects.”33 It is a movement that has developed over the last couple of decades in response to a growing dissatisfaction with the legal system among clients and lawyers.34 Analogous to the relationship between holistic therapy and traditional medicine, therapeutic jurisprudence goes beyond the law to consider the social, psychological and emotional consequences of an action and takes into account the parties’ emotions, feelings, needs, resources, goals, psychological health, relationships, values, morals, and financial concerns.35 The rising popularity of therapeutic jurisprudence is evidenced, for instance, in the inclusion of a “Spirituality Section” on the Association for Conflict Resolution website36 and the foundation of the Global Negotiation Insight Institute, which studies the intersection of conflict resolution, philosophy, spirituality, and psychology.37 Therapeutic jurisprudence has been employed by attorneys dealing with mental health patients,38 in employment law,39 and in regards to the military’s “Don’t Ask, Don’t Tell” policy.40

32 Emery & Sharr, supra note 13, at 24 (citing Robert E. Emery, The Truth About Children and Divorce (2004)).
34 Daicoff, supra note 33, at 1.
35 Id. at 9 (discussing the idea of a client’s “rights plus”).
38 Daicoff, supra note 33, at 11; see also Robert D. Miller et al., Litigiousness as a Resistance to Therapy, in DAVID WEXLER, THERAPEUTIC JURISPRUDENCE: THE LAW AS A THERAPEUTIC AGENT 332-35 (David Wexler ed., 1990).
40 See Kate Kavanagh, Don’t Ask, Don’t Tell: Deception Required, Disclosure Denied, 1 PSYCHOL. PUB. POL’Y & L. 142 (1995).
Considering the personal relationships inherent in family law, therapeutic jurisprudence may be especially beneficial to disputes in this legal arena, including divorce.\(^{41}\) One particularly therapeutic option is mediation.\(^{42}\) Mediation is a method of alternative dispute resolution wherein the parties meet with a mutually selected impartial person (the mediator) who assists them in identifying and working out their differences.\(^{43}\) Comparisons of mediation with adjudication have shown that it encourages settlement and generates a higher degree of user satisfaction.\(^{44}\) Mediation has also been found to improve communication between ex-spouses during the divorce process, results in successful co-parenting, reduces the incidence of re-litigation and is, on the whole, more cost-effective and time efficient.\(^{45}\) This is in large part due to three attributes often associated with mediation: (1) focus on communication; (2) empowerment and recognition; and (3) self-determination.\(^{46}\)

Divorce mediation is generally limited to the five major issues addressed in divorce law: property division, spousal support, child support, child visitation and child custody.\(^{47}\) By encouraging an honest and open conversation, a divorcing couple can be flexible and creative in crafting a settlement dividing property and arranging for their children’s future.\(^{48}\) A divorce is unique in that the relationship of the parties, more often than not, does not end at

\(^{41}\) See generally Divorce Mediation: Theory and Practice (Jay Folberg & Anne Milne eds., 1998) (“When a marriage dissolves, legal proceedings become entwined with emotional dynamics, making decisions about divorce a matter of the heart and the law.”).

\(^{42}\) Id. at 5 (“Within the past decade, we have begun to see therapists who identify themselves as divorce counselors and specialize in services directed toward the mental health concerns of the divorcing family . . . This divorce theory has moved the social scientists from a one-dimensional view of divorce as a legal process to a more integrated view of divorce as a multidimensional process involving both legal and psychological matters. The advent of divorce mediation has furthered these principles. Mental health professionals view mediation as a means of helping the divorcing family with the psychological dissolution of the marriage and to a contractual definition of independent and shared responsibilities.”) (citations omitted).


\(^{44}\) Emery & Sbarra, supra note 10, at 22.

\(^{45}\) Id. (“The key ‘active ingredients’ of mediation are likely to include: (1) the call for parental cooperation over the long run; (2) the opportunity to address underlying emotional issues (albeit briefly); (3) helping parents to establish a businesslike relationship; and (4) the avoidance of divisive negotiations at a critical time for family relationships.”).

\(^{46}\) Saposnek & Rose, supra note 13.


\(^{48}\) Ms. Katz recalls an instance where a divorcing couple had to decide who got to keep the engagement ring. The husband was more economically secure and the ring was an heirloom in his family while the wife was less economically secure. Once each side’s concerns were ex-
settlement. In light of the on-going nature of a settlement, communication is the terra firma on which divorce mediation rests. Furthermore, having a neutral person mediating the conversation can facilitate a more effective and efficient conversation. Couples going through a divorce are often caught up in, as divorce mediator Paula James describes it, a “fog of emotional turmoil.” They are too hurt, angry and/or shocked to even attempt a rational discourse. Fortunately for divorce attorneys and their billable hours, this is the perfect opportunity to step in and tell the individual to “leave everything up to me.” However, having a third-party mediator present who can guide them through, as opposed to someone purposely butting up against them, is an emotionally healthier alternative. A divorce proceeding, while admittedly not pleasant, need not be deleterious. In fact, mediation has the potential to be a healing process, one that brings the disputing parties together to discuss and analyze their differences and resolve conflicts and disagreements.

By way of empowerment (in other words, the restoration to individuals of a sense of their own value and strength and their capacity to handle life’s problems) and recognition (i.e. acknowledgment and empathy for the situation and problems of others), parties can go through a beneficial transformation during the divorce process rather than fall apart at the seams. One myth of pressed, a natural solution—that the husband would buy the ring back from his ex-wife—was reached almost immediately. Katz, supra note 14.

49 Emery, supra note 47, at 379 (“Divorcing parents are not expected to be friends, but mediators assume that partners who are also parents will, of necessity, maintain some form of ongoing coparental relationship. In this sense, former spouses who remain parents can never completely divorce.”).


52 JAMES, supra note 3, at 41.

53 Id.

54 Ms. Katz likens this to going into a realtor’s office and being told that you won’t have to do anything but buy and live in a house you’ve never seen before for the rest of your life. Katz, supra note 14.

55 JAMES, supra note 3, at 41.


57 Id.


59 Id.

60 Id.
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divorce is that an individual has been rendered helpless by shock or
grief, and therefore cannot speak in his or her own voice. By
encouraging parties to voice their opinions and communicate
openly, a divorcing couple is not only more likely to reach a settle-
ment efficiently, but they are also more likely to leave (and re-
main) satisfied with that settlement.

Finally, mediation is a therapeutic alternative in that a funda-
mental principle of the process is self-determination. Parties are
encouraged to make a voluntary and non-coerced decision regarding
the possible resolution to any issue in dispute. This not only
restores control to each spouse during the negotiation, but also
parties are more likely to adhere to the terms of a mediation agree-
ment as opposed to a judicial order. A study by family law schol-
ars Robert Emery, David Sbarra and Tara Grover found greater
compliance with child support orders when parents actively partici-
pated in the mediation of their own divorce. The researchers hy-
pothesize that this was due to the cooperative atmosphere of the
process as a whole, along with an increased feeling of “ownership”
over agreements reached on their own.

Mediation is not only a therapeutic alternative during the ac-
tual divorce process, but is also beneficial to the post-divorce rela-
tionship. As mediator Kenneth Neumann points out, “you only

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61 Katz, supra note 14.
62 Emery & Sbarra, supra note 10, at 28 (“Our consistent finding was that, on average, par-
ents did prefer mediation to adversary settlement and this held true both on items assessing the
assumed strengths of mediation (e.g., your feelings were understood) and the assumed strengths
of adversary settlement (e.g., your rights were protected) . . . Furthermore, we found that par-
ents were more satisfied with mediation than with adversary settlement six weeks after dispute, a
year and a half later, and twelve years following initial settlements.”).
63 See, e.g., ABA House of Delegates, Symposium on Standards of Practice, Model Stan-
dards of Practice for Family and Divorce Mediation, Overview and Definitions, 2001, Standard I,
available at http://www.abanet.org/family/reports/mediation.pdf (“Self-determination is the fun-
damental principle of family mediation. The mediation process relies upon the ability of partici-
pants to make their own voluntary and informed decisions.”).
64 Haitham Haloush & Bashar Malkawi, Internet Characteristics and Online Dispute Resolu-
65 Emery & Sbarra, supra note 10, at 27; see also David Wexler & Bruce Winnick, Therapeutic
Jurisprudence as a New Research Tool, in ESSAYS IN THERAPEUTIC JURISPRUDENCE 303, 307
(David Wexler & Bruce Winnick eds., 1991) (“[The] participatory or dignitary value of process
produces litigant satisfaction and a greater degree of acceptance and compliance with the ulti-
mate decision reached.”).
66 Emery & Sbarra, supra note 47, at 27.
67 Id.
ever get a little divorced.”68 The open communication encouraged by the mediator allows the couple to air their grievances in a safe environment, effectively training the couple to be open and cooperative in their future communication and co-parenting. Furthermore, mediation encourages discussion and deliberation over issues that may not be considered by attorneys or a judge.69 Mediation is viewed as such a useful tool in divorce that a number of states including California,70 Florida,71 Arizona,72 and Louisiana73 have adopted legislation mandating the mediation of custody disputes under most circumstances.

IV. ONLINE DISPUTE RESOLUTION

Online dispute resolution ("ODR") is the use of technology to assist parties with the resolution of a dispute outside the courtroom.74 All of the processes available under the alternative dispute resolution ("ADR") umbrella are offered online, including the three main branches: negotiation, mediation and arbitration.75 Because mediation is the prevailing method of ADR applied to divorce,76 this Note focuses on online mediation and its advantages and disadvantages.

ODR was initially developed to handle disputes arising within the emerging field of e-commerce.77 Because these disputes were

68 Kenneth Neumann, Director of Training, Center for Family and Divorce Mediation, at a Panel on Divorce Mediation at Benjamin N. Cardozo School of Law (Oct. 14, 2010) (on file with author).
69 Emery, supra note 47, at 380.
70 ANN. CAL. FAM. CODE § 3170(a) (West 2010).
71 FLA STA. ANN. § 61.183 (West 2010).
72 ARIZ. REV. ST. § 24-413 (Thomson Reuters 2010).
73 LA. REV. STAT. ANN. § 9:332 (West 2010).
76 See generally Roger Clapp, Family Law Disputes Cry Out for Mediated Settlements, 53 DISP. RESOL. J. 34, 35 (1998); but see Penelope Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441, 523 (1992) (opposing mediation in divorce cases because it shifts focus “from rights to relatedness . . . endangering divorcing women and reinforcing male dominance.”).
77 See generally Ethan Katsh, Dispute Resolution in Cyberspace, 28 CONN. L. REV. 953 (1996).
often cross-border, low value, and had their roots in online transactions, online resolution was viewed as the natural option.78

One of the first ODR programs was the Online Ombuds Office, an academic pilot project developed by eBay and the Center for Information Technology and Dispute Resolution at the University of Massachusetts by professors Ethan Katsh and Janet Rifkin in 1999.79 By the end of the project, roughly 144 disputes were mediated online via e-mail with the help of an “ombudsman.”80 The pilot project ultimately led to the adoption of an online dispute resolution system for eBay, provided by the independent company Squaretrade.81 Squaretrade eventually became the first widely used ODR provider, with over 1,500,000 disputes resolved between February 2000 and June 2004.82 Parties settled disputes over anything from lost items to disputes over the feedback that users had left on the eBay Feedback Forum.83 The first step was what Squaretrade labeled “Direct Negotiation,” whereby a user filed a complaint and the other party’s response appeared in a secure area on Squaretrade’s website.84 If direct negotiation failed to result in settlement, the parties had the option of recruiting a mediator to facilitate an agreement for a modest fee.85 Squaretrade eventually discontinued its dispute resolution services in 2008 and is now pri-

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78 So much so that the Federal Trade Commission and the Department of Commerce hosted a workshop exploring the use of ADR mechanisms for online consumer transactions in 2000. See FTC, Commerce to Host Public Workshop to Explore Online Dispute Resolution, FEDERAL TRADE COMMISSION (Feb. 9, 2000), http://www.ftc.gov/opa/2000/02/adrrev.shtm.


80 Id. at 712.


82 Phillipe Gilliéron, From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?, 23 OHIO ST. L.J. 301, 306. For a detailed explanation of Squaretrade and it’s operation see Steve Abernathy, Building Large-Scale Online Dispute Resolution & Trustmark Systems, available at http://www.odr.info/unece2003 (last visited Nov. 7, 2010).

83 Rule, supra note 81, at 101-02.

84 Abernathy, supra note 82, at 7.

85 Id.
marily a warranty provider. However, it paved the way for other ODR providers, including Cybersettle.

Cybersettle has emerged as a prominent ODR provider thanks in large part to a relatively recent contract with the City of New York. The City began using the system in 2004 to settle personal injury and property damage claims. By November 2007, the city had made almost three thousand settlements and saved an estimated $53.8 million in total settlement costs. Cybersettle, which holds patent rights to what is described as an “automated, online, double-blind bid dispute resolution system,” helps users match settlement offers with demands. If the parties fail to come to an agreement within three rounds, the users can call a telephone facilitator to help mediate.

Another notable arena where ODR has emerged as the primary method of dispute resolution is in disputes over domain names. As internet use expanded in the 1990s, entities raced to buy domain names and trademark holders grew concerned about infringement when other users registered domain names that were the same as, or uncomfortably similar to, their trademark. In response to these growing concerns and resulting disputes, the Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998. The not-for-profit corporation established a process and set of governing rules for deciding domain name disputes called the Uniform Dispute Resolution Policy (“UDRP”). The UDRP is the prescribed method of solving domain name disputes registered under the generic top-level domains (i.e., “.com,”

92 Braeutigam, supra note 74, at 278.
93 Id.
94 See Internet Corporation for Assigned Names and Numbers [hereinafter ICANN], http://www.icann.org/en/about/ (last visited Dec. 27, 2011).
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“.org,” and “.net”). Under the policy, most types of trademark-based domain-name disputes must be resolved by agreement, court action, or arbitration before a registrar will cancel, suspend, or transfer a domain name. In order to succeed, a complainant must demonstrate to an arbitrator the following: (1) that the domain name in dispute is identical or substantially similar to a trademark in which rights are held, (2) that the defendant does not have a legitimate interest in the domain name, and (3) that the defendant registered it in bad faith. While not all service providers approved by ICANN offer wholly online arbitration, the UDRP nonetheless represents an important step in the development of ODR.

Governmental agencies and public organizations have also considered ODR and have provided several reports on its development. Large-scale national and international ODR forums and programs have been instituted in countries such as Argentina and Canada, and in 2010 the United Nations Commission on International Trade Law established a Working Group to undertake work in the field of ODR relating to cross-border electronic commerce transactions.

Despite ODR’s steady expansion beyond strictly e-commerce disputes, sites offering online mediation remain scarce. A recent

96 Id. The policy has also been adopted by certain managers of country-code top-level domains (e.g., .nu, .tv, .ws). Id.
97 Id.
99 The four current providers of UDRP arbitration are: The Asia Domain Name Dispute Resolution Centre, the National Arbitration Forum, the World Intellectual Property Organization, and the Czech Arbitration Court Arbitration Center for Internet Disputes. List of Approved Dispute Resolution Service Providers, ICANN, http://www.icann.org/en/dndr/udrp/approved-providers.htm (last visited Feb. 27, 2011).
search found very few working sites offering comprehensive online mediation services,\textsuperscript{104} and only two sites specifically offering online mediation for divorce purposes.\textsuperscript{105} One such site, Mediationline, offers disputing parties three options: (1) traditional (i.e., face-to-face) mediation; (2) do-it-yourself mediation; and (3) online mediation.\textsuperscript{106} New York City attorney Petra Maxwell founded the site when she noticed the benefits of online videoconferencing services such as Skype in her practice.\textsuperscript{107} Instead of using online communication as a supplement, she imagined many clients would appreciate the convenience and cost-effectiveness of a wholly online platform.\textsuperscript{108}

While early programs such as the Online Ombudsman Office tended to rely mainly on email communication, ODR technology has expanded to include process-guided applications that allow users to communicate on secure platforms.\textsuperscript{109} While past ODR providers did not tend to offer videoconferencing because of slow bandwidths,\textsuperscript{110} advances in technology have resulted in a more confident attitude toward videoconferencing.\textsuperscript{111} Of course, the reasons why a couple chose ODR in the first place may lead to apprehension toward videoconferencing. Ms. Maxwell describes one situation where a couple had planned to use videoconferencing because the wife lived in California and the husband lived in New York.\textsuperscript{112} At the last minute the wife had second thoughts, saying she did not even want to look at her ex-husband (from whom she had been separated for more than two years.)\textsuperscript{113} In the end, the parties decided to conduct the mediation via telephone conference calls with Ms. Maxwell and a therapist.\textsuperscript{114} Both Ms. Maxwell and the participating therapist expressed concern prior to the first session because


\textsuperscript{107} Telephone Interview with Petra Maxwell, Founder of The Mediationline (Oct. 27, 2010).

\textsuperscript{108} \textit{Id}.

\textsuperscript{109} For a comprehensive explanation and discussion of an ODR application developed at the University of Massachusetts-Amherst, see Borislava I. Simidchieva et al., \textit{Storm2: Process-Guided Online Dispute Resolution} (June 2010), available at http://laser.cs.umass.edu/techreports/09-046.pdf.

\textsuperscript{110} RULE, supra note 81, at 251.

\textsuperscript{111} THE MEDIATIONLINE, supra note 106.

\textsuperscript{112} Maxwell, supra note 107.

\textsuperscript{113} \textit{Id}.

\textsuperscript{114} \textit{Id}.
neither had met the husband or wife. However, both agreed afterward that they were able to get a good sense of the couples’ personalities over the phone. Furthermore, Ms. Maxwell attributed the lack of acrimony in what had the potential to be a very stressful situation to the fact that the couple knew they could avoid seeing each other face to face.

Online mediation mirrors traditional mediation in most procedural aspects. Before mediation commences, parties agree to submit to specific, personally created terms. The mediator then checks the background documents presented by the participants and identifies the particular issues to be addressed. The participants are then asked to propose their own solution to the issues. These solutions are discussed, analyzed and synthesized by the mediator, who uses the suggestions to develop a more concrete proposal aimed at satisfy both parties. Each participant is asked to respond or ask a clarifying question, and this back-and-forth process continues until a settlement is reached. At the end of the mediation, the mediator fills out a dispute closure form clarifying the outcome and the terms of any agreements made. The mediation process, offline or online, however, does not develop in a “legal vacuum.” Mediation must always take place in the “shadow of the law,” and any agreements reached must rely upon some law rendering it valid and effective. Furthermore, at all times each

115 Id.
116 Id.
117 Id.
118 For example, divorce mediator James Melamed suggests addressing the issue of confidentiality—a topic especially important when the vast majority of communication and document exchange is performed online. James Melamed, Divorce Mediation and the Internet (Jan. 2002), http://www.mediate.com/articles/melamed9.cfm.
119 In the first phase of negotiation in the Storm2 system, party representatives clicks on a button labeled “Issue Statement” and identifies an issue (or issues) in the form of an open-ended question (or questions). The statement is then transmitted to the mediator. Once both parties have submitted their proposed issues, the mediator synthesizes a group issue statement to reflect both parties’ suggestions. Simidchieva, supra note 109, at 4.
120 Storm2 calls this the “brainstorming component” and gives the option to contribute publicly, anonymously, or only to certain parties or just the mediator. Id. at 6.
121 For templates and examples of forms commonly used in divorce mediation see James Melamed, Mediating Divorce Agreement, Divorce Mediation Forms and Resources, http://www.mediate.com/divorce/pg2.cfm (last visited Dec. 6, 2011).
122 Haloush & Malkawi, supra note 64, at 336 (“[U]ltimately, mediation must rely upon some law rendering it valid and effective for it to exist in the legal order”).
123 Id. at 337.
124 Id.
party retains the opportunity to end the mediation and take the
dispute to court.125

Despite similarities in the traditional and online processes, on-
line mediation has been met with resistance in the alternative dis-
pute resolution community due to the untested assumptions about
mediating without face-to-face contact.126 Due to the especially
tense emotional situations inherent in divorce mediation, this re-
luctance is not surprising. However, in light of the advantages of-
fered by ODR, these attitudes may not be entirely valid.127 This is
especially true considering many therapists offer to conduct ses-
sions over the phone or via videoconference when meeting face-to-
face is unavailable.128 In fact, from a therapeutic jurisprudence
perspective, ODR may be a comparable, if not more beneficial,
method of mediating a divorce.

V. ADVANTAGES OF ODR AND ITS APPLICATION
to DIVORCE MEDIATION

A. Speed

Former Chief Justice of the Supreme Court Warren Burger
said, “the notion that most people want black-robed judges, well-
dressed lawyers, and fine-paneled courtrooms as the setting to re-
solve their dispute is not correct. People with problems, like peo-
ple with pains, want relief, and they want it as quickly and
inexpensively as possible.”129 In line with the Chief Justice’s obser-
vation, speed is a principal reason why many divorcing couples opt
for mediation and why it is a therapeutic alternative to litigation.
Studies have shown that divorcing couples that opt for mediation
settle their disputes in roughly half the time than those who choose

125 Id. at 335. This resistance is not unique to professionals. Some of Ms. Maxwell’s greatest
hurdles are clients hesitant to mediate strictly online. However, after an initial in-person meet-
ing, she finds that people tend to quickly ease into strictly online communication. Telephone
Interview with Petra Maxwell, Founder of The Mediationline (Sept. 15, 2011).
126 Joel B. Eisen, Are We Ready for Mediation in Cyberspace? 1998 B.Y.U. L. REV. 1305,
1321 (“The most obvious set of shortcomings inheres in the substitution of writings for meetings.
The electronic character of the proceeding will make it difficult, if not impossible, to pursue
important process values of mediation.”).
127 Maxwell, supra note 107.
128 See, eg., Rachael Lowe, Videoconferencing Could Help Vets Manage Anger, Reuters
PN20100216.
an adversarial route. Online mediation offers an even quicker route to settlement by eliminating the need to meet in person, which means not having to coordinate schedules of three or more individuals. Indeed, many legal scholars consider the potential for speed to be ODR’s main advantage.

An efficient mediation agreement, i.e. one that covers all relevant factors and requires no future visitation, offers the added benefit of decreasing the probability of long-term psychological effects on children. Research and clinical discussions of divorce and its consequences for children has resulted in the popular perspective that divorce is considered not merely an event, but a series of changes in family relationships. This process perspective of divorce indicates that correlated family stressors, not the actual divorce per se, account for difficulties in children’s post-divorce adjustment. Further evidence indicates that children are actually quite resilient in coping with divorce when parents adequately manage potential disruptive family processes. It has been suggested that adversarial litigation may increase acrimony between divorcing spouses. However, mediation offers the promise of promoting more positive familial relationships during and after divorce. Thus, while the courts may announce a concern for the children’s best interests, determining such interests may be better facilitated by avoiding court altogether. Furthermore, maintaining distance may facilitate a more business-like relationship between the couple. This will not only help keep emotions at bay during divorce negotiations, but may also be advantageous for any necessary future communication or co-parenting.

Quicker settlements also lend to the cost-effectiveness benefit of ODR. The theory may be that the more expensive a divorce,

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131 Gilliéron, *supra* note 82, at 314.
134 Id.
135 Id.
136 Id. at 383.
137 Id. at 378.
138 Emery & Sbarra, *supra* note 10, at 33 (“We believe that encouraging former partners to develop businesslike boundaries around their ongoing co-parenting relationship was a third key component to our approach to mediation . . . We developed several techniques to help parents get more distance from each other, and thereby reduce conflict, facilitate grieving, and improve parenting and co-parenting.”).
the better. However, the stress associated with the costs of litigation can negate any ultimate satisfaction that may be achieved in finally reaching a settlement. Furthermore, economic imbalance between the parties could lead to an inequitable outcome. By being able to mediate more divorces in a shorter period of time and not having to worry about expenses, such as transportation or office space rentals, online mediators are able to charge even less than traditional mediators. Even in mediations where a party (or both parties) is represented by an attorney, online mediation keeps attorney fees down even more than traditional mediation thanks to the anonymity option afforded by the online platform. For instance, this not only keeps the overall cost down, but also allows the divorcing spouses to focus on the substantive issues rather than a ticking clock.

B. Distance

The distance afforded by online mediation can be beneficial in several ways. First, it is a convenient and inexpensive option for a divorcing couple that no longer lives in the same state, country or time zone. Second, it can facilitate the creation of the business-like relationship desired in a mediation session, as discussed above. Finally, the ability to keep the divorcing couple apart without resorting to negotiations strictly between attorneys may be the only way a divorce will be sought.

This is especially true in situations involving domestic violence. As divorce mediator James Melamed points out, “it is im-

139 Katz, supra note 14 (discussing a client who was forced to take out a third mortgage on her house in order to pay her divorce attorney).
140 This is one reason New York recently passed a bill amending its Domestic Relations Law to provide for a presumption of counsel fees to a non-monied spouse. See N.Y. DOM. REL. LAW § 238 (McKinney 2010).
142 Simidchieva, supra note 102, at 6 (“STORM2’s process can be tailored so that the identity of the different participants in the negotiation can be concealed.”).
143 Braeutigam, supra note 74, at 277.
144 See supra Part IV.A.
145 Braeutigam, supra note 74, at 299 (“Disputants who feel threatened or are otherwise unwilling to meet face-to-face can still avail themselves of mediation, but at a safer distance. One important caveat in this regard is that online mediation is not appropriate where there is the risk of violence between people who live in the same geographic area. Should violence erupt during the course of mediation, the online mediator may not become aware of an imminent threat of violence, nor be able to physically intervene.”).
possible to receive a bloody nose over the Internet.”

Studies have shown that partners who have assaulted or emotionally abused their partners during their marital relationships are more likely to assault or abuse them during and following negotiations or mediations. Furthermore, someone who has suffered violence during a marriage but cannot afford to hire an attorney may choose to forgo a divorce altogether in order to avoid contact with his or her spouse.

Physical distance between the parties may be especially advantageous from a therapeutic jurisprudence point of view by creating a rational, emotionally sterile online conversation while at the same time allowing parties to unrestrictedly express their emotions. When an individual feels attacked, a neurological reaction takes place. The hippocampus induces a heightened sense of alertness affecting the prefrontal lobe, shutting down the executive functioning and causing extreme stress and anxiety. When the amygdala is stimulated in this way, it causes the release of various stress hormones, including cortisol, which heightens the senses, dulls the mind, and steals energy resources from working memory and the intellect so that such energy may be used to prepare for the individual to either fight or run. This stress, anxiety, and increased cortisol levels create hurdles in creating a rational conversation, thus inhibiting effective negotiation.

In her research of online mediation and its effectiveness, How Do You Write Yes? (hereinafter the “Hammond Study”), conflict analysis and management researcher Anne Marie Hammond found that a majority of participating disputants reported feeling calmer, more confident, and better equipped to negotiate without the added stressors of face-to-face interaction.

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146 James Melamed, quoted in J. Kim Wright, Lawyers as Peacemakers 58 (2010).
148 This is one of the main reasons why New York passed no-fault divorce legislation, a reason why divorce rates tend to momentarily increase when no-fault legislation is passed, and a reason why female suicide decreases by twenty percent when such legislation is passed. See Bill S890A-2009 Memo: An Act to Amend the Domestic Relations Law in Relation to No Fault Divorce (July 27, 2010) (discussing studies presented at a 2007 Forum on the Need for No-Fault Divorce presented by the New York State Court Administration Office of Matrimonial and Family Law Study and Reform). At least one researcher has criticized the use of mediation in these cases, and the diversion of wife abuse from “formal legal action combined with punishment or rehabilitation.” Lisa G. Lerman, Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women, 7 Harv. Women’s L.J. 57, 71 (1984).
151 Id.
152 Amendola, supra note 56.
and less hostile in the online environment. Some disputants reported feeling less pressure and the environment to be less threatening, reducing the animosity often felt in face-to-face situations. Being in a separate room, away from the other spouse (and perhaps even being alone entirely) may help an individual feel calmer and better able to focus on the substantive issues rather than dealing with any unnecessary power struggle.

Alternatively, it could be argued that parties may be more willing to engage in riskier interpersonal behavior if engaged in strictly online communication, thus exacerbating the emotional intensity of the mediation. Not having to ever meet the mediator in person or not being in the same room as the other spouse may remove any filter that exists in face-to-face mediation and may result in, as authors Leigh Thompson and Janice Nadler call it, an “aversive emotional style.” Experiments have demonstrated that e-mail encourages uninhibited and aggressive communications because e-mailers are less influenced by social norms. Furthermore, the same level of comfort and support available from a present neutral third-party may create a “me against the world” mentality.

C. Netocracy

The online setting may result in a more effective negotiation and a fairer settlement by resolving any power imbalances that may exist between the divorcing couple. The anonymity afforded by the Internet allows for a phenomenon author Robert

154 Id.
156 Id.
158 On the other hand, the inability for the mediator to defend a party may be beneficial. Jo DeMars et al., Virtual Virtues: Ethical Considerations for an Online Dispute Resolution Practice, 17 DISP. RESOL. MAG. 7 (2010) (“As soon as the mediator aids the perceived weaker of the parties to ensure a balanced, fair outcome, the mediator has infringed on his or her ability to remain neutral.”).
159 Robert Gordon, The Electronic Personality and Digital Self, 56 DISP. RESOL. J. 8, 13 (2001) (discussing the difficulty in avoiding a deferential tendency in face-to-face mediating sessions).
Gordon calls “netocracy,” a situation in which all communicants are rendered equal in terms of status. Mediation, while inherently less adversarial than litigation, may still act as a forum in which individuals use the same “harm resources” (for example, physical strength, offensive language, credible threats) they would typically use to cast a coercive shadow over any other situation. Furthermore, individuals tend to modify their behavior according to society’s expectations of them. So, for instance, if a wife had allowed a husband to dominate the relationship during the marriage, he is likely to exhibit that same dominant behavior in a mediation session, maybe even more so. ODR and its inherent “netocracy” has a greater potential to create a level playing field in these situations. This is especially advantageous for participants who are generally conflict-avoidant. These individuals are less likely to speak their mind and are more likely to concede or give into the demands of the more assertive participant in order to simply end the mediation and get out of the room as quickly as possible. Further, mediation is particularly suited to divorce because it has the possibility of resulting in a positive sum (i.e. a win-win outcome). By maintaining a distance and allowing for a “netocracy,” the chances of both parties leaving satisfied increases.

This democratic leveling is enhanced by the potential to eliminate biases that mediators may unconsciously possess that can affect their ability to properly mediate. Mediation standards of

160 Id.
161 DesmonD Ellis & NoGreen Stuckless, Mediating and Negotiating Marital Conflicts 29 (1996).
162 Id.
163 See Gordon, supra 159, at 14-15 (discussing the benefits of online communication in the context of employee-employer disputes).
164 Id. at 14.
165 See Bernard Mayer, The Dynamics of Conflict Resolution: A Practitioner’s Guide 30-32 (2000). (Noting that “[s]ome people are much more comfortable engaging a conflict” and “[o]thers will go to great lengths to avoid conflict, to disengage as quickly as possible, and to prevent its recurrence.”).
166 Emery, supra note 47, at 379.
167 Benjamin Davis et al., The First International Competition for Online Dispute Resolution: Is This Big, Different and New, 19 J. Int’l Arb. 379, 389 (2002) (writing that face-to-face negotiations are “fraught with issues ancillary to the actual resolution of the dispute itself. [Asynchronous communication] encourages both sides to realistically evaluate their dispute in absence of personality conflicts and posturing . . . [T]he parties cannot focus on each other’s presence. Instead they are forced to focus on the substantive issues.”).
168 Braeutigam, supra note 74 at 292, 296-297.
conduct, more often than not, require impartiality. That being said, studies have shown that traditional mediation tends to advantage individuals who are physically attractive, articulate, well educated, or are members of a dominant ethnic, racial or gender group. Especially in mediations where the majority of the communication is text-based, chances of even an unconscious bias against a party may be diluted. The digital trail of communication and automatic archiving of conversations and communications is also a helpful tool as it helps keep mediators in check by helping them record and track their tendencies and provides convenient and reliable evidence in cases where there are allegations of impartiality or fairness.

D. Asynchronous Communication

Another key feature afforded by ODR is the asynchronous (i.e. non-instant) nature of the attendant communication. Where a conversation or issue is especially tense and emotional, the ability to step away from the computer and reflect on a statement or situation before responding is invaluable. Divorce mediator Kenneth Neumann points out that clients are often advised to hold back during face-to-face sessions in order to facilitate the process. However, this instruction may prove especially difficult when dealing with a potent topic, such as child custody. Maintaining a rational stance is made easier in an online setting where a person can consider the other party’s statements and deliberate for however long they need, before responding.

Because taking time to deliberate is seen as a useful tool in negotiating, traditional mediators often break into caucus during

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169 DeMars et al., supra note 158, at 6.
171 Of course, this does not mean there doesn’t exist “campaigns,” whereby parties will try to place themselves in a good light prior to or in between mediation sessions. See Maxwell, supra note 107.
172 Haloush & Malkawi, supra note 64, at 331 (“[T]he internet facilitates the storage, retrieval, review, comparison, annotation, classification, and reuse of information more than other communication mediums.”).
173 Id.; see also Gordon, supra note 159, at 11; Braeutigam, supra note 74, at 295-96.
174 Melamed, supra note 118 (suggesting that the asynchronous nature of the Internet offers participants their own contemplative safe space).
175 Neumann, supra note 68.
mediation sessions. While one party catches their breath, the mediator meets with the other party—going over what has already been discussed and letting the spouse run an idea by the mediator before the other spouse hears it. While beneficial in the long run, caucusing often proves burdensome in that it interrupts the flow of discussion and may give rise to frustration or suspicion as the other participant waits and wonders what is being discussed without them. Caucusing may also create a potential for manipulative behavior, whereby parties attempt to win the mediator over to their side. Online mediation, however, allows a mediator and a party to talk privately without breaking the flow of conversation entirely. It further allows a mediator to communicate privately with one party while allowing the joint discussion to progress. Efficient caucusing is even possible with video conferencing by making use of virtual private rooms.

Asynchronous communication not only allows individuals to better manage their emotions and express themselves in a more rational manner, it also helps mediators perform their job more effectively. In the Hammond Study, all participating mediators agreed that online communication helped them focus on the broader picture and not just on the moment-to-moment interactions. One mediator viewed the private meeting space as the most valuable tool in the online facility by allowing the mediator to explore what was happening without making the parties feel vulnerable or alienated while the others were caucusing. Furthermore, all mediators agreed that having time to craft their responses

177 JAMES, supra note 3, at 96.
178 One mediator in the Hammond study viewed the private meeting space as the most powerful tool in the online facility, allowing the mediator to explore what was happening without making the parties vulnerable and without calling a halt to the proceedings. Hammond, supra note 153, at 271. Another mediator added that private online meetings were more effective than face-to-face because the other parties were unaware of their occurrence and there was no alienation of parties as a result. Id.
179 Maxwell, supra note 107.
180 Haloush & Malkawi, supra note 64, at 339.
181 Id.
183 Hammond, supra note 153, at 275.
184 Id.
185 Id. at 339.
enabled them to express their questions and comments more effectively. Similarly, the majority of the disputants said the medium allowed them to be more thoughtful in their submissions and responses. They reported finding value in being able to review prior exchanges and talk or consult with others before making decisions.

On the other hand, asynchronous communication could be detrimental in that it essentially permits parties to disengage, rethink, and maybe even change their minds. At least one disputant in the Hammond Study reported feeling anxious when responses were not timely. Other disputants expressed frustration at the length of other parties’ responses and irritation at seeing past transgressions on screen. Mediators observed that a party could frustrate the process simply by staying offline, and the flexibility of participating online could result in procrastination. It has also been posited that relying on e-mail or similar asynchronous communication prevents the parties from immediately clarifying their position or correcting it so as to prevent misunderstandings.

Possibilities of delay and frustrations aside, the ability to think and communicate clearly is an especially helpful quality in allowing for an effective mediation, coming to a suitable divorce agreement, and preventing the need for further mediation (or litigation, for that matter) in the future.

E. Text-Based Communication

Perhaps the most debated attribute of ODR is the ability to rely on text-based communication. While advancing technologies means video conferencing, and even holography, may be a

186 Id. at 275.
187 Id. at 276.
188 Id.
189 Haloush & Malkawi, supra note 64, at 343.
190 Hammond, supra note 153, at 277.
191 Id.
192 Id. at 273.
193 Gilliérion, supra note 82, at 336.
194 Braeutigam, supra note 74, at 287.
viable option, it is possible for a mediation to take place entirely through bulletins, instant messaging, and e-mail. The ability to express one’s viewpoint without having to worry about interruptions reduces anxiety and increases confidence.196 Furthermore, a key tool in reaching settlement is careful listening, a particularly difficult task during a stressful or emotional conversation.197 One participant in the Hammond Study commented in regards to face-to-face mediation: “[i]t is easier for one’s mind to wander and not truly listen to what the other party is saying . . . one can already be formulating an opinion or rebuttal to what the other party is saying without truly understanding or hearing their entire message!”198 Alternatively, typing and the resulting lag time allows individuals to not only focus on the substantive content of received communication, but also allows for more care and consideration in drafting a response.199

By eliminating body language and speech through text-based communication, any disruptive or superfluous communication cues are eliminated. Numerous nonverbal communication cues such as facial expressions, body posture, gestures, and eye contact (or lack thereof), can interfere with the transmission of information necessary for an equitable settlement.200 The elimination of body language is especially helpful in creating a neutral environment. Even where relations are relatively amicable, divorcing couples have well-established patterns of communication and are adept at reading (and using to their advantage) each other’s nonverbal cues.201

Furthermore, unconscious body language can too easily be misinterpreted. For instance, crossed arms can lead a participant to be perceived as angry or closed off.202 When a party perceives negative behavior, whether or not it is a misinterpretation, they tend to focus on the negative content and will react, increasing the likelihood of retaliatory behavior and perhaps even an impasse.203

196 James, supra note 3, at 88.
197 Id.
198 Hammond, supra note 153, at 276.
199 Braeutigam, supra note 74, at 296. In the Hammond Study, disputants reported finding value in knowing they could reword statements before sending them. Hammond, supra note 149, at 277.
200 See Gordon, supra note 159, at 15 (suggesting that because of this “blizzard” of nonverbal cues, people are often unable to accurately “hear” each other during face-to-face conversations).
201 Braeutigam, supra note 74, at 298.
202 Id. at 293.
203 Gibbons et al., supra note 170, at 44-45.
Critics of ODR argue that this is too “lean” a medium and that “rich” (i.e. face-to-face) communication is necessary in order to experience the cathartic experience mediation offers. Other critics argue that online communication affects any perception of friendliness, attentiveness and humor, thus inhibiting the development of trust and rapport between the disputants and the mediator necessary in a successful mediation. Friendly banter, a common technique used by mediators, is replaced with a businesslike tone, thus turning mediation into a formal and less effective means of therapeutic dispute resolution. Furthermore, the absence of facial expressions, gestures and other body cues create communication voids, which may be filled in with psychological doubts and fears. These psychological creations may not only inhibit a sense of trust between the mediator and disputants, it facilitates the negative reconstruction of spousal identity common when negotiating a lengthy divorce.

As with distance, relying on text-based communication may also result in less filtration or create a negative filter through which conversations between individuals with a negative past history are seen, making a productive conversation more difficult. Studies have shown that remarks containing swearing, insults, name-calling and hostile comments are eight times more frequent in online communication than in face-to-face interactions. Thompson and Nadler attribute this to “counter-normative e-behavior” encouraged by the lack of influence by social norms in the online environment.

However, countervailing research has shown that there is little evidence to support the claim that online communication is inferior

206 Simidchieva, supra note 81, at 1322 (“For many participants, mediation is about the ‘venting’ of feelings and emotions...”).
207 Gordon, supra note 159, at 10.
208 A result scholars call “flaming.” Gilliéron, supra note 82, at 336.
210 Gilliéron, supra note 82, at 336.
211 Thompson & Nadler, supra note 155, at 119.
to face-to-face interaction. For instance, the Hammond Study found that reduced communication cues and textual communication did not significantly impact participants’ experiences in online mediation. Participants noted that they typed as they would have spoken and used their usual communication skills of considering what was being said, clarifying their understanding of the issues and offering their perspectives and options. People have adapted to online communication and a large part of people’s day-to-day business is conducted through e-mail and online, so they are attuned to what is being conveyed in online communication. Furthermore, Thompson and Nadler suggest that participants unconsciously imitate the linguistic structure of each other’s messages (i.e. length and grammar), the socio-emotional connotations of the other’s messages (i.e. tone and directness), and rate of replies. In this way, text-based communication augments the other benefits of ODR that make it so appealing, such as its offer of speed and “netocracy.”

VI. CONCLUSION

“When two people decide to get a divorce, it isn’t a sign that they ‘don’t understand’ one another, but a sign that they have, at last, begun to.” This quote by American humorist Helen Rowland best sums up why mediation and the communication it encourages is particularly advantageous in negotiating a divorce. Furthermore, from a therapeutic jurisprudence perspective, mediation is especially useful in mitigating the negative emotions at play during the process. On the other hand, mediation may not be practical because of physical distance, time requirements, safety concerns, or even just a mere lack of desire to be in the same room with an ex-spouse for an extended period of time.

213 Hammond, supra note 153, at 276.
214 Id. at 277.
215 Braeutigam, supra note 74, at 290.
216 Thompson & Nadler, supra note 155, at 113.
217 HELEN ROWLAND, A GUIDE TO MEN: BEING ENCORE REFLECTIONS OF A BACHELOR GIRL (1922).
ODR, in particular online mediation, offers the benefits of traditional mediation with the convenience, speed, and distance of online communication. The offer of expedient negotiations reduces the levels of anger, anguish, guilt, and anxiety often experienced by the spouses during the divorce process. This speedier process may in turn prove to be in the children’s best interest, emotionally and psychologically.\textsuperscript{218} The ability to conduct mediation sessions from a distance is not only convenient and cost-efficient, but may help assuage fear, anger, and other emotions that may potentially hinder negotiations and eventual settlement.\textsuperscript{219} This distance and assuaged emotions further allows for equitable bargaining by leveling the playing field and eliminating any potential biases the mediator may have.\textsuperscript{220} Finally, the asynchronous and text-based communication afforded by avoiding face-to-face meetings allows for a formal, more rational, and less emotional conversation between the divorcing parties.\textsuperscript{221} With the ability to communicate more clearly and listen more carefully, both parties are more likely to leave satisfied and better able to continue a successful co-parenting relationship.

Divorce is always going to be a (if not the most) difficult period in a person’s life. However, the alternative and emerging method of ODR may ease the inevitable pain and stress, and result in a more satisfying process and happier aftermath.

\textsuperscript{218} See supra Part IV.A.
\textsuperscript{219} See supra Part IV.B.
\textsuperscript{220} See supra Part IV.C.
\textsuperscript{221} See supra Part IV.D-E.