

TILL DEATH DO US PART?!
ONLINE MEDIATION AS AN ANSWER TO DIVORCE CASES
INVOLVING VIOLENCE

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“Till death do us part”—is a phrase that probably represents the wish of most married couples. However, statistically speaking, almost half of all marriages end in divorce. A sizable number of divorces involve the parameter of violence. Behind the figures, there are always human beings, the victims of violence, who endure suffering, fear, and palpable danger on a daily, even hourly basis. For them, the possibility of a real option that is accessible, helpful, and effective in putting an end to the destructive relationship is a true necessity, so that the expression “till death do us part” does not become a chilling reality.

The Internet has great potential and several years of experience in resolving disputes between parties, including those in divorce cases. Through an examination of the advantages, disadvantages and ways of coping with them, this Article explores the possibility of applying the model of online mediation, as an upgraded version of traditional mediation. This improvement should eliminate the fundamental disadvantages of traditional mediation, offer independent and unique advantages of its own and thereby serve as a real aid and provide a less painful solution for disputes of this type. This trend towards a continued search for human solutions and more appropriate processes for divorce cases involving violence in order to reduce to a minimum the painful experiences of the victims and their children is incredibly important. This Article delves more deeply into e-mediation, as an additional solution for victims in divorce cases involving violence.

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I. INTRODUCTION

The Internet and the transition to digital media have brought about dramatic changes to the field of Alternative Dispute Resolution (“ADR”). Since the late 1990s, these changes have given rise to a new field known as Online Dispute Resolution (“ODR”), which incorporates new technological channels for alternate methods of resolving disputes outside the judicial process. The most outstanding example of these is known as e-Mediation.¹

ODR is a “hot” issue in academic discourse. It can be applied to offline disputes, namely those that were not born on the virtual network, such as the field of family disputes. “Till death do us part” is probably the aspiration of most married couples. Nevertheless, reality is shattered on the rock of statistics. Almost half of all marriages end in divorce.² Other statistics supply disturbing data regarding the percentage of couples that divorce, in which the parameter of violence plays a role in their marital history. Such couples are the subject of this Article, which discusses divorce cases involving violence.

In some cases, the phrase “till death do us part” may take on a chillingly concrete significance if no quick, effective, and efficient solution is found to put an end to the violent relationship. For some time, litigation has not been considered an ideal solution for

¹ The three traditional central branches of ADR include negotiation, mediation, and arbitration. Each of these found its online parallel in the domain of ODR, for example: online negotiation, online mediation, and online arbitration. For online negotiation, see MOHAMED S. ABDEL WAHAB ET AL., *ODR and eNegotiation*, ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE – A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 341 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainy eds., 2011), available at http://www.ombuds.org/odrbook/Table_of_Contents.htm. For online mediation, see Noam Ebner, *ODR and eMediation*, *id.* at 369. For online arbitration, see Mohamed S. Abdel Wahab, *ODR and eArbitration*, *id.* at 399.

² Rebecca Brennan, *Mismatch.com: Online Dispute Resolution and Divorce*, 13 CARDOZO J. CONFLICT RESOL. 197, 198 (2011).

divorce cases in general, and it is of dubious efficacy in cases of divorce involving violence in particular. Even the traditional mediation process, despite its relative merits compared to the judicial process, is still found lacking and inadequate. Accordingly, this Article delves more deeply into another option—mediation—as an answer to divorce cases involving violence.

After a review of the current situation in the academic discourse regarding the limitations and failures of the judicial process in dealing with divorce cases involving violence, this Article presents the argument that due to its special structure the e-Mediation model embodies a unique potential for the type of dispute under discussion. In an examination of its advantages, disadvantages, and ways of coping with these, this Article explores the possibility of implementing the e-Mediation model as an additional, complementary solution for victims in divorce cases involving violence.

This Article is comprised of five parts. Part II defines the key terminology relevant to the discussion and defines its boundaries. Part III lays out the problematic nature of the approach of the judicial system and the traditional mediation process to divorce cases involving violence. Part IV examines the possibility of adopting e-Mediation as an answer to divorce cases involving violence, including an analysis of its potential to offset the drawbacks of traditional mediation, a presentation of its independent advantages, and a discussion of the disadvantages of the online process and ways of coping with them. Lastly, Part V provides recommendations for the implementation and use of e-Mediation.

II. DOMESTIC VIOLENCE, TRADITIONAL MEDIATION AND E-MEDIATION—DEFINITIONS AND SETTING LIMITS

In order to explore the option of e-Mediation as an answer to divorce cases involving violence, defining three key terms is necessary: domestic violence, traditional mediation (also known as “face-to-face mediation”) and e-Mediation (also known as “online mediation” or “cyber mediation”).

The term “domestic violence” refers to a behavior pattern that involves elements of control by means of coercion over the spouse. The pattern may include physical attack, sexual assault, financial abuse, psychological abuse, and emotional abuse.³

³ Thompson provides a similar definition: “Domestic violence is a pattern of behaviors that one partner uses to establish power and control over the other partner. A batterer may use physical, emotional, psychological, or sexual violence, manifested through behaviors that include intimidation, coercion, threats, isolation, financial control, and insults.” Megan G. Thompson, *Mandatory Mediation and Domestic Violence: Reformulating the Good-Faith Standard*, 86 OR. L. REV. 599, 613 (2007); see also, Jan Jeske, *Custody Mediation within the Context of Domestic Violence*, 31 HAMLIN J. PUB. L. & POL’Y 657, 694 (2010) (“Domestic violence is a broad concept encompassing behaviors ranging from isolated incidents to patterns of repeated violence involving physical, sexual, and emotional abuse that controls the victim.”). Jeske cites several generally accepted concepts to define domestic violence including: “Coercive Controlling Violence,” “Situational Couple Violence,” “Separation-Instigated Violence,” “Violence Resistance,” and “Intimate Partner Sexual Assault.” *Id.* at 663–70.

On the nature, dynamic and history of domestic violence see Thompson, *supra* note 3, at 612–16; see also, Susan Landrum, *The Ongoing Debate about Mediation Effectiveness*, 12 CARDOZO J. CONFLICT RESOL. 425, 430 (2011). In addition, Landrum cites various distinctions between types of family violence that are relevant to the decision to end the marriage by means of mediation:

Scholars have also begun to differentiate between different types of domestic violence and to argue that the type may matter when determining whether a couple can effectively mediate. For example, Joan Kelly and Michael Johnson have defined four different types of domestic violence: coercive controlling violence, violent resistance, situational couple violence, and separation-instigated violence. Kelly and Johnson define coercive controlling violence, also sometimes called “intimate terrorism,” as “a pattern of emotionally abusive intimidation, coercion, and control coupled with physical violence against partners.” Coercive controlling violence is what most people typically associate with domestic violence. The second type of domestic violence, violent resistance, has also been defined as “female resistance,” “resistive/reactive violence,” and “self-defense.” Situational couple violence is a “type of partner violence that does not have its basis in the dynamic of power and control.” Finally, separation-instigated violence is a term used to describe violence that does not occur until a couple is in the process of ending their

A legal definition of the term “domestic violence” appears in the Model Code on Domestic and Family Violence:

Domestic or family violence means the occurrence of one or more of the following acts by a family or household member, but does not include acts of self defense:

- (a) Attempting to cause or causing physical harm to another family or household member;
- (b) Placing a family or household member in fear of physical harm; or
- (c) Causing a family or household member to engage involuntarily in sexual activity by force, threat of force or duress.⁴

The previous definition places emphasis on physical abuse. Nevertheless, broader definitions have been provided by some social scientists:

Domestic violence is a pattern of coercive behavior that changes the dynamics of an intimate relationship within which it occurs. Once the pattern of coercive control is established, both parties understand differently the meaning of specific actions and words. Domestic violence is not simply a list of discrete behaviors, but is patterns, and gestures, which, taken together, establish power and control over an intimate partner.⁵

The term “traditional mediation,” or face-to-face mediation, refers to a voluntary process in which a mediator—a neutral party, not necessarily a lawyer—helps disputing parties identify and discuss issues that concern them and seek solutions. The process steers them towards an agreement that is acceptable to both sides.⁶

relationship. Kelly and Johnson believe that an understanding of the different types of domestic violence can lead to better screening processes.

Id. at 432–33; Nancy Ver Steegh, *Yes, No, and Maybe: Informed Decision Making About Divorce Mediation in the Presence of Domestic Violence*, 9 WM. & MARY J. WOMEN & L. 145, 152–58 (2003).

⁴ MODEL CODE ON DOMESTIC & FAMILY VIOLENCE § 102 (1994).

⁵ Mary Ann Dutton, *Expert Witness Testimony*, in THE IMPACT OF DOMESTIC VIOLENCE ON YOUR LEGAL PRACTICE, ABA COMM’N ON DOMESTIC VIOLENCE § 8-81, § 8-8 (Deborah M. Goelman et al. eds., 1996).

⁶ The Model Standards of Practice for Family and Divorce Mediation define mediation as:

A process in which a mediator, an impartial third party, facilitates the resolution of family dispute by promoting the participants voluntary

The term e-Mediation refers to one of the most widespread forms of online dispute resolution.⁷ Online Dispute Resolution (“ODR”) refers to a wide range of alternative methods of dispute resolution outside of the courtroom, for example e-Mediation, e-Negotiation, and e-Arbitration, which are conducted using communication and technology, such as the Internet.⁸ ODR is actually a private case of Alternative Dispute Resolution (“ADR”) that draws most of its ideas and methods from the latter.⁹ While the starting point of the traditional model of ADR is the assumption that there are three partners in any dispute resolution process—the parties to the dispute and the third, neutral party—the online dispute resolution process adds technology as a fourth partner.

Online mediation actually mirrors the traditional mediation process in almost all its procedural aspects.¹⁰ Prior to the onset of the process, the parties agree on a number of basic rules of order. Then the mediator checks the background documents supplied by each of the parties, and uses them to identify the issues of the

agreement. The family mediator assists communication, encourages understanding and focuses the participants on their individual and common interests. The family mediator works with the participants to explore options, make decisions and reach their own agreements.

Andrew Shepard, *An Introduction to the Model Standards of Practice for Family and Divorce Mediation*, 35 FAM. L.Q. 1, 3 (2001); see also UNIF. MEDIATION ACT § 2(1) (2003) (“‘Mediation’ means a process in which a mediator facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute.”); Mechtel v. Mechtel, 528 N.W.2d 916, 919 (Minn. App. 1995) (defining mediation as “[a] forum in which an impartial person, the mediator, facilitates communication between parties to promote conciliation, settlement, or understanding among them.” (quoting Vogt v. Vogt, 455 N.W.2d 471, 474 (Minn. 1990))).

⁷ Ebner, *supra* note 1, at 370, 397.

⁸ Melissa Conley Tyler & Mark McPherson, *Online Dispute Resolution and Family Disputes*, 12 J. OF FAM. STUD. 1, 5 (2006) (Austl.), <http://ssrn.com/abstract=1032743>; see also, Phillippe 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.”).

⁹ Abraham Tennenbaum, Ofir Liber, *Online Alternative Dispute Resolution—The Present and The Future*, 3 SHA’AREI MISHPAT 75, 77 (2002) (Isr.).

¹⁰ Brennan, *supra* note 2, at 211.

dispute. In the next stage, the parties present their solutions to the dispute. The mediator examines the solutions, analyzes them, and synthesizes them into a proposal for a concrete solution intended to satisfy the needs of both parties.¹¹ In the next stage, each party is asked to submit his or her response to the proposed solution, along with clarifications, in a kind of ongoing game of “ping pong,” until a settlement is reached. At the end, the mediator conducts a concluding forum that clarifies that the outcome is in accord with the terms and limits of each of the stipulations of the settlement.¹² Finally, each of the parties is free to withdraw from the process at any time and turn to the courts to resolve the dispute.¹³ Online mediation is usually not conducted in a vacuum, but rather is conducted as “mediation in the shadow of the law,”¹⁴ ensuring the terms of the settlement are applicable and viable under the law.

The inception of ODR took place in the second half of the 1990s, along with the development and proliferation of electronic commerce. Out of awareness of the limitations of traditional channels for resolving disputes in dealing with controversies that arose on the Internet (for example, disputes in electronic commerce), pioneers developed new channels of online dispute resolution. Over the years, ODR in particular and online mediation in general has begun to include disputes that were not born in virtual space (i.e., “offline disputes”), such as divorce cases.¹⁵

III. THE ADVERSARIAL SYSTEM AND TRADITIONAL MEDIATION IN DIVORCE CASES INVOLVING VIOLENCE—LIMITED SOLUTIONS

¹¹ *Id.*

¹² *Id.*

¹³ *Id.* at 335.

¹⁴ Haitham Haloush & Bashar Malkawi, *Internet Characteristics and Online Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 337 (2008).

¹⁵ See Ethan Katsh, *ODR: A Look at History—A Few Thoughts About the Present and Some Speculation About the Future*, ONLINE DISPUTE RESOL.: THEORY AND PRACTICE, *supra* note 1, at 27 (“The 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.”).

A. *Limitations of the Adversarial System*

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.¹⁶ There are limitations in the adversarial system with regard to treatment of family law cases in general. Specifically, in divorce cases involving violence, the criticism regarding its suitability of the adversarial process is even harsher. The academic discourse reiterates the argument that in divorce cases where a dangerous conflict already exists, the judicial process, which by its very nature exacerbates the conflict, is liable to be especially damaging.¹⁷ “In divorce cases complicated by domestic violence, the escalation of conflict can be especially severe. Increased hostility between parents has led, in extreme cases, to the homicide of the battered parent and/or their children and the subsequent suicide of the batterer.”¹⁸

In criticizing the adversarial system and the extent of its suitability to handle divorce cases that involve violence, Elayne Greenberg identifies five painful common characteristics:

1. There is no agreement about what constitutes domestic violence.
2. There is no foolproof screening for domestic violence.
3. Courts have been ineffective in stopping many forms of violence.
4. Batterers are statistically more successful than survivors at securing custody of their children.

¹⁶ Marsha B. Freeman, *Comparing Philosophies and Practices of Family Law Between the United States and Other Nations: The Flintstones vs. The Jetsons*, 13 CHAP. L. REV. 249, 249 (2010) (“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.”).

¹⁷ Ver Steegh, *supra* note 3, at 162–63.

¹⁸ Jeske, *supra* note 3, at 657.

5. Children are the casualties of their family's violence.¹⁹

When clarifying questions about custody, the victim may find himself or herself at a disadvantage due to a lack of knowledge about family violence, a failure to relate physical violence and parenting under the law, and the abundance of considerations for “friendly parents.”²⁰ The presence of violence is not necessarily relevant to decisions regarding custody. Studies show that the abusive parent often wins in custody battles.²¹ Even when the victim does win sole custody, the other party’s visits may present a problem. Courts are sometimes inattentive to security concerns related to these visits, thereby creating an opportunity for the violent party to continue to manipulate the family.²²

Moreover, many victims of violence in the family are not willing to press charges against their attackers because they are worried about issues of publicity, privacy, and family preservation.²³ For victims of violence in the family, a costly process that increases antagonism, entails drawn out and continuous contact with the abuser, and weakens the victim’s capacity to make empowered decisions is a less than ideal solution. In light of these considerations, insistence on litigation in such cases of domestic violence is not the preferred answer.²⁴

Another drawback in the legal process is related to the feminist argument that women’s voices are not heard in situations of adversarial litigation. Feminism points to the systematic silencing of the voices of women in the judicial process, which obscures them, conceals them from the public eye, or assimilates them into the “male voice.” The claim is that the judicial process tends not to

¹⁹ Elayne E. Greenberg, *Beyond the Polemics: Realistic Options to Help Divorcing Families Manage Domestic Violence*, 24(3) ST. JOHN’S J. LEGAL COMMENT 603, 606–07 (2011).

²⁰ Jeske, *supra* note 3, at 609–12.

²¹ Ver Steegh, *supra* note 3, at 186.

²² Ver Steegh, *supra* note 3, at 168–69.

²³ Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24(2) OHIO ST. J. ON DISP. RESOL. 349, 367–68 (2009).

²⁴ Thompson, *supra* note 3, at 620–21.

articulate the “feminine voice” in public and formal situations, such as formal negotiations or legal procedures.²⁵ The shortcoming of the judicial process in this constellation contributes to the oppression of the victim, as it silences and stifles the feminine voice.²⁶

In summary, although the adversarial system has a long history of resolving disputes in cases of family law, its degree of success in protecting the interests of families in divorce cases involving violence is questionable.²⁷ Indeed, the heavy criticism of the adversarial system, especially its handling of family cases and its imminent limitations in this area (particularly in divorce cases involving violence), has led a number of countries in recent decades to turn to non-litigious methods—chiefly mediation—for resolving family matters.²⁸

B. *Limitations of Traditional Mediation*

Most observers accept that, compared to the legal procedure, mediation and the mediator provide a healthier atmosphere and a more constructive and creative environment for couples in the process of separation when the parameter of violence does not play a role in the dispute.²⁹ When the welfare of the child is at stake, the mediation process helps the parties mutually attack the problem in

²⁵ Liora Bilsky, *The Violence of Silence: The Legal Procedure between Allocation and Voice*, 23(2) 23 TEL AVIV U. L. REV. 421 (2000).

²⁶ *Id.* at 437–38; *see also*, Jeske, *supra* note 3, at 660–61.

²⁷ *See* Ver Steegh, *supra* note 3, at 159–170.

²⁸ Freeman, *supra* note 16; *see also*, Jeske, *supra* note 3, at 673 (“There is a national movement in the family law practice area toward ‘alternative dispute resolution,’ as opposed to litigation, as the first and favored method to resolve custody disputes.”).

²⁹ Douglas D. Knowlton & Tara Lea Muhlhauser, *Mediation in the Presence of Domestic Violence: Is It the Light at the End of the Tunnel or Is a Train on the Track?*, 70 N.D. L. REV. 255, 259 (1994). We should bear in mind that proper treatment of the relations between separating couples usually requires the use of interdisciplinary tools (such as those used in psychology and social work), which is why mediation is considered more suitable compared to litigation; *see also* Carrie Menkel-Meadow, *When Dispute Resolution Begets Disputes of Its Own: Conflicts Among Dispute Professionals*, 44 UCLA L. REV. 1871, 1902 (1997).

a joint effort to reach a settlement, instead of attacking each other (as, for example, in litigation). They may have energy that they can channel into helping their children with any psychological problems and social repercussions that the children experience because of the divorce.

Nevertheless, when the parameter of violence enters the picture, the issue of divorce mediation in the presence of domestic violence becomes one of the most controversial issues in the academic literature.³⁰ Many scholars, including practitioners working “in the field” (such as mediators who actually mediate), object to the use of traditional mediation in cases of divorce involving violence³¹ with very good reason. Below are some of the major disadvantages that they ascribe to mediation.

1. *The Component of Danger*

The claim is that the process of mediation inherently endangers the wife,³² who is in danger of severe physical injury and even death.³³ The very fact that the violent husband knows the exact

³⁰ Along with these, there are also intermediate approaches. *See also* Ver Steegh, *supra* note 3.

³¹ Kara C. Utzig, *Entering the Debate on Spousal Abuse Divorce Mediation: Safely Managing Divorce Mediation When Domestic Violence is Discovered*, 7 BUFF. WOMEN'S L.J. 51, 52 (1999) (“Opponents argue that one should never mediate divorce matters when domestic violence is present.”); *see also* Penelope E. 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); Lisa G. Lerman, *Mediation of Wife Abuse Cases: The Adverse Impact of Informal Dispute Resolution on Women*, 7 HARV. WOMEN'S L.J. 57 (1984).

³² *See* Jennifer P. Maxwell, *Mandatory Mediation of Custody in the Face of Domestic Violence: Suggestions for Courts and Mediators*, 37 FAM. CT. REV. 335, 335 (1999); Landrum, *supra* note 3, at 438, 444.

³³ Maxwell, *supra* note 32, at 346 (“Addressing the ethical and legal considerations of intervention with victims of domestic violence, Dutton (1992) cautions that ‘a breach of confidentiality when working with a battered woman could place her at risk for serious physical injury or death.’”).

time and place where she will be (at the mediation session) puts her in great jeopardy.³⁴

In the United States, twenty states explicitly prohibit the use of mediation in divorce cases involving violence,³⁵ claiming that mediation is not set up to provide the protection the woman needs during or after the process.³⁶ The most severe, violent, and murderous attacks take place in reaction to the victim's attempts to leave her violent husband.³⁷ Regrettably, mediation is not set up to provide the setting or the sterile conditions to protect the woman from the "post-leaving" attacks of the husband.³⁸ Moreover, an advance assessment of the existence or intensity of present danger is not always possible. Battering husbands, even the most violent of them, are usually equipped with their "public face" disguise, which they make sure to wear in public.³⁹ The mediator will never be able to obtain exact information about the violent husband's behavior from the moment the mediation session ends.⁴⁰

Studies show that mediation is less successful than legal measures in preventing violence: While 17% of violent men reverted to the use of violence after mediation, only 10% did so

³⁴ Utzig, *supra* note 31, at 56–57; *see also* Jessica Pearson, *Mediating When Domestic Violence Is a Factor: Policies and Practices in Court-Based Divorce Mediation Programs*, 14(4) *MEDIATION Q.* 319, 320 (1997).

³⁵ Utzig, *supra* note 31, at 56.

³⁶ Rogers, *supra* note 23, at 365–66.

³⁷ K. Loomis, *Comment: Domestic Violence and Mediation: A Tragic Combination for Victims in California Family Court*, 35 *CAL. W. L. REV.* 355, 366 (1999).

³⁸ *See* Penelope Eileen Bryan, *Women's Freedom to Contract at Divorce: A Mask for Contextual Coercion*, 47 *BUFF. L. REV.* 1153, 1221 (1999) ("The risk of violence escalates when the abused wife attempts to break the abuser's control by leaving him.").

³⁹ *See also* Thompson, *supra* note 3, at 616 ("Batterers are often skilled at manipulation and may charm outsiders. Indeed, people outside a battering relationship generally characterize batterers as 'generous, caring, and good,' since batterers typically act violently at home and calmly in public. To an outside observer, therefore, a batterer may seem more 'dominant, charming, agreeable, and socially facile in comparison to his less assertive wife.'").

⁴⁰ Maxwell, *supra* note 32, at 346.

after legal steps (for example, arrest) were taken.⁴¹ Studies show that the appearance of violence after mediation is more common than violence after a legal procedure in court.⁴² Court procedures enable the use of a joint deterrent: preventing access to the woman by the attacker coupled with an effective sanction. Mediation does not provide such a deterrent.

Many scholars argue that, compared to the adversarial system, mediation is more dangerous.⁴³ Even the outcome of mediation, namely, the settlement, cannot provide a solution that truly protects the woman. The mediation settlement is not capable of providing the woman with the necessary protection from the violent husband, whereas criminal and civil law provide measures against violent husbands who do not honor court orders regarding their cases.⁴⁴

2. *Imbalance of Power between the Parties*

“By definition, when domestic violence is present in a relationship, there is a disparity of power.”⁴⁵ “[A] history of domestic violence has the potential to create insurmountable power imbalances.”⁴⁶ When the element of violence enters the picture, the parties cannot approach the mediation table “on equal footing.” One of the greatest concerns noted in the professional literature is that the imbalance of power will cause the victim to make too many concessions out of fear.⁴⁷

A settlement based on fear is devoid of willing consent and sincerity, and is inevitably flawed and unacceptable.⁴⁸ We must bear in mind that the violent party is likely to intimidate the victim by verbal or nonverbal means, intimating future violence as a way

⁴¹ Loomis, *supra* note 37, at 366.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ Maxwell, *supra* note, 32, at 335. One reply to this criticism is that mediation does not make the legal system redundant, and if a victim of violence wishes, she can press charges, demand a restraining order from the court, and still opt for mediation.

⁴⁵ *Id.*

⁴⁶ Landrum, *supra* note 3, at 437.

⁴⁷ Pearson, *supra* note, 34 at 320.

⁴⁸ *Id.*

of creating an advantage of power. “The abused could very easily agree to terms that put her life or the life of her children in danger, simply to get out of the room.”⁴⁹ Fear is the name of the game. In this type of relationship, even in the absence of an overt threat, the victim may be helpless when it comes to protecting her own interests.⁵⁰

The interests of the third party in the picture—the children—must also be taken into consideration. A flawed settlement made possible by dint of disparities in the balance of power between the parties, fear, and denial of the free will of the victim may have disastrous repercussions for the children as well.⁵¹ We can sum up this disadvantage by stating that mediation and violent relationships are an oxymoron.⁵² While mediation is based on the fundamental premise of relatively equal bargaining power, in divorce cases involving violence, the starting premise is exactly the opposite—a starting premise of disparity of power and imbalance between the parties. This fundamental contradiction will inevitably sabotage the success of the mediation process.⁵³

Moreover, the weakening of the victim by the violent husband sometimes manifests in her isolation from the outside world. In an effort to maintain his total control over the victim, as well as her physical, emotional,⁵⁴ and economic dependence on him, the violent party acts to isolate the victim from her surroundings. Professionals note the irony of the situation, because precisely in

⁴⁹ Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, 26 S. ILL. U. L.J. 559, 572 (2002).

⁵⁰ Landrum, *supra* note 3, at 48.

⁵¹ Knowlton & Muhlhauser, *supra* note 29, at 268; *see also* Pearson, *supra* note 34, at 320 (“Many mediation critics are troubled by the conjoint and compromising nature of the mediation process and fear that mediators favor joint custody arrangements, which often run counter to what is best for the victim and children.”).

⁵² Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, 7 MEDIATION Q. 317, 320 (1990).

⁵³ *See* Thompson, *supra* note 3, at 617.

⁵⁴ *See* Bryan, *supra* note 38, at 1222 (“[a]dditionally, a batterer frequently isolates his victim from family and friends, depriving her of the emotional support she might need to confront him.”).

such circumstances, the victim often develops total and exclusive dependence on the violent husband.⁵⁵ This is a direct result of years of isolation from the outside world, prohibitions and distancing from family and friends, and sanctions on leaving the house without the husband's permission. All of these serve to tighten the violent husband's noose of control over the victim and, paradoxically, increase her dependence on him, and perpetuate the imbalance of power between the aggressor and the absolute denial of freedom of choice for the victim.⁵⁶

Sometimes the imbalance of power between the parties is so great that speaking only of the denial of free will or of the independence of the victim is not enough. Meditation must also address negation of the victim's self. The husband's violence sometimes creates a framework of rules and behaviors that constitute the "justification framework" for physical abuse (e.g., if the victim broke one of the rules).⁵⁷ The victim is liable to become obsessed with pleasing the husband and doing his will out of a desire to avoid provoking another alleged reason for an outburst.⁵⁸ Because the pretext for the outburst may be an inconsequential and minor detail, and there is little advance warning (if at all), the victim tends to develop an obsessive behavior pattern by constantly ensuring the husband's constant comfort, whether the behavior is rational or not. For example, she may develop a pattern of erasing her "I" and her own will, nullifying her very being.⁵⁹ This "programming" to placate and fulfill all the demands and needs of the violent husband, while negating herself, runs so deep that it does not cease even when warning signs that the marriage is coming to an end appear in mediation. In other words, relying on mediation is insufficient to bring about changes in the behavior and thinking patterns that have accompanied the victim throughout her

⁵⁵ See Loomis, *supra* note 37, at 359–60.

⁵⁶ *Id.*; see also J. M. Truss, *The Subjection of Women . . . Still: Unfulfilled Promises of Protection for Women Victims of Domestic Violence*, 26 ST. MARY'S L.J. 1149, 1167–68 (1995).

⁵⁷ Loomis, *supra* note 37, at 359–60.

⁵⁸ *Id.*

⁵⁹ Loomis, *supra* note 37, at 362.

marriage. A woman who believes that she survived by obeying her husband's laws and meeting his needs may find it very difficult to identify and redefine her own needs.⁶⁰

3. *The Limitations of the Mediator*

Many mediation programs provide training for mediators to recognize signs of domestic violence and be able to manage situations where it becomes an issue. In spite of the fact that legislatures and courts have developed a variety of "solutions," very few empirical studies have evaluated the effectiveness of mediation in cases where there is a history of domestic violence.⁶¹

Many scholars throughout the world, along with professionals in the field such as lawyers who represent female victims of violence in family law cases in court, cast doubts about the quality and caliber of the treatment that mediation may provide in cases of divorces cases involving violence.⁶² These doubts concern the various mediation programs and the mediator herself. The doubts relate to the ability of the mediation programs and the mediator to identify and screen out divorce cases involving violence and deal with them appropriately.⁶³ Critics claim that mediators often conduct mediation programs under the pressure of time and case overload.⁶⁴ Community mediation programs usually rely on volunteer mediators, who have received a minimal amount of training.⁶⁵ These conditions make it almost impossible to provide proper treatment to divorce cases involving violence, and the results can be disastrous.⁶⁶ The mediator may fail to identify how much influence the violent party wields over the victim during the mediation session—right under his nose. The violent husband often is able to control the victim with a word, gesture, or cue

⁶⁰ See Bryan, *supra* note 38, at 1221; see also Thompson, *supra* note 3, at 617.

⁶¹ See Landrum, *supra* note 3, at 428.

⁶² See Pearson, *supra* note 34, at 320.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.*

known to or understood solely by him and the victim as a coded signal or disguised threat of violence.⁶⁷

The mediator's neutrality is another fundamental limitation inherent to the mediation process. One of the basic principles of mediation that enables the success of the mediator is his commitment to neutrality.⁶⁸ In the context of his role, the mediator must serve as a neutral and independent third party who does not favor either side, does not identify with either side, and does not blame either side. The mediator does not represent either of the parties during mediation, but serves as a neutral third party.⁶⁹ This neutrality is an essential attribute of the role of the mediator and one of the significant keys to his success in the mediation. It enables him to gain the trust of each party, thus encouraging each party to reveal his and her true interests, desires, and weaknesses.

Some skeptics claim that the mediator cannot remain neutral and properly handle a divorce case involving violence.⁷⁰ If he intervenes on behalf of the victim, his obligation to be neutral will be compromised. On the other hand, the mediator who retains his neutrality helps to perpetuate the power imbalance and the violence against the victim.⁷¹

⁶⁷ Loomis, *supra* note 37, at 364–65.

⁶⁸ Karen A. Zerhusen, *Reflection on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169 (1993) (“Impartiality is key to the mediator’s role.”).

⁶⁹ Roger Crouch, *Divorce Mediation and Legal Ethics*, 16 FAM. L.Q. 219, 223–24 (1982).

⁷⁰ *Id.* at 362–63 (“The role of the mediator is to remain neutral and refrain from placing blame on either party. This creates problems when mediation is used to resolve cases that include domestic violence. The problems arise because it is psychologically essential that victims understand that they are not responsible for the abuse. Because of the nature of mediation, this places the mediator in a difficult position because the mediator must not condemn either side in order to ensure fairness.”); *see also* Thompson, *supra* note 3, at 617–18; Landrum, *supra* note 3, at 438.

⁷¹ Landrum, *supra* note 3, at 441 (“If a mediator is truly going to balance the bargaining power differential, the mediator may have to compromise her neutrality, at least in the eyes of the batterer. It is quite difficult to remain neutral when the mediator has to work to protect the rights of one of the parties. And if the mediator attempts to ignore or fails to give credence to the allegations of

4. *Preserving the Aggressive Paradigm*

Critics of mediation have argued that when the parameter of violence and control is present in the relationship between the parties, a process such as mediation may trigger the cyclical pattern of manipulation and in essence create optimal conditions for the manipulator to continue his behavior even more vigorously.⁷²

The stronger party sometimes manages to win the mediator over to his side by using the mediation process to tilt the balance of power in his favor. One of the common ways the violent party succeeds in “controlling” the mediator is by becoming the best participant in the mediation process.⁷³ The victim usually is unwilling to speak openly, to share custody of the children, and to compromise on visitation rights or provide information.⁷⁴ In contrast, the violent party is quite willing to share custody and to discuss the various visitation options, if only in order to ensure continued contact with his wife, or, in other words, to continue to manipulate and intimidate her.⁷⁵ The concessions and the discussion about the various options often make him appear to be the preferred candidate to gain custody of the children.⁷⁶

Mediation itself, insofar as it is a voluntary process throughout, may contribute to the perpetuation of the abuser-victim behavior pattern in the relationship by granting a platform to the aggressive party.⁷⁷ As a professional manipulator, with an array of disguises,

abuse, the victim may feel that the mediator is on the abuser’s side, destroying the victim’s belief that the mediator is neutral.”).

⁷² Utzig, *supra* note 31, at 57.

⁷³ See Wheeler, *supra* note 49, at 570.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Id.* This claim is strongly linked to the third objection in the aforementioned “limitations of the mediator.” See also Thompson, *supra* note 3, at 618.

⁷⁷ See Loomis, *supra* note 37, at 356 (“Due to the nature of domestic violence, a man enjoys significant control over a woman, which provides him with advantages in a mediation session. In the end, the wrong party is punished. Batterers walk away with little or no repercussions from the crime they commit, while the victims essentially bargain away their safety as well as other important issues within the mediation, such as custody, visitation, or support.”).

the violent party may appear to be a wonderful “actor-controller” of the mediation process, of the second party, and even of the mediator.⁷⁸

C. Solutions and Ways of Coping with the Limitations of Traditional Mediation

The professional literature suggests a number of optional solutions and ways of coping with the abovementioned disadvantages attributed to traditional mediation and its treatment of divorce cases involving violence. Nevertheless, these solutions are limited in scope and cannot hermetically cancel out the disadvantages noted.

1. *Screening*

One solution that mediators have implemented in response to the danger and the imbalance of power between the parties is screening.⁷⁹ This refers to preliminary screening, prior to mediation, intended to identify disputes that are not suitable for mediation, such as those in which the consent of the victim is not truthful and is given only to placate the abuser.⁸⁰

The problem is that this solution is not free of flaws and may frequently result in disappointment. First, the findings indicate that only 80% of mediation programs officially attempt to identify violence and only half of these programs conduct personal

⁷⁸ *See id.*

⁷⁹ Jeske, *supra* note 3, at 694–96.

⁸⁰ The abuser shows clear contempt for the words, feelings, desires and actions of the victim and refuses to acknowledge her worth, even after the mediator speaks to him about the effect of his behavior on the victim; the abuse continues during the mediation sessions and the violent husband refuses to respect the security bounds that were decided upon beforehand; the parties, or one of them, insist on carrying a weapon; the parties, or one of them, is under the influence of narcotics/alcohol; one of the parties breaks the rules that were decided upon *a priori* and refuses to admit that this violation is a problem. Even supporters of mediation diagnose these disputes as permanently inappropriate for mediation. Among the existing methods of screening: screening by questionnaire, screening by caucusing, screening by non-verbal insinuations, etc. *See Utzig, supra* note 31, at 60–63.

interviews in addition to filling out questionnaires.⁸¹ Secondly, Thompson states that:

Screening mechanisms are frequently inaccurate. Many such mechanisms place the burden to screen on judges, but typically cases are sent to mediation before judicial intervention occurs. Further, most screening mechanisms require one of the parties to disclose the abuse, but batterers have no incentive to disclose abuse that they perpetrate. The burden of disclosure falls on the victim, who may be reluctant to disclose the abuse for the same reasons she is reluctant to seek intervention.⁸²

Also, bear in mind that identification of violence is more an art than a science and that the diagnostic skills of the third party are an important factor.⁸³ Therefore, some mediators are of the opinion that it is impossible to obtain exact outcomes because of screening. In fact, some studies claim that as few as five percent of mediation cases are excluded because of domestic violence.⁸⁴ In addition, Greenberg notes that:

There is no foolproof screening for domestic violence Screening such as those designed by Tolman, Ellis, and Girdner have limited efficacy. Different domestic violence screenings are designed for specific types of violence, excluding the identification of others beyond their scope. Most are not calibrated to account for the range of cultural expressions of violence.⁸⁵

2. *Caucusing*

Another solution proposed to cope with the component of danger and the imbalance of power between the parties is to conduct separate meetings.⁸⁶ Mediation advocates claim that separate meetings may enable the mediator to control the balance

⁸¹ Ver Steegh, *supra* note 3, at 194.

⁸² Thompson, *supra* note 3, at 621–22.

⁸³ Ver Steegh, *supra* note 3, at 194.

⁸⁴ Thompson, *supra* note 3, at 600.

⁸⁵ Greenberg, *supra* note 19, at 609; *see also* Landrum, *supra* note 3, at 451.

⁸⁶ Ver Steegh, *supra* note 3, at 187. The term “caucusing” refers to private meetings between the mediator and one of the parties, at which the other party is not present. Separate meetings are a tool commonly used by mediators to help the parties to express themselves freely, and to help the mediator to clarify information that a party will not dare to reveal in the presence of the opposing party.

of power between the parties and contribute to a better balance between the sides.⁸⁷ This is done through control of the information in the procedure (that which is communicated between the parties and that which is not). “Separate caucuses give the mediator a chance to obtain direct feedback on power and safety issues.”⁸⁸ Nevertheless, those who object to mediation note the inefficacy of this solution: “Although mediators claim that they can balance power, perhaps by meeting separately with each spouse, the extreme power disparities between an abused wife and her violent husband defy balancing.”⁸⁹

3. *The Training and Skill of the Mediator*

Still another solution proposed, especially as a way of coping with the limitations of the mediator, involves the mediator’s training and skill. Proponents claim that mediation that is conducted solely by a skilled and experienced mediator who has specialized in the subject of domestic violence and who understands the unique dynamics of these cases and employs singular techniques to treat them, may counteract many of the objections to mediation.⁹⁰ For example, the skill and proper training of the mediator will help him to identify, *a priori*, violent elements in a relationship and to elicit information that may help to contend with the situation within the mediation process itself.⁹¹

Indeed, many mediation programs provide training for mediators to recognize signs of domestic violence and be able to handle situations where it becomes an issue. However, some states do not require special training for mediators.⁹² For example, only 70% of the mediation programs surveyed report that the mediators had participated in training programs on the subject of domestic violence.⁹³ Critics also suspect that no matter how extensive the

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ Bryan, *supra* note 38, at 1224.

⁹⁰ See Ver Steegh, *supra* note 3, at 186–87.

⁹¹ *Id.*

⁹² *Id.* at 188–90.

⁹³ *Id.* at 189–90.

training, the mediator will not be able to detect all the signs of control and abuse in a relationship.⁹⁴ More importantly, others have argued that no one can be sufficiently qualified to consign the victim to a position of power equal to that of the violent, abusive party, no matter how “tuned in” the mediator is to the dynamics of the relationship.⁹⁵ Moreover, even a very skilled mediator cannot provide an answer to the other aspect of the disadvantage, which stems from his obligation to remain neutral⁹⁶ and restricts his ability to act concerning the balance of power and the protection of the interests of the weaker party, namely, the victim.

The literature on mediation also mentions other solutions to contend with the disadvantages of traditional mediation in divorce cases involving violence. They include: (1) the use of separate legal counsel for each side (when the victim’s lawyer is well versed in the mediation process as well as the subject of domestic violence),⁹⁷ (2) involvement of additional experts in the process (professionals and therapists, among others),⁹⁸ and (3) screening, which is an ongoing part of the process throughout⁹⁹. All the while, the mediator has the option of assistance from the courts through referral of the parties to emergency investigation or by assessment of the case and its legal aspects.¹⁰⁰

⁹⁴ See Landrum, *supra* note 3, at 440 (“There may be subtle indicators—or sometimes overt signs—that the abuser is still intimidating the victim to get what he or she wants from the mediation, and if the mediator is not vigilant he or she will miss those signals.”).

⁹⁵ *Id.* at 441.

⁹⁶ See *supra* notes 68–71 and accompanying text.

⁹⁷ Maxwell, *supra* note 32, at 346 (discussing the idea that a trained advocate may help compensate for the power disparity between a victim and an abuser); see also Utzig, *supra* note 31, at 64.

⁹⁸ Utzig, *supra* note 31, at 65 (advocating that in instances of economic abuse a mediator may rely on an expert to speak with the parties in order to correct the power imbalances created by the abuse).

⁹⁹ Loretta M. Frederick, *Questions About Family Court Domestic Violence, Screening and Assessment*, 46 FAM CT. REV. 523, 526 (2008) (“[S]creening must not be treated as a one-time event. Rather, screening must be recurrent and take place at several points in time and at different stages of the case.”).

¹⁰⁰ Pearson, *supra* note 34, at 326–27.

Regarding the claim that the mediation settlement is not set up to provide the woman with the necessary protection from a violent husband,¹⁰¹ the response of the traditional mediator to this concern is that the mediation process does not supersede the criminal law system. If a victim of violence so desires, she can press charges, demand a restraining order, and then still opt for mediation. Moreover, advocates of mediation in divorce cases involving violence¹⁰² claim “litigation is also dangerous.”¹⁰³ In fact, they claim that the concept of relative safety provided by the adversarial system is flawed.¹⁰⁴ Pearson, for example, notes that despite the fact that lawyers prefer court intervention, many of them admit that domestic violence is often concealed from them in divorce cases and that the same danger exists in the judicial procedure and in mediation.¹⁰⁵

In light of everything above, “[n]either the traditional legal system nor the mediation alternative provides a perfect solution for battered women.”¹⁰⁶

Nevertheless, when comparing the judicial procedure to mediation in divorce cases involving violence, the scales seem to tilt in favor of the latter. For example, studies indicate that the percentage of successful outcomes of mediation in such cases is very similar to the percentage of success in other types of cases

¹⁰¹ *Id.* at 320. Aside from the enforcement of the existing laws in the criminal and civil courts against violent husbands, who do not comply with court orders issued against them.

¹⁰² Thompson, *supra* note 3, at 620; *see also* Alexandria Zylstra, *Mediation and Domestic Violence: A Practical Screening Method for Mediators and Mediation Program Administrators*, 2001 J. DISP. RESOL. 253, 259 (2001) (asserting that critics of mediation err in “comparing the best possible litigation scenario (where truth is found and justice served) to the worst possible mediation scenario for cases involving domestic violence (joint session with an untrained mediator)”).

¹⁰³ Thompson, *supra* note 3, at 620.

¹⁰⁴ On the contrary, they claim that mediation is safer. *See* Lauri Boxer-Macomber, *Revisiting the Impact of California’s Mandatory Custody Mediation Program on Victims of Domestic Violence Through a Feminist Positionality Lens*, 15 ST. THOMAS L. REV. 883, 896 (2003).

¹⁰⁵ Pearson, *supra* note 34, at 331.

¹⁰⁶ Thompson, *supra* note 3, at 620.

where mediation is used.¹⁰⁷ The figures speak of a success rate ranging from 51% to 76% in dispute resolution.¹⁰⁸ In addition, violent (and non-violent) couples report satisfaction with the mediation process, with the settlement that was reached, and with the level of implementation of the settlement.¹⁰⁹ Researchers generally agree that in divorce cases involving violence, mediation, despite its limitations, still offers advantageous benefits over the adversarial system. Consider, for example, that mediation is usually cheaper and quicker than litigation.¹¹⁰ It is especially advantageous for the female victim of violence who is naturally interested in getting the proceedings over with as quickly as possible.¹¹¹

Furthermore, scholars claim that the adversarial system actually encourages the husband to deny his abusive behavior because his lawyer helps him do so.¹¹² In mediation, on the other hand, the privacy of the process and the neutrality of the mediator serve to increase the likelihood that the abuser will abandon his ways and agree to accept help.¹¹³ Since the neutral role of the mediator does not require him to be a judge who rules on events of the past, he is able to focus on the future and on steps to eliminate all possibility of future violence.¹¹⁴ In view of this, advocates of mediation claim that some abusers are likely to respond in a more constructive manner when they feel that they are being heard, they

¹⁰⁷ Ver Steegh, *supra* note 3, at 190.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* This is a benefit particularly in divorce cases involving violence. In one study, 80% reported satisfaction with the process. Other studies found that women tended to be more satisfied, and that couples felt that the dialogue between them had improved. *Id.* This is a benefit particularly in divorce cases involving violence

¹¹⁰ Utzig, *supra* note 31, at 58; *see also* Knowlton & Mulhauser, *supra* note 29, at 261 (“[M]ediation offers an alternative that is quicker and less expensive than the traditional adversarial method.”).

¹¹¹ At minimal cost, especially if she is a victim of financial abuse.

¹¹² Ver Steegh, *supra* note 3, at 181.

¹¹³ Landrum, *supra* note 3, at 463.

¹¹⁴ *See* Pearson, *supra* note 34, at 331 (“Overall, the investigators conclude that, compared to lawyer negotiations, mediation makes a greater contribution toward preventing the abuse of separated women by their ex-partners.”).

are being treated fairly, and they are developing expectations for future behavior.¹¹⁵

In addition, participants can learn about the range of options that they may be able to choose, including programs in anger management and treatment of batterers; alcohol and drug treatment programs; dual-diagnosis counselors and treatment; and numerous other options.¹¹⁶

If the judicial process is far from providing answers but mediation is also limited and inadequate, the question is,—is there not a third, more suitable way to handle divorce cases involving violence? In other words, does the victim of violence have to settle for a choice between a bad option and a worse option? Is there not a way to upgrade the traditional mediation model to one that will counteract the alleged disadvantages?

The next part will deal with these questions by examining an additional option for handling the type of disputes under discussion: the option of e-Mediation.

IV. E-MEDIATION

A. *e-Mediation in Family Cases*

The 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.¹¹⁷ When it began, e-Mediation¹¹⁸ provided solutions to disputes that arose on the Internet such as disputes over electronic commerce. However, over the years, it has become more widespread¹¹⁹ and parties have applied it to disputes that did not originate in virtual space, namely, offline disputes such as divorce cases. E-Mediation in divorce cases was proposed in 1996 in a pilot project conducted by the

¹¹⁵ See Ver Steegh, *supra* note 3, at 181–82.

¹¹⁶ Landrum, *supra* note 3, at 463.

¹¹⁷ Tyler & McPherson, *supra* note 8, at 15 (quoting Jim Melamed, founder-partner of Mediate.com).

¹¹⁸ See discussion *supra* Part II.

¹¹⁹ See Katsh, *supra* note 15 and accompanying text.

University of Maryland.¹²⁰ The project offered mediation services by e-mail in family disputes, as provided by Maryland law. Later on, the website SquareTrade¹²¹ offered online mediation in divorce cases.

The use of e-Mediation as a method of handling family law cases has expanded over the years and is gaining momentum. Two successful projects have used e-Mediation in family law cases in recent years: one by the online mediation company Juripax in 2008, and the other by the British Mediator Roster Society, which took place in 2009-2010.¹²² According to Noam Ebner, the projects are good indicators of the benefits of e-Mediation in family law.¹²³ In both projects, the level of agreement and satisfaction was high and the parties indicated willingness to use mediation in future cases. Ebner states that these projects attest to the accelerated development of this field and are likely to predict its future implementations.¹²⁴

A website in Canada, Family Mediation Canada,¹²⁵ offers its users advanced technology in e-Mediation in family law cases.¹²⁶ In Holland, researchers conducted an empirical study consisting of 126 participants in 2009 on the subject of e-Mediation in divorce cases.¹²⁷ The object of the study was to provide e-Mediation with an evaluative assessment composed of parameters of the quality of the process, the quality of the outcome, and the price exacted. All communication between the mediator and the parties and between the parties themselves took place asynchronously, solely by means of e-mail, and with an advance commitment by the parties to send their messages within 48 hours. The results of the study show that

¹²⁰ Tyler & McPherson, *supra* note 8, at 23 (describing the University of Maryland Online Mediation Project).

¹²¹ *Id.* at 23–24.

¹²² Ebner, *supra* note 1, at 375.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ Found here: <http://www.fmc.ca/>

¹²⁶ Tyler & McPherson, *supra* note 8, at 24.

¹²⁷ Martin Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce*, 14 J. L. & FAM. STUD. 97, 97 (2012).

each of the parties rated the process and its outcome highly.¹²⁸ Of the participants, 76% reported that they had reached a mutual agreement acceptable to both sides, 32% were highly satisfied with the mediator, and 46.4% of the participants reported very high satisfaction. Approximately 90% found the mediator to be trustworthy and even very trustworthy.¹²⁹ As to the process and its price, most of the participants expressed satisfaction with the material expenses that were required for the process.

Regarding the outcome, parties on both sides of the Dutch study felt that the settlement was fair and gave each of them an equal share of the resources, and that the outcome reflected the efforts that were made and took into consideration the interests and needs of both parties.¹³⁰ The study concluded that the process has a true potential for resolving legal disputes in a fair and just manner; the results of the study indicate that e-Mediation in divorce cases may definitely serve as a practical and viable alternative.¹³¹

B. *e-Mediation as an Option in Divorce Cases Involving Violence*

1. *Counteracting the Disadvantages of Traditional Mediation*

This section addresses the issue of whether and how e-Mediation can serve as an improved model of traditional mediation and reduce or counteract the various disadvantages attributed to the latter (enumerated previously),¹³² with regard to divorce cases involving violence.

a. *Dealing with the Component of Danger Disadvantage*

By eliminating any real or perceived physical threat between victim and offender in cases where it exists, ODR might allow restorative justice where there was previously no other option to address the wrong.¹³³

¹²⁸ *Id.* at 109–15.

¹²⁹ *Id.* at 109.

¹³⁰ *Id.* at 115.

¹³¹ *Id.* at 120.

¹³² See discussion *supra* Part III.B.

¹³³ Rogers, *supra* note 23, at 368.

Consider, for example, the advantage of physical distance online mediation provides, which is especially important in situations of divorce involving violence.¹³⁴ Contrary to traditional mediation, which takes place face-to-face and requires the close physical presence of the parties, e-Mediation eliminates the possibility of injury. ODR is also the only mode that enables direct communication between the parties (as opposed to the negotiations between their lawyers), but prevents a potentially dangerous meeting between them.¹³⁵

Through the advantage of distance, e-Mediation may expand the range of cases that can be addressed by mediation. By eliminating the component of danger, online mediation may also prove suitable for cases that would be disqualified for mediation and would be referred to litigation (with all its inadequacies, as previously noted).¹³⁶ This would include, for example, cases of extreme violence and other circumstances, which, by accepted opinion, would disqualify the case for mediation.¹³⁷

b. *Dealing with the “Imbalance of Power between the Parties” Disadvantage*

The concern regarding the imminent disparity of power between the parties in cases of divorce involving violence stems from the fact that “fear is the name of the game.”¹³⁸ Very often, the violent husband has the power to control the victim with a word, a movement, or a gesture known to or recognized by himself and the victim (as a coded signal or a disguised threat of violence).¹³⁹ The victim may easily agree to conditions that will jeopardize her life and those of her children, simply in order to get out of the room.¹⁴⁰

¹³⁴ See Jeske, *supra* note 3, at 671 (“Currently in the United States, . . . on average, three women are murdered each day by their husbands or boyfriends.”).

¹³⁵ Rogers, *supra* note 23, at 368.

¹³⁶ See discussion *supra* Part III.A.

¹³⁷ See Thompson, *supra* note 3, at 623 (“[V]ery severe domestic violence cases may also be uniformly inappropriate for mediation.”).

¹³⁸ See discussion *supra* Part III.B.2.

¹³⁹ Loomis, *supra* note 37, at 364–65.

¹⁴⁰ Landrum, *supra* note 3, at 438; see also Brennan, *supra* note 2, at 221.

One of the major advantages of online communication is its sole reliance on written texts.¹⁴¹ An important benefit of this type of communication lies in its ability to eliminate intrusions that may arise because of body language and nonverbal hints by the abusive party, which serve as a means of intimidation and control of the victim. Examples of these might be hostile facial expressions and subtle use of body posture communicate aggression, such as particular gestures and eye contact. Thus, online mediation paves the way to conduct practical negotiations without accompaniments that might hinder the reaching of an effective settlement.¹⁴²

In this context, one of the key advantages of online mediation is that it enables asynchronous communication. This type of communication allows for the possibility of “taking a step back with the computer and reflecting before reacting.”¹⁴³ Online mediation makes it easier to react rationally in a reasoned manner. Asynchronous communication contributes to the “organization” and control of feelings; it facilitates presenting them to the other party in a rationalistic manner that uses good judgment. This attribute is likely to ease the concern that the victim will make rash decisions or make too many concessions out of fear on the part of the victim.

In addition, e-Mediation may further improve upon traditional mediation’s ability to counter the ‘imbalance of power between the parties’ through the use of separate meetings.¹⁴⁴ Advocates of traditional mediation argue, as previously noted,¹⁴⁵ that in separate meetings, the mediator is more likely to control the balance of power between the parties and enable more equilibrium between the couple. Nonetheless, this solution is limited and

¹⁴¹ See Gramatikov & Klaming, *supra* note 127, at 100 (“Divorce cases may be particularly suited for ODR because both parties know each other well enough to interpret each other’s actions and motivations despite lack of physical proximity, increasing the likelihood of finding an integrative agreement.”).

¹⁴² See Brennan, *supra* note 2, at 221.

¹⁴³ *Id.* at 218.

¹⁴⁴ See discussion *supra* Part III.C.2.

¹⁴⁵ *Id.*

unsatisfactory.¹⁴⁶ In e-Mediation, on the other hand, this practical technique turns out to have many new advantages. First, the mediator in the online process, as opposed to traditional mediation, does not have to worry about the reactions and/or the apprehensions of one of the parties about the amount of time he is devoting to a separate meeting with the other party.¹⁴⁷ Second, in a face-to-face meeting, the joint session has to come to a halt in order to set up a separate meeting with each party, which could disrupt the flow of discussion.¹⁴⁸ E-Mediation, on the other hand, allows the mediator to speak with each party privately by using separate virtual rooms in video-conferencing.¹⁴⁹ The online procedure, which allows only the mediator (as opposed to his counterpart in traditional mediation) to be present at three locations concurrently, requires him to acquire and master new skills.¹⁵⁰ It seems evident that part of the implementation of expertise in the virtual environment must view, as its goal, the gradual increase of the wealth of online interaction, thereby enabling the mediator to demonstrate his skill in the most effective and efficacious manner.

Another characteristic of the online process that may help to counteract the imbalance of power between the parties is the anonymity provided by Internet communication, termed “netocracy” by Robert Gordon.¹⁵¹ This refers to a situation in which all of the correspondents enjoy equal status.¹⁵² He argues that the online process increases the likelihood that negotiations will be effective and will result in a fair and equal outcome,

¹⁴⁶ See *supra* note 79–84 and accompanying text.

¹⁴⁷ Nadja Alexander, *Mobile Mediation: How Technology is Driving the Globalization of ADR*, 27 *HAMLIN J. PUB. L. & POL’Y* 243, 251 (2006).

¹⁴⁸ Brennan, *supra* note 2, at 219.

¹⁴⁹ *Id.*

¹⁵⁰ Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, *MEDIATE.COM* (Dec. 2000), <http://www.mediate.com/articles/rule.cfm> (“Managing these different threads (and making sure communications go in the right places) is one of the new skills ODR professionals need to master.”).

¹⁵¹ Robert Gordon, *The Electronic Personality and Digital Self*, 56 *J. DISP. RESOL.* 8, 14 (2001).

¹⁵² *Id.*

reached by means of the netocracy.¹⁵³ People apparently tend to adapt their behavior to society's expectations of them. If the man was more dominant in the spousal relationship, in all probability, he will continue this behavior during divorce mediation.¹⁵⁴ The Internet netocracy in the ODR creates a "balanced playing field" in situations of power imbalance (overt or concealed) and may well contribute to a win-win settlement in which both sides are truly satisfied.¹⁵⁵ In Ebner's words: "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."¹⁵⁶

Another approach proposed by traditional mediation regarding the imbalance of power between the parties in divorce cases involving violence is the inclusion of other experts. One of the major advantages of online dispute resolution is the ability to overcome obstacles such as venue and distance. Online discourse makes it possible for people in different locations to communicate easily and quickly from almost anywhere. In e-Mediation, this advantage may even increase the possibility of drawing on a wealth of professional knowledge of the process by consulting experts from afar, who suddenly become accessible. As Ebner notes, "Parties gain access to mediator expertise beyond that which might be available in any given geographical region."¹⁵⁷ He states further, "External experts can be consulted with, or brought into the process as necessary, regardless of their geographical location, and without disrupting the process' dynamics."¹⁵⁸

In divorce cases involving violence, when it comes to the use of professional knowledge as a means of protecting the rights of the parties and the balance of power between them, the mediator may need to make very frequent use of external aids. In a face-to-

¹⁵³ *Id.*

¹⁵⁴ Brennan, *supra* note 2, at 217.

¹⁵⁵ Gordon, *supra* note 151, at 14.

¹⁵⁶ Ebner, *supra* note 1, at 377.

¹⁵⁷ Ebner, *supra* note 1, at 377.

¹⁵⁸ *Id.* at 378.

face meeting, the mediator's use of such aids is liable to cause the parties to lose their confidence in him, to question his expertise and waste valuable time. The online environment, on the other hand, allows instant access to sources of help, and the use of them is hidden from the parties.¹⁵⁹

c. *Dealing with "The Limitations of the Mediator" Disadvantage*

The insulation of physical "non-presence" also has the power to disrupt unique control devices of the abuser in the domestic violence system.¹⁶⁰ The claim here is that a skilled mediator may not recognize the extent of the influence of the violent party on the victim, even during a mediation session, because the violent spouse is very often able to control the victim through a word, movement or gesture, known to or understood only by the victim and the abuser.¹⁶¹

Textual communication, one of the characteristics of e-Mediation, may counteract this disadvantage, because communication based on written messages neutralizes body language. The physical distance between the parties can eliminate the abuser's abilities to manipulate the session through physical movements. While the chance that the violent party will use coercive language is still possible, it is no longer possible to insinuate threats through language inflection.¹⁶²

On this point, another relevant advantage of online communication is the advantage of saving archives. In the traditional process, the emphasis is on confidentiality and on the fact that nothing is saved. In online dispute resolution, everything is saved. The fact that the digital written texts are monitored and automatically saved provides the mediator with a record of the exchange of words, the disagreements, and agreements, without requiring him to make any special effort. It is safe to assume that under these circumstances, when everything is open, aboveboard, and documented, the violent party will avoid conveying disguised

¹⁵⁹ Rule, *supra* note 150.

¹⁶⁰ Rogers, *supra* note 23, at 373.

¹⁶¹ See *supra* notes 61–71 and accompanying text.

¹⁶² Rogers, *supra* note 23, at 373.

threats of violence or control. If the violent party does so anyway, the textual communication and the archival saving will serve as documentation of it and enable the mediator to exercise his judgment and respond appropriately to the circumstances, such as stopping the mediation, referring the parties to litigation, etc.

Just as in traditional mediation, online mediators should be well trained in identifying aggressive language between the parties in order to prevent it, and should hold private talks with the victim as well as joint sessions with the abuser. Training enables the mediator to observe how the mediation affects the victim and allows him to communicate with the victim, with no possibility that the abuser will be able to exercise manipulation. Online mediation enables the mediator to intervene in any attempts at manipulation by the abuser by restricting conversations instantly if either party so wishes.¹⁶³

Regarding the claim that the mediator is limited in maintaining the balance of power between the parties, due to his obligation to remain neutral, online mediation provides a number of tools to maintain neutrality and advance the balance of power between parties.¹⁶⁴ A prime example is the use of the framework of preliminary communication, namely, a framework in which the messages of the parties first reach the mediator rather than the other party.¹⁶⁵ By using this framework, the mediator can coach the parties in more respectful forms of expression and can block manipulative statements and assertions such as attempts to exercise power or control before they reach the other party.¹⁶⁶ This is an upgrade of the technique known as “reframing,”¹⁶⁷ which is also

¹⁶³ *See id.* at 373–74.

¹⁶⁴ *See supra* notes 45–60 and accompanying texts.

¹⁶⁵ Ebner, *supra* note 1, at 392.

¹⁶⁶ Marta Poblet & Pompeu Casanovas, *Emotions in ODR*, 21(2) INT’L REV. L. COMPUTERS & TECH. 145, 150 (2007).

¹⁶⁷ This skill helps the mediator replace negative messages (expressed by one of the parties) with positive, constructive messages by rephrasing and refining what was said, with the basic objective being to enable the other party to listen to them. In other words, it facilitates effective communication while confronting feelings that the parties express in bold statements. This technique helps to

used by the traditional mediator. The mediator in the online process can take as much time as he needs before responding in order to reframe a problematic statement written by one of the parties. This luxury is usually not possible in face-to-face mediation.

d. *Dealing with the “Preserving the Aggressive Paradigm” Disadvantage*

Studies have shown that those who insulted or emotionally abused their partners when they were together tend to continue this behavior pattern during negotiations (or mediation) at the end of the relationship.¹⁶⁸ This disadvantage, termed “preserving the aggressive paradigm,” includes the concern that, because traditional mediation is a voluntary process, it may arouse this cycle of controller-controlee and provide the violent party with optimal conditions for maintaining this pattern of control and aggression towards the weaker party. Online mediation may counteract this disadvantage by means of physical distance and written communication. “Coupled with the obvious decrease in physical danger when parties are separate, the ‘role of the screen’ as insulation can greatly reduce the potential for victim intimidation during mediation.”¹⁶⁹

Furthermore, the concern is that the dominant party may control the mediator.¹⁷⁰ As noted, since he is potentially a skilled manipulator who can assume many different disguises (as usually happens), the dominant party may control not only the weaker party, but also the mediator, and may even succeed in recruiting him to his side, or in other words, use the mediator to tilt the balance of power in his favor—namely, for the benefit of the violent party.¹⁷¹

remove emotional obstacles by presenting statements by one party against the other in a less emotional, or critical/judgmental manner.

¹⁶⁸ See JOHN MONAHAN, *THE CLINICAL PREDICTION OF VIOLENT BEHAVIOR* (1981).

¹⁶⁹ Rogers, *supra* note 23, at 374.

¹⁷⁰ See *supra* notes 72–78 and accompanying text.

¹⁷¹ *Id.*

Online mediation is likely to counteract this fear. Rogers notes, “ODR also has the potential to eliminate or reduce gender and racial norms that skew mediation and prevent parties from effectively advocating their own interests.”¹⁷² In other words, “netocracy,” which characterizes the online discourse,¹⁷³ has another advantage: it minimizes the stereotypes and cognitive biases that may affect the mediator’s perception of the parties. Traditional mediation, conducted face-to-face, naturally promotes the advantages of people who are educated, good looking, speak fluently, or belong to a dominant social group.¹⁷⁴ Written communication diminishes chances that the mediator will (even subconsciously) favor one party over the other,¹⁷⁵ thereby increasing the prospects of neutrality and absence of partiality on the part of the mediator.¹⁷⁶ In this way, netocracy is able to break the cycle of the aggressive paradigm and eliminate this disadvantage.

2. *Independent Advantages of e-Mediation*

a. *Efficacy and Speed*

The need for speedy and unimpeded decisions is a major reason for the development of alternate dispute resolution methods, especially in the field of divorce.¹⁷⁷ Studies show that divorcing couples that turned to traditional mediation were able to resolve their disputes in almost half the time it took their counterparts who turned to litigation.¹⁷⁸ Online mediation offers an even faster track, and makes physical meetings, setting up appointments, and wasting valuable time on traveling back and forth unnecessary. This time saving is one of the major advantages of this process.¹⁷⁹

¹⁷² Rogers, *supra* note 23, at 351.

¹⁷³ See *supra* note 150 and accompanying text.

¹⁷⁴ Brennan, *supra* note 2, at 218; see also, Tyler & McPherson, *supra* note 8, at 10.

¹⁷⁵ Brennan, *supra* note 2, at 217–18.

¹⁷⁶ *Id.*

¹⁷⁷ *Id.* at 212.

¹⁷⁸ Robert Emery, David Sbarra & Tara Grover, *Divorce Mediation: Research and Reflections*, 43 FAM. CT. REV. 22, 27 (2005).

¹⁷⁹ See Gillieron, *supra* note 8, at 314.

Moreover, this is an effective process that minimizes the escalation of the dispute and plays down the traumatic repercussions of divorce in every respect, especially for the children.¹⁸⁰ The benefits of efficacy and speed are even more pronounced in cases of divorce in the presence of violence. The need to end the marriage as quickly as possible is often critical, both for the woman and for any children.¹⁸¹ The speed with which the marriage is ended may have practical implications in reducing the component of danger (for the victim and/or the children).¹⁸²

In addition, a quick resolution of the dispute may, naturally, lower costs.¹⁸³ The online process is cheaper because there is no need to rent an office or venue to hold the sessions. Eliminating these expenses enables the online mediator to make the process even cheaper than traditional mediation. Online mediation also reduces the expenses of lawyers (in cases where the parties engage one during the online process).¹⁸⁴ When the equation “time is money” is less prominent, the parties are free to focus on important issues, such as the future and welfare of any children, without having to worry about the ticking clock.¹⁸⁵

Beyond that, the economic advantage is not to be taken lightly in disputes of this type. Abuse may also include financial abuse¹⁸⁶ where the husband has total control of all financial resources and withholds information about the couple’s financial situation, net worth, and/or access to means of payment. Such an economic imbalance of power¹⁸⁷ may bring the woman to the mediation

¹⁸⁰ See Tyler and McPherson, *supra* note 8, at 12–14.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Brennan, *supra* note 2, at 214.

¹⁸⁵ *Id.*

¹⁸⁶ Utzig, *supra* note 31, at 65; see also Bryan, *supra* note 66, at 1220 (“Although most husbands exercise the lion’s share of control over marital finance, abusive husbands typically exercise extreme financial control.”); R. L. Valente, *Addressing Domestic Violence: The Role of the Family Law Practitioner*, 29 FAM. L.Q. 187, 189 (1995).

¹⁸⁷ See Bryan, *supra* note 38, at 1220 (“Moreover, her abuser likely has compromised her work performance and participation, making her a difficult

bargaining table against her will, having no other choice because she lacks the financial means to hire a lawyer.¹⁸⁸ Moreover, someone who has suffered from violence during marriage but who is financially unable to hire a lawyer may waive divorce in order to avoid meetings with the violent spouse.¹⁸⁹ In such cases, the economic advantage of e-Mediation for the victim is critical.

b. *Simplicity and Comfort*

An additional advantage to online mediation is the maximal comfort of conducting negotiations, which is especially important in emotionally charged disputes such as divorce. The main advantage offered by ODR lies in its simplicity. Aside from good will and subscribing to the web, the process demands almost nothing of the parties. They do not have to agree on a neutral location and travel there, and they do not have to synchronize appointments to meet because ODR services are available twenty-four hours a day throughout the week.¹⁹⁰

c. *The Advantage of Distance*

“[T]he unique psychological characteristics of the victim-offender relationship may make a face-to-face, intimate meeting between the two parties more damaging than healing.”¹⁹¹ Dispute resolution from a distance, using the online process, has a significant advantage in divorce cases involving violence, by eliminating the obstacle of the component of danger.¹⁹² The distance has an independent advantage: maximal comfort and economy, which is significant for separated couples who no longer live in the same region or country. Physical distance is common in divorce cases involving violence, whether due to a restraining

employee. After separation, she may still have difficulty locating employment and earning the funds she needs to hire a lawyer. Finally, the battered wife may lack the financial knowledge necessary to accurately assess her financial needs and develop a realistic post-divorce financial plan.”).

¹⁸⁸ See Utzig, *supra* note 31, at 62–63.

¹⁸⁹ Brennan, *supra* note 2, at 215.

¹⁹⁰ Gillieron *supra* note 8, at 312–13.

¹⁹¹ Rogers, *supra* note 23, at 351.

¹⁹² See discussion *supra* notes 133–37 and accompanying text.

order issued by the court against the husband or the fact that the woman is in a battered wives' shelter.

According to professionals,¹⁹³ another benefit of distance is that it helps to sustain the nature of a "businesslike" relationship, a clear advantage in view of the charged atmosphere of the dispute.¹⁹⁴ In other words, while the adversarial process in court is perceived as escalating the dispute and harming the relationship, and traditional mediation is perceived as offsetting hostility, or at least preventing escalation,¹⁹⁵ online mediation goes one step further by providing a businesslike environment.

Even from the viewpoint of the "ethics of care," distance may serve as an advantage in highly charged disputes such as divorce cases involving violence. The distance helps to establish a relaxed and rational atmosphere and to tone down emotions.¹⁹⁶ An atmosphere of highly charged emotions that come to the foreground in face-to-face meetings may even possibly propagate itself.¹⁹⁷ The studies of Mary Hammond, which deal with conflict and conflict resolution, demonstrate that the parties in a dispute felt "calmer, more confident, and less hostile" in the ODR atmosphere.¹⁹⁸ Some users have defined the online environment as less pressuring and threatening, even lowering animosity, in comparison with face-to-face dispute resolution.¹⁹⁹ One positive implication of the online environment in divorce cases involving violence is that distance is likely to mitigate, and even eliminate, the sense of fear on the part of the victim. The ability to control this emotion is, for the victim, an important step on the way to personal progress and self-empowerment, which constitutes an

¹⁹³ Brennan, *supra* note 2, at 213.

¹⁹⁴ Robert Emery, *Divorce Mediation: Negotiation Agreements and Renegotiating Relationships*, 44:4 FAM. REL. 377, 383 (1995).

¹⁹⁵ *Id.*

¹⁹⁶ Brennan, *supra* note 2, at 216.

¹⁹⁷ *Id.* at 215.

¹⁹⁸ Anne-Marie B. Hammond, *How Do You Write "Yes"?: A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261, 277 (2003).

¹⁹⁹ *Id.*

additional, independent benefit of the online process, as noted further on.²⁰⁰

d. *Textual Communication*

The nature of written communication is itself an advantage. Communication that relies on written texts is able to temper emotions because it slows down the tempo of response compared to verbal response and visually reflects to the writer the message he or she is conveying. This advantage is significant precisely in situations fraught with emotional involvement such as divorce cases involving violence. This emotional involvement is liable to divert the parties away from focusing on the important issues that have to be addressed. Online mediation “may force these divorcees to focus on the issues that need to be settled instead of being distracted by the emotional aspects of the conflict.”²⁰¹

Divorcing couples, particularly in the face of violence, usually adhere to a fixed pattern of communication based on mutual reading of body language.²⁰² The neutralization of body language contributes to the creation of a neutral atmosphere, and it allows the communicants to reassess their words. An additional disadvantage of body language, which written communication is likely to neutralize, is the fact that parties may misinterpret body language.²⁰³ When one party perceives behavior as negative, even if his interpretation is erroneous, he tends to react with a form of retaliation that may bring the negotiations to an impasse. Written communication is therefore especially important for communicants who arrive with emotional baggage and flawed communication replete with suspicions, mistrust and past traumas, such as divorcing couples. Sometimes the violent party undergoes a process of healing, therapy, or positive progress in the course of divorcing. The problem is that past traumas prevent the victim from listening to the updated material. Written communication

²⁰⁰ See *infra* notes 204–09 and accompanying text.

²⁰¹ Gramatikov & Klaming, *supra* note 127, at 100.

²⁰² Brennan, *supra* note 2, at 221.

²⁰³ *Id.*

may force the parties to really listen and to fully concentrate on the essential material.

e. *Empowerment of the Woman*

For a victim who wishes to affirm her separation from the offender by addressing him in a safe environment but who also wants a chance to tell her side of the story, ODR provides a perfect and unique opportunity to do so.²⁰⁴ The need to speak out, to be heard, and to be understood, is a basic human need which can liberate, expand, and lead to growth generally and particularly in emotionally-laden situations.²⁰⁵ Mediation, which is less confrontational than litigation, is potentially more empowering to the battered woman than the formality of the courtroom.²⁰⁶ One of the elements needed most by the battered woman, perhaps the most critical of all, is a voice. The ability to speak out and express herself (especially in charged situations such as divorce) with no fear of being “cut off” by the other party is a truly valuable asset.²⁰⁷ By giving the woman a voice, the mediation process may help the battered woman regain the power that was taken away from her in an aggressive relationship and give her the confidence that she is in control of her own life.²⁰⁸ A process that provides her with a platform to express her feelings, her fears, and her wishes, and that is attentive to descriptions of the situation and perceptions as seen through her prism, contributes to the empowerment of the victim.²⁰⁹ It gives her what she needs more than anything else does.

Sandra Zaher has explained that, “mediation can empower those without power by allowing them to speak in their own voice and articulate their own interests, perhaps for the first time.”²¹⁰ In

²⁰⁴ Rogers, *supra* note 23, at 372.

²⁰⁵ See Carl R. Rogers & Richard E. Farson, *Active Listening*, available at http://www.go-get.org/pdf/Rogers_Farson.pdf.

²⁰⁶ Jeske, *supra* note 3, at 686.

²⁰⁷ Brennan, *supra* note 2, at 221.

²⁰⁸ Knowlton & Muhlhauser, *supra* note 29, at 266–67.

²⁰⁹ *Id.* at 256. (“Several commentators, however, have argued that mediation is a vehicle for empowerment and an appropriate mode of intervention even when domestic violence has occurred.”).

²¹⁰ Landrum, *supra* note 3, at 447.

fact, John Haynes, the founder of the Academy of Family Mediators, maintains that mediation can enable the victim (and her abuser) “to focus on the direction of their lives as separate, complete, independent people.”²¹¹ Some authors have found that such a process can help to empower the victim in the mediation, instead of merely defining him or her as the object of abuse.²¹² Battered women also report that the traditional mediation process gave them a sense of empowerment, helped them to stand up for themselves, and helped them take responsibility for their choices, their deeds, and their futures so they could present their positions and solve their problems.²¹³

Online mediation may “upgrade” the female voice in the mediation process in several senses. First, divorce cases involving violence are characterized by an imbalance of power between the parties, and are therefore likely to undermine the voice of the weaker party, often the woman, in traditional mediation.²¹⁴ In face-to-face meetings, it is easy to interrupt the other party and to prepare a counter reaction before the other party has finished speaking.²¹⁵ Asynchronous written communication, customary in online mediation, can be a tool in the hands of the woman who is a victim of domestic violence, allowing her to speak out fully and freely, without being cut off.

Second, one of the criticisms voiced against traditional mediation questions its ability to encourage the victim of domestic violence, after years of silence, suppression, concealment, and subjugation, to open up, to speak out, and to conduct negotiations on an equal footing.²¹⁶ Written communication may help the woman to “open up” because this type of communication compels

²¹¹ *Id.*

²¹² *Id.*

²¹³ Thompson, *supra* note 3, at 622.

²¹⁴ *Id.*

²¹⁵ Brennan, *supra* note 2, 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!”).

²¹⁶ Loomis, *supra* note 37, at 364–65.

the sender of the message to express himself clearly and precisely. Throwing out hints or remarks from the sidelines is not enough. For example, because the absence of a text is not the same as silence in a face-to-face meeting, it serves as a real incentive for the victim to articulate clearly her feelings, interests, and wishes.²¹⁷

Third, women will not feel as compelled to hide emotions that are considered “unfeminine” as they do in a face-to-face mediation session. The face-to-face encounter between the parties can intensify the need to repress anger in expression and tone of voice. Online mediation allows women the freedom to express their anger in the privacy of their homes or out of sight of the other party. With no constant pressure to appear cooperative, women may feel free to assert their own interests and to confront their abusers without having to worry about losing their self-possession in public.²¹⁸

Fourth, the empowerment of a woman and reclamation of control over her life begins with the act of choosing a process that will enable her to end a destructive marriage, allow her to take responsibility for her life, and escape the cycle of oppression and violence. There are two main options: the judicial process and traditional mediation. When both of these are limited, the prospects for empowerment of women are diminished. Many women who endure domestic violence, despite their suffering, will not turn to the judicial process to end their marriage for a variety of reasons, among them protection of their families.²¹⁹ Traditional mediation (the second option) entails shortcomings that cannot be hermetically eliminated.²²⁰ The very fact that there is an upgraded model of mediation in the form of online mediation opens up new options for selecting a process which may constitute the first step on the way to empowerment and independence for the woman.

²¹⁷ Rule, *supra* note 150.

²¹⁸ Rogers, *supra* note 23, at 374.

²¹⁹ Rogers, *supra* note 23 at 353 (“In addition, prosecution of domestic violence is complicated because victims often refrain from participating in prosecution to protect their families.”).

²²⁰ See *supra* notes 29–78 and accompanying text.

Nevertheless, along with the advantages noted in this section, online mediation also has disadvantages. In the following sections, these will be addressed, as well as ways to cope with them.

3. *Disadvantages of e-Mediation and Ways of Coping with Them*

The assurance of confidentiality in the online process becomes a more difficult task, compared to traditional mediation, due to the nature of the Internet. For example, in the online mediation of Online Ombudsman, the terms of use stipulate that the service cannot guarantee the confidentiality of information once it is posted on the web. But once the information reaches the web, reasonable measures will be taken to safeguard access to information and protect confidentiality. In addition, a comparative study conducted among ODR providers shows that most ODR sites themselves are secure, but the security does not extend to the transmission of e-mail.²²¹ “While many service providers are explicit about their security procedures, there are no certain guarantees in internet security.”²²²

This lack of security is certainly a problematic situation, especially in sensitive cases such as divorce in the presence of violence. It is incumbent upon service providers to seriously address the issue of information security and secrecy that ODR programs on the Internet are obligated to guarantee: confidentiality and data security.²²³ Service providers must adopt strict policies of information security in order to ensure the privacy of the system’s users and the approaches to it, which includes transmissions on the web.

Another attributed disadvantage to the online process is distance. Some skeptics claim the distance, previously presented as one of the advantages of e-Mediation in divorce cases involving

²²¹ See THOMAS SCHULTZ ET AL., ONLINE DISPUTE RESOLUTION: THE STATES OF ART AND THE ISSUES 49 (Geneva 2001).

²²² Ebner, *supra* note 1, at 378.

²²³ See Online Dispute Resolution Standards of Practice, ICANN, <http://www.icann.org/en/help/ombudsman/odr-standards-of-practice> (last visited Oct. 16, 2014).

violence,²²⁴ is actually one of the disadvantages of the online process. They argue that in the online environment the parties will be inclined to express their highly charged feelings in an excessive manner.²²⁵ The knowledge that they will not have to meet the mediator or the other party during the mediation may summon a style of expression that the parties would not permit themselves in a face-to-face meeting.²²⁶ It is easier to express oneself aggressively to the computer than to a flesh and blood person.²²⁷ In this case, the claim is that the online discourse may be less filtered and even produce negative filters that undermine constructive communication.²²⁸ Studies show that communication replete with insults and invective, mutual name-calling and hostile remarks is eight times more common in online communication than in face-to-face discourse.²²⁹ Some have clearly stated that communication between computers encourages aggressive and uninhibited behavior, since the accepted social codes and behavior norms have less impact on the online environment.²³⁰ According to the Thompson and Nadler, this increased frequency in vulgarity is caused by “‘counter-normative e-behavior’ encouraged by the lack of influence by social norms in the online environment.”²³¹

The danger may be much greater when dealing with individuals in divorce cases involving violence who already have a history of hostile communication. Still, some contradictory studies show that insufficient proof supports the claim that online discourse is inferior to face-to-face interaction.²³² The study by Hammond, for instance, found that textual communication did not have a negative influence on the behavior of the parties in

²²⁴ See *supra* notes 133–37 and accompanying text.

²²⁵ Brennan, *supra* note 2, at 216.

²²⁶ *Id.*

²²⁷ *Id.*

²²⁸ *Id.*; see also, Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 NEGOT. J. 133, 139 (2000).

²²⁹ Brennan, *supra* note 2, at 222.

²³⁰ Gillieron, *supra* note 8, at 336.

²³¹ Brennan, *supra* note 2, at 222.

²³² *Id.* at 223.

mediation. The participants in the study reported that they behaved as they would have in verbal, face-to-face interaction, and that they used their usual communicative skills when considering what to say and how to articulate their positions, their perceptions, and their suggestions for solutions.²³³ Brennan offers reinforcement by stating that, with the passage of time, people have become accustomed to online discourse since most daily communication is conducted online and by e-mail. Most are compatible with it, are used to it, and it will not necessarily cause significant changes in their style of expression.²³⁴

In addition, some claim that written communications have many disadvantages. They argue that toning down or neutralizing feelings, made possible by written communication, does not necessarily constitute an advantage. Written communication, say the critics, will always be “lean” and inadequate in comparison to face-to-face communication, which is considered the richest and most interactive communication between people.²³⁵ Written communication lacks nonverbal cues, such as facial expressions, body movements, and tone of voice. This is a significant defect, as Kaisler and Sparwell note, people 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 their conformity to social norms.”²³⁶

The critics claim that a dialogue in which facial expressions, gestures, and other cues related to body language are absent creates laconic communication. That laconic communication is liable to lead to misunderstandings at best,²³⁷ or lead to doubts, suspicion, and fear at worst, especially when the latter qualities already characterize the relationship between divorcing couples.²³⁸ As one participant in an e-Mediation study said, “[b]ecause it is very

²³³ Hammond, *supra* note 198, at 277.

²³⁴ Brennan, *supra* note 2, at 223.

²³⁵ *Id.* at 222; *see also*, Gillieron, *supra* note 8, at 327–28.

²³⁶ Gillieron, *supra* note 8, at 327.

²³⁷ Gramatikov & Klaming, *supra* note 127, at 100.

²³⁸ Brennan, *supra* note 2, at 222.

difficult to tell clearly your story only with words, it is possible that the other party reads a different story.”²³⁹

Another disadvantage that may result from written communication is the limited power of the mediator. Some scholars claim that the mediator loses the potential to control the situation sometimes to the point of no control.²⁴⁰ Face-to-face mediation enables the mediator to “sense” the parties and the dynamic taking place before his eyes. He takes note of expressions of strength or weakness, lack of confidence, or discomfort, flexibility, or deterioration of the relationship. He can observe how things that are said are heard, and see, eye to eye, the effect and the impression made on the listener. Thus, in this type of mediation, the mediator is more capable of controlling the general direction of the situation, even if only to cut a speaker short, or send him out of the room.²⁴¹ Especially in divorce cases involving violence, observers must not underestimate the importance of visual impressions that the parties make on the mediator, the gestures, the perceptions and the dynamic that develops between them. When the mediator notes deterioration in the relationship, senses the danger of physical or emotional harm, gestures or hints of violence or control of the victim, or involuntary consent or concessions on the part of the victim, he should halt the process. The implications of restriction of the mediator’s ability to form visual impressions in this type of dispute may be critical.

There are a number of possible responses to this criticism. First, there are situations that preclude the possibility of conducting face-to-face meetings. If there is no online process, there is no process at all.²⁴² One of these situations occurs when the continued threat of violence between a victim and perpetrator makes restorative justice too dangerous to attempt.²⁴³ Therefore, even accepting the abovementioned criticisms of written communication in e-Mediation, it is still often lesser of two evils.

²³⁹ Gramatikov & Klaming, *supra* note 127, at 119.

²⁴⁰ Poblet & Casanovas, *supra* note 166, at 149.

²⁴¹ *Id.*

²⁴² Tyler & McPherson, *supra* note 8, at 11.

²⁴³ Rogers, *supra* note 23, at 365.

Second, Gramatikov and Klaming claim that the chance that the other party will misinterpret the written message in the absence of nonverbal additions is almost nonexistent in divorce cases. Divorcing couples know each other very well, certainly well enough not to misconstrue the words of the other party, even in the absence of physical proximity.²⁴⁴

Third, some researchers have argued that in face-to-face meetings, people tend to entrench themselves in their positions and have difficulty establishing trust. On the contrary, ODR, using appropriate software, may calm down the parties and help to create mutual trust; thus, employing more effective measures will help them find a solution to their disagreements.²⁴⁵

Fourth, the online environment does not preclude face-to-face meetings. Rogers explains: “‘Hybrid Mediation’ is a form of mediation that combines face-to-face mediation with online mediation. Therefore, mediators may even be able to develop innovative ways to combine the two mediums to provide optimum safety and effectiveness in mediation.”²⁴⁶

Moreover, even in an online environment it is possible to hold a meeting in which both parties see each other; this is done using simple and available means such as video and digital cameras. Videoconferencing is a developing technology that constitutes a form of ODR that may replicate face-to-face contact while removing the real and perceived threat of violence. Technological progress has made it possible to widen computer screens and improve their resolution level so that much more information can be presented in a clearer and more sophisticated manner. Today’s screens have color, shape, animation, and sound. The possibility of combining all of these into interlinked nets at high speed provides a momentous vehicle for communication. For example, even if

²⁴⁴ See Gramatikov & Klaming, *supra* note 127, at 100.

²⁴⁵ See Poblet & Casanovas, *supra* note 166, at 151.

²⁴⁶ Rogers, *supra* note 23, at 365; *see also*, Tyler & McPherson, *supra* note 8, at 12 (“DR 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.”)

spoken communication has many advantages, among them the ability to convey messages by changing tone, speed, and register, for that very reason many platforms of ODR offer integration of vocal communication.²⁴⁷

Fifth, in response to criticism regarding the limitations of the parties in expressing their feelings in written communication (in comparison with face-to-face contact), Poblet and Casanovas argue that recent findings weaken this criticism.²⁴⁸ Various studies indicate that parties do not feel that their ability to express feelings is especially limited in online written communication. They simply use other means of expressing feelings unique to this type of communication.²⁴⁹ One example offered by Raines illustrates how the use of capital letters can convey shouting in written communications: “I JUST WANT TO BE DONE WITH HER AND NEVER DEAL WITH HER AGAIN! LET’S JUST STOP ALL THE HASSLE AND RETURN MY MONEY! MANY, MANY THANKS!”²⁵⁰

The use of the exclamation mark on the keyboard, the happy face, and other emoticons also help the parties to express feelings in a manner distinctive to written communication (for example, a change of fonts, or coloring the entire text red to express anger).²⁵¹ Van Cliff’s studies also show that demerging feelings, expressed in written communication as an integral part of the process, shape the choices of the parties in responding and constitute an important factor in mutual interaction.²⁵²

Following a survey of the extensive professional literature published recently on the subject of feelings in ODR processes,²⁵³ Poblet and Casanovas conclude that:

²⁴⁷ Ethan Katsh, *Online Dispute Resolution: Some Lessons from the E-Commerce Revolution*, 28 N. KY. L. REV. 810, 816 (2001).

²⁴⁸ See Poblet & Casanovas, *supra* note 166, at 149.

²⁴⁹ *Id.*

²⁵⁰ S. Summers Raines, *Can Online Mediation Be Transformative? Tales From The Front*, 22 (4) CONFLICT RESOL. Q. 437 (2005).

²⁵¹ Ebner, *supra* note 1, at 392.

²⁵² Poblet & Casanovas, *supra* note 166, at 149.

²⁵³ *Id.*

[C]ontrary to traditional views, ODR cannot be considered an inferior medium for the transmission of emotions, as compared with offline ADR. Rather, emotions are expressed in a different way as they emerge in off-line, face-to-face environments. In this line, ODR experts suggest that online communication culture has developed its own paralinguistic cues to express emotions i.e. through special characters, emoticons, use of capital letters, etc.).²⁵⁴

Sixth, concerning the misgivings about the limited power of the mediator in written communication as compared to face-to-face interaction, studies indicate that various online applications may provide practitioners with new tools to improve their skills and promote the process. Some have argued, for example, that asynchronous communication even contributes to the ability of the mediator to carry out his task more effectively. In Hammond's study, all the mediators agreed that online communication contributed to their ability to focus on the general picture and not on the specific interaction at any given moment.²⁵⁵ All the mediators agreed that the asynchronous communication allowed them time to react, which they capably exploited to prepare their responses and questions to the parties.²⁵⁶ Most of them reported on the benefit of their ability to observe the changes and shifts in the documented interaction and use the time slot for outside consultations before reaching a decision.²⁵⁷ The ability to consult others is especially important in divorce cases involving violence.²⁵⁸

The possibility of performing certain tasks better in an online environment in comparison to the environment of traditional mediation may provide new opportunities for effective communication and interaction, thereby constituting a basic justification for online mediation and a satisfactory answer to those who argue that this process limits, or partially limits, the mediator.

²⁵⁴ Poblet & Casanovas, *supra* note 166, at 152.

²⁵⁵ Hammond, *supra* note 198, at 275.

²⁵⁶ *Id.*

²⁵⁷ *Id.*

²⁵⁸ See *supra* notes 156–58 and accompanying text.

In conclusion, technology is no longer a marginal tool. On the contrary, thanks to its advantages, complexity, and capabilities, it has assumed its place as still another, more natural partner in dispute resolution, to the point that it has been metaphorically defined as “the fourth partner in the process.”²⁵⁹ In divorce cases involving violence, this partner has the intrinsic potential to eliminate the disadvantages of traditional mediation by contributing its own unique and independent advantages; the alleged disadvantages of this process can be counteracted using a variety of coping methods that have been enumerated previously in this chapter.

V. RECOMMENDATIONS

In divorce cases involving violence, despite its limitations, the process of mediation has additional value when compared to the adversarial system.²⁶⁰ This Article proposes e-Mediation as an upgraded model of traditional mediation, one that may eliminate the fundamental disadvantages of traditional mediation, offer independent, unique advantages of its own and therefore serve as a genuine tool and pain-relieving solution in disputes of this type.

The proposed model is an online and voluntary mediation process, used only if the victim agrees to it.²⁶¹ This Article recommends the gradual and intelligent adoption of the process. Intelligent adoption in this case means taking into account the relevant information available throughout the world in order to learn from the experience of others and avoid the mistakes of beginners. Gradual adoption refers to conducting a pilot study, offered to the public at a reduced price in a limited number of cases and offered by official service providers and mediators who

²⁵⁹ See “the ‘fourth’ party in dispute resolution,” ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* 93–116 (2001).

²⁶⁰ See *supra* note 29 and accompanying text.

²⁶¹ See Thompson, *supra* note 3, at 622 (“Mediation should never occur against the wishes of a victim. Mediating a domestic violence case against the wishes of a victim undermines her ability to protect herself and denies her capacity for self-determination.”).

have undergone proper training in the field. Gradual and intelligent adoption is a cautious and worthwhile process, especially in light of the fledgling status of online mediation in the specific area of family law.

Regarding the training and proficiency required of mediators in this process, their very choice of such a complex and sensitive type of dispute (divorce cases involving violence) dictates first that they undergo the same training as traditional mediators who deal with this type of dispute.²⁶² This Article recommends that training include information and advice about ways to ensure the security of the process itself, the safety of the participants (both during and after the process), as well as the option of involving external sources that may contribute to its success.²⁶³ Training is intended to help the mediator understand the dynamic of domestic violence and learn the following: unique techniques for working with such families and for dealing with power imbalance; detecting the presence of violence; taking cautionary measures; building a safe program; and contending with the community attitude towards the problem. This training should be accompanied by requirements of experience and seniority in practicing mediation under supervision.²⁶⁴

A mediator practicing e-Mediation should be required to be skilled and capable at creating effective communication in a virtual workplace. The introduction of the fourth party, technology, obligates the third player, the online mediator, to be innovative and to master skills, knowledge, and strategies.²⁶⁵ For example, the

²⁶² Training programs for mediators on the subject of divorce cases involving violence have gained momentum around the world. Pearson notes that 79% of the centers offering training programs for mediators report that their mediators participate in interdisciplinary professional forums and training sessions dealing with domestic violence. Pearson, *supra* note 34, at 324.

²⁶³ Knowlton & Muhlhauser, *supra* note 29, at 265 (“If safety concerns emerge from the mediation process, particularly in post-dispositional cases, the mediator must have an immediate plan of action ready to assess the problem and must be ready to refer the case to the appropriate agency in order to diminish the harm to the parties or their children.”).

²⁶⁴ Ver Steegh, *supra* note 3, at 190.

²⁶⁵ Tyler & McPherson, *supra* note 8, at 27.

principal skill required of the online mediator is the ability to translate the same techniques required of the traditional mediator to the online environment. Creation of a work environment and process in which the parties feel safe and are willing to speak openly and cooperate in an effort to reach a fair settlement presents new challenges for the neutral party in an online process.²⁶⁶ The main challenge of the online mediator is the utilization of the technological tools and knowledge at his disposal to achieve the goals of the process (online and traditional) and to derive additional benefits over traditional mediation. This is done by using the classic skills of the traditional mediator, which take on a distinctive quality when transferred to the virtual media.²⁶⁷

Nevertheless, the issue of training mediators in the online process is still in a developmental stage and requires further development. There are still no widely accepted standards regarding the content or style of the training.²⁶⁸ Rule, for example, suggests that professionals who practice online dispute resolution undergo a process of study, simulated practice, a period of mentoring by an experienced professional in the field, participation in discussion groups with other professionals on the subject of ethics, and receipt of feedback from other colleagues in the field.²⁶⁹ The Mediation Room, an online dispute resolution service, is the first, and possibly the only one, to offer actual courses in practical training in managing online dispute resolution processes.²⁷⁰ The British Columbia Distance Mediation Project, which provides training and other support for online dispute resolution, has suggested guidelines for online mediation, which they claim can serve as a basis for any training program for practitioners of online

²⁶⁶ *Id.*

²⁶⁷ Katsh and Rifkin, for example, present three final objectives that must characterize, in their view, every mechanism of dispute resolution: convenience, trust, and expertise. This model is known as “the triangle model.” According to them, every practical system has to be convenient to use, provide a sense of trust and safety and provide expert services. *See* KATSH & RIFKIN, *supra* note 259, at 73.

²⁶⁸ Ebner, *supra* note 1, at 393.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

mediation.²⁷¹ These guidelines are meant to supplement a basic training program for mediators (traditional mediation) and they include: the suitability of e-Mediation for specific cases; choice of appropriate technology; managing confidentiality and security; and expertise in online communication.

On the other hand, some claim that reinventing the wheel is unnecessary, and that the e-mediator must meet the standards of traditional mediators, plus the modifications dictated by the technological workplace, which do not require specific training.²⁷² In any case, the challenge does not lie in use of the web in order to duplicate a regular dispute resolution environment. Rather, the challenge lies in expanding creative thinking and the search for original modes and methods of dispute resolution while increasing user satisfaction in the online environment.

This Article also proposes the adoption of mechanisms for evaluation and control, as practiced in various locations around the world, regarding online dispute resolution programs,²⁷³ i.e., periodic evaluation of the general effectiveness of the programs. Such evaluation should be made by independent, outside evaluators who ideally took part in the design of a pilot study. Control of the program is an ongoing process of data collection that enables those in charge of the program to oversee the quality of the program and at the same time provide supervision to the mediators. Evaluators should design the evaluation tool and control system to measure success in terms of achievement of the goals of

²⁷¹ *Id.*

²⁷² See S. Summers Raines, *Mediating in your Pajamas: The Benefits and Challenges for ODR Practitioners*, 23 CONFLICT RESOL. Q. 359 (2006). On the other hand, some claim that online mediation involves another 'style' which differs from traditional mediation, and this is not just an addition to the toolbox of the traditional mediator, but requires practical training for the acquisition of skills and capabilities that are not familiar to the traditional mediator. The Distance Mediation Project report claims that the absence of this training may create deficiencies, confusion, and incorrect applications of the techniques by e-mediators. See Colleen Getz, *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*, Victoria, BC British Columbia Mediator Roster Society, 3 (2010).

²⁷³ Gramatikov & Klaming, *supra* note 127, at 108.

the online process,²⁷⁴ elimination of the disadvantages of traditional mediation (in divorce cases involving violence), and the realization of the unique and independent advantages of online mediation as described in Part III.

Systems for the evaluation and control of e-Mediation must focus on collecting data directly from the parties. The systems should use an online questionnaire regarding their impressions of the online mediation process itself and their level of satisfaction from the outcomes. The questions can be designed to yield information regarding every aspect of the e-Mediation process. After the data has been collected and analyzed, mediators can use the feedback to improve the online mediation program.

In divorce cases involving violence, online mediation may, with the mediator's recommendation, take place concurrently with face-to-face mediation or as an addition to other tools at the parties' disposal. This Article does not claim that online mediation is suitable for all divorce cases involving violence, or that it is flaw-free. On the contrary, every case must be examined on its own merits and the relevant treatment approach chosen. "Cookie cutter responses, or one-size-fits-all solutions, will not do."²⁷⁵ The professional literature, particularly in recent years, notes that defining one prototype of domestic violence is not possible,²⁷⁶ and the typology of each type of violence is relevant to the choice of an appropriate solution on a case-by-case basis. Processes are not merely forms. They are meant to advance ends pertaining to human needs and they are not inherently sacred. Nevertheless, one of the scholars correctly noted that "[w]e should be using every

²⁷⁴ For example, Katsh and Rifkin's 'triangle model.' KATSH & RIFKIN, *supra* note 259.

²⁷⁵ Greenberg, *supra* note 19, at 603.

²⁷⁶ *Id.* Greenberg presents the diagnosis of Janet Johnston, who defined five typologies of domestic violence: Ongoing or male episodic battering, female-initiated violence, male-controlled interactive violence, separation and post-divorce violence, and violence stemming from psychotic and paranoid reactions. *Id.*

tool at our disposal to identify and help victims of domestic violence.”²⁷⁷

VI. CONCLUSION

Ongoing violence takes place in at least 25% of American homes.²⁷⁸ Violent behavior between intimate partners occurs every fifteen seconds in the United States.²⁷⁹ Behind these dry figures and numbers there are always people, victims of violence who contend with suffering, dread, and real danger on a daily, even hourly basis. For them, the existence of a viable, accessible, worthwhile, and effective option to end a destructive relationship is a real and essential necessity, so that the expression ‘till death do us part’ does not become a chilling reality. This Article explores another alternative: “until cyberspace do us part.”

Cyberspace has great potential and years worth of experience in dispute resolution between individuals, including family law and divorce cases. Online mediation, in disputes of this type, offers the parties the benefit of traditional mediation (rather than the judicial procedure), while eliminating the shortcomings of traditional mediation.

Online mediation has many inherent, independent, and unique advantages of its own, such as efficacy and speed, simplicity and convenience, lower cost, empowerment of the weaker party, and additional advantages of distant, asynchronous, netocratic and written communication. The positive implications are, primarily, for the victim of violence. Aside from the advantages of distance

²⁷⁷ Jeske, *supra* note 3, at 671–72.

²⁷⁸ See Ver Steegh, *supra* note 3, at 148.

²⁷⁹ Jeske, *supra* note 3, at 670 (“One out of nearly every three women will be the victim of domestic violence in her lifetime. Further, the Centers for Disease Control and Prevention report that United States women experience two million injuries from domestic violence annually. It appears this trend has filtered down to younger girls, who may later become ensconced in the dynamics of domestic abuse and face child custody issues as well. Indeed, it is reported that approximately one in three adolescent girls in the United States is a victim of physical, emotional or verbal abuse from a dating partner.”)

and speed, written and asynchronous communication may provide a number of benefits, including a more equitable balance of power and a reduction in hostility.

This communication may even provide the online mediator with new tools and a variety of online applications to improve his performance in conducting the process (for instance, the ability to advance the balance of power between the parties), and upgrade existing technologies. Moreover, through the advantage of distance, the mediator may open the way to cases that, without online mediation, would be disqualified after preliminary screening for mediation. The very ability to choose e-Mediation as an additional option in the termination of a marriage may constitute, for many victims, an important lifeline, and significant milestone on the road to regaining control over their lives and breaking out of the cycle of oppression and violence.

Various issues pertaining to the use of e-Mediation in family law in general, and divorce cases involving violence in particular, still require clarification and point to the need for future writing on the subject, such as the subject of training of e-mediators, which is in the developmental stage and requires further development.²⁸⁰ The same applies to the question of the standardization required (in order to set guidelines and develop ethical codes in the field) and to a question of accreditation that deals with a number of secondary issues.²⁸¹ Accordingly, this Article's recommendation is to examine the option of adopting a reasoned, gradual model of online mediation for divorce cases involving violence, and to establish ongoing mechanisms for monitoring and control of the field is, in many ways, only the beginning. It is the hopeful beginning of a discourse about the design and construction of the

²⁸⁰ See *supra* notes 261–72 and accompanying text.

²⁸¹ See, e.g., “Standards for the Practice of Online Dispute Resolution” published by the N.C.T.D.R. (National Centre of Technology and Dispute Resolution) which relies on various standards that were adopted by organizations such as 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 and others.

incorporation of e-Mediation into the broad range of solutions that should be available to the victims of divorce cases involving violence. This Article mainly seeks to stress the hidden potential of e-Mediation, as an important part of the array of such solutions. Even the mediation sessions are virtual, the pain of the victim never is. Clearly, society must relentlessly pursue humane solutions and better procedures for dealing with divorce cases involving violence. This will reduce the painful experiences of the victims and their children.