NO MORE CLICK? CLICK IN HERE:
E-MEDIATION IN DIVORCE DISPUTES—
THE REALITY AND THE DESIRABLE

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ABSTRACT

This Article deals with the relatively innovative field of e-Mediation (also known as “online mediation” or “cyber mediation”) as used for the resolution of divorce disputes. The first part of the Article surveys the framework and background of the development of e-Mediation, its implementation, its advantages and disadvantages, focusing on the field of divorce disputes. It includes insights regarding the proven need for the development of alternative dispute resolution processes for such disputes, and the great potential inherent in the model of e-Mediation to address many of the problems typically accompanying such disputes.

In view of the urgency of the matter and the need to expand the spectrum of available options for people in one of the most painful and traumatic periods of their lives, Part II of this Article addresses improvements that could be made in the way e-Mediation is currently used in divorce disputes. These include guidelines for the adoption of an improved model that would, among other things, include training and certification standards, as well as regulation and supervision of e-Mediation service providers for divorce disputes.

Throughout the world, the field of alternative dispute resolution has undergone a great deal of change in recent years. It may be that the most significant change relates to current thinking about resolving our disputes in cyberspace. This Article seeks to contribute to this interesting development.

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I. INTRODUCTION

At the end of the 1990s a new field known as Online Dispute Resolution (“ODR”) began to flourish. It included new channels 
and technology for dispute resolution outside of courts, such as e- 
Mediation (also known as “online mediation” or “cyber mediation”). At that point, there were already some who argued that we 
are in a stage in which the alternative has become the norm for 
resolving conflicts.1 However, while the traditional models of al-
ternative dispute resolution (“ADR”), such as mediation, arbitration 
and mediation-arbitration (“med-arb”), operate under the 
assumption that the process of dispute resolution includes three

1 “[W]e are in an age where ‘alternative’ dispute resolution has become the primary model 
for responding to conflict.” Ethan Katsh, ODR: A Look at History – A Few Thoughts about the 
Present and Some Speculation about the Future, in ONLINE DISPUTE RESOLUTION: THEORY AND 
PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 21, 32 (Mohamed S. 
Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011).
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partners, i.e., the two parties to the dispute and a third, neutral party; e-Mediation adds the “fourth party”—technology.2

Over the years, ODR, which was initially in use primarily in the area of electronic commerce on the Internet, began to spread out to disputes that did not arise from the virtual sphere (i.e., “off-line” disputes) and various areas of application such as divorce disputes. From the time that e-Mediation began dealing with disputes of this nature, many divorcing couples have traded their vision from “until death do us part” to “until cyberspace do us part.” However, the research (theoretical and applied) of the e-Mediation model in the field of divorce disputes is still in the development stage, in spite of its potential and the benefit that it offers for couples involved in such disputes.3 This Article seeks to deepen the examination of the option of using this model as an auxiliary means for resolving divorce disputes.

The body of this Article is divided into two parts. Part II of this Article presents the current situation with respect to the use of the e-Mediation model in divorce disputes. This part examines the field of ODR in its entirety, as the overall context from which the model of e-Mediation developed. In addition, Part II examines various applications of ODR in the field of divorce disputes, with the emphasis on the model of e-Mediation, its advantages and its disadvantages. Part III of this Article deals with the desirable situation and includes proposals for goals, emphases and improvement of the existing model in three areas: the definition of goals, the skills and training of mediators and ethics and regulation.

Divorce and marital separation have been recognized as major life stressors, assuming the second and third places in the Social Readjustment Scale, following the death of a spouse.4 The spectrum of available options for online communications technology is undergoing constant and rapid change. It may be that we will be able to forgive ourselves that we were not pioneers in developing these options, but it is not at all certain that we can forgive ourselves if we ignore the existing implementations that are likely, with improvements, to provide less painful solutions for divorcing couples and their children.

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2 For more information on the “fourth party” in dispute resolution see Ethan Katsh & Janet Rikin, Online Dispute Resolution: Resolving Conflicts in Cyberspace 93–116 (2001).


4 Rebecca Brennan, Online Dispute Resolution and Divorce, 13 Cardozo J. Conflict Resol. 197, 197 (2011).
II. THE CURRENT SITUATION

A. ODR: The Framework and Background of the Development of e-Mediation

E-Mediation grew out of the area of ODR, the entire spectrum of alternative dispute resolution that takes place outside of the court, that is carried out with the use of communications and technological means, mainly the Internet. ODR is essentially a subcategory of ADR, most of whose ideas and methods are drawn from the latter. ODR uses a broad range of tools and technological means such as e-mail, conference calls, direct mail, internet bulletin boards and diverse video options, which are intended to enable the resolution of disputes in cases in which the classic or traditional alternatives are less worthwhile and at times even impossible.

ODR was conceived in the second half of the 1990s, with the development and flourishing of electronic commerce. With the understanding regarding the limitations of traditional channels for dispute resolution in dealing with controversies that arose on the Internet (such as disputes regarding electronic commerce), new channels developed that offered ODR. Traditional means of dispute resolution including litigation, arbitration and mediation proved to be inadequate for a number of reasons: complicated questions of jurisdiction and choice of law often arose; litigation between parties based at great geographic distances from one another resulted in high costs; and it was often difficult to enforce the outcomes and the rights conveyed. ODR arose, therefore, as an inexpensive, convenient and accessible alternative to these traditional means of dispute resolution.

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5 Tyler & McPherson, supra note 3, at 5. See also Phillipe Gillieron, From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy?, 23 OHIO ST. J. ON DISP. RESOL. 301, 302 (2008) (“ODR can be defined as any ‘form of alternative dispute resolution (ADR) that incorporate[s] the use of the Internet’ or technological tools.”).


7 Gabrielle Kaufmann-Kohler & Thomas Schultz, Online Dispute Resolution: Challenges for Contemporary Justice (2004).

As Katsh and Rifkin point out, the chronological development of ODR passed swiftly through three central stages. The first stage was the “amateur stage,” when the private “fans” started to implement ODR. The second stage was the “experimental stage,” when funds of academic bodies, international bodies and non-profit organizations “floated” pilot programs on the subject. The third stage was the “initiatives stage,” when for-profit organizations opened ODR sites. Tyler and Breterton speak of a fourth stage in the development of the ODR field—“the institutional stage.” In this stage ODR was adopted for dispute resolution programs and pilot programs by a wide spectrum of institutions and institutional bodies in the world, including courts and various providers of alternative dispute resolution methods. Over the years, agencies and governmental offices as well as public organizations joined the “game,” whether through use of ODR services or through reports and recommendations to develop ODR services.

9 Tyler & McPherson, supra note 3, at 6. For an expansive discussion see Katsh & Rifkin, supra note 2, at 47–72. See also Noam Ebner, e-Mediation, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE supra note 1, at 369, 370–71.

10 Among the first to “pick up the glove” was the company eBay, the owner of one of the largest electronic commerce sites in the world. In 2000, eBay began to offer the users of the site online dispute resolution services on the site, through the company SquareTrade. The process offered combined, in practice, e-Negotiations and e-Mediation. The first phase included a process of “automated negotiation.” The complainant submitted his complaint on an electronic form on which he chose the type of complaint from a fixed menu (e.g., non-payment, late delivery of the product, a product different from the one described on the site,), as well as the resolution that was acceptable to him (e.g., receipt of an alternative product, refund of payment). In addition to the fixed menu there was also the option of filling in the box independently. The information that was entered was submitted to the other party, who was asked to provide information and to respond to the proposal for resolution. About 80% of the disputes were resolved at this stage. All of the disputes that were not resolved at this stage were transmitted, at the next stage, to a “physical” mediator, trained by SquareTrade, who held mediation between the parties with an understanding of the contribution of the online solution to strengthening the connection between the site and its regular users as well as regarding the chance to expand the spectrum of its future users (in view of the fact that both of these knew that they had an “address” in the case of a complaint or, in other words, a reduced risk alongside significant cost savings). The results were not late in arriving, with SquareTrade becoming the main provider of ODR services, with one and a half million disputes of eBay users being resolved through these services during the period from 2000 to 2004 alone. See Rabinovich-Einy, supra note 8, at 5.

11 Tyler & McPherson, supra note 3, at 6.

12 In the United States, the National Mediation Board (“NMB”) and the Office of Government Information Services (“OGIS”) chose to adopt ODR and to promote it for the purpose of resolution of conflicts with the private citizen. See Katsh, supra note 1, at 27.

with tremendous growth in the number of providers of ODR services and stakeholders in such services.\footnote{Katsh, supra note 1, at 27 ("[g]overnment use of ODR promises to be a very large market . . . .").}

It is possible to point to a trend of development of ODR both quantitatively and geographically. As to the quantitative development: in 2006 there were 149 sites providing ODR services,\footnote{Tyler & McPherson, supra note 3, at 6–7.} but by 2010 the number of disputes resolved online, only through the eBay site, reached about six million.\footnote{Katsh, supra note 1, at 24.} Regarding the geographic development: while in the first years most of the activity was concentrated in North America, over time, various other areas have been added and at present it can be said that ODR services are available in almost every area in the world.\footnote{Tyler & McPherson, supra note 3, at 6–7.} ODR services can be found in North America,\footnote{For a more expansive discussion see Arthur Pearlstein, Bryan Hanson & Noam Ebner, ODR in North America, in Online Dispute Resolution: Theory and Practice, supra note 1, at 443.} throughout Europe,\footnote{For a more expansive discussion see Marta Poblet & Graham Ross, ODR in Europe, in Online Dispute Resolution: Theory and Practice, supra note 1, at 465.} in Asia,\footnote{For a more expansive discussion see Tania Sourdin & Chinthaka Liyanage, The Promise and Reality of Online Dispute Resolution in Australia, in Online Dispute Resolution: Theory and Practice, supra note 1, at 483.} in Israel,\footnote{For a more expansive discussion see Zhao Yun, Timothy Sze, Tommy Li & Chittu Nagarajan, Online Dispute Resolution in Asia, in Online Dispute Resolution: Theory and Practice, supra note 1, at 511.} in Latin America and even in Africa.\footnote{In Israel, the organization Benoam, founded by Adv. Yehuda Tunik, carried out online arbitration on subjects of arbitrations and claims for subrogation for property damage (motor vehicles) between insurance companies that are members of the Union of Insurance Companies and other insurance companies that are not members of the Union. This project, which has been discontinued, included handling subrogation claims for claims involving motor vehicles (damage to the outside of the vehicle) up to 100,000 Israeli New Shekel per claim. The handling of the claims were carried out through the administration of Benoam, a computerized administration based on an Internet computerization platform. See also Orna Rabinovich-Einy & Roce Tsur, The Case for Greater Formality in ADR: Drawing on the Lessons of Benoam's Private Arbitration System, 34 Vt. L. R. 529, 542 (2010); Orna Rabinovich-Einy & Roce Tsur, Unclogging the Collision Course: The Evolution of Benoam, an Online Private Court, ACResolution 8 (2010).} The last decade even witnessed the development of many programs accommodated for online resolution of conflicts, with the field of computer science demonstrating more and more interest in ODR and acting in cooperation with it.\footnote{Katsh, supra note 1, at 28.}
E-MEDIATION IN DIVORCE DISPUTES

The three central models for the resolution of disputes recognized in the sphere of ODR are “e-Negotiation,”25 “e-Arbitration”26 and “e-Mediation.”27 e-Mediation (online mediation28 or cyber mediation29), the subject of this Article, is the most common form of online dispute resolution.30 Mediation is essentially a voluntary process, allowing the disputing parties to resolve their conflict through a neutral third party (a mediator). While according to the accepted definitions, the mediator does not have authority to

25 Negotiations in principle do not need a third party (outside of the parties to the dispute) for the purpose of resolving the conflict. Indeed, it is accepted to divide online negotiations into two central types: “assisted negotiation” and “automated negotiation.” While in the former kind the parties carry out the negotiation independently, i.e., they approach one another directly (through technological means) and are assisted by a program that helps them regarding technical and minor levels only, the latter type is more “sophisticated” and makes much greater use of the technological potential inherent in the model of online negotiations. This type of service is included in the category called “blind bidding,” in which the administrator enables the parties to submit to the computer (rather than to each other) proposals for resolving the dispute. To the extent that the proposals meet the criteria that were established by the administrator, a settlement is arrived at. Katsh & RIFKIN, supra note 2, at 61. For a more expansive discussion, see Gillieron, supra note 5, at 304–06. See also Ernest Thiessen, Paul Miniato & Bruce Hiebert, ODR and eNegotiation, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, supra note 1, at 341. The attraction of this kind of service is in the knowledge regarding the confidentiality of the proposals in every instance in which a settlement is not reached at the end of the process. It is accepted to view this type of service as if the computer has become the neutral third party; the party who receives the proposals but does not reveal their content to the parties. The Smartsettle site serves as an example of this category. See SMARTSETTLE, http://www.smartsettle.com (last visited Nov. 10, 2014).

26 Arbitration is a quasi-judicial process, at the conclusion of which a neutral third party (the arbitrator) renders a judgment in the dispute between the parties. In online arbitration, the arbitrator is appointed by the parties or by a recognized arbitration institution. “The Virtual Magistrate” was the first site that provided such a service. However, there are those who argue that it would not be precise to define the service provided by the site as ‘pure’ arbitration in the full sense of the word. Moreover, various scholars cast serious reservations with respect to the possibility of holding online arbitration and the possibility of such service becoming a common tool on the Internet. De facto, various arbitration services can be found on the Internet. For example, the site e Resolution provides online arbitration services and the service of the WIPO Mediation and Arbitration Center, a service for the online resolution of disputes in the field of intellectual property. However, arbitration in its full meaning is still not commonly used online as a tool for the resolution of disputes. For a more expansive discussion, see Mohamed S. Abdel Wahab, ODR and e-Arbitration – Trends and Challenges, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, supra note 1, at 399. See also Gillieron, supra note 5, at 307–08.

27 Gillieron, supra note 5, at 303 (parallel to the three central traditional branches of ADR, i.e., negotiation, mediation and arbitration).

28 See Ebner, supra note 9.

29 Tyler & McPherson, supra note 3, at 5.

30 Ebner, supra note 9, at 370, 397.
decide and he may not impose a solution on the parties, in fact, the level of involvement of the mediator is not uniform and it varies from those who intervene as little as possible to those who erode the autonomy of the parties to the point of massive intervention in the formulation of the agreement. This kind of mediation is referred to as “facilitative mediation,” in which the mediator intentionally refrains from expressing an opinion or offering solutions and instead serves as a kind of catalyst for communication, with the aim of assisting the parties to simplify their negotiating stances so that they can more easily make their own decisions. This type of mediation is the kind generally found on the Internet. At the opposite end of the spectrum there is “evaluative mediation,” in which the mediator is likely to express an opinion regarding the dispute, the positions of the parties, the settlement being formulated or any other matter, to evaluate the chances of a party to the mediation in the event that the conflict goes to court and to fashion and present solutions of his own. WebMediate, a former online service provider, adopted this kind of active approach. Another model is the intermediate model, which supports intervention of the mediator only to the extent that the parties are not succeeding with their negotiations, with the scope of the intervention determined by the parties themselves. The mediator will propose a solution only if requested to do so by the parties. This is the model that was chosen by the site SquareTrade.

In view of the success of ADR, over the years various entities have made efforts to make the practice of the dispute resolution world compatible with the Internet. The common denominator of all of these efforts is that they are based on the viewpoint that the process offered by online dispute resolution is more efficient in the


33 Randolph Lowry, To Evaluate or Not – That is not the Question!, 38 FAM. & CONCiliation Cts. Rev. 48 (2000); see also Leonard L. Riskin, Understanding Mediators’ Orientations, Strategies and Techniques: A Grid for the Perplexed, 1 HARV. NEGOT. L. REV. 7, 44–46 (1996); LAVI, supra note 32, at 164–75.

34 LAVI, THE MEDIATOR supra note 32, at 164–75.


36 Gillieron, supra note 5, at 306–07.
problem solving process and more effective with respect to enforcement of the results.\textsuperscript{37} It can be determined that the technology (including cybernet) is no longer viewed as a marginal auxiliary tool. Quite the opposite, due to its advantages, its complexity and its abilities, ODR assumes its place as an additional natural partner to the point that it has been referred to as the “fourth partner” in the dispute resolution process.\textsuperscript{38}

In recent years there has been a trend to expand the use of online conflict resolution in general and particularly e-Mediation, beyond disputes arising from electronic commerce and the virtual sphere.\textsuperscript{39} The use of ODR has also spread to offline conflicts, i.e., conflicts arising in the “real world” and removed from the virtual space.\textsuperscript{40} The use of ODR is found at present throughout the world in a very wide range of offline disputes, beginning with disputes between neighbors, moving to commercial or interpersonal negotiations, and onto international disputes and attempts to get peace processes moving.\textsuperscript{41} An example of the sphere of such application, in which the use of ODR is admittedly just beginning,\textsuperscript{42} but is gaining momentum, is the area of divorce disputes.

\section*{B. ODR in Divorce Disputes}

\subsection*{1. Various Applications}

ODR\textsuperscript{43} has been applied in various ways in the realm of divorce disputes since 1996, although it did not create a great deal of

\textsuperscript{38} See Katsh & Riffkin, supra note 2. 
\textsuperscript{39} For example, the disputes arising on the electronic commerce sites or in disputes over domain names. See Brennan, supra note 4, at 208–09. 
\textsuperscript{40} Katsh, supra note 1, at 25 (“Most importantly, ODR, which was originally focused on disputes related to online activities is now employed in offline disputes. Rather than finding disputes that can utilize ODR, the new challenge is finding tools that can deliver trust, convenience and expertise for many different kinds of conflicts.”). 
\textsuperscript{41} Tyler & McPherson, supra note 3, at 7. See also Katsh, supra note 1, at 27 (“[T]he marketplace for ODR is now offline disputes as well as those originating online and public sector disputes as well as those originating in the private sector.”). 
\textsuperscript{42} Conley Tyler & McPherson, supra note 3, at 14–15. 
\textsuperscript{43} The intention is to offer various models of online dispute resolution (such as e-Negotiation or e-Mediation) to the public through various sites.}
impact at that point.\textsuperscript{44} For example, in 2005, only five out of 115 sites providing ODR services provided these services in divorce disputes, with only two of these five sites dealing primarily with such disputes.\textsuperscript{45} One of these, Mediationline, offered three options to users: (1) traditional face-to-face mediation; (2) mediation according to the “do it yourself” approach; and (3) e-Mediation.\textsuperscript{46} The founder of the site, Patra Maxwell, established it after she noticed, in the course of her work, the benefits (such as convenience and lower costs) that are likely to accrue to the divorcing parties as a result of the use of video conferencing services such as Skype and Dimdim.\textsuperscript{47} Indeed, the development of ODR technology brought about a broader use of online video services in divorce disputes throughout the world, which were previously enabled in only a limited manner (due to problems such as the breadth of the band).\textsuperscript{48}

Tyler and McPherson\textsuperscript{49} present a number of different applications for ODR processes in divorce disputes existing in various areas of the world. Each of these applications adopts a method that tries to realize the potential inherent in online dispute resolution in family law cases. For example, the Up to Parents site\textsuperscript{50} helps parents strengthen their parental responsibility through the program on the site. A standard settlement agreement is offered to the parties in which each party marks the tasks he or she agrees to adopt. The program identifies the clauses of the agreement as to which there is consensus and in accordance with this, issues a “parental contract.” This method is directed at the objective, presented by Fisher and Brandon\textsuperscript{51} as a redefinition of the relationship from a marital one to a parental relationship with shared responsibility for their children. This method permits, on the one hand, direct negotiations between the parties and, on the other hand, directs it to positive channels instead of channels that exacerbate conflict.\textsuperscript{52}

Another application of ODR in divorce disputes is OurDivorceAgreement,\textsuperscript{53} which although established in the United States, issues divorce agreements suitable for submission to the

\textsuperscript{44} Tyler & McPherson, supra note 3, at 14.
\textsuperscript{45} Id. See also Brennan, supra note 4, at 209.
\textsuperscript{46} Brennan, supra note 4, at 210.
\textsuperscript{47} Id.
\textsuperscript{48} Id.
\textsuperscript{49} Tyler & McPherson, supra note 3, at 18.
\textsuperscript{51} LINDA FISHER & MIEKE BRANDON, MEDIATING WITH FAMILIES 47 (2002).
\textsuperscript{52} Tyler & McPherson, supra note 3, at 19.
family courts in Australia. The site enables parties interested in a non-competitive divorce to fashion their divorce agreement online. In each case in which the desire to separate is not contested, the site provides negotiation or mediation services. The former are offered through access to a site that prepares a “parental time table” and the latter are offered through a link to a site providing American mediation through conference calls, online audio, video conferencing and “face-to-face” conversations.

A further application appears on the site OurFamilyWizard, which was developed in the United States for divorce disputes and has evolved into an international program. This is a collaborative software program, enabling a separated couple to store the relevant family information in one encoded location that provides each of them with easy access to all of it. This program is composed of tools such as an online calendar, access to information centers, address books, notice boards, reminders and access to important documents. After the parties fill out the relevant information, they have a first rate organizational tool that improves the flow of information and communications between them and organizes the daily schedule with respect to childcare and the needs of the children. In this manner, all of the relevant information (school and vacation schedules, the addresses of the children’s barbers, dentists, the parents’ rotations with respect to tasks involving the children, etc.) is kept together in one place shared by and accessible to each of the parents independently of one another. Beyond making the relationship between the parents “business-like” and less hostile, there is an additional benefit in that the information is documented in a kind of historic archive, that is easy to view, and which can prevent unnecessary conflicts regarding the occurrence (or non-occurrence) of events, schedule rotations and division of tasks.

The Canadian site SmartSettle offers a process assisted by an analytical program, which supports “face-to-face” mediation and e-Mediation. After the parties define their preferences and rank them, there is a process of exchange among the preferences and priorities with the objective of achieving the optimal agreement. The site even offers the option of carrying out complete online

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57 Tyler & McPherson, supra note 3, at 20.
family mediation (where the geographic distance between the couple justifies this or for any other good reason).

Additional applications are found on the Australian sites, Family Winner and Split Up.\footnote{Id.} While the former is an Australian computer program, designed to conform to the Australian legal system in family cases, with the objective of providing support in the process of making decisions in the course of negotiations between the parties to a divorce dispute,\footnote{Each of the parties, separately, is asked to note the important subjects in dispute and to appraise their weight in their view. Using this information, the program develops trading rules in these matters and creates possible results for examination of the parties. \textit{Id.} at 21.} the latter focuses on the decision making of each party, assisting the parties to evaluate the distribution of property in divorce disputes. In effect, this is an “artificial intelligence” program that surveys the information banks of the family law court decisions in Australia, with the goal of providing the parties with an indication of the likely results in a given negotiation.\footnote{Id.}

From all of the applications described above it transpires that the field of ODR in divorce disputes is growing and expanding throughout the world. It is indeed difficult to know what the future holds, but as Tyler and McPherson note:

The reality is that many divorced parents are already using email as the primary means of communicating both at work and in their parenting relationship. Extending this to include mediation discussions is more and more natural. If getting together is in any way difficult or costly, we will find more and more modification discussions taking place online.\footnote{Tyler & McPherson, \textit{supra} note 3, at 16–17.}

From among all of the applications of ODR in the area of divorce disputes enumerated above, the following sub-part focuses on e-Mediation, the subject of this article.

2. E-Mediation

\textit{[T]he internet is changing the way divorce mediation is practiced in the USA and is becoming an integral part of effective and affordable divorce mediation services and programs.}\footnote{James Melamed, founder and partner of Mediate.com; \textit{see also} Tyler & McPherson, \textit{supra} note 3, at 15.}

The Internet assists parties interested in ending their marital relationship through mediation in a variety of ways.\footnote{Tyler & McPherson, \textit{supra} note 3, at 16–17.} Examples
include the search for a mediator through a search program, the use of sites advertising professional mediators, learning about the mediation process through sites providing such information, coordinating positions and demands through electronic communications with a mediator or the other party, being assisted in a discussion environment that is protected, being assisted by the professional information possessed by the mediator, sending drafts of the agreement to or from the mediator, accessing legal and other information on the Internet (which assists both the parties and the mediator) and modifying the agreement over time when the parties do not live in the same area.\textsuperscript{64} Clearly not all of the uses listed above constitute “pure” e-Mediation, i.e., a full mediation process from the beginning to the end and in the fullest sense of the word. However, as of late, the latter can also be found on the Internet in the context of divorce disputes.

“Pure” e-Mediation essentially reflects traditional mediation in most of its procedural aspects.\textsuperscript{65} Prior to the beginning of the process, the parties agree on a number of basic rules. Afterwards, the mediator examines the background documents (which each of the parties issues) and through them, identifies the disputed issues. In the next stage, the parties are asked to propose their solutions to the dispute. The mediator examines the solutions, analyzes them and frames them into a concrete solution, which is intended to satisfy both parties.\textsuperscript{66} In the subsequent stage, each party is asked to submit his or her reaction to the proposed solution, alongside any questions for clarification there might be, in a kind of on-going Ping-Pong, until an agreement is reached. In the final stage, the mediator holds a kind of concluding forum, which clarifies the results achieved, including the terms and limits of each condition of the agreement.\textsuperscript{67} It bears noting that the e-Mediation process is not carried out, for the most part, in a vacuum, but rather according to what is called “mediation in the shadow of the law,”\textsuperscript{68} where each of the conditions of the agreement is drafted in accordance with the law. Additionally, each of the parties is entitled to leave the process at any time and to go to court in order to resolve the conflict.\textsuperscript{69}

\textsuperscript{64} Id.
\textsuperscript{65} Brennan, \textit{supra} note 4, at 211.
\textsuperscript{66} Id.
\textsuperscript{67} Id.
\textsuperscript{69} Id. at 335.
E-Mediation in divorce disputes was proposed as early as 1996 through a pilot project carried out by the University of Maryland.\textsuperscript{70} The project offered mediation services through e-mail in family disputes in accordance with Maryland state law. At present, the site SquareTrade\textsuperscript{71} also offers e-Mediation services in divorce disputes. At first, the site referred those looking for mediation in family cases to a traditional mediator (face to face), however, after a number of people refused mediation of this nature, stating specific reasons for their request for e-Mediation (such as living at a great distance from one another), a movement started to offer e-Mediation services for such cases. At first Professor Reines, a family therapist by training and a mediator in familial dispute cases, offered these services on the site. Over the years, and in view of the increased demand, more mediators were added to provide the service.\textsuperscript{72} There is also a site in Canada, Family Mediation Canada, offering advanced technology in mediation of family disputes.\textsuperscript{73}

In his article, Ebner mentions two recent successful projects of e-Mediation in family disputes.\textsuperscript{74} One of these is Juripax from 2008 and the other is the British Columbia Mediator Roster Society, which operated between May 2009 and February 2010. According to Ebner, these two projects are the best indicators of the effectiveness of e-Mediation in family disputes. In both projects there was a high rate of agreement, accompanied by a high degree of party satisfaction, alongside willingness to use this process in the future as well. According to Ebner, these projects, which implement online dispute resolution in an area characterized by high emotions and previous acquaintance of the parties (as opposed to the characteristics of the areas in which ODR started), serve as testimony to the accelerated development of the field and are even likely to predict future applications.\textsuperscript{75}

In Holland, in 2009, an empirical study with 126 participants was carried out on the subject of e-Mediation in divorce disputes.\textsuperscript{76} The objective of the study was to provide an appraisal of the online

\textsuperscript{70} The University of Maryland Online Mediation Project. See Conley Tyler & McPherson, \textit{supra} note 3, at 23.

\textsuperscript{71} Extended Warrant Insurance, \textsc{SquareTrade}, \url{http://www.squaretrade.com} (last visited Nov. 10, 2014).

\textsuperscript{72} Tyler & McPherson, \textit{supra} note 3, at 24.

\textsuperscript{73} \textit{Id}.

\textsuperscript{74} Ebner, \textit{supra} note 9, at 375.

\textsuperscript{75} \textit{Id}.

process, which would be comprised of parameters of the quality of the process, quality of the results and the price for achieving them. The overall communications (between the parties and the mediator and between the parties) was carried out in an asynchronous manner and exclusively through e-mails with the parties undertaking in advance to send their messages within forty-eight hours.

The results of the study in Holland reveal that each of the parties gave high points both to the process and to its results. Seventy-six percent (76%) of the participants reported reaching an agreement resolving the entire dispute that was acceptable to both parties. Eight percent (8%) reported reaching a partial agreement and only sixteen percent found that the process did not lead to any agreement. Most of the participants perceived the process as fair. Thirty-two percent (32%) of the participants were highly satisfied with the mediator while 46.4% voiced very high satisfaction. About ninety percent of the participants found that the mediator was very trustworthy. As to the process and its price, most of the participants reported satisfaction with regard to the material costs demanded by the process, but they were less satisfied with the non-material price, such as tension and other negative feelings, as well as damage to the relationship. However, and as Gramatikov and Klaming note, it is not certain that this is a failure typical specifically or uniquely of the ODR process, insofar as every dispute resolution process (whether online or not online) is likely to be accompanied by such feelings. Regarding the results, both of the parties felt that the result was fair and gave them a fair and equal share of the resources as well as a result that reflected the efforts invested and addressed the interests and needs of each of the parties. This finding is particularly interesting in view of the fact that a divorce dispute ends with a result of distribution (visitation rights and parental custody, division of family assets and support payments), which often leave one side more satisfied than the other or one who perceives the other’s gains as being at his expense. In this sense, Gramatikov and Klaming assert that the e-Mediation process has achieved an important objective: division of the “cake” in an equal and fair manner. This is in addition to the result being satisfactory to both parties.

77 Id.
78 Id. at 109.
79 Id. at 112–13.
80 Id. at 115.
81 Id. at 117, 120.
One of the interesting insights of the Dutch study is that ODR is regarded as a significant tool for providing legal assistance and solutions to problems comprised of legal issues. Most of the participants in the Dutch study were not accompanied by a lawyer but rather relied on their own abilities as well as the knowledge and professional skill of the mediator in his or her efforts to arrive at an agreement. In view of the finding noted above, according to which both parties to the dispute expressed a high and fairly equivalent degree of satisfaction, both from the process and from its results, precisely in a dispute that is fundamentally competitive and adversarial in its nature, it may be concluded that there is real potential here for a fair and just solution to legal disputes.\textsuperscript{82} From these results it transpires that e-Mediation in divorce disputes is highly likely to serve as a practical and viable alternative.

A further interesting finding of the study is that significant differences were not found between men and women with respect to their assessment of the process or its outcome,\textsuperscript{83} although women reported a higher level of negative feelings experienced in the course of the process, such as frustration, anger and despair. This finding is liable to give rise to the insight regarding a certain failure of the process to take care of the emotional needs of the participants (in spite of the fact that it is perceived as fair).\textsuperscript{84} The exchange of electronic messages is likely to be a negative and frustrating experience when fateful interpersonal issues are under discussion. This insight is likely to be consistent with what is defined as one of the clear disadvantages of the online dispute resolution process—the limitation of expression of feelings in comparison to a process that is carried out face to face. This disadvantage (along with others) and the means of dealing with it will be discussed in the following sections.

3. Advantages and Disadvantages of e-Mediation and their Impacts on Divorce Disputes

\textit{Speed and Efficiency}

Former United States Supreme Court Chief Justice Warren Burger wrote, \textquotedblleft 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

\textsuperscript{82} Gramatikov & Klaming, \textit{supra} note 76, at 120.
\textsuperscript{83} \textit{Id.} at 116.
\textsuperscript{84} \textit{Id.} at 118.
problems, like people with pains, want relief, and they want it as quickly and inexpensively as possible.”

The need for a speedy decision is a central reason for the development of alternative means for dispute resolution, especially in the sphere of divorce disputes. Studies demonstrate that divorcing couples that choose mediation reach resolution of their matters in about half the time of couples that choose the judicial process. E-Mediation offers an even faster route through dispensing with the need for face-to-face meetings, coordinating schedules (between at least three people) and wasting precious time on traveling back and forth. Indeed, saving time is perceived as one of the most prominent advantages of the online process.

Moreover, it seems that there is no dispute that a proper and effective process is one that lessens, to the extent possible, the exacerbation of the dispute and the traumatic psychological effects of the divorce on all of those involved, primarily the children. Studies reveal that the atmosphere and tension surrounding and leading up to the divorce (and not necessarily the separation itself) influence the post-divorce experience of the children and that the children demonstrate more flexibility and adjustment to the new situation when the separation process is relatively calm and quick. It should not be forgotten that the emotional tension and energy of all of those involved in a long and expensive divorce process are likely to empty the final agreement of any feeling of satisfaction.

Additionally, a swift resolution of the dispute almost always reduces expenses. Since the divorce is financed from one pool of resources, the advantage of reducing costs in such disputes cannot be overlooked. The reduced expense of the online process also stems from the fact that there is no need to rent an office or other venue for the mediation meetings. Thus, the online process can be even less expensive than a traditional mediation process. The online process even reduces the costs associated with receiving assistance from an attorney (in cases in which parties choose to receive such assistance in the online process). When the equation of time equals money is less threatening, the parties are freed to focus on

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86 Brennan, supra note 4, at 212.
88 Gillieron, supra note 5, at 314.
89 Brennan, supra note 4, at 213.
90 Conley Tyler & McPherson, supra note 3, at 12.
91 Brennan, supra note 4, at 214.
the issues that are truly significant for them (such as their children’s future and best interest) instead of focusing on the ticking clock.92

On the other hand, in spite of its advantages, the speed of the process is also likely to be perceived as a disadvantage for several reasons. First, it is not at all clear that clarification and decision of the kinds of critical issues discussed in divorce disputes (such as child custody), are supposed to be quick. Time and moderation have their own advantages, especially with respect to issues such as these. Second, the mediation process, certainly in divorce disputes and especially according to several models,93 places emphasis not only on the result but also on the procedure, or more precisely, on the process the parties go through on their way to an end of the conflict. Transformative mediation, for example, one of the models commonly in use in the United States,94 sets as its objective the transformation that the parties go through in the course of the process. According to this method, the direct striving towards an agreement without placing the emphasis on the transformative process of the parties (and the situation), composed of empowerment and recognition does not fully realize the promise embodied in mediation, does not provide a true remedy to the pain of the conflict and is likely to lead to illusory or unjust settlements.95 In other words, the real problem remains, even if it presents itself on the surface as resolved (in the form of a signed settlement agreement between the parties). Clearly transformation is a process and as such it requires time. According to this and similar models, any erosion of the latter is likely to injure the former and certainly not to be considered an advantage.

\[92 \text{Id.}\]

\[93 \text{See Dafna Lavi, The Mediator, supra note 32, at 164 (discussing mediation models that belong to the category of “facilitative mediation”).}\]

\[94 \text{The United States Postal Service, the second largest employer in the United States and one of the largest civil employers in the world (numbering approximately 850,000 employees) makes use of the transformative mediation model with respect to the complaints of its employees as part of a program called REDRESS (Resolve Employment Disputes Reach Equitable Solutions Swiftly). For a more expansive discussion, see Dafna Lavi, Transformative Mediation – The Substantive and Procedural Aspects – A Proposal to Adopt a New-Old Model into the Current Discourse, 5 Sha’arei Mishpat 131 (2009) (Isr.).}\]

\[95 \text{Id. at 145.}\]
Distance

As we have mentioned above, one of the outstanding advantages of online dispute resolution is the ability to overcome obstacles such as location and distance. Through use of online discussion, communications between people in various locations can be carried out easily and quickly, from almost anywhere, without the need for physical presence. This advantage is likely to increase the ability to use broad professional knowledge in the process, through the participation of experts who are far away, who suddenly become available. Especially with regard to distance, it is possible, therefore, to say that the Internet offers the possibility of forming new kinds of spaces that are not physical and in these spaces virtual processes and tools can be used.

In divorce disputes particularly, the advantage of distance is particularly valuable. First, this is an especially significant saving for separated couples, who no longer live in the same area. As Abraham Kuhl wrote, “[w]hen children are involved, the parties will need to maintain contact with one another for a number of reasons that may arise. As children grow older and circumstances change, a modification of the court’s order may be necessary to better serve the children’s best interest.”

Second, according to various scholars distance helps to preserve the “business-like” nature of the relationship, a clear advantage in the charged atmosphere of the dispute. It bears remembering that this advantage is likely to stand the parties in good stead not only in the course of the negotiations surrounding the divorce, but also in future communications regarding joint custody. In other words, while the courtroom adversarial process is perceived as exacerbating the conflict and poisoning the relationship and traditional mediation is perceived as neutralizing hostil-

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96 See supra Part II.A.1.
97 See supra Part II.A.1.
98 Ebner, supra note 9, at 377–78 (“Parties gain access to mediator expertise beyond that which might be available in any given geographical region . . . [Moreover,] [e]xternal experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process’ dynamics.”).
100 Brennan, supra note 4, at 213.
101 Id.
ity or at least preventing escalation of the conflict, e-Mediation takes a further step forward by conferring a businesslike character to the entire enterprise. Third, at times this is the only way in which it is possible, on the one hand, to carry out direct communication between the parties (as distinguished from negotiations carried out solely between lawyers), but on the other hand, to prevent a meeting between them. For example, the advantage of distance is particularly significant in situations in which domestic violence (or domestic abuse of any kind) is involved. The distance removes the possibility of injury. Studies show that people, who use insults or emotionally abuse their spouses when together, are inclined to continue this conduct in the course of the negotiations (or mediation) for the termination of the relationship as well. Moreover, one who suffers from violence in the course of the marriage, but cannot afford the services of a lawyer, is likely to give up on getting a divorce in order to avoid meetings with the violent spouse. The advantage of distance in these situations is, therefore, critical. Fourth, from the angle of the therapeutic doctrine of law as well, the distance is likely to be an advantage in loaded conflicts such as divorce disputes. The distance contributes to the conduct of communications in a calm, rational and emotionally moderating atmosphere. The argument is that an atmosphere of charged emotions, which are expressed in a face-to-face meeting, is likely to feed on itself. When one party feels attacked, he attacks back and the resulting vicious cycle is likely to cause damage (to the communication and the relationship) and to waste energy on the attack and the defense instead of channeling it to rational thinking that contributes to the conduct of effective negotiations for achieving optimal solutions. The studies conducted by Anne-Mary Hammond, dealing with the study of conflict and its resolution, reveal that the parties to a dispute feel calmer, less hostile and more self-confident in an environment of online dispute resolution. A number of users of the process described the online environment as less stressful and threatening and even as reducing

103 Id.
106 Brennan, supra note 4, at 215.
107 Id. at 216.
108 Id. at 215.
109 Id.
bitterness in comparison with face-to-face conflict resolution. On the other hand, it can be argued that online discussion is likely to be less filtered and to bring about extreme expressions of loaded emotions. There is a common argument, supported by the research, according to which online communications encourage aggressive and unrestrained conduct. The very knowledge that the party will not have to personally meet the mediator or the other party in the course of the mediation is likely to push the parties to a style that they would not permit themselves in face-to-face meetings. It seems that the danger is far greater when the parties are involved in a divorce dispute, where at times there is a history of hostile discourse between them at some level. On the other hand, there are also studies demonstrating the opposite, i.e., that there is not sufficient proof to support the assertion that online discussion is inferior in comparison to face-to-face interaction.

“Netocracy”

The anonymity enabled by the Internet creates a situation called “netocracy” by Robert Gordon in which all of the parties involved have equal status. Traditional mediation, in spite of its

111 Brennan, supra note 4, at 216.
112 This is because social codes alongside accepted behavioral norms have less influence in an online environment. Gillieron, supra note 5, at 336. See also Leigh Thompson & Janice Nadler, Negotiating via Information Technology: Theory and Application, 58 J. SOC. ISSUES 109, 119 (2002). Indeed, studies show that communication rife with insults, name-calling and hostile remarks are more common in online communications than in face-to-face discourse. See Brennan, supra note 4, at 222.
113 Gillieron, supra note 5, at 336. For a more expansive discussion, see Elaine M. Landry, Scrolling Around the New Organization: The Potential for Conflict in the Online Environment, 16 NEGOT. J. 133, 139 (2000).
114 Brennan, supra note 4, at 223. In Hammond’s study, for example, it was found that written communication did not negatively influence the conduct of the parties to the mediation. The participants in the study reported that they behaved in the same manner in which they would have behaved had the communication been oral and face to face and that they utilized their normal communication skills when they considered what to say, how to clarify their position and perceptions, as well as their proposals for a solution. Hammond, supra note 110, at 277.
being less adversarial and coercive than the judicial process, is still likely to provide a platform for injury, such as physical force, insulting language or threats, in situations of power gaps between the parties. These are likely to cause a crack, even if this is only a crack in the free consent of the weaker party.\footnote{116} The argument is that the online process increases the chance for effective negotiations and achievement of a fairer result because it deals with the difficulty of potential power gaps between the divorcing couple.\footnote{117} People tend to accommodate their behavior to societal expectations. If the husband was the more dominant figure in the relationship during the marriage, there is a high degree of probability that he will continue to behave in this manner in the divorce mediation process.\footnote{118} The argument is that the netocracy inherent in the ODR process evens the playing field in a situation of power gaps (revealed or hidden) and is likely to contribute to arriving at a true agreement of win-win in which both parties are truly satisfied.\footnote{119}

Netocracy is even likely to contribute to promoting equal standing between the parties. As Kuhl states:

> Without the benefit of communicating online, many people become “conflict-avoidant” and shy away from conflict and make concessions when confronted by the dominant party. Online, however, an interesting thing happens. Those who are generally passive in social settings, for example, will become assertive in an attempt to project their “best self.” While a submissive party will generally make concessions offline so as to avoid confrontation with the dominant party, online, with the Internet providing a safe distance barrier, a once submissive party feels a sense of empowerment and will communicate directly, more assertively, and be less likely to make concessions.\footnote{120}

Netocracy makes a further contribution by reducing the stereotypes and the cognitive skewing, which are likely to be the fate of the mediator with respect to the parties. Traditional face-to-face mediation, by its nature, emphasizes the advantages of those who have the better outward appearance, are more fluent in their speech, more educated or those who belong to the majority group of a society.\footnote{121} When the communication is written, the chance that the mediator will prefer one of the parties (even subcon-
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Asynchronous Communication

One of the key advantages of the online process is that it enables asynchronous (non-simultaneous) communication. In this type of communication, there is the possibility of taking a step back from the computer to think about the matter before responding. Kent Neuman, a traditional mediator in family cases, notes that one of the common pieces of advice for the parties in a mediation process for divorce is to stop before responding. This is particularly true where the discussion takes an especially loaded turn (or where the issue under discussion is very loaded). However, this advice, in spite of its importance, turns out to be very difficult to implement for the parties in a traditional process, especially where under discussion are loaded issues such as child custody. In an online process it is easier to respond in a rational and thoughtful manner. Asynchronous communication contributes to organizing feelings and controlling them, as well as to presenting them to the other party in a thought-out manner.

It is argued that asynchronous communication also contributes to the mediator’s ability to perform his job in a more effective manner. In Hammond’s study, all of the mediators agreed that the online communication contributed to their ability to concentrate on the overall picture instead of concentrating on the interactions between the parties at any given moment. All of the mediators agreed that asynchronous communication gave them time to respond which they used to skillfully word their responses and questions to the parties. Most of the mediators reported the added value in being able to follow the changes in the documented interaction and to use the time until sending a response to consult with others prior to reaching a decision.

However, the asynchronous model also has disadvantages. The response time may lead to regret or changes in what was con-

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122 Id. at 217.
123 Id.
124 Id. at 218.
125 Id.
126 Hammond, supra note 110, at 275.
127 Id.
128 Id.
sidered to be consent that had already been given. Delays in sending responses or prolonged waiting for a response is likely to give rise to a great deal of frustration and even harm to the party who is waiting. Additionally, each party can easily sabotage the communication simply by detaching from the computer. Another disadvantage is the limitation of the ability to immediately correct, while speaking, a slip of the tongue or to soften something said in order to prevent injury or misunderstanding.129 One possible solution to this problem is the one chosen by the mediators of the SquareTrade site. A common practice among the site’s mediators is to send both parties the following message:

To you both, I ask a favor: However this situation arose, it is likely that miscommunication, error, assumptions and a host of other human frailties may be at the root, however much each of you did his honest best—I respectfully request that you try to imagine the most benign of intentions in each other. I have found that Internet dealings easily foster enormous distrust in folks and that as much harm comes from assuming the worst of the other as anything else. I will do my best to help you work this out. I certainly assume that each of you is doing their honest best to come to an agreement you both will find satisfies your concerns.130

Another proposed method for dealing with the problem of prolonged waiting is setting limitations in advance on the time for response. The mediator can explain to the parties, in advance, that the online environment gets us used to expecting immediate responses and therefore it is important to respond to messages as quickly as possible. In cases in which longer time than usual is needed, it can be decided that a party needs to respond to the other party within twenty-four hours, even if this is only to say that a full response is forthcoming.

**Written Communications (Texting)**

One of the biggest advantages of online communication is its reliance on written text. Written communication has the ability to moderate emotions (including neutralizing negative emotions), slow down the response time (in comparison with oral responses) and reflect to the writer (in front of his eyes) the message being

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129 Brennan, *supra* note 4, at 220.

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imparted. This ability has a significant advantage precisely in situations rich in emotional entanglement, such as divorce disputes. The emotional entanglement is likely to distract the parties from concentrating on the important matters at issues that need to be decided. E-Mediation is likely to “force” the parties to concentrate on the matters as to which they need to reach agreement instead of focusing on the emotional aspects of the dispute.131

Additionally, the ability of a party to express what is on his mind without fearing that he will be interrupted by the other party is a very valuable advantage, especially in the charged situation of divorce disputes.132 The need to express oneself, to be heard and to be understood is a basic human need and it has a liberating effect, encouraging development and growth in general and particularly in situations with a high level of emotional entanglement.133 A party who realizes that he was listened to and understood is open to listen and even, at times, to be persuaded and to accept.134 In face-to-face meetings, certainly in tense situations in which fateful decisions are being made (as in divorce disputes), it is easier to forget this fact, to interrupt the other party and thereby to frustrate (even if unintentionally) the healthy progression of the negotiations. The easiest and most natural thing to do when the other party is expressing opposing positions is to prepare a response or to formulate an attack of his words instead of really listening to him and trying to understand the whole message.135 In addition, it is obvious that concentrated listening to the other party is a basic key to understanding him (including his needs, desires, fears and other interests) and increases the chance of arriving at an integrative settlement agreement which addresses most of the interests of both parties.136 Written communication, therefore, opens the way for concentrating on the substantive content of what is said and reins in the instinct to respond with an attack.

131 Gramatikov & Klaming, supra note 76, at 100.
132 Brennan, supra note 4, at 221.
134 Id.
135 Brennan, supra note 4, at 221 (“It 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!”).
Similarly, written communication is likely to be of assistance by forcing the transmitter of the message to be precise and clear in his messages. In this form of communication it is not sufficient to throw out hints or interim remarks. For example, the presence or absence of a text is not the same as silence in a face-to-face meeting, rather it serves as a real impetus to the parties to open up and express feelings, interests and desires. Additionally, written communication is even likely to remove disruptions that are likely to be caused as a result of body language and non-verbal hints such as hostile facial expressions, a position that transmits aggression, gestures or eye contact or lack thereof. In this manner, the way is paved for negotiations on the merits without additions that are likely to delay the arrival at an effective settlement.

A further argument made in this context is that when speaking of couples that are divorcing, in most cases there is a set pattern of communications based in part on the reading of one another’s body language. Neutralizing the body language contributes, in this context, to creating an unbiased environment, enabling the parties to judge things anew. A further disadvantage to body language, that written communication is likely to neutralize, is the fact that body language may be misinterpreted. When a party perceives conduct as negative, even if this interpretation is mistaken, the tendency is to concentrate on it, to respond accordingly through some kind of retributory action, which is likely to lead to a similar reaction, and so forth, leading the negotiations to an impasse. Written communication is important, therefore, especially for those dealing with emotionally loaded situations and faulty communications from the outset, laden with suspicions, lack of trust and past traumas, as is the case in divorce disputes. The written messages that neutralize the other forms of communication are likely to force the parties to truly listen, possibly for the first time, and to concentrate exclusively on the substantive content.

A further advantage of written communication, in comparison to traditional ADR, is the advantage of “archival preservation.” In the traditional process the emphasis is on confidentiality and the fact that “nothing is saved.” In online dispute resolution, everything is saved. The digital tracking of the written texts and saving

138 Brennan, supra note 4, at 221.
139 Id.
140 Id.
them automatically creates a record of the entire exchange of communications, the disputes and the agreements, without the need to invest special efforts. It is this characteristic of online discourse that provides a real tool to the mediator, which does not exist in traditional face-to-face mediation—the mediator can examine the written, archived communications in order to use it to help in clarifying the issues or in order to remind the parties of their past declarations. In a face-to-face meeting, after the parties have spoken, in the absence of some kind of recording, their statements do not exist except in the manner in which those present in the room remember them. If, afterwards, a mediator reminds a speaker of what he said, the speaker may remember his words in a different manner or in a different context. Archival communications enables the mediator to preserve copies of the language that brought about positive responses. He can copy the exact words a party used and show them to him. Moreover, textual communication and saving it as a matter of course gives the e-Mediators a valuable tool to assist in future disputes. The site Online Resolution,141 for example, has a file available only to mediators in which there are useful sources and suggested language for various situations. While in traditional mediation, where the meeting is face-to-face, the use by the mediator of such sources is likely to cause the parties to doubt the mediator’s expertise and even to waste valuable time, in an online environment there is immediate access to sources that the mediator can avail himself of outside the presence of the parties.

Written communication, however, has its own disadvantages. The critics argue that moderating or neutralizing emotions, which written communication enables, is not necessarily (or in all situations) an advantage. The argument is that written communication is always “thin” and lacking in comparison to face-to-face communication, which is perceived as the richest and most interactive form of communication between people.142 Written communication lacks those non-verbal hints such as facial expressions, body gestures and tone of voice. This absence is significant, as Keisler and Sperwohl note, “[P]eople come to understand social order through ‘static’ and ‘dynamic’ social context cues, and ‘[o]nce people perceive social context cues, they adjust their targets of communication, the tone and content of their communications, and

141 Rule, supra note 137.
142 Brennan, supra note 4, at 222. See also Gillieron, supra note 5, at 327–28.
their conformity to social norms." 

Eye contact, for example, has been proven to convey messages of friendship, recognition, coordination and promotion of relationships. Gillieron notes as follows:

Social cues are important to build interpersonal “rapport” . . . . “[R]apport” can be described as “a state of mutual positivity and interest that arises through the entrainment of expressive behavior in an interaction.” F2F (Face-to-Face) allows more “rapport” than CMC (computer-mediated-communications), which in turn leads to more trust and thus more cooperation.144

Written communication is likely to sabotage every potential gesture of friendship, politeness or courtesy and even the ability to use humor and to develop a relationship of trust and cooperation, which is a necessary condition for successful mediation.145 If the tone of the parties and of the mediator, is “cold,” the mediation becomes formal and prevents the mediator from using techniques of humor and positive atmosphere, which encourage openness and coming closer. In other words, the entire mediation loses something of its therapeutic character and thereby its effectiveness.146 Face-to-face communication, on the other hand, is likely to contribute to drawing the parties nearer and to improving communications and understanding between the parties as well as the overall relationship. All of these are likely to advance the chances for success of the process. The latter is perceived, in addition, as positive, for the purposes of fully utilizing the potential of mediation and the experience of the parties through the process.147

Additionally, with respect to emotions, written communication is likely to be very frustrating. On the basis of an empirical study, Gramatikov and Klaming assert that “[i]t is a known fact that online communication is less well suited for the expression of emotions than face-to-face communication.”148

Exchanging messages through e-mail seems limiting with respect to emotions in comparison with face-to-face communications. Various participants in studies carried out by Gramatikov and Klaming expressed the problem in terms such as “[s]uch types of

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143 Gillieron, supra note 5, at 327.
144 Id.
146 Brennan, supra note 4, at 222.
147 Id.
148 Gramatikov & Flaming, supra note 76, at 118.
problems have to be approached in a more personal manner,” \(^{149}\) or, “[I will not use e-Mediation in the future] because I prefer to look the other party in the eyes as I talk. By this way [e-mail exchange] you can never make it clear what you mean. I find it distant. At the end it was quite disappointing for me.” \(^{150}\) In view of the results of their research, Gramatikov and Klaming conclude that e-Mediation in divorce disputes does not sufficiently take into account the emotional needs of the parties. \(^{151}\)

Additionally, there is an assertion that a discussion with no facial expressions, gestures and other hints stemming from body language creates laconic communication, which is likely to give rise to misunderstandings, in the best case scenario, \(^{152}\) or filling the lacunae with doubts, suspicions and fears in the worst case. This is particularly the case where, as in divorce disputes, these feelings tend to characterize the relationship in any event. \(^{153}\) As one of the participants in an empirical trial of e-Mediation put it, “[b]ecause it is very difficult to tell clearly your story only with words, it is possible that the other party reads a different story.” \(^{154}\)

An additional disadvantage, which is likely to occur with written communication, is the limitation of the power of the mediator. There are scholars who have expressed apprehension with respect to the limitation of the mediator’s power as a result of such communication. The argument is that the mediator’s ability to control the process may be compromised, at times to the point of loss of control. \(^{155}\) Face-to-face mediation enables the mediator to feel out the parties and the dynamic taking place before him. He can form an impression from expressions of strength or weakness, lack of confidence or unease, flexibility or exacerbation of the dispute. He can form an impression of how things that were said sound to the other party and to see with his own eyes the effect and the impression left on him. The argument is that as a result, the mediator in such a mediation has more varied tools to guide the general direction of the process, if only through stopping the speaker or removing him from the room. \(^{156}\)

\(^{149}\) Id. at 119.

\(^{150}\) Id.

\(^{151}\) Id.

\(^{152}\) Id. at 100.

\(^{153}\) Brennan, supra note 4, at 222.

\(^{154}\) Gramatikov & Klaming, supra note 76, at 118.


\(^{156}\) Id.
To summarize this criticism, it seems that the absence of human interaction places a question mark over the ODR process in general and in particular with respect to divorce disputes, in which the relationships are particularly loaded emotionally.157 There are a number of possible answers to this criticism of written communication. The first answer asserts that it must be remembered that there are situations in which there is simply no possibility of holding a face-to-face meeting. If there is no online process there will be no process at all. In other words, there will be no divorce, at least in the short term.158 Therefore, even if we accept the criticism as brought above against written communication that is offered by e-Mediation, in many situations that is still the lesser evil.

Moreover, the online environment does not prevent face-to-face meetings. This is due to the fact that these meetings are likely to (and do in fact) occur159 as an addition to the online procedure, while increasing the satisfaction of all the parties involved160 and because even in the online environment it is possible to hold a session in which the parties see each other through the use of simple and available technology of video and digital cameras. The technological advances have also enabled enlarging computer screens and improving the resolution. It is now possible to present on the screen much more information in a clear and sophisticated manner. The screen has colors, form, animation and sound. The possibility of combining all of these through high-speed networks provides a significant communications tool. For example, if we agree that communications based on the human voice (as distinguished from written communication) has many advantages due, inter alia, to the ability to transmit messages through a change in tone, speed and overtone, it is precisely because of this that many platforms for online dispute resolution now offer integration of voice communications.161

158 Tennenbaum & Liber, supra note 6, at 86. See also Tyler & McPherson, supra note 3, at 11.
159 See Tyler & McPherson, supra note 3, at 12 (“ODR can be used in combination with face-to-face dispute resolution when it is used to clarify stories and issues before a meeting and to facilitate post-mediation session actions, negotiations and drafting the terms of settlement.”).
160 See Poblet & Casanovas, supra note 155, at 151 (“Finally it has also been stated that using both CMC and FTF for discussion enhances job satisfaction more than using just one media.”).
As to the concern regarding misinterpretation of the text (in the absence of being nearby physically and the non-verbal supplements), according to the assertions of the supporters of e-Mediation, this concern is unrealistic with respect to divorce disputes, due to the fact that the divorcing parties know one another very well. An additional answer to the critics of written communication is the argument that it is precisely in face-to-face encounters that people tend to get locked into their positions and find it difficult to build trust. On the other hand, ODR, through the use of an appropriate program, is likely to calm the parties and to assist in building trust between them. Thus, through the use of more effective means, they will be able to find a solution to those issues as to which they disagree.

In response to the criticism discussed above regarding the limitation of the parties in expressing their feelings in written communications (in comparison to face-to-face communications), recent findings may be cited to weaken this criticism. Studies point to the fact that emotions surface and are expressed in written communication as an integral part of the process, fashion the choices of the parties in responding to them and constitute a significant component of the interaction. Parties do not feel particularly limited with respect to their ability to express emotions in written online communications. They simply use different means, specific to the expression of emotions in communication of this kind, regardless of whether this is through the use of large letters (as a means to express a scream), use of an exclamation mark on the keyboard, the smiley face or the frown (emoticons) which enable the parties to express their unique emotions in a manner accommodated to written communications. Even if we were to agree, therefore, that the level of online interaction is still lacking in comparison to face-to-face encounters, the argument is that the online environ-

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162 Gramatikov & Klaming, supra note 76, at 100.
163 Poblet & Casanovas, supra note 155, at 151 (“Pesendorfer and Koeszegi state that ‘synchronous negotiation mode leads to less friendly, more affective and more competitive negotiation behavior. Asynchronous communication mode leads to more exchange of private and task-oriented information and to a more friendly communication style.’”).
164 See id. at 149 (“[R]ecent findings may moderate some concerns about ODR as an impersonal environment where emotions cannot be used as contextual or interactive cues.”).
165 Id.
166 Id.
167 S. Summers Raines, Can Online Mediation Be Transformative? Tales from the Front, 22 CONFLICT RESOL. Q. 437 (2005).
168 For example, changing the font or coloring the entire text in red is likely to express anger. See Ebner, supra note 9, at 392.
ment also has new sources and means that enable the parties to avail themselves of effective expression. The virtual world does not hide emotions, even if at times it blurs them; still this does not mean that it is not possible to develop alternative patterns of conduct that can instruct us about the emotions of the parties.

With respect to the concern, expressed above, regarding the restriction of the authority of the mediator in written (text) communication, in comparison to face-to-face encounters, the research indicates that it is precisely the various online applications that are likely to give those dealing in the field of e-Mediation new tools to improve how they function in the process and to promote its use. One example is the use of the framework of preliminary communication, i.e., a framework in which the messages of the parties reach the mediator in the first place rather than one another. Through this framework, the mediator can “train” the parties regarding forms of more respectful expression as well as blocking declarations and statements that are likely to be destructive to the continuation of the process from reaching the other party. In effect, there is a kind of upgrading of the technique of reframing used by the traditional mediator as well. However, the advantage of this upgrading, enabled by written communication, is that the mediator in the online process can take his time to respond, as necessary, with the objective of reframing a problematic statement of one of the parties (which for the most part cannot be done in face-to-face communication). This is the case with other skills as well, that are sometimes required of the mediator, such as a “poker face,” that are not required of an e-Mediator. Other useful techniques in mediation processes, such as caucusing, have a further advantage in the online process, since, as distinguished from traditional mediation, the mediator in the online process does not have to be dis-

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169 Id. at 392.
170 Poblet & Casanovas, supra note 155, at 150.
171 This skill assists the mediator to change the negative messages (that were voiced by one of the parties) to positive, constructive messages, through redrafting and softening things that were said, with the basic objective being to enable the other party to express himself. In other words, it enables effective communication, while dealing with the feelings that the parties express with piercing statements. This technique of redefining contributes, inter alia, the removal of emotional obstacles by presenting the statements of each of the parties to the opposing party in a less emotional or less judgmental manner. See Ronen Sati, Through Mediation to Agreement 140 (2001).
172 Caucusing denotes private meetings of the mediator with one of the parties without the presence of the other party. The separate meetings are a common work tool of a mediator and the assist the parties to open up freely and help the mediator to clarify information that one party would not dare to provide in the presence of the other party.
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...rupted by the response or concerns of the other party. Moreover, in a face-to-face meeting, for the purpose of holding a separate meeting with each of the parties, there is a need to stop the joint meeting, which is often likely to interfere with the continuity of the discussions. E-Mediation and text communication, on the other hand, enable the mediator to speak with a party privately without interfering with the continuity of the discussions in the joint conversation. This is of course through the use of a number of windows simultaneously or through use of separate virtual rooms in video conferencing. This kind of handling of the process, permitting only the mediator in a online process (as distinguished from his colleague in a traditional mediation) to be present simultaneously in three places requires, of course, that those who deal in the field master a new skill.

Indeed, it seems that the implementation of expertise in the virtual environment must be, in part, for the purpose of gradually increasing the richness of the online interaction, thereby enabling the mediator to use his expertise in the most effective and efficient manner. The possibility, therefore, of carrying out certain actions better in the online environment as compared to the traditional mediation environment, is likely, as discussed above, to add new opportunities for effective communication and interaction and thus, in my opinion, to constitute a fundamental justification for the existence of e-Mediation and a satisfactory response to those who argue as to the limitation (or partial limitation) of the mediator and textual communication in this process.

Simplicity and Convenience

A further advantage of the online process is carrying out negotiations with maximum convenience. This advantage is particularly significant in disputes that are loaded in any event, such as divorce disputes. The central advantage that e-Mediation offers is its simplicity. Beyond their good will and connection to the network, the process demands almost nothing from the parties. There is no need to agree on a neutral place and to travel there, there is no

174 Brennan, supra note 4, at 219.
175 Id.
176 Rule, supra note 137.
need to coordinate schedules for a meeting, as the providers of ODR are available twenty-four hours a day, throughout the week. 177

Alongside the advantage of simplicity, there is also likely to be a disadvantage. The concern is that there will be a cheapening of the family connection, due to the possibility of tearing it apart with the push of a button. This does not mean that a “good” marriage will fall apart simply because of the convenience and availability of the option of breaking it up, and on the other hand, the need to have a convenient option such as this in many cases is clear (e.g., when there is urgency to end the connection in cases of domestic violence or when it is clear beyond any doubt that the marriage is no longer viable). However, the concern relates to the intermediate cases, i.e., when the determination is not unequivocal and what are required are soul searching and rethinking, painful decisions and deep examination. The computer cannot replace the need for self-examination (at times painful) and fleeing to easy solutions is still fleeing. Rabinovich-Einy and Katsh note that ODR is not just an agent for change, which provides new optional tools that are likely to constitute an addition or strengthening of the traditional processes. ODR raises, in addition, questions that would perhaps not arise in its absence. For example, in addition to the question whether there is a better way (in the matter at hand, to preserve what exists, i.e., to preserve the marriage), it raises the question if there is no other way (i.e., to change or break up what exists—the marriage). 178 Rabinovich-Einy and Katsh argue that the Internet, under external camouflage, is an innovative force not only in accelerating changes but also in accelerating changes of direction. 179 As they note, “[t]echnology changes not only what we can do, but also, over time, how we decide what to do and what needs to be done. It gives us not only new tools but also new ideas about the use of these tools. . .” 180

In another place, Katsh warns as follows:

Ask anyone who knows something about computers to talk about them, and you will find that they will, unabashedly and relentlessly, extol the wonders of computers. You will also find

177 Gillieron, supra note 5, at 313.
178 Katsh & Rabinovich-Einy, supra note 8, at 166 (They also assert there that “[n]ew technologies change what it is possible to do and, in the process, raise a range of questions about the value and need for doing either what was difficult before or not possible at all.”).
179 Id. at 168.
180 Id. at 166.
that in most cases they will completely neglect to mention any of the liabilities of computers. This is a dangerous imbalance, since the greater the wonders of a technology, the greater will be its negative consequences.\footnote{Katsh, \textit{supra} note 1, at 31.}

In other words, the criticism of the online process on this point notes that by opening a window to new possibilities, and without sufficient attention, innovative technology is likely to bring about, and even to lead a reevaluation of objectives, priorities, assumptions and expectations.\footnote{Katsh & Rabinovich-Einy, \textit{supra} note 8, at 166.} Additionally, the convenience and the need to think less are tempting. The danger inherent in the combination of the two is of being led, without noticing. The danger awaits first of all the parties to the dispute but also the mediator, who, in the absence of face-to-face meetings, is likely too easily to fall into mediation that is not “mindfulness meditation.”\footnote{The term was coined by Leonard L. Riskin in 2004. See Leonard L. Riskin, \textit{Resolution}, 54 \textit{J. LEGAL EDUC.} 79, 83 (2004). The term “mindfulness meditation” means mediation that is informed, alert and aware of the specific circumstances of the case under consideration. Riskin calls for mediation that will break away from previous assumptions and perceptions, stemming from the power of habit, and are likely to be mistaken for specific parties in the given mediation. In intelligent, aware mediation, progress is heel to toe with alertness and awareness to the personal feelings, thoughts, emotions and needs of the specific parties. The assertion is that only such mediation enables true listening and understanding, true gathering of relevant information, adopting approaches and making decisions that are the most correct for the specific dispute. See David Allen Larson, \textit{Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR}, 21 \textit{OHIO ST. J. ON DISP. RESOL.} 629, 678 (2006).}

It is easy to forget that while mediation meetings are virtual, the pain of the divorce is never virtual. The people behind the online communication are real and live. This is the case with respect to their feelings as well. This is true of their children as well. Obviously, as a society, we would not want to look back in a few years and discover that the percentage of divorces has risen, \textit{inter alia}, due to the ease and availability along with the unbearable lightness of breaking up the marriage connection.\footnote{Katsh, \textit{supra} note 1, at 131.}

To conclude this part of the Article, after surveying the accelerated development and the advanced adoption in the world of e-Mediation, along with delving into the advantages of the process precisely in divorce disputes, its disadvantages and possible ways to overcome these disadvantages, it seems that there is ample reason to examine the adoption of e-Mediation as part of the menu of services offered for the resolution of divorce disputes. Particularly in divorce disputes, the recognition of the need for the existence of
an attractive and useful alternative for the parties, outside of court, addresses broad interests that extend well beyond the social interest of reducing the workload of the courts. As Freeman notes:

Legal pundits, practitioners, judges, psychiatrists, psychologists, social workers and virtually anyone who has dealt with families in distress due to divorce or related issues have agreed for years that the family law legal system is broken. Parties remain angry years after the initial hurt, relationships crack under stress, and most difficult of all, children are unable to maintain meaningful and positive associations with their family members. While everyone involved in litigious family law proceedings, most especially the parents, likely believe, or at least convince themselves, that they are acting in the children’s best interests, the reality is that this system creates unnecessary turmoil in everyone, particularly the children, separate and apart from the difficulties inherent in the initial breakup itself.185

Traditional mediation in the sphere of divorce disputes provides a partial answer to this problem and creates a line of criticism186 which e-Mediation asserts that it is able to deal with through using computer technology.187 Out of recognition of the potential in the use of the e-Mediation model in divorce disputes on the one hand, but also out of understanding regarding the inherent risk in use of this model in a manner that is not sufficiently cautious and informed, Part III of this Article will propose a line of emphases, objectives and improvements to the existing model discussed in this part.

III. The Desirable Situation: Objectives, Emphases and Suggestions for Improving the Current Situation

It seems that up to the present, the model of e-Mediation (including mediation dealing with divorce disputes) has developed sporadically. The demand gave rise to the supply and the needs fashioned the reality. This situation was likely to be considered

186 An example of such criticism is the suitability of mediation in cases of power gaps between the parties. See also Dafna Lavi, Divorce Involving Domestic Abuse: Is Med-Arb Likely to be the Solution?, 14 PEPP. DISP. RESOL. J. 101, 115 (2014); Dafna Lavi, Not Only Arbitration and Not Only Mediation, supra note 31, at 633–37.
bearable with respect to e-Mediation in e-Commerce disputes, e.g., in disputes regarding transactions over eBay, and when at issue were disputes involving small amounts of money. However, when dealing with the area of divorce disputes, when the subject of the dispute deeply affects the way people (the parties and their children) live their lives, it would seem that the existing situation requires improvement. Additionally, at this chronological stage in the development of the model, when the field is quite young, on the one hand, but on the other hand, practical and theoretical experience has been accumulated, it would seem such experience should be used to build a foundation that will present, in a concentrated fashion, the objectives, the emphases and the improvements necessary for the desirable model of e-Mediation in divorce disputes. This part of the Article will present such a foundation.

Part III begins with a definition of the objectives meant to direct such a model, then focuses on the technical-professional aspect including the skills and the talents alongside the training which must be required from those professionals working in the field and concludes with a discussion of the issue of ethics and regulation, with a focus on the new ethical subjects that arise in the online environment in the field of divorce disputes and the adoption of standards of professional practice and qualifications.

A. Definition of Objectives

It is critical to define objectives and establish requirements and expectations for the desired model of e-Mediation in divorce disputes, both for the purpose of its proper adoption in the first place (in accordance with the objectives presented) and for the purpose of examining the functioning of the system in hindsight, as part of the critical review and oversight process.

Since the model in question is online on the one hand, but deals with the area of divorce disputes on the other hand, it must combine objectives that are critical for e-Mediation and those that characterize the area of divorce disputes. It would seem that the three threshold objectives must characterize every apparatus for online dispute resolution: (1) convenience; (2) trust/confidence and; (3) expertise. In the scholarly literature, this model is called

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188 See supra Part I.A.
189 Katsh & Rifkin, supra note 2, at 73.
“the three-part model.” Every online apparatus must be convenient to use, impart a feeling of trust and confidence in its use and provide services with expertise. The meaning of convenience is to advance the accessibility and participation (of the parties to the dispute), a particularly prominent feature, as stated above, in the common situation in which the couple is separated and the parties are living at a significant distance from one another. The second objective, trust/confidence, is connected to the sense of trust and confidence of the parties in the online process. This sense is critical in order for the acts carried out through the online apparatus to gain legitimacy. Additionally, the objective of trust/confidence has specific contexts in the area of divorce disputes because indeed, in this field particularly, the question of the parties’ trust of one another arises in a marked manner and creates unique challenges, which will be discussed below. The third objective, expertise, is connected to the value that the parties receive from the online apparatus.

Clearly, the three objectives set out above also exist in traditional mediation, but in e-Mediation they have several unique emphases. For example, with respect to convenience (and accessibility) it must be remembered that there may be an imbalance between the parties in their levels of computer literacy and sophistication. Therefore, the overall standard must be accommodated to the party with the lower level. Technological gaps between the two parties are likely to be discovered in other matters as well, such as the speed of the Internet connection. These things also require, of course, the attention of the mediator. Regarding trust, even in traditional mediation it is necessary to build trust and preserve it (trust between the parties and the mediator and on the part of the parties with respect to the process), however, the online mediator faces an even greater challenge. In the online environment there are technical problems such as inadequate confidential-

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190 Id.; see also Katsh, supra note 1, at 25 (“Most importantly, ODR, which was originally focused on disputes related to online activities, is now employed in offline disputes. Rather than finding disputes that can utilize ODR, the new challenge is finding tools that can deliver trust, convenience and expertise for many different kinds of conflicts.”).


192 In the term “trust,” Katsh means the basic need of the users of commercial sites to know that if problems arise vis a vis the sellers they have an address to turn to deal with the problem, in other words there is a way to address their problem through the online dispute resolution service. In other words, trust in the sense of a business safety net or risk reduction. See Katsh supra note 1, at 29–30.

193 See infra notes 196–98 and accompanying text.

194 Katsh & Ripkin, supra note 2, at 77.
ity, security, identity or authenticity, which are also likely to erode
the parties’ trust.195 The question of basic trust in the process or in
the mediator is likely to be more challenging in the absence
of face-to-face meetings, which, by their nature, are relied upon to
increase personal impressions, often leading to an increase in
trust.196 This is in addition to the assistance provided by tone of
voice, body language, remaining calm, which is at the disposal of a
face-to-face mediator but which is lacking in the work environment
of an online mediator.197

With respect to the issue of trust of the parties in each other, it
must be remembered that in divorce disputes (as opposed to e-
Commerce disputes, such as a transaction over eBay) we are talk-
ing about parties to a dispute that know each other well. This fa-
miliarity leads, in most cases, to mutual disappointment to the
extent that it very seriously jeopardizes the mutual trust. A breach
of trust is likely to create barriers to communication, leading to
further erosion of trust. Therefore, according to the online model
with respect to divorce disputes, the mediator must see achieve-
ment of the objective of a minimal level of trust between the par-
ties as a special challenge and as one of the basic objectives of the
process. Without this objective, it is impossible to create coopera-
tion between the parties in order to reach an agreement through
the online apparatus.

With respect to expertise, here as well, e-Mediation presents a
unique challenge.198 Online communication includes the sending
and receipt of messages. The online solution of a dispute was cre-
at as a result of communications of this nature. Since, as dis-
cussed above in Part II,199 such communication, in the absence of
face-to-face discussions, has its own disadvantages that must be
dealt with through means tailored to the online process, the media-
tor must have expertise in implementing these means, as shall be
addressed in greater detail below.200

An additional challenge connected to expertise is the use of
these advantages, which are unique to the online process. Katsh
and Rifkin201 emphasize that online communication adds new op-

195 Poblet & Casanovas, supra note 155, at 149.
196 For a more expansive discussion of the issue of trust, see Noam Ebner, ODR and Interper-
sonal Trust, in Online Dispute Resolution: Theory and Practice supra note 1, at 215.
197 Katsh & Rifkin, supra note 2, at 147.
198 Id. at 89–90.
199 See supra Part I.A.
200 See infra Part III.B.
201 Katsh & Rifkin, supra note 2, at 91.
opportunities for communication and effective interactions (as stated above in Part II). The challenge here is the use of expertise in order to utilize these opportunities in ways that are not possible in the normal setting. In other words, in the absence of face-to-face meetings, the mediation process in the online setting is a more complex communications process and it has to make up for what is lacking. One of the objectives of e-Mediation must be the gradual increase of the wealth of online interaction, in this manner enabling the expertise to be implemented in fact in a more effective and efficient manner. The strategy of implementation of expertise in the online setting requires, inter alia, strengthening the places in which the traditional model is weaker, and this is possible, as demonstrated above in Part II. The classic example is automated negotiation, which opens up possibilities that do not exist in traditional mediation and in the absence of technology. For example, according to Thiessen, Miniato and Hiebert:

When a negotiation problem is modeled, a computer can act as an intelligent agent using optimization algorithms that seek the best solution . . . . Optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.

Particularly in divorce disputes, when the parties present polarized positions with respect to the division of property or regarding child custody, the mediator is likely, during the stage of proposing solutions to the dispute, to engage in paraphrasing according to the model of automated negotiation in order to bring the positions closer. Additionally, for the purpose of evaluating the division of property in these disputes, the mediator and parties are entitled to use a program of artificial intelligence, which surveys the information banks of the decisions of family courts of a given state (agreed upon between the parties), with the goal of receiving an indication of objective criteria, agreed upon by both parties, in order to arrive at a agreed-upon solution.

\[202 \text{ See supra Part I.A and text accompanying notes 166–76.} \]
\[203 \text{ Katsh, supra note 161, at 138.} \]
\[204 \text{ For example, the model of ‘blind bidding’ demonstrates that there are opportunities to carry out certain activities online more successfully than in other settings. See generally supra note 25 and accompanying text.} \]
\[205 \text{ Thiessen, Miniato & Hiebert, supra note 25, at 345.} \]
\[206 \text{ See supra notes 38–60 and accompanying text.} \]
Moreover, the technology enables creative use of the screen as a communications tool. The design of the background of the screen, the interface and the operation of the screen are likely to serve as new means (i.e., they do not exist in traditional mediation), available to the mediator in the online process in the framework of striving to meet the objective of expertise. All of these and others are likely to enable the mediator to increase the convenience and the trust of the parties, who are communicating through the online process. The fourth player, technology, is likely, therefore, to add accessibility, authority and quality with the goal of advancing both the communication and the process towards an agreement.

In addition to the objectives of “the three-part model,” there is a further objective, which must, in my opinion, be perceived as part of the objectives of the desirable model for e-Mediation in divorce disputes. This objective is to prevent exacerbating the poor relationship between the parties. Divorce disputes are by definition disputes with a high level of emotional involvement. In disputes of this nature the parties become adversaries in the most personal sense. The end of a marriage is an emotional experience in which the parties almost cannot avoid seeing one another as an adversary. The parties are people who are hurting badly, angry, anxious, regressive and above everything else, very vulnerable. Their personal emotional problems tend to become intertwined with the substantive problems. Due to the fact that these are for the most part disputes between parties in an ongoing relationship (whether due to shared children or for other reasons), as distinguished from e-Commerce disputes where the relationship ceases to exist upon resolving the issues, it is important to achieve the objective of preserving the relationship between the parties or at least to prevent a deterioration of the relationship. E-Mediation must take into account all of these and provide a unique response, which, on the one hand, will not exacerbate the situation and on the other hand is likely to provide added value as compared to traditional mediation.

A further goal, which must be perceived as one of the objectives of the model of e-Mediation in divorce disputes is fairness and

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207 Katsh, supra note 161, at 816.
209 Id.
210 See Brennan, supra note 4, at 197.
In principle, the intention is preserving the rules of natural justice in the process. In spite of the fact that this objective is not unique to e-Mediation or to alternative processes, or to the field of divorce disputes, in the context of the model under consideration it is likely to contain special nuances. The first nuance is the fact that this is a different and relatively innovative procedure. For example, the value of “equality,” one of the aspects of justice, is particularly likely to be assisted by the online technology (through netocracy), as discussed above in the previous part and as Ebner notes, “Some of the benefits associated with text communication for e-mediation are that it often minimizes the effects of ‘good talkers’ gaining the upper hand or of dominant figures causing others to reduce their participation levels.”

The area of divorce disputes is precisely the classic area to hear the arguments regarding the inequality between the parties to the dispute and regarding the power gaps between them, particularly in the context of gender. The objective set up before e-Mediation in divorce disputes is providing an appropriate response to these critical arguments. Particularly in domestic disputes involving violence, in which the power gap between the parties is especially prominent and significant, creating equality through online communications and empowerment of the weaker party, in the framework of the objective of equality and justice presents a special challenge.

Another nuance, which, in my opinion, is important to bring up in the context of fairness and justice in e-Mediation, is the importance of the procedure. Studies from the field of social psychol-

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211 For a more expansive discussion, see Ruha Devanesan & Jerffrey Aresty, ODR and Justice – An Evaluation of Online Dispute Resolution’s Interplay with Traditional Theories of Justice, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE, supra note 1, at 26.

212 See supra Part I.A and text accompanying notes 115–122.

213 Ebner, supra note 9, at 377.

214 One of the common arguments in the feminist criticism of traditional mediation is that the mediation process exacerbates the power gaps that exist in any event between the sexes at the time of dissolving the marriage, weaken the woman and incline the balance of power in favor of the man to an even greater degree. See Penelope Bryan, Killing Us Softly: Divorce Mediation and the Politics of Power, 40 BUFF. L. REV. 441 (1992); Trina Grillo, The Mediation Alternative: Process Dangers for Women, 100 YALE L. J. 1545 (1991).

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ogy point to the fact that when deciding with respect to the fairness of the process, the parties are influenced not only by its final result but also by the procedure that the process included and that led to that result.\textsuperscript{216} It also transpires that parties consider a process to be fair if the procedure used enabled them to make their voice heard. Additionally, the procedure must be unbiased, neutral, based on precise information and relying on ethical and moral criteria. Transparency, for example, advances procedure and contributes to the parties evaluating the process as just and fair.\textsuperscript{217} Transparency relates to the quantity of the information provided to the parties in relation to the process’ procedures and its quality.\textsuperscript{218} Empirical studies reveal that when parties feel they received respectful treatment in the procedure and that the underlying rationale of the procedure and decision-making were explained to them, they are more likely to evaluate the process as fair and just.\textsuperscript{219} Additionally, as part of the concern for bringing all of the information before the parties, in the framework of the objective of fairness and justice, there is reason to emphasize the importance of the concern for the availability of legal experts who can provide consultation to the parties when specialized knowledge is required regarding the interpretation and application of laws and regulations.\textsuperscript{220}

These things are even more important when speaking of e-Mediation in the area of divorce disputes. One of the advantages, as stated above,\textsuperscript{221} of the online model is that it makes the use of lawyers unnecessary in many cases (thereby lowering the costs of the divorcing parties). However, while lowering costs is particularly important in these disputes, the parties must be aware of the laws relevant to their affairs, in order that the compromises that will result from the e-Negotiations between them, will be informed compromises, i.e., those that stem from the parties’ awareness of their legal rights.

\textsuperscript{216} Gramatikov & Klaming, supra note 76, at 101–02.
\textsuperscript{217} Id. at 107.
\textsuperscript{218} Id. at 102.
\textsuperscript{219} Id.
\textsuperscript{220} In accordance with the recommendation of the Online Dispute Resolution Standards of Practice, published by the National Centre of Technology and Dispute Resolution (NCTDR) in reliance on standards adopted by various organizations (e.g., the US Federal Trade Commission, the Canadian Working Group on Electronic Commerce and Consumers, the Australian National Alternative Dispute Resolution Advisory Council, the Alliance for Global Business). See Advisory Committee of the National Centre for Technology and Dispute, Online Dispute Resolution Standards of Practice, ICANN https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf [hereinafter Online Dispute Resolution Standards of Practice].
\textsuperscript{221} See supra note 82 and accompanying text.
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It seems, therefore, that the appropriate model of e-Mediation in divorce disputes must take into account various aspects dealing with the online procedure and which turn it into something that promotes a fair and just process in the view of those using it. Here as well, as with the other objectives enumerated above, the challenge for the e-Mediator, in comparison to the traditional mediator, is greater, since it deals with advancing justice and fairness through computer technology. The computer technology discussed above222 as being likely to advance the other objectives of the online process, are also likely to promote this objective of justice and fairness. There may be additional computerized means, such as a computerized questionnaire filled out by the parties at the end of the process in order to evaluate its fairness. In any event, it is important to state also that the challenge is not in the use of the Internet in order to reproduce the situation of the normal environment of dispute resolution but rather to expand the creative thinking and the challenging search for original ways and new means to resolve disputes and increase the parties’ satisfaction from the online environment.

B. Skills and Training

1. Skills

Dispute resolution professionals shall have sufficient skills and training to fulfill their function.223

The entrance of the fourth party, technology, onto the stage, requires the third player, the mediator in e-Mediation, to be innovative and to have at his disposal the necessary skills, knowledge and strategy.224 Even if the central objectives of e-Mediation are not different from those of traditional mediation, the means of achieving them are likely to be different to at least some degree. The creation of a work environment and process in which the parties feel protected and prepared to open up while cooperating and working towards a fair agreement places new challenges before the neutral party in the online process.225 The mediator in an online process (including divorce disputes) must broaden his skills of ef-

222 See supra notes 175, 204 and accompanying text.
223 See Online Dispute Resolution Standards of Practice, supra note 220.
224 Tyler & McPherson, supra note 3, at 27.
225 Id.
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Effective communication. Much thought is devoted to the integration between traditional mediation techniques and tools unique to the online world.

The central skill that the online mediator needs is the ability to translate to the online environment the methods used by the traditional mediator. This ability can be broken down into a series of skills:

1. The skill of preserving the flow of ongoing communication (including control of the flow of information through speedy and effective intervention);  
2. Control of the material and content of new technology (e.g., the practiced use of videoconferencing, the use of talk-to-text conversion programs);  
3. Simultaneous functioning in a number of virtual rooms (in a separate room for private meetings and in the room of the joint discussion);  
4. Assistance to the parties in using the technology and feeling comfortable with such use;  
5. Proper use of time and recognition of the unique dynamic of time and pace in the online process;  
6. Trained use of the technique of asking questions, formulating them clearly and precisely (in order to overcome barriers such as misunderstanding, which are likely to be common, as a matter of course, in communications lacking voice, body language and facial expression);  
7. “Active reading” (along the line of active listening), including reading between the lines, identification of emotions (expressed electronically), recognizing them and relating to them correctly and sufficiently;  
8. Control of written and archival communication (including understanding the unique dynamic that it cre-

226 Id. at 29.  
227 Ebner, supra note 9, at 389.  
228 Id.  
229 Id.  
230 Tyler & McPherson, supra note 3, at 29. See also Ebner, supra note 9, at 391–92.  
231 Tyler & McPherson, supra note 3, at 29.
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ates alongside the problem that it includes, proper handling of it and including the parties if necessary);\textsuperscript{232}
(9) Command of “netiquette”\textsuperscript{233} (including development of knowledge and the ability to deal with breaches on the part of the parties);
(10) Familiarity with the psychology of the online media (the effect of communications from a distance) and command of it;\textsuperscript{234}
(11) The ability to build trust and preserve it within the dynamic of the online process;\textsuperscript{235} and
(12) Familiarity with the nuances of the written word within online interaction.\textsuperscript{236}

In effect, the above list of skills has three central objectives. First, assisting the mediator in achieving the objectives of e-Mediation, including those enumerated in the previous sub-chapter (e.g., convenience, trust, expertise).\textsuperscript{237} Second, dealing with the disadvantages of the virtual dispute resolution environment. Third, providing advantages to e-Mediation over traditional mediation.

\textsuperscript{232} Ebner, supra note 9, at 391–92 (“Mediators need to understand the dynamics of asynchronous communication, and the pitfalls it presents in mediation processes. The anxiety and doubt that accompanies waiting for the other party to respond are a natural breeding ground for distrust and anger. Mediators should find ways to reflect this dynamic and explain it to parties when it seems to be affecting the process.”).

\textsuperscript{233} The term “netiquette” refers to the rules of conduct while using technology, the rules that apply when communicating through the Internet, including social networks or apps. In other words, it means the accepted conduct in social terms in an online or digital setting. This is a relatively new term indicating that as with all rules of conduct that are rooted in a culture, online communication has also developed rules of its own. An example would be the conditions of use of a site. See Ebner, supra note 9, at 389.

\textsuperscript{234} Id.

\textsuperscript{235} Id. (or “trust-building” as it is called).

\textsuperscript{236} As Ebner notes:

Language issues are an immense challenge in online communication, and skills with written language are a must-have in an online mediator’s toolbox. The lack of contextual cues such as body language and tone of voice leaves parties and mediators straining to infer meaning from any cue they can get and in particular, attention returns to the actual wording of the text itself. This, as opposed to face-to-face communication in which we infer most of a message’s meaning from non-verbal cues. With the written word highlighted, shades of meaning, subjective interpretation and cultural differences turn every sentence written into a powerful tool for dispute resolution—at the same time it becomes a potential process-wrecker. Accuracy becomes paramount. While pre-written language can be employed and helpful, overly generic language can lend the sense that the mediator is not really present, engaged and listening. The emotional content of language, and the way it affects the framing of the dispute, has also been found to affect the likelihood of resolution.

Ebner, supra note 9, at 391–92.

\textsuperscript{237} See supra Part II.B.1.
For example, in the framework of the first objective, skill number (5) advances the objective of trust, in that trust of the parties is likely to be eroded as a result of an insufficiently prompt response of the mediator in comparison to their expectations. Moreover, Hammond’s study reveals that the lack of sufficient skill in controlling technology and online platforms (skill number (2)) also erodes the parties’ trust.

In the framework of the second objective the use of the skill of “active reading” (skill number (7)) can be mentioned as an example. It replaces active listening, which occurs as a necessity only in face-to-face mediation. Active reading is intended to achieve the same goals as active listening, but this is within the framework of the limitation of virtual communications (where active listening cannot be carried out). If we assume that the written word (as opposed to the spoken word) indeed makes identification of the emotion more difficult, the online mediator must develop the skill of recognition and identification of emotions expressed electronically and act accordingly. Active listening or reading and mirroring serve, in e-Mediation (as in traditional mediation), to achieve the same important objectives, such as conveying listening and empathy and developing trust, so that the online mediator cannot permit himself to dispense with these things. It seems that this is vital particularly in disputes rich in emotional involvement such as the field of divorce disputes. Moreover, in this field of disputes in particular, again due to the fact that at issue are, for the most part, disputes rich in emotional involvement, the skill of command of voice communication, included in skill number (2), to advance the sec-

238 The objective set out above as one of the objectives of the mediation. Id.
240 Ebner, supra note 9, at 390.
241 An additional example, the skill of simultaneous functioning in a number of virtual rooms (skill number (3)) also assists the mediator in advancing the objective of “trust.” Skill number (4) assists in achieving the objective of “trust.”

Parties to online mediation not only need an introduction to the concept and nature of mediation, they also need to understand the nature and rules of the online venue they will be employing for the mediation process. Providing parties with a tour of the platform or some initial training in its operation increases their satisfaction and comfort levels. Parties’ sense that their mediator is capable with the technological platform and has a clear road map for the process affects their degree of trust in the mediator . . . . Elements of this might include a site tour and tutorial, communication ground rules, instructions for participation, comments regarding language, time zones, synchronous/asynchronous communication and expectations and technical support available to parties.

Ebner, supra note 9, at 388.
ond objective, i.e., communications based on the human voice, is likely to make up for the limitation in expressing emotions in written communication, through the use of the ability to control the speed, with changes in tone and overtone of speech.\textsuperscript{242}

As an example of the third objective, I can give the skill of command of written and archival communications (skill number (8) above). This communication skill is unique to written communication and therefore imparts advantages to e-Mediation, which do not exist in face-to-face mediation.\textsuperscript{243} An additional example of the third objective is the use of the skill of reframing.\textsuperscript{244} The reframing technique, which mediators in the traditional process use a great deal, contributes, \textit{inter alia}, to removing emotional obstacles by presenting the statements of one of the parties to the other party in a less emotional, or less critical or judgmental manner.\textsuperscript{245} It transpires that it is precisely in online communication that this technique has unique benefits, in comparison with face-to-face communication. In the latter, the use of reframing is usually in the presence of both of the parties. As a result, in traditional mediation unfortunate statements (e.g., insulting names or casting serious blame) have already done their damage and the possibility of softening the statement through the use of reframing is at times limited. On the other hand, in an online process, through control of technological skills, the mediator can use a program that will transmit the message of each party first to the mediator rather than to the other party.\textsuperscript{246} In this manner, before the mediator sends the message to the other party, he can discuss with the sender the wording of the message as well as the emotions expressed in the written message and help the sender reframe the statement so that, in its new form, it can be heard by the other party. It bears emphasis that this strengthening of the filtering of the productive communications between the parties and neutralization of negative emotions, which harm the relationship, has an added value precisely in divorce disputes that are, by their very nature, accompanied by extremely negative emotions.

To summarize the issue of skills, it is important to emphasize that there are skills belonging to traditional mediation that become irrelevant in e-Mediation, such as the skill of reading body lan-

\textsuperscript{242} See also supra notes 142–51 and accompanying text.
\textsuperscript{243} See also supra note 141 and accompanying text.
\textsuperscript{244} See also supra notes 170–71 and accompanying text.
\textsuperscript{245} Cheryl Picard, \textit{Mediation Skills} (1995).
\textsuperscript{246} Ebner, \textit{supra} note 9, at 392.
guage and non-verbal hints that are part of face-to-face communication.\textsuperscript{247} On the other hand, there are new skills that are not known to or relevant to traditional mediation and the online mediator must acquire and develop sufficient command of them in order to carry out his work.\textsuperscript{248} In addition, there are skills that also exist in face-to-face mediation and that serve the traditional mediator, but that require his online colleague to accommodate them to the new media and to add content through online techniques and improved technology. In essence, we can say that this is the challenge facing the mediator in the online process—utilization of the technological tools and know-how available to him—for the purpose of achieving the objectives of the mediation process (both traditional and online) and achieving advantages beyond those of traditional mediation. All of this is through use of the classic skills of a traditional mediator that receive unique content and character when they make the transition to the virtual media.

2. Training

\textit{[T]here is no doubt that the neutrals will have to be educated because online disputes raise new psychological issues.}\textsuperscript{249}

In spite of the existence of broad consensus regarding the need for special skills and qualifications for mediators in the online process, there is still disagreement regarding the need for training for these mediators. As opposed to the opinion quoted above, there are those who assert that there is no need to reinvent the wheel or to develop special training, and that an online mediator needs the same skills as a traditional mediator with additions and changes as required by his technological work environment.\textsuperscript{250} Others argue that e-Mediation involves a different style from that of traditional mediation and that it is not merely an addition to the tool box of the traditional mediator, but rather it requires practical training and the acquisition of skills and expertise with which the traditional mediator is not familiar.\textsuperscript{251} The assertion is that in the

\begin{itemize}
\item \textsuperscript{247} \textit{Id.} at 388–89.
\item \textsuperscript{248} \textit{E.g.}, skills (2), (3), (4) and (9) enumerated above. \textit{See supra} notes 226–32 and accompanying text.
\item \textsuperscript{249} \textit{Gillieron, supra} note 5, at 325.
\item \textsuperscript{250} \textit{See S. Summers Raines, Mediating in Your Pajamas: The Benefits and Challenges for ODR Practitioners, 23 Conflict Resol. Q. 359 (2006).}
\item \textsuperscript{251} This is asserted, for example by the report of the Distance Mediation Project. \textit{See also} Colleen Getz, \textit{Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project}, Victoria, BC British Columbia Mediator Roster Soc. 3 (2010).
\end{itemize}
absence of such training, online processes are likely to be plagued by deficiencies, confusion and incorrect implementation of technique by mediators.

In my opinion, the latter are correct in their viewpoint. The broad consensus regarding the online mediator’s need for specific skills brings about the need for specific training to impart such skills to him. This is true to a far greater extent when speaking of e-Mediation in divorce disputes, where the mediator, as part of his skills, must pay special attention to those matters that make this sensitive area special.

In spite of all this, there are still no accepted uniform broad standards regarding the content or style of such training. Moreover, in reality, there is still no supply to the general public of training programs for online mediators (as opposed to the many training programs for traditional mediators). For the most part, the mediators who operate with a supplier of online dispute resolution services receive their training in-house from the supplier of the services. For example, the mediators of the SquareTrade service undergo in-house training and a process of individual coaching for each process by a support group of e-Mediation experts of SquareTrade. Another supplier, Online Resolution, trains its mediators through use of online platforms. It seems that theMediationRoom is the first (and possibly still the only) entity to offer real courses for practical training for handling e-Mediation processes.

From the above-stated it appears that the issue of training of mediators in an online process suffers from dichotomy and deficiency, is in stages of development and still needs additional development. As has been noted above, this situation is likely to be perceived as bearable with respect to e-Mediation for e-Commerce disputes (such as a transaction over eBay) and with respect to disputes involving small sums of money. However, where parties to a divorce dispute are involved, and at issue are the living arrangements of people (their own and their children’s), it seems that the conclusion must be that risks should not be taken and the third neutral party must be required to undergo maximum professional training. This training must result in skilled mediators with experi-

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252 Ebner, supra note 9, at 393.
253 Id.
255 Ebner, supra note 9, at 393.
256 Id.
ence in domestic disputes, with specialty in issues arising in this field of disputes (such as domestic violence), who understand the unique dynamic of these cases and who are trained in the use of unique techniques to deal with them.\footnote{Including inequality of power between the parties, the problem of security, etc. See Steegh, supra note 215.}

The British Columbia Distance Mediation Project suggests guidelines for e-Mediation, which can, according to them, constitute a basis for every training program for mediators in e-Mediation.\footnote{Ebner, supra note 9, at 393.} These guidelines are intended for use as a supplement for the basic mediator-training program (for traditional mediation) and they include treatment of accommodation of e-Mediation for specific cases, choosing the appropriate technology, handling confidentiality and security, online communication skills, etc. Our recommendation, therefore, is that the desired model of e-Mediation in divorce disputes adopts these guidelines. In addition, we would obligate every mediator who deals with online dispute resolution in divorce disputes to go through a process of learning, experience in simulations and a period of apprenticeship with a professional with experience in the field.\footnote{Consistent with Rule’s recommendation. See id.} All of this would not derogate from the obligation of a mediator of this kind to go through the basic training for traditional mediation, including specific, deep and broad treatment of the field of divorce dispute mediation. In this manner damage due to lack of knowledge, understanding, skills or professionalism by those dealing in this sensitive field can be avoided.\footnote{For example, in divorce disputes involving an element of violence in the couple’s relationship, an untrained or unprofessional mediation is likely to not even identify the element of violence. See Dafna Lavi, Divorce Involving Domestic Violence, supra note 186, at 119, 134–35. It must be remembered that divorce disputes involving domestic violence constitute at least 50% of the disputes coming to mediation programs in family disputes. Steegh, supra note 215.}

## C. Ethics and Regulation

### 1. Ethics

There is no controversy between the various entities dealing with the field of online dispute resolution, that a certain degree of standardization is necessary to provide the outline for ways of operating and from which behavioral codes will develop in the field.\footnote{See, e.g., Online Dispute Resolution Standards of Practice, supra note 220.} However, shared or uniform codes for ODR (including for
divorce disputes) have not yet been enacted, in spite of the fact that almost all of the providers of ODR services have adopted some kind of conduct guidelines without a legislative provision, or some other kind of legal provision.\footnote{Thomas Schultz et al., Online Dispute Resolution: The State of the Art and the Issues, 88–89 (2001).}

The proper way to operate in any practice offering services is the adoption of a basic ethical code that is brought to the attention of the users of the service, for the good of those receiving the service and for the general public good as well. It seems that the discussion regarding improvement of the existing situation, with respect to e-Mediation in divorce disputes, will not be complete without a suggestion for basic standardization. Clearly the field of online dispute resolution cannot remain wide open, without some setting of boundaries and rules. The rationale is clear: the user of e-Mediation services in divorce disputes must be provided the same level of protection that he would be entitled to in the real environment, and he must be assured of receiving a process that meets normative threshold standards.

In effect, the need for ethical rules for ODR processes has been discussed during the first stages of development of the field when many organizations and institutions prepared draft working papers including guiding ethical rules. Tyler notes as follows:

The American Bar Association established a task force to look at ways of ensuring that ODR services remain effective and ethical. The Online Sector of the Association for Conflict Management prepared Proposed Guidelines for Online Dispute. In Australia, NADRAC 2002 provides draft practitioner standards for ODR and the Department of Justice Victoria has commissioned a study into accreditation of ODR practitioners.\footnote{Melissa Conley Tyler & Jackie Bornstein, Accreditation of Online Dispute Resolution Practitioners, 23 Conflict Resol. Q. 383 (2006).}

Many providers of ODR services have also adopted the guidelines and ethical rules as internal codes for ethical conduct or as their manifesto appearing in the “about us” window of the site.\footnote{Ebner, supra note 9, at 396.}

Many of the ethical rules that have been formulated rely, in effect, on the ethical rules of traditional mediation, with technical standards being added to them. Providers of ODR services add as standards the quality of the platforms that they provide as part of the service, as well as the expertise of the mediators they em-
ploy. However, it must be remembered that ethical standards taken from the world of traditional mediation require, at times, reworking for the online sphere. It seems that with respect to the issue of ethics of ODR the last word has not yet been spoken. It can be expected that this issue will continue to be a subject for scholarly writing even beyond the ongoing occupation with it in practice by various organizations, institutions and service providers.

It bears emphasizing that it is precisely in the area of divorce disputes, in view of the scope of the phenomenon of domestic violence, that the need for the enactment of established ethical standards in the field of online processes is particularly obvious. It seems that at present it is almost inevitable that a mediator in an online process, who works in the field of family disputes, will be confronted by divorce disputes in the shadow of violence. However, in the absence of regulated ethical rules, how should a mediator in the online process act, when he suspects the presence of violence in the relationship between the parties? How can he clarify his suspicions in a process without face-to-face meetings? What are the limits of his role? Should he refer the parties to outside counseling? Stop the process? Require face-to-face meetings? Perhaps even more importantly, should we, as a society, rely upon the exclusive discretion of a mediator, whoever he may be, with respect to this weighty and multifaceted issue? In my opinion, the ethical boundaries of the mediator’s action in these matters are the business of the entire society and do not end only with the individual satisfaction of the parties in a specific mediation process. In my view, there is a great deal of doubt if it is correct to leave to the independent, exclusive moral discretion of an individual mediator the decisions regarding sensitive topics such as divorce disputes in general and particularly divorce disputes in the shadow of violence, particularly in view of the fact that in many cases children are also involved.

265 Id.
266 Id.
267 For example, Jo DeMars, Susan Nauss Exon, Kimberly Kovach and Colin Rule discuss in their articles a number of areas requiring dealing with the ethical issue in ODR processes. See Jo DeMars et al., Virtual Virtues: Ethical Considerations for an Online Dispute Resolution Practice, DISP. RESOL. MAG. 6 (Fall 2010).
268 See generally supra note 213 and accompanying text. See also Jan Jeske, supra note 104, at 670 (“Violent behavior between intimate partners occurs every fifteen seconds in the United States.”).
In my opinion, the basic question that must be asked in the discussion regarding the appropriate ethical standards to be included in the uniform ethical code for e-Mediation in divorce disputes is: What is the substantive content that must be introduced under the umbrella of ethical rules, in order to ensure carrying out a high quality and ethical practice in this area? This content must include, first and foremost, a number of fundamental components, as to which there is consensus among those dealing in the area of online dispute resolution and which do not specifically relate to the field of divorce disputes: accessibility; affordability; transparency; fairness; innovation; neutrality and impartiality; confidentiality. Some of these foundations exist in traditional mediation as well, however, these components have aspects that are unique to the world of virtual dispute resolution as shall be explicated below.

With respect to accessibility, the intention is that the model of e-Mediation must be available and easy to use for the consumers of the service. Similarly, it must aid in overcoming the language barriers. Additionally, this platform must include the possibilities of easy to use and available assistance and guidance, while preserving user interfaces that are as simple as possible.

In the component of affordability and effectiveness the intention is that e-Mediation must provide an affordable alternative to traditional mediation (as well as to the adversarial process). Similarly, the dispute must be dealt with within a reasonable period of time, and as fast as possible.

In the component of transparency, the intent is that the programs for online dispute resolution must explain the process (including its various stages, the means of contacting the other party, the timing and the timeframes for responses) and its goals, must expose the identity and affiliations of service providers and mediators, as well as the means taken in order to protect the identities of the consumers of the service and the information provided by them. It seems that those who operate in the online world must meet a higher level of disclosure than their colleagues in the actual physical world and that the component of transparency is particularly important precisely in the online process, when consumers of the service do not agree with the providers. For example, the provision of information regarding the neutral third party as well as regarding the provider of the service, can help the users receive a true picture regarding their skills along with their reputation, as

\footnote{See, e.g., Online Dispute Resolution Standards of Practice, supra note 220.}
well as the trustworthiness and quality of the offered service.\textsuperscript{270} In addition, in my opinion, prior to the beginning of the process it must be ascertained that the parties are aware of all of the information and that their consent to the process is informed consent.\textsuperscript{271}

The component of fairness means that the online mediator must insure that the Internet environment, the proposed platform and the program used do not grant an advantage or preference to one party to the dispute over the other party and that equality exists as far as possible.

With respect to innovation, the model of e-Mediation remains the spearhead of providing service and technological innovation. The component of neutrality and impartiality indeed exists in traditional mediation. However, in the online process, its uniqueness is expressed in that this component is required not only with respect to the mediator, but also with respect to the service provider who employs him.\textsuperscript{272}

The final component, confidentiality, deals with the confidentiality of the proceedings and protecting the privacy of the parties and it is, of course, found in traditional mediation as well. Therefore, just as with traditional mediation where, due to the obligation of confidentiality, the mediator is prohibited from transmitting to one party things told him by the other party, the online mediator is prohibited from transmitting to one party a message sent to him by the other party (without the permission of the latter). However, with respect to dispute resolution in the Internet environment, the issue of confidentiality has particular importance. Programs for online dispute resolution must provide safeguarding of confidentiality and data as required by legislation.\textsuperscript{273} The safeguarding of confidentiality becomes a more difficult mission due to the nature of the Internet, which enables easy access to information. For example, in the e-Mediation of Online Ombudsman, the conditions of use provide that the service provider is not able to insure confidentiality of the information when it is transmitted on the Internet and therefore does not undertake to do so. However, when the information reaches the site, reasonable efforts will be made to protect access to the information and confidentiality.

\textsuperscript{270} Katsh & Rifkin, supra note 2, at 157.


\textsuperscript{272} Ebner, supra note 9, at 396.

\textsuperscript{273} See Online Dispute Resolution Standards of Practice, supra note 220.
A comparative study carried out among providers of ODR services reveals that most of the ODR sites themselves are in fact secured, however, the protection does not cover the sending of e-mail. Clearly, this situation is quite problematic and needs to be improved. In my opinion, it requires substantive attention by service providers regarding the topic of encoding and information security. It must be remembered that these matters are particularly important in disputes like divorce disputes. In this type of dispute, the subject of the online conversation relates to the personal details of lives of people and the exposure of such conversation (in the absence of stringent security measures) is likely to cause irreversible damage to themselves and their children. In my opinion, the service providers should adopt the strictest information security policy possible, with the goal of insuring the privacy of the users of the system itself and of the paths to it (i.e., at the time of transmission over the Internet as well). We would add that when talking about divorce disputes in particular, the ethical code must also include relevant and specific attention to this type of disputes, which, as stated, has serious ramifications for the lives of the parties and their children. A further point likely to be relevant to divorce disputes in particular is found in the Online Dispute Resolution Standards of Practice: “Online Dispute Resolution schemes should encourage parties, whenever appropriate, to resolve their disputes using consensual processes, particularly when the restoration of the social links amongst disputants is of paramount importance, such as in family disputes. Consensual processes, however, should not be imposed against the will of the parties.”

In my opinion, it is indeed inappropriate to adopt a mandatory model for an e-Mediation process with respect to divorce disputes. In view of the data demonstrating that a high percentage of such cases include a component of domestic violence, the concern has grown that the model of mandatory e-Mediation in divorce disputes will force the victims of violence to participate in a process in which they are not interested. Since the component of violence cannot always be identified even in a traditional mediation pro-

274 Schultz, supra note 262, at 49. Ebner, supra note 9, at 387 (“While many service providers are explicit about their security procedures, there are no certain guarantees in internet security.”).
275 See Online Dispute Resolution Standards of Practice, supra note 220.
276 See generally supra note 267.
277 See Andrea Braeutigum, Passes that Fit: Online Mediation in Non-Commercial Contexts, 5 Appalachian J. L. 275, 299 (2006) (“Should violence erupt during the course of mediation, the
cess, let alone in e-Mediation (where the mediator may not ever meet the parties face-to-face), and in view of the existing criticism of the extent to which the mediation process is appropriate for disputes in which there are obvious power gaps between the parties (e.g., family disputes in the shadow of violence), it seems that consent should be required by both of the parties to participate in such a process and therefore it would not be appropriate to adopt it as an obligatory model.278

2. Regulation

The issue of regulation is addressed in the scholarly literature in the field of ODR in general but not necessarily in the context of divorce disputes. What is discussed are the questions of need and actual ability to carry out regulation.279 Cole and Blankley summarize this issue as follows:

Policymakers who regulate traditional mediation attempt to balance four general goals: fairness, effectiveness, quality and access. To the extent that regulation of e-Mediation is necessary, potential regulators of e-Mediation should add to that list: access to technology, effectiveness of process as compared to traditional mediation, and quality of mediator services.280

In my opinion, the issue of regulation, including the issue of regulation of sites that provide online dispute resolution services, is particularly important with respect to divorce disputes. As opposed to e-Commerce disputes, the area of divorce disputes at issue is not a purely economic dispute but rather personal details of people’s lives, often including the lives of the parties’ children. Therefore, it would be a serious mistake to leave this field of service open without outside regulation. In other words, it is wrong to leave market forces to operate, under the assumption that with time sites that are not professional and that provide defective services will in any event close for lack of demand while the good services will survive. In my opinion, just as, in accordance with our recommendation, a uniform ethical code is required that outlines the mediator’s discretion in e-Mediation and sets out the areas of

online mediator may not become aware of an imminent threat of violence, nor be able to physically intervene.”).

278 Id. (“One important caveat in this regard is that online mediation is not appropriate when there is the risk of violence between people who live in the same geographic area.”).

279 Ebner, supra note 9, at 394.

280 Sarah R. Cole & Kristen M. Blankley, Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be, U. TOL. L. REV. 38 (2006).
his ethical operation in such disputes, an external apparatus is necessary that will regulate those sites that purport to operate in reliance on such a code.

Moreover, it is important to remember that “[m]ost e-Mediation has so far been provided by agencies or service providers, with relatively few ‘private practitioners in the field.’” However, it seems that this trend is about to change. The prediction is that soon we will see a trend of increase in the entrance of private entities into the dispute resolution “market,” including those that offer e-Mediation services in offline disputes, including divorce disputes. Since, as stated above, divorce disputes are for the most part those dealing with third parties (the children) and since in a great many cases they also include some element of domestic violence, the quality of service provided in them, in any normative society, is of general public interest, and it cannot be left for the open market, i.e., open to all who offer private services without outside oversight and regulation. It seems, therefore, that some improvements need to be made in the existing situation, not only in order to accommodate it to foreseeable market trends, as stated.

My recommendation, therefore, is to establish a professional body, whether it be governmental, public or a private business and possibly even an international body (hereinafter: the regulatory body), that would, as part of its duties, supervise the sites providing e-Mediation services in divorce disputes. Recommended rules of ethics for an e-Mediation process in divorce disputes would be published on the site of the regulatory body alongside the substance of the minimal professional training required for mediators operating in such a process. Additionally, a list of sites would be published on the site of the regulatory body that would include only the names of those sites that declare that they are subject to the regulation of the regulatory body as well as the ethics rules and that they employ only mediators who completed the minimum training as published on the site of the regulatory body. Additionally, each site on the list of sites would receive the seal (that cannot be duplicated) of the regulatory body that was stamped on the site.

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281 See recommendation for the adoption of a uniform ethical code, supra Part III.C.1. and notes 260–80 and accompanying text.
282 Ebner, supra note 9, at 395.
283 Id.
284 See recommendation for the adoption of a uniform ethical code, supra Part III.C.1. and notes 260–80 and accompanying text.
285 See recommendation for the adoption of appropriate training, supra Part III.B.2. and notes 248–59 and accompanying text.
by the regulatory body, which would constitute a kind of seal of quality or standard, thereby conferring on this site a business advantage and preference in the view of the potential user public.

The regulation of the sites will be through various means, including a web-based questionnaire to be completed by the parties prior to and after the mediation. The use of questionnaires is vital in order to locate data relating to the extent to which the site providing the services provided the best process and met its declaration (by virtue of which, as stated, it was included in the list of sites). The questions can be fashioned so as to produce information about the impression of the parties regarding the process, the mediator and the results. Included in this would be the degree of the parties' satisfaction from the process (as well as from the mediator and the results); the degree to which the parties felt that they were understood or that they understood the other party (as well as the process and the mediator); the extent to which they felt that the result was derived from the decisions made by them (as distinguished from being coerced to give in to the mediator or the other party) and; comparative aspects (in the view of the parties) of e-Mediation and traditional mediation (to the extent that the parties have participated in traditional mediation), etc.

My recommendation is that the questionnaires be filled out on the site of the service provider, but that they also be addressed directly to the regulatory body. After gathering and analyzing the data, the site of the service provider can use them as feedback to improve its mediation programs in the future while the regulatory body can reward worthy sites through the use of stars (e.g., a rating from one to five), while sites that are not worthy would risk losing their seal of quality or standard as conferred by the regulatory body.

A further means of regulation is through regular reports (annual or semi-annual), which each site on the list would be required to submit to the regulatory body and which would contain data with respect to the percentage of cases ending with an agreement, the average amount of time for handling the case, etc. These data would be published on the site of the regulatory body and would be open to potential users to assist them in choosing the provider of services preferred by them.

Another means of regulation, which could be used by the regulatory body is the use of the issue of consent by the mediators. The issue of consent deals with determinations such as who is qualified to be certified as a mediator in the online process and who is
qualified to certify him, whether a minimum threshold should be set for those operating in the field (those certified and the certifiers), etc.\textsuperscript{286} The regulation on this point is likely, therefore, to be, \textit{inter alia}, through the setting of threshold conditions for mediators desiring to enter this field of occupation. In effect, the issue of consent is composed of the tension between the aspiration to preserve the minimum threshold requirements of the level of professionalism of those operating in this field on the one hand, and the desire not to “choke” the field and to enable good mediators from diverse backgrounds to participate in it, even if they do not meet empirical threshold standards which are limiting and rigid, on the other hand. A survey carried out by Tyler and Bornstein of accreditation models for ODR began with an overview of accreditation models in the ADR field.\textsuperscript{287} Six organizations and service providers that provide some form of accreditation or screening process for practitioners, including governmental and commercial bodies were included in the survey. They were examined for entry barriers to accreditation as well as for requirements of practitioners wishing to maintain their accreditation.

Although Tyler and Bornstein’s article deals with ODR in general, their recommendations are also relevant to the model of e-Mediation and are likely to be particularly relevant to the field of divorce disputes. In my opinion, the regulatory body should publish its recommendations on the issue of consent (relying on the existing literature in the field) and include in its list of sites only those sites that adopted a percentage of these recommendations as determined by the regulatory body in advance.

To summarize, if we wish to achieve an improved model for e-Mediation in divorce disputes it is not sufficient to determine expertise, professional training and skills required of a mediator in such a process (as discussed above in this part). Similarly, it is not sufficient to adopt basic rules of ethics to insure the level of practitioners the field (above in this part). What is further required is an apparatus of regulation that is external to the sites providing the service, in order to protect those receiving the service found on the site during the most painful and traumatic periods in their lives. There is an inherent need for a supervisory apparatus through which it will be possible to build a comprehensive institutional framework that will supervise the sites of such service providers.

\textsuperscript{286} Ebner, \textit{supra} note 9, at 394–95.

\textsuperscript{287} Tyler & Bornstein, \textit{supra} note 263, at 23.
and support professional mediation services, subject to strict and clear ethical norms that can be subject to ongoing oversight.

IV. Conclusion

Technology, like stage lighting for a play, should not be the focus. If people walk out of a play talking about the stage lighting, then odds are either the play or the lighting was not a success.\(^{288}\)

In spite of the correctness of the assertion in the quote above, behind the curtain of every successful performance there are discussions, sometimes going on for hours, regarding the appropriate placement of each light or fog machine, in order for the lights to be more natural and unobtrusive but at the same time to fulfill their role in helping the audience concentrate on the actors and the performance. This Article deals with “stage lighting.” As part of the discussion of the means (of achieving the objective), we presented a fourth player at the e-Mediation table in divorce disputes—technology itself.

In recent years the field of alternative dispute resolution has experienced a significant turnabout through a new conception that perceives technology as an integral part of the dispute resolution process and as a vital fourth party. ODR, including online mediation, which at the beginning focused on resolving conflicts created on the Internet, has broadened the areas of its applicability to offline disputes as well, including divorce disputes, with the challenge now being to find tools that can increase the faith in the process and its security, convenience and flexibility alongside the expertise and justice performed in a broad spectrum of disputes, in the world of online communications.

Alongside the presentation of the existing situation with respect to e-Mediation in divorce disputes, including the substance, framework and background of its development, its applications in various areas of the world as well as its advantages and disadvantages, the article also discussed the desirable situation. As part of this discussion, the article dealt with the goals, emphases and improvements required for the desired model, including issues such as training, skills, ethics and regulation. All of this with the understanding that where speaking of an online model in the area of divorce disputes, where at issue is the personal lives of the people

\(^{288}\) Rule, supra note 37, at 245.
involved, it is not possible to rely only on the existing goals, rules and principles that were fashioned, for the most part, for online commercial disputes or for dispute resolutions that are not online. From the understanding of the urgency and need to broaden the spectrum of available possibilities for people in one of the most painful and traumatic periods of their lives, the article proposes guidelines for the adoption of an improved model for e-Mediation in divorce disputes.

“Until death do us part” seems to be the false hope of many married couples. This Article examines another possibility—until cyberspace do us part. Cyberspace has great potential and a number of years of experience in dispute resolution between individuals, including in domestic disputes and divorces. E-Mediation offers the parties the advantages of traditional mediation with the addition of convenience, speed and reduction of costs, as well as the advantages of long distance communication that is asynchronous and written. The positive implications are first and foremost for the children. Beyond the advantage of speed, which in itself contributes to reducing the emotional distress and other negative feelings accompanying an aggressive, lengthy and charged process, written and asynchronous communication which refrains from face-to-face meetings is likely to contribute to equality between the parties, to reduce the level of hostility and tension, to be formulated after using discretion and with greater clarity and to increase the parties' satisfaction and the chances to arrive at successful parental cooperation.

In view of all of this, it seems that those who asserted that changes in the patterns of communications would ultimately bring about changes in the practice of dispute resolution in divorce disputes and that in the not-too-distance future we will be witness to a growing demand for online dispute resolution services in this field—were correct. It seems that professionals in the field should anticipate this and learn the potential of these things and make the necessary adjustments.

However, with insight, the scholarly literature also points to the fact that technological development and computer communications fashions our choices and influences not only the procedure (with its technical parts) but also (and perhaps mainly) the substance and the use of it, certainly with respect to divorce dispute resolution must be carried out in a thought-out manner. Ethan

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289 Tyler & McPherson, supra note 3, at 30 (“Changed communication patterns will inevitably change family dispute resolution practice.”).
Katsh, one of the fashioners of online dispute resolution, asserts that total concentration in praising computer technology while ignoring its dangers and price is likely to bring about a dangerous imbalance. Therefore, it is important not to fall captive to the convenience and availability and not to be, heaven forfend, unintentionally misled. The proposal of this article is to adopt an improved model, that is thought out and professional, for e-Mediation in divorce disputes and for establishing apparatuses for ongoing supervision, follow-up and oversight of the field. The necessary caution is in order not to be exposed in the future as a society in which the rate of divorces has significantly increased since cyberspace has indeed parted us.

Indeed, online dispute resolution is likely, on the one hand, to lead to loss of control to some degree in the sphere of technological takeover, but is also likely, on the other hand, to assist by way of increasing convenience and ability in an ever-changing world of technology. In the end, the technology is developing and will continue to develop. We can be certain that the gap between face-to-face communications and computer communications, even if it exists, is rapidly decreasing. Mediation in divorce disputes is likely, in my opinion, to receive a significant push as a result of the adoption of e-Mediation technology in disputes of this nature.

290 Gillieron, supra note 5, at 342.