

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. Kramer*⁴-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).

² Thomas Holmes & Richard Rahe, *The Social Readjustment Rating Scale*, 11 J. PSYCHOSOM. RES. 213, 216 (1967).

³ PAULA JAMES, *THE DIVORCE MEDIATION HANDBOOK: EVERYTHING YOU NEED TO KNOW* 1, 1 (1997).

⁴ *KRAMER V. KRAMER* (Columbia Pictures 1979).

⁵ *14th Women to be Linked to Tiger Identified: Report*, N.Y. POST (Dec. 14, 2009, 4:42 PM), http://www.nypost.com/p/latest_gal_is_th_to_be_linked_to_f4refs52DZRRh4suw8xh5L.

⁶ Dan Jewel, *But Who's Counting? Romance Closes the Age Gap for Michael Douglas and Catherine Zeta-Jones*, PEOPLE, Oct. 11, 1999, at 105-108. See also Emily Smith et al., *Michael Douglas' Ex-Wife greedy for his 'Wall Street 2' \$\$*, N.Y. POST (June 28, 2010, 10:10 AM), http://www.nypost.com/p/news/local/manhattan/echo_of_gekko_BpWeGhK3LUfABiZSJQxcnL.

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-

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).

icant 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.¹² 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.¹³

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.¹⁴ To lose this person is a profound loss and it is physiologically difficult to hold the resultant sadness and grief.¹⁵ Furthermore, studies suggest that divorce is more often than not a unilateral decision.¹⁶ This non-mutuality results in a significant discrepancy in a couple's respective emotional stages; this discrepancy may further hinder negotiations.¹⁷ Anger and vengeance, however, can be a wonderful temporary antidote.¹⁸ 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.¹⁹ As family mediator Robert Emery and his colleagues point out, "conflict is not inherently 'bad,' something to be avoided at all costs."²⁰ 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.").

¹³ See Donald T. Saposnek & Chip Rose, *The Psychology of Divorce*, *MEDIATE.COM*, (March 2004), <http://www.mediate.com/articles/saporo.cfm>.

¹⁴ Elana Katz, Mediator at Center for Family and Divorce Mediation, Panel on Divorce Mediation at Benjamin N. Cardozo School of Law (Oct. 14, 2010) (on file with author).

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.*

¹⁹ Emery & Sbarra, *supra* note 10, at 24.

²⁰ *Id.*

Guilt in one partner and pain felt by the other work together in a yoked system.²¹ 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.²² 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.²³ 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 resentment later in the divorce process or even post-settlement.²⁴

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.²⁵ 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.²⁶ 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.²⁷ Men may have reason to be especially worried after reading studies showing contact between divorced, non-custo-

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.

²⁵ Estimates on average cost of divorce in the U.S. range from \$15,000 to \$30,000. Leah Hoffman, *To Have and to Hold on to*, FORBES.COM (Nov. 11, 2006, 5:00 PM), http://www.forbes.com/2006/11/07/divorce-costs-legal-biz-cx_lh_1107legaldivorce.html.

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 & Sbarra, *supra* note 13, at 24 (citing ROBERT E. EMERY, *THE TRUTH ABOUT CHILDREN AND DIVORCE* (2004)).

³³ Susan Daicoff, *Law as a Healing Profession: The Comprehensive Law Movement*, 6 PEPP. DISP. RESOL. L.J. 1, 11 (2006) (quoting Christopher Slobogin, *Therapeutic Jurisprudence: Five Dilemmas to Ponder*, 1 PSYCHOL. PUB. POL’Y & L. 193, 196 (1995)).

³⁴ Daicoff, *supra* note 33, at 1.

³⁵ *Id.* at 9 (discussing the idea of a client’s “rights plus”).

³⁶ See ACR Spirituality Section, *MEDIATE.COM*, <http://www.mediate.com/acrspirituality/> (last visited Nov. 3, 2010).

³⁷ See GLOBAL NEGOTIATION INSIGHT INSTITUTE, <http://www.negotiationinsight.com/about> (last visited Nov. 3, 2011).

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).

³⁹ See Rose Daly-Rooney, *Designing Reasonable Accommodations Through Co-Worker Participation: Therapeutic Jurisprudence and the Confidentiality Provision of the Americans with Disabilities Act*, 8 J.L. & HEALTH 89 (1994).

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).

⁴³ *Mediation Defined*, JAMS, <http://www.jamsadr.com/adri-mediation> (last visited Nov. 3, 2010).

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.

⁴⁷ Robert Emery, *Divorce Mediation: Negotiation Agreements and Renegotiating Relationships*, 44:4 *FAM. REL.* 377 (1995).

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.⁴⁹ In light of the on-going nature of a settlement, communication is the *terra firma*⁵⁰ on which divorce mediation rests.⁵¹ 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.”⁵² They are too hurt, angry and/or shocked to even attempt a rational discourse.⁵³ 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.”⁵⁴ 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.⁵⁵ A divorce proceeding, while admittedly not pleasant, need not be deleterious.⁵⁶ 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.⁵⁷

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)⁵⁸ and recognition (i.e. acknowledgment and empathy for the situation and problems of others),⁵⁹ parties can go through a beneficial transformation during the divorce process rather than fall apart at the seams.⁶⁰ 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.”).

⁵⁰ “Dry land; solid ground.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY (11th ed. 2008).

⁵¹ Stephanie Cooper, Attorney, at Panel on Divorce Mediation at Benjamin N. Cardozo School of Law (Oct. 14, 2010) (on file with author).

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 for the rest of your life. Katz, *supra* note 14.

⁵⁵ JAMES, *supra* note 3, at 41.

⁵⁶ Andrew Amendola, *New Perspective in Negotiation: A Therapeutic Jurisprudence Approach*, HARV. NEG. L. R. ONLINE, Jan. 27, 2010, available at <http://www.hnlr.org/?p=577>.

⁵⁷ *Id.*

⁵⁸ See ROBERT BARUCH BUSH & JOSEPH FOLGER, *THE PROMISE OF MEDIATION: RESPONDING TO CONFLICT THROUGH EMPOWERMENT AND RECOGNITION* 89-94 (1994).

⁵⁹ *Id.*

⁶⁰ *Id.*

divorce is that an individual has been rendered helpless by shock or grief, and therefore cannot speak in his or her own voice.⁶¹ By encouraging parties to voice their opinions and communicate openly, a divorcing couple is not only more likely to reach a settlement efficiently, but they are also more likely to leave (and remain) satisfied with that settlement.⁶²

Finally, mediation is a therapeutic alternative in that a fundamental principle of the process is self-determination.⁶³ Parties are encouraged to make a voluntary and non-coerced decision regarding the possible resolution to any issue in dispute.⁶⁴ 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 agreement as opposed to a judicial order.⁶⁵ A study by family law scholars Robert Emery, David Sbarra and Tara Grover found greater compliance with child support orders when parents actively participated in the mediation of their own divorce.⁶⁶ The researchers hypothesize 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.⁶⁷

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

⁶¹ Katz, *supra* note 14.

⁶² Emery & Sbarra, *supra* note 10, at 28 (“Our consistent finding was that, on average, parents 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 parents 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 Standards 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 fundamental principle of family mediation. The mediation process relies upon the ability of participants to make their own voluntary and informed decisions.”).

⁶⁴ Haitham Haloush & Bashar Malkawi, *Internet Characteristics and Online Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 337 (2008).

⁶⁵ Emery & Sbarra, *supra* note 10, at 27; see also David Wexler & Bruce Winick, *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 ultimate 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).

⁷⁴ Andrea Braeutigam, *Fusses That Fit: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 281 (2006).

⁷⁵ For a comprehensive list of ADR services available see *ADR Spectrum*, JAMS, <http://www.jamsadr.com/adr-spectrum/> (last visited Feb. 27, 2011).

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-

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>.

⁷⁹ See Center for Information Technology and Dispute Resolution, Online Ombuds Office, <http://www.ombuds.org/center/ombuds.html> (last visited September 12, 2011). See also Ethan Katsh, Janet Rifkin & Alan Gaitenby, *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of “Ebay Law,”* 15 OHIO ST. J. ON DISP. RESOL. 705, 705-08 (2000) [hereinafter Katsh & Rifkin].

⁸⁰ *Id.* at 712.

⁸¹ COLIN RULE, *ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS* 84, 103 (2002). See also, *Ebay Dispute Resolution Overview*, eBay, <http://pages.ebay.com/services/buyandsell/disputeres.html> (last visited Nov. 3, 2010). Ebay currently mediates disputes between buyers and sellers itself. See *Ebay Resolution Center*, EBAY, <http://resolutioncenter.ebay.com/> (last visited Nov. 3, 2010).

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 its 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.⁸⁶ However, it paved the way for other ODR providers, including Cybersettle.⁸⁷

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.⁸⁸ By November 2007, the city had made almost three thousand settlements and saved an estimated \$53.8 million in total settlement costs.⁸⁹ Cybersettle, which holds patent rights to what is described as an “automated, online, double-blind bid dispute resolution system,”⁹⁰ 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.⁹¹

Another notable arena where ODR has emerged as the primary method of dispute resolution is in disputes over domain names.⁹² 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.⁹³ In response to these growing concerns and resulting disputes, the Internet Corporation for Assigned Names and Numbers (“ICANN”) was formed in 1998.⁹⁴ 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”).⁹⁵ The UDRP is the prescribed method of solving domain name disputes registered under the generic top-level domains (i.e., “.com,”

⁸⁶ *About Us*, SQUARETRADE.COM, www.squaretrade.com (last visited Jan. 11, 2011).

⁸⁷ See CYBERSETTLE.COM, <http://www.cybersettle.com/pub/> (last visited Nov. 3, 2010).

⁸⁸ *Case Studies*, CYBERSETTLE.COM, <http://www.cybersettle.com/pub/home/casestudies/nyc.aspx> (last visited Nov. 3, 2010).

⁸⁹ Bureau of Information Systems, Key Projects Recently Completed, Cybersettle, <http://www.comptroller.nyc.gov/bureaus/bis/cybersettle.shtm> (last visited Sept. 15, 2011).

⁹⁰ *About Cybersettle*, CYBERSETTLE.COM, <http://www.cybersettle.com/pub/home/about.aspx> (last visited Dec. 27, 2011).

⁹¹ *How Cybersettle Works*, CYBERSETTLE.COM, <http://www.cybersettle.com/pub/home/demo.aspx> (last visited Dec. 6, 2011).

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).

⁹⁵ *Timeline for the Formulation and Implementation of the Uniform Domain-Name Dispute-Resolution Policy*, ICANN, <http://www.icann.org/udrp/udrp-schedule.htm> (last visited Nov. 3, 2010).

“.org,” and “.net”).⁹⁶ 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.⁹⁷ 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.⁹⁸ While not all service providers approved by ICANN offer wholly online arbitration,⁹⁹ 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.¹⁰⁰ Large-scale national and international ODR forums and programs have been instituted in countries such as Argentina¹⁰¹ and Canada,¹⁰² 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.¹⁰³

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.*

⁹⁸ *Rules for Uniform Domain Name Dispute Resolution Policy*, ICANN, <http://www.icann.org/en/dndr/udrp/uniform-rules.htm#5> (last visited Nov. 3, 2010).

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).

¹⁰⁰ For a discussion on ODR and its potential if used by governments, see Susan Schiavetta, *Online Dispute Resolution, E-Government and Overcoming the Digital Divide*, 20th BILETA Conference (April 2005), <http://www.bileta.ac.uk/Document%20Library/1/Online%20Dispute%20Resolution,%20E-Government%20and%20Overcoming%20the%20Digital%20Divide.pdf>.

¹⁰¹ See *Peace Building in the Digital Era*, INTERNATIONAL FORUM ON ONLINE METHODS FOR ALTERNATIVE DISPUTE RESOLUTION 2010, <http://www.odr2010.com.ar/ing/>. See also *Cross-Border Commerce and Online Dispute Resolution: Emerging International Legislative and Systemic Developments*, IBLS (Oct. 27, 2010), http://www.ibls.com/internet_law_news_portal_view.aspx?s=sa&id=1993#_edn4.

¹⁰² See e-Video Mediation, <http://adrchambers.com/ca/mediation/evideo-meditation/> (last visited Nov. 3, 2010).

¹⁰³ United Nations Commission on International Trade Law, *Report of Working Group III (Online Dispute Resolution) on the work of its twenty-third session (New York, 23-27 May 2011) 2*, available at http://www.uncitral.org/pdf/english/commissiondocs/A_CN_9_721_draft.pdf.

search found very few working sites offering comprehensive online mediation services,¹⁰⁴ and only two sites specifically offering online mediation for divorce purposes.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.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.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.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.¹⁰⁹ While past ODR providers did not tend to offer videoconferencing because of slow bandwidths,¹¹⁰ advances in technology have resulted in a more confident attitude toward videoconferencing.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.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.)¹¹³ In the end, the parties decided to conduct the mediation via telephone conference calls with Ms. Maxwell and a therapist.¹¹⁴ Both Ms. Maxwell and the participating therapist expressed concern prior to the first session because

¹⁰⁴ Examples as of January 11, 2011 include Butler Mediation, <http://www.butlermediation.com/>; The Mediation Room, <http://www.themediationroom1.com/>; and Juripax, <http://www.juripax.com/>.

¹⁰⁵ See <http://clearviewdivorce.com> and <http://themediationline.com>.

¹⁰⁶ THE MEDIATIONLINE, <http://themediationline.com/> (last visited Feb. 27, 2011).

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

¹⁰⁸ *Id.*

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

¹¹⁰ RULE, *supra* note 81, at 251.

¹¹¹ THE MEDIATIONLINE, *supra* note 106.

¹¹² Maxwell, *supra* note 107.

¹¹³ *Id.*

¹¹⁴ *Id.*

neither had met the husband or wife.¹¹⁵ However, both agreed afterward that they were able to get a good sense of the couples' personalities over the phone.¹¹⁶ 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.¹¹⁷

Online mediation mirrors traditional mediation in most procedural aspects. Before mediation commences, parties agree to submit to specific, personally created terms.¹¹⁸ The mediator then checks the background documents presented by the participants and identifies the particular issues to be addressed.¹¹⁹ 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.¹²⁰ 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.¹²¹ The mediation process, offline or online, however, does not develop in a "legal vacuum."¹²² Mediation must always take place in the "shadow of the law,"¹²³ and any agreements reached must rely upon some law rendering it valid and effective.¹²⁴ 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, online mediation has been met with resistance in the alternative dispute 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 reluctance is not surprising. However, in light of the advantages offered by ODR, these attitudes may not be entirely valid.¹²⁷ This is especially true considering many therapists offer to conduct sessions 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 resolve their dispute is not correct. People with problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”¹²⁹ In line with the Chief Justice’s observation, 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 meeting, 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 (Feb. 16, 2010, 2:21 PM), <http://www.reuters.com/article/2010/02/16/us-vets-anger-idUSTRE61F4PN20100216>.

¹²⁹ Warren E. Burger, *Our Vicious Legal Spiral*, 16 JUDGES J. 23, 49 (1977).

an adversarial route.¹³⁰ 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.¹³¹

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.¹³² 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.¹³³ 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.¹³⁴ Further evidence indicates that children are actually quite resilient in coping with divorce when parents adequately manage potential disruptive family processes.¹³⁵ It has been suggested that adversarial litigation may increase acrimony between divorcing spouses.¹³⁶ However, mediation offers the promise of promoting more positive familial relationships during and after divorce.¹³⁷ 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.¹³⁸

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

¹³⁰ Emery & Sbarra, *supra* note 10, at 24.

¹³¹ Gilliéron, *supra* note 82, at 314.

¹³² Saposnek & Rose, *supra* note 10.

¹³³ Emery, *supra* note 47, at 378.

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.¹³⁹ 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.¹⁴⁰ 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.¹⁴¹ 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.¹⁴² 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.¹⁴³ Second, it can facilitate the creation of the business-like relationship desired in a mediation session, as discussed above.¹⁴⁴ 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.¹⁴⁵

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).

¹⁴¹ *See Divorce Mediation Cost Calculator*, NEWSRESOLUTION.COM, http://www.newresolution.org/d_costcalculator.shtml (last visited Jan. 14, 2011).

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.”¹⁴⁶ 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.¹⁴⁷ 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.¹⁴⁸

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.¹⁴⁹ The hippocampus induces a heightened sense of alertness affecting the prefrontal lobe, shutting down the executive functioning and causing extreme stress and anxiety.¹⁵⁰ 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.¹⁵¹ This stress, anxiety, and increased cortisol levels create hurdles in creating a rational conversation, thus inhibiting effective negotiation.¹⁵² 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,

¹⁴⁶ James Melamed, *quoted in* J. KIM WRIGHT, *LAWYERS AS PEACEMAKERS* 58 (2010).

¹⁴⁷ See generally JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981).

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).

¹⁴⁹ See DANIEL GOLEMAN, *WORKING WITH EMOTIONAL INTELLIGENCE* 73 (1998).

¹⁵⁰ Bruce Winick, *Therapeutic Jurisprudence and the Role of Counsel in Litigation*, 37 CAL. W. L. REV. 105, 110 (2000).

¹⁵¹ *Id.*

¹⁵² Amendola, *supra* note 56.

and less hostile in the online environment.¹⁵³ Some disputants reported feeling less pressure and the environment to be less threatening, reducing the animosity often felt in face-to-face situations.¹⁵⁴ 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.¹⁵⁵ 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.”¹⁵⁶ Experiments have demonstrated that e-mail encourages uninhibited and aggressive communications because e-mailers are less influenced by social norms.¹⁵⁷ Furthermore, the same level of comfort and support available from a present neutral third-party may create a “me against the world” mentality.¹⁵⁸

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.¹⁵⁹ The anonymity afforded by the Internet allows for a phenomenon author Robert

¹⁵³ Anne-Marie B. Hammond, *How Do You Write “Yes”?: A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261, 277 (2003).

¹⁵⁴ *Id.*

¹⁵⁵ Leigh Thompson & Janice Nadler, *Negotiating via Information Technology: Theory and Application*, 58 J. SOC. ISSUES 109, 118 (2002).

¹⁵⁶ *Id.*

¹⁵⁷ Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 NEGOT. J. 133, 139 (2000).

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.¹⁶⁰ 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.¹⁶¹ Furthermore, individuals tend to modify their behavior according to society’s expectations of them.¹⁶² 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.¹⁶³ ODR and its inherent “netocracy” has a greater potential to create a level playing field in these situation.¹⁶⁴ 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.¹⁶⁵ Further, mediation is particularly suited to divorce because it has the possibility of resulting in a positive sum (i.e. a win-win outcome).¹⁶⁶ By maintaining a distance and allowing for a “netocracy,” the chances of both parties leaving satisfied increases.¹⁶⁷

This democratic leveling is enhanced by the potential to eliminate biases that mediators may unconsciously possess that can affect their ability to properly mediate.¹⁶⁸ Mediation standards of

¹⁶⁰ *Id.*

¹⁶¹ DESMOND ELLIS & NOREEN 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.¹⁶⁹ 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.¹⁷⁰ Especially in mediations where the majority of the communication is text-based, chances of even an unconscious bias against a party may be diluted.¹⁷¹ 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.¹⁷²

D. *Asynchronous Communication*

Another key feature afforded by ODR is the asynchronous (i.e. non-instant) nature of the attendant communication.¹⁷³ 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.¹⁷⁴ 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.¹⁷⁵ 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

¹⁶⁹ DeMars et al., *supra* note 158, at 6.

¹⁷⁰ Llewellyn Joseph Gibbons et al., *Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 44 (2002).

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.¹⁷⁶ 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.¹⁷⁷ 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.¹⁷⁸ Caucusing may also create a potential for manipulative behavior, whereby parties attempt to win the mediator over to their side.¹⁷⁹ Online mediation, however, allows a mediator and a party to talk privately without breaking the flow of conversation entirely.¹⁸⁰ It further allows a mediator to communicate privately with one party while allowing the joint discussion to progress.¹⁸¹ Efficient caucusing is even possible with video conferencing by making use of virtual private rooms.¹⁸²

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.¹⁸³ 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.¹⁸⁴ 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.¹⁸⁵ Furthermore, all mediators agreed that having time to craft their responses

¹⁷⁶ See generally Stuart Israel, *Two Dozen Reasons for Using Caucuses in Facilitative Mediation*, available at http://files.ali-aba.org/thumbs/datastorage/lacidoirep/articles/PLIT_PLIT0511-ISRAEL_thumb.pdf (last visited Dec. 31, 2011).

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.*

¹⁸² For an example of video conferencing services offered by an ADR provider, see *eVideo Mediation*, ADR CHAMBERS, <http://adrchambers.com/ca/mediation/evideo-mediation/> (last visited Jan. 14, 2011).

¹⁸³ Hammond, *supra* note 153, at 275.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.* at 339.

enabled them to express their questions and comments more effectively.¹⁸⁶ Similarly, the majority of the disputants said the medium allowed them to be more thoughtful in their submissions and responses.¹⁸⁷ They reported finding value in being able to review prior exchanges and talk or consult with others before making decisions.¹⁸⁸

On the other hand, asynchronous communication could be detrimental in that it essentially permits parties to disengage, re-think, and maybe even change their minds.¹⁸⁹ At least one disputant in the Hammond Study reported feeling anxious when responses were not timely.¹⁹⁰ Other disputants expressed frustration at the length of other parties' responses and irritation at seeing past transgressions on screen.¹⁹¹ Mediators observed that a party could frustrate the process simply by staying offline, and the flexibility of participating online could result in procrastination.¹⁹² 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.¹⁹³

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.¹⁹⁴ While advancing technologies means video conferencing, and even holography,¹⁹⁵ 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 Gilliéron, *supra* note 82, at 336.

¹⁹⁴ Braeutigam, *supra* note 74, at 287.

¹⁹⁵ See Susan Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 CARDOZO J. CONFLICT RESOL. 19, 20 (2010).

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.²⁰⁴ 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.²⁰⁵ 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.²⁰⁶ Furthermore, the absence of facial expressions, gestures and other body cues create communication voids, which may be filled in with psychological doubts and fears.²⁰⁷ 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 filtration²⁰⁸ or create a negative filter through which conversations between individuals with a negative past history are seen, making a productive conversation more difficult.²⁰⁹ 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.²¹⁰ Thompson and Nadler attribute this to “counter-normative e-behavior” encouraged by the lack of influence by social norms in the online environment.²¹¹

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

²⁰⁴ See Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?*, 1998 BYU L. REV. 1305, 1310-11 (1998).

²⁰⁵ See Bruce Leonard Beal, *Online Mediation: Has Its Time Come?* 15 OHIO ST. J. ON DISP. RESOL. 735, 737 (2000).

²⁰⁶ Simidchieva, *supra* note 81, at 1322 (“For many participants, mediation is about the ‘venting’ of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to tell one’s version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants.”).

²⁰⁷ Gordon, *supra* note 159, at 10.

²⁰⁸ A result scholars call “flaming.” Gilliéron, *supra* note 82, at 336.

²⁰⁹ Paul Godin, *Understanding What Makes Conversations Difficult*, ADR CHAMBERS (Dec. 2, 2010), <http://www.adrchambers.com/blog/> (identifying three types of general challenges in conversations during mediation: Past History, Conflicting Goals, and Challenging Communication Processes).

²¹⁰ Gilliéron, *supra* note 82, at 336.

²¹¹ Thompson & Nadler, *supra* note 155, at 119.

to face-to-face interaction.²¹² For instance, the Hammond Study found that reduced communication cues and textual communication did not significantly impact participants' experiences in online mediation.²¹³ 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.²¹⁴ 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.²¹⁵ 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.²¹⁶ 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."²¹⁷ 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.

²¹² See Robert Bastress & Joseph Harbaugh, *Taking the Lawyer's Craft into Virtual Space: Computer-Mediated Interviewing, Counseling, and Negotiating*, 10 CLIN. L. REV. 115, 131-44 (2003) (discussing different theoretical approaches to the study of computer-mediation communication between attorneys and their clients).

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.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.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.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.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.

²¹⁸ See *supra* Part IV.A.

²¹⁹ See *supra* Part IV.B.

²²⁰ See *supra* Part IV.C.

²²¹ See *supra* Part IV.D-E.