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FAMILY LAW ONLINE: THE IMPACT OF
THE INTERNET

I. Introduction: The Effect of the Internet on Family Law Practice

It is impossible to fully appreciate the impact the Internet has had on the legal profession. From its humble beginnings, the Internet has evolved into a vast communications medium, providing hundreds of millions of people worldwide with the ability to instantaneously share information.¹ Not surprisingly, the Internet has commonly been referred to as “the biggest advent in communications since the invention of the telephone.”² Len Kleinrock, a pioneer of Internet technology at the Massachusetts Institute of Technology, once commented that, “The Internet will become transparent to us . . . it will be everywhere, always available and not in our face, just like electricity.”³ He was right. Today, the Internet is everywhere. From homes to libraries, the workplace to cell phones, the ability to access e-mail or connect to the Internet is just seconds away. The advantages of e-mail are now widely understood, but e-mail is only the beginning of the Internet’s communications tools.⁴

The Internet makes it easier for lawyers to communicate not only with other lawyers within a firm, but with clients as well. Extranets, or private, secure areas of the Internet, facilitate cooperation between those who are geographically separated or just find them easier to use than older, traditional methods of working with one another.⁵ Beyond providing a cyber forum that allows clients and attorneys to communicate, the Internet serves as an excellent research tool. As the quantity and quality of free

¹ Adam Wolf & Hilary Greer Fike, *Surfing the Internet and the Practice of Family Law*, 29 COLO. LAW. 63 (Mar. 2000).

² *Id.*

³ *Id.*; see also *The Internet and Beyond*, at http://www.cbsnews.com/stories/1999/08/31/tech/main60541.shtml?source=search_story

⁴ Jerry Lawson, *Trial Research? Marketing? The Net Changes Everything*, American Bar Association General Practice, Solo & Small Firm Division, Fall 1999, at <http://www.abanet.org/genpractice/solo/1999/fall/lawson.html>.

⁵ *Id.*

legal research sites continues to increase, it becomes clearer that legal researchers who utilize the many benefits of the Internet are gaining a competitive advantage over those that rely solely on books and older online services.⁶

Today's Internet savvy culture is more computer literate than ever before, and all signs point to a continued growth in a wide variety of areas, especially among the legal profession. The demographic shift towards more visually oriented legal consumers is already well under way.⁷ Those born after 1977, the so-called "Generation Y" or Internet Generation, are "growing in economic power," accounting for thirty percent of the total population.⁸ More importantly, its members have "never known a time without television, radio, satellite broadcasts, microwaves, computers, game systems, and the Internet."⁹ It is no surprise then that this demographic has become a target market for many computer-related products, including those that integrate technological innovation with the legal profession. The creation, availability, and acceptance of legal software and self-help books allow individuals to handle routine legal matters, such as drafting a will, creating a power of attorney, and preparing the documents necessary for a divorce . . . all without ever needing to speak to an attorney.¹⁰

To not only attract new clients, but to keep their existing ones, law offices need to fight more effectively and efficiently than ever before, and must do so by developing new and innovative ways to offer "high-quality legal services at a reasonable cost."¹¹ The implementation of such technological advancements as computers, networking, e-mail, law firm websites, and other legal billing software programs are no longer just luxuries for large firms.¹² Led by smaller firms in their attempt to bridge the technological gap that separates them from large firms, firms of

⁶ *Id.*

⁷ Dick Dahl, *Web Site Videos by Lawyers Become More Common*, 22 MO. LAW. WKLY. 203 (Mar. 3, 2008).

⁸ *Id.*

⁹ *Id.*; citing Larry Bodine in his Law Marketing Blog, available at <http://blog.larrybodine.com>.

¹⁰ Alan R. Nye, *Ten Things Maine Lawyers Should Know About the Internet*, 14 ME. B.J. 196 (1999).

¹¹ *Id.*

¹² *Id.*

all sizes are rapidly improving the technological services they have to offer.

The advent of the Internet has had a profound impact on how lawyers interact with clients, how law firms of all sizes operate, and what services they offer. The Internet has significantly changed the way lawyers practice law, and has greatly complemented lawyers' practices that handle adoptions or offer online mediation services. The Internet will undoubtedly continue to change the way lawyers practice, and lawyers must continue to not only adapt, but strive to develop novel ways to stay on the cutting edge of technological innovation.

II. Lawyers and Their Informed Clients

The availability of the Internet has had a dramatic impact on how lawyers practice law. With just the click of a mouse, documents, files, and other information can be shared instantly via e-mail, thus accomplishing the dual task of both saving time and drastically reducing costs. Today, the average desk worker receives approximately fifty e-mails each day.¹³ New ways of creating and storing information continue to emerge, and it is now estimated that "more than ninety percent of all documents today are created electronically."¹⁴ Acknowledging this trend, in December 2006, the Federal Rules of Civil Procedure enacted amendments to certain discovery rules, including pretrial conferences, interrogatories, production of documents, and subpoenas.¹⁵ As a result of these amendments, "attorneys should be much more involved in the preservation and collection of electronically stored information," and should discuss with clients how they store their electronic information, how the information can be accessed, and the procedures they will take to accomplish this.¹⁶ Failing to consult with clients about their electronic infor-

¹³ Katherine W. Wittenberg, *Technology Gives Federal Rules a Big Shove*, American Bar Association, Section of Litigation, Dec. 2006, available at http://www.abanet.org/litigation/litigationupdate/2006/december_hottopics.html.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

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mation can be disastrous, and huge sanctions and penalties can be (and have been) imposed.¹⁷

As the use of e-mail continues to become a widely accepted means of communication, software developers have created programs that allow “e-mail communications and addresses to be compiled and used in databases and other malleable formats.”¹⁸ Microsoft Outlook, for example, is a program that allows e-mail to be accessed at a work computer, externally accessed by another computer through the Internet, or through a cell phone that has a Microsoft Windows compatible software program.¹⁹ New computers, whether for home or work, now come equipped with Microsoft Outlook or a similar program as part of a standard software package.

Perhaps the greatest impact the Internet has had on the family law profession has been the ability to perform “comprehensive and cost-effective legal research.”²⁰ The Internet has provided lawyers with the ability to have available at their fingertips a number of websites, databases, statutes, and search engines, all of which contain valuable information. Instead of using expensive legal research software for every inquiry, attorneys skilled and efficient with computers and the Internet are able to access numerous local, state, federal and other websites that allow them to save both time and money, ultimately reducing costs to both attorneys and clients.²¹

Attorneys are not the only ones who are aware of this. The availability of the Internet and access to it is at an all time high, and is evidenced by people being wired through their homes, jobs, schools, libraries, coffee shops and bistros, restaurants, cars, and even their cell phones.²² Today, computer savvy people use

¹⁷ *Id.*; citing *Coleman (Parent) Holdings, Inc. v. Morgan Stanley & Co.*, 2005 WL 679071 (Fla. Cir. Ct. 2005) (awarding the plaintiff \$1.4 billion in damages after finding that Morgan Stanley’s discovery failures were deliberate and in bad faith).

¹⁸ Wolf, *supra* note 1, at 65.

¹⁹ Microsoft Outlook and Microsoft Windows are registered trademarks of the Microsoft Corporation. For more information, see the company’s website at <http://www.microsoft.com>.

²⁰ Wolf, *supra* note 1, at 65.

²¹ See Missouri Revised Statutes, available at <http://www.moga.mo.gov/STATUTES/STATUTES.HTM>.

²² Nye, *supra* note 10, at 197.

the Internet for far greater purposes than research and have the ability to run virtually all aspects of their lives online. Whether it is using online banking to create a monthly budget, trading stocks, or getting breaking news updates via e-mail, people have managed to fully integrate the Internet into their everyday lives.²³ By becoming comfortable with the Internet, clients are able to use the Internet to their advantage by performing their own online research before even contacting an attorney.²⁴ As a result of such independent research, the Internet has enabled clients to enter the office better prepared, more informed, and ready to proceed with their case.

From e-mail access to the accessibility of the Internet, it is clear that “technology is changing both the way lawyers practice law and the way individuals obtain legal services.”²⁵ Many websites and online blogs offer legal advice, statutes, case law, and even the required legal documents for little to no charge.²⁶ While potentially very helpful, people should be cautious when dealing with these sites. Although some websites may be reliable, many are not, and even the reliable sites may not be accurate or up-to-date. Statutes and case law are continuously changing, and while the Internet allows these changes to be available online rather quickly, that is not always the case. Many online blogs often go weeks or months (or even longer) without being updated. An online blog, even if written by a licensed attorney, may serve as little more use to the client than a conversation at a cocktail party. The information found online may be inapplicable to the client’s case, outdated, for the wrong jurisdiction, or just wrong altogether.

In addition to legal research, the legal software market is flooded with programs that produce wills, leases and other real estate documents, business documents (such as the articles of incorporation), information and other guidance through divorces, and “more legal contracts than any one person is ever likely to

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*; The author references the ‘Lectric Law Library, available at <http://www.lectlaw.com>. For another comprehensive website, see the Legal Information Institute at Cornell University Law School, available at <http://www.law.cornell.edu>.

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need.”²⁷ This infiltration into the legal profession has raised concerns among lawyers throughout the country that legal software companies are participating in the unauthorized practice of law, that the public is in need of protection, and the use of legal software may deter potential clients from using their services.²⁸ As a result of such fears, a number of lawsuits have been initiated against software publishers, accusing them of engaging in the unauthorized practice of law.²⁹ These lawsuits have left courts asking, “What constitutes the unauthorized practice of law?” In an attempt to answer this question, the American Bar Association’s Non-lawyer Committee has developed a three-pronged balancing test that suggests evaluating the software by: “(1) assessing the risk of harm to the consumer; (2) assessing the ability of the recipient to evaluate the provider’s qualifications; and (3) determining whether regulation would produce a net public benefit.”³⁰

With legal software, the person can access the program at any time and from any place, thus making life easier since there is “no need to make an appointment with a lawyer, take time off work, fight traffic or pay high legal fees.”³¹ While legal software may appear cheaper, it may be quite the opposite in the long run. Many software packages provide standard, boilerplate forms, as opposed to the tailored services an attorney can provide. While helpful in establishing the basic rules of law, these packages may not address the specific details of the client’s case. Relying on boilerplate information, a client may form misconceptions about the law. If the client meets with a lawyer about his or her case, it may take some time for the lawyer to clear up these misconcep-

²⁷ *Id.*

²⁸ Steve French, *When Public Policies Collide . . . Legal “Self-Help” Software and the Unauthorized Practice of Law*, 27 RUTGERS COMPUTER & TECH. L.J. 93 (2001).

²⁹ *Id.* See *Unauthorized Practice of Law Comm. v. Parsons Tech., Inc.*, No. Civ. A. 3:97CV-2859H, 1999 WL 47235 (N.D. Tex. Jan. 22, 1999) (holding that Quicken Family Lawyer software is in violation of the Texas unauthorized practice of law statute). Subsequent to filing the appeal, the Texas statute was amended, and the previous judgment was vacated.

³⁰ *Id.* at 121, citing AM. BAR. ASS’N COMM’N ON NON-LAWYER PRACTICE, NON-LAWYER ACTIVITY IN LAW-RELATED SITUATIONS: A REPORT WITH RECOMMENDATIONS, 9 (Aug. 1995).

³¹ Nye, *supra* note 10, at 197.

tions. Further, if the client relies on the wrong law prior to speaking with a lawyer and has his or her case heard by the court, two costly results may happen: first, even if the client obtained a favorable result, it may not have been the best result; and second, the court may rule against the client, making it costly if the client chooses to hire a lawyer for an appeal. As time goes by and laws change, software often lacks the capabilities to update on its own. Even the most accurate software, unless updated, can become virtually worthless, and ultimately costly.

Rather than fearing legal software programs, lawyers may be able to capitalize on them by providing ancillary services, such as reviewing the documents produced by the software program to make sure it complies with the rule of law in that jurisdiction.³² Ultimately, to survive financially, lawyers must use technology and the Internet to offer clients more information and specific advice than they might receive in a self-help book, an inexpensive software program, or on a legal website.³³

III. Ways the Internet Complements Legal Practice

The Internet complements the legal practice in numerous ways. Law firms of all sizes are taking advantage of the vast resources the Internet has available, including: “(1) customized and reasonably priced marketing; (2) instant and cost-effective communications (e-mail); (3) cost-effective (often free) legal research; (4) subject-specific mailing lists; and (5) electronic filing of court documents.”³⁴ Attorneys can use the Internet as a powerful marketing tool. Law firms of all sizes understand that people use the Internet as a tool for finding an attorney, and capitalize on this by using the Internet to attract potential clients. A 2001 survey of law firm websites shows that seventy-seven percent of law firms have an online presence.³⁵ Today, as society has

³² *Id.*

³³ *Id.*

³⁴ Wolf, *supra* note 1.

³⁵ Lexa Gondolfo, *Incorporating a Website into Your Marketing Strategy: Getting Your Solo Practice or Small Firm Online*, 3210 Consulting, LLC, (2001), available at http://3210consulting.com/resources/lawfirm_website.cfm. 3210 Consulting, LLC, is a Washington D.C. based full service website design, software development, and online marketing company.

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become more connected and people have become better acquainted with the Internet, that number is sure to be much higher. Potential clients are drawn to eye-catching websites, many of which feature Question and Answer sections, helpful links, pod-casts, or even videos. Law firms realize that people want to know about the attorneys that will be representing them and provide information about their attorneys on their websites.

Law firms also understand that potential clients need to be able to find their website. One way for attorneys to attract potential clients is by advertising their services on the Internet. Law firms frequently place advertisements on popular websites that relate to the services they provide. Divorce Magazine, for example, is a popular website that describes itself as the “Internet’s leading divorce and separation resource site” and provides information, articles, advice about divorce, children, and other family law related issues.³⁶ By simply selecting one of the states listed on the homepage, a potential client is able to find a lawyer’s website instantly.³⁷ Mediate.com, a website that focuses on mediation and dispute resolution services, provides articles, blogs, links to various training resources, as well as a feature called “Locate a Mediator” which, upon inputting the requested information (i.e., area code, state, or type of practice), will yield a list of mediators.³⁸

Another way for a client to find an attorney is through the use of a search engine. Internet search engines such as Google and Yahoo! are the modern equivalent of the telephone book.³⁹ Using a search engine is a quick, easy, and inexpensive way to obtain a list of lawyers. In fact, when searching for new products or services, an estimated eighty-five percent of Internet users turn to search engines.⁴⁰ To conduct a search using a search engine, a person begins by inputting information into the search

³⁶ Divorce Magazine, available at <http://www.divorcemag.com>.

³⁷ *Id.*

³⁸ Mediate.com, Solutions for Conflict, is powered by Resourceful Internet Solutions, Inc., at <http://www.mediate.com>.

³⁹ Google is a trademark of Google, Inc. Their mission is to organize the world’s information and make it universally accessible and useful. For more information, see <http://www.google.com> and click on the “About Us” section. Yahoo! is a registered trademark of Yahoo!, Inc.

⁴⁰ Search Engine Marketing, 3210 Consulting, LLC, at: <http://3210consulting.com/services/sem.cfm>.

box. Based upon that information, a list of links that match the inquiry will populate. When the list appears, an attorney may be lucky and have his or her name appear near the top of the list. At the same time, however, the attorney's name may also end up near the bottom of the list, or possibly even on a separate page. When using a search engine, users tend to choose one of the top three links that appear in the search results, and often fail to look beyond the first page.⁴¹ Law firms can benefit from these searches by paying for what is known as search engine optimization. Search engine optimization is a process that puts the attorney's name at or near the top of the list, thus improving their marketing plans and generating more business. The list that appears is the result of many complex algorithms and other common methods such as "using a search term repeatedly in the text and metatags of a site, "scraping" (i.e., copying) prominent text from popular sites, and creating multiple related websites whose only purpose is to provide links to one another."⁴²

Attorneys also implement the Internet into their practices by obtaining and using evidence they find online. Whether clients or their opposition realize it, the Internet creates a virtual paper trail that may contain incriminating evidence. People should be cautious when using social networking sites, especially ones that contain public discussion forums or allow their members to post photographs, blogs, or videos, since these are easily discoverable and may later be used against them. Popular websites such as AutoAdmit, Facebook, and Myspace are proving to be valuable discovery tools for attorneys.⁴³ In June 2007, two Yale law students filed a lawsuit in the federal district court of Connecticut against Anthony Ciolli and a number of anonymous bloggers on AutoAdmit's website.⁴⁴ The lawsuit claims that the

⁴¹ *Id.*

⁴² Jeffrey D. Goldman & Eric J. German, *Pollution in the Blogosphere: The Only Purpose of a New Form of Blog, Called a Splog, Is Fraud and Infringement*, 30 L.A. L.A.W. 32, 35 (June 2007).

⁴³ AutoAdmit is a trademark at <http://www.autoadmit.com>. Facebook is at <http://www.facebook.com>. Myspace is a registered trademark at <http://www.myspace.com>.

⁴⁴ *Doe v. Ciolli*, 307CV00909 CFD, is available through the *Wall Street Journal* at <http://online.wsj.com/public/resources/documents/aaComplaint.pdf>. Note: the defendant Anthony Ciolli has been voluntarily dismissed from the lawsuit. For the latest information on this case, see Isaac Arnsdorf, *AutoAdmit*

students have suffered, among other things, “serious emotional distress” as a result of the “defaming, threatening, and outrageous” comments against them.⁴⁵ Because these statements were posted on a public forum, they left a virtual smoking gun, and could potentially be used as evidence against the defendant.

In the family law setting, information obtained through social networking sites is also being used as evidence in a variety of cases, especially in abuse-prevention hearings.⁴⁶ Information gathered from social network sites provides lawyers with an insight into people’s lives. Even if information cannot be admitted as evidence due to hearsay or authentication issues, these sites can help the lawyer throughout the discovery process by guiding the lawyer in asking questions or requesting certain documents that may not have otherwise been detected.⁴⁷

The ability to research, obtain evidence, communicate, and market their services has greatly changed the way lawyers practice law. This is true regardless of the area of law in which an attorney practices. However, the Internet has had an especially profound impact on the adoption world. Adoption Online, established in 1995, was the first Internet site for adoption, and is responsible for the world’s first successful Internet assisted adoption, which was completed in March 1996.⁴⁸ Adoption websites describe the adoption process in great detail, covering everything from defining commonly used phrases and terminology, suggesting classes and workshops to attend, to providing a reading list of books and other literature to better familiarize readers with the process. Adoption websites often assist families by placing Dear Birthparent letters and photos on the Internet for potential birthparents and their legal representatives to find.⁴⁹ They further provide customized search tools and advertisements, and also network extensively to aid those in the adoption

Case Moves Forward, YALE DAILY NEWS, Jan. 31, 2008, available at <http://www.yaledailynews.com/articles/view/23231>.

⁴⁵ *Id.*

⁴⁶ Noah Schaffer, *Family Law Changed by Social Networking Sites*, 22 MO. LAW. WKLY. 202 (Mar. 3, 2008) (discussing with Laura M. Unflat how the practice of family law is changed by social networking sites).

⁴⁷ *Id.*

⁴⁸ Adoption Online, at www.adoptions.com (last visited Apr. 5, 2008); AdoptionOnline.com is part of the Adoptions.com family of websites.

⁴⁹ *Id.*

process. Adoption Online and many other online adoption websites, however, caution that they are not licensed child placement agencies, and do not provide many of the services required in order to complete the adoption process. The adoption process is far more complex than many people realize, and numerous legal barriers exist. A number of legal requirements, such as a home study, either by the state of residence or by the state in which the adoption will occur, still need to take place.⁵⁰ Attorneys that specialize in adoptions are able to assist future parents with these requirements, and should provide the necessary information and services to do so.

Calling itself the “Internet’s central location for Adoption Information, International Adoptions, Special Needs Adoption, Adoption Articles and Waiting Child Photolistsings,” RainbowKids.com is an adoption advocacy website.⁵¹ Informative and interactive, RainbowKids.com (RK as it is referred to on its website) is the largest and oldest online website helping people to adopt from multiple countries, as well as the largest photolisting website for awaiting children.⁵² RK offers guides, free of charge, on “Special Needs Adoption, How To Adopt, Getting Started, After you Adopt and much more.”⁵³ While not an adoption agency itself, RK is supported by over seventy adoption agencies that share the vision of joining families together.⁵⁴ Because of this support, RK is able to offer all information and resources free of charge, furthering their goal in hopes that “many more children will find their way home.”⁵⁵

These are just two examples of the many websites dedicated to the adoption process. Thanks to websites like these, potential parents are able to gain a better understanding of the adoption process, often at little to no cost. These websites provide numerous answers to the seemingly endless number of questions that hopeful parents undoubtedly have. Even if they do not find all of their answers online, if parents become better informed and

⁵⁰ *Id.*

⁵¹ RainbowKids.com, at <http://www.rainbowkids.com> (click on the About Us section) (last visited Apr. 5, 2008).

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.*

more knowledgeable about the adoption process, it will help when they do meet with an attorney to reduce the costs of an already extraordinary expensive process. While wanting to reduce costs in and of itself is not a bad thing, people need to be careful that they obtain the correct information. The Internet provides an unprecedented wealth of knowledge that lawyers and clients alike need to explore. Lawyers should be careful and conduct their own research and never rely solely on a client's independent research.

IV. Online Mediation

Lawyers have an obligation to their clients to not only look for, but also to develop and utilize tools that will aid in achieving their clients' goals. One tool lawyers can turn to is the use of online mediation to resolve conflicts. In a society that relies as much on the Internet as today's technologically-dependent culture, attorneys need to not only be aware of online mediation, but should consider implementing it into their practices. Mediating online implements the same practices as traditional mediation, but creates a virtual meeting place for the parties. Online mediation can be as simple as an exchange of e-mails, as complex as high-bandwidth video-conferencing, or anything in between. Mediating online has many advantages and may potentially "provide the key that unlocks their [client's] dispute."⁵⁶

To fully understand online mediation, it is important to first understand the concept of online dispute resolution. ODR, as it is commonly known, "at its most basic level . . . is any method by which parties attempt to resolve disputes online."⁵⁷ ODR is based on the premise that every model of dispute resolution involves generating, communicating, evaluating, processing, and managing information, and has been described as the "computer mediated communication analogue of ADR [alternative dispute

⁵⁶ JAMES J. ALFINI ET AL, *MEDIATION THEORY AND PRACTICE: SECOND EDITION* 648 (LexisNexis Group, 2006), citing Jeffrey Krivis, *Taking Mediation Online*, *DISPUTE RESOLUTION MAG.*, Summer 1998, at 25.

⁵⁷ Sarah Rudolph Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 *U. Tol. L. Rev.* 193, 193 (2006).

resolution].”⁵⁸ ODR applies the tools and resources of cyberspace with the goals and processes of dispute resolution.

The growth of ODR has been developed and refined to address numerous court problems including, but not limited to, “delays, high costs of litigation, and party dissatisfaction with litigated outcomes.”⁵⁹ Initially focused on problems arising out of online activities, due to its unique characteristics, online mediation can easily be applied to many non-commercial disputes, including those involving families.⁶⁰ In an effort to encourage resolution of custody and visitation issues, many states, including Missouri, have adopted policies that require divorcing parents to meet with mediators and attempt to work out financial and custody plans.⁶¹ When mediating family law disputes online, just as in offline mediation, the mediator assists the disputants in developing mutually acceptable solutions to their problems. Absent technology, the online mediation process is virtually identical to its offline counterpart. Generally speaking, online mediation operates under the same premises as traditional mediation practices, namely: “identifying the matters at issue, creating dialogue between the parties, and helping the parties arrive at a mutually agreeable solution.”⁶²

⁵⁸ Llewellyn Gibbons et al, *Frontiers of Law: The Internet and Cyberspace*, 32 N.M. L. REV. 27, 40 (2002).

⁵⁹ Andrea M. Braeutigam, *Fusses that Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 277 (Spring 2006), citing Deborah R. Hensler, *Our Courts, Ourselves: How the Alternative Dispute Resolution Movement is Re-Shaping Our Legal System*, 108 PENN. ST. L. REV. 165 (2003).

⁶⁰ *Id.* at 275.

⁶¹ Missouri Supreme Court Rule 88.02 states that “any judicial circuit may elect to establish a mediation program for child custody and visitation disputes.” For more information on this and other Missouri Supreme Court Rules relating to dissolution, legal separation, and child support, see <http://www.courts.mo.gov/page.asp?id=1002>. In an effort to encourage resolution of custody and visitation issues by parents, pursuant to Missouri Supreme Court Rule 88.02, the 16th Judicial Circuit of Jackson County Family Court Division adopted Local Court Rule 68.12 requiring parties to use mediation as a tool to resolve custody and visitation issues. For more information, see http://www.16thcircuit.org/Orders/orders_localrules.asp.

⁶² Cole, *supra* note 57, at 194.

Like traditional mediation, an online mediation involves the mediator, both parties, and sometimes their respective counsel.⁶³ Mediations typically begin with the mediator giving an opening statement that introduces him or herself to the parties, describes the mediation process, sets forth ground rules on how the mediation will proceed, and identifies the needs, interests, and concerns of the parties.⁶⁴ The parties, empowered and with the help of the mediator, strive to reach an agreement that is a “natural consequence of party self-determination.”⁶⁵ Due to mediation’s unique relationship with the law, the parties can reach settlements that traditionally would not be available in court.⁶⁶ If the parties reach an agreement, they are then able to memorialize the settlement agreement and present it to the court for approval as a binding legal contract.⁶⁷

Because “mediation exists on a continuum from face-to-face to pure online mediation,” mediators and parties can reach mutually agreed upon solutions in a number of ways, including jointly or by caucusing.⁶⁸ Mediating online and communicating via the Internet creates an opportunity for “increased efficiency and greater trust when mediators use private meetings, or caucuses, with the parties.”⁶⁹ Caucusing can prove to be a valuable tool for the offline mediator, but may prove particularly useful in online mediation as well. Problems exist in traditional mediation when one party knows that the opposing party is talking with the mediator without them present, and can “give rise to frustration or suspicion as participants are forced to wait and wonder what is being discussed with the other side.”⁷⁰ Online, however, mediators are able to “caucus with participants concurrently, throughout the process, and without the other’s knowledge of when it is happening.”⁷¹ Because communicating online is done quickly, these fears are erased, delays are reduced, and

⁶³ Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. SCI. & TECH. 715, 716 (2002).

⁶⁴ *Id.*

⁶⁵ Cole, *supra* note 57, at 194.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ Gibbons, *supra* note 58, at 28.

⁶⁹ Braeutigam, *supra* note 59, at 287.

⁷⁰ *Id.*

⁷¹ *Id.*

the flow of ideas and discussions are not disrupted like they are in traditional mediation settings, thus saving both time and expense, while simultaneously promoting efficiency.⁷² Parties can minimize these fears by choosing a mediator they both perceive to be “impartial, perceptive, persuasive, trustworthy, interested, innovative and prepared.”⁷³

People choose to mediate online for a number of reasons. From the numerous cost benefits including the reduction in losses due to taking time off of work and other responsibilities, speed and efficiency purposes, neutralizing power imbalances, the ease of scheduling, the ability to obtain remedies not otherwise available in court, to twenty-four hour access and the privacy that comes with allowing one to mediate from home, the reasons to mediate online seem endless.⁷⁴ Although parties choose to mediate online for numerous reasons, perhaps the most important reason is because of the nature of how the information is communicated. With online mediation, communication occurs primarily in the form of text. Critics of this form of communication claim that “technology transforms mediation into an impersonal process,” which allows for party miscommunication to occur, and ultimately leaves the parties “less likely to trust either each other or the mediator.”⁷⁵ Face-to-face interaction allows parties to communicate quickly, spontaneously, and often through non-verbal communication.⁷⁶ With textual communication, parties and the mediator are unable to rely on non-verbal communication. Absent non-verbal communication, there is an increased chance of miscommunication, which may further increase if cultural or language barriers exist.⁷⁷ While technology seems to impair the mediation process to some extent, it proves to be quite beneficial in certain situations, and is especially beneficial when dealing with family disputes where the parties have a history of negative conflict or when dealing with emotionally-charged issues.

⁷² Gibbons, *supra* note 58, at 43.

⁷³ *Id.* at 27.

⁷⁴ Braeutigam, *supra* note 59, at 287.

⁷⁵ Cole, *supra* note 57, at 202.

⁷⁶ Ethan Katsh, *The New Frontier: Online ADR Becoming a Global Priority*, 6 DISP. RES. MAG. 6 (Winter 2000).

⁷⁷ Cole, *supra* note 57, at 203.

The downfall with working in a solely text-based environment is that the parties are unable to build trust or a good rapport with one another due to the lessened degree of personal involvement. However, the mitigating effect the Internet has on the parties may help avoid a possible impasse. A study published in 2003 by Anne-Marie Hammond found that “the reduced communication cues and textual communication did not significantly impact participants’ experience in online mediation.”⁷⁸ The study revealed that the majority of the parties in an online mediation believed they were able to express themselves and did not feel constrained due to the lack of body language or non-verbal cues.⁷⁹ In fact, many felt more confident and better able to express themselves in writing than through speaking; that the environment was less hostile and that they were able to communicate more honestly and openly; and “found that overall, ODR can be used successfully for resolving disputes.”⁸⁰

While the medium of communication is important, the timing of the communication is equally important. In offline mediation, communication occurs synchronously. This often leads to conflict, especially when the parties are emotionally involved in the dispute. When angry, parties are likely to be vindictive and insult the other party. In online mediation, however, communication occurs asynchronously. Mediators are able to “slow down the process” and assist the parties in drafting more “thoughtful, crafted messages.”⁸¹ The asynchronous nature of online mediation provides parties and the mediator with “their own contemplative, safe place.”⁸² Because communication is textual and not face-to-face, there is often a delay which allows the parties more time and a better opportunity to “think about their disputes and to respond in a manner that will promote resolution to the dispute.”⁸³ Research shows that “two-thirds of e-mail users take

⁷⁸ Braeutigam, *supra* note 59, at 287, citing Anne-Marie Hammond, *How Do You Write “Yes”?: A Study of the Effectiveness of Online Dispute Resolution*, 20(3) CONFLICT. RES. Q. 261, 261-86 (2003).

⁷⁹ *Id.*

⁸⁰ *Id.* at 291.

⁸¹ James Melamed, *Divorce Mediation and the Internet*, 2002, available at <http://www.mediate.com/articles/melamed9.cfm>.

⁸² James Melamed, *Mediating on the Internet Today and Tomorrow*, 1 PEPP. DISP. RESOL. L.J. 11 (2000).

⁸³ Gibbons, *supra* note 58, at 43.

about the same care composing e-mail as they do with memos and letters.”⁸⁴ The resulting communications are clearer, more direct, and better focused on the issues at hand.⁸⁵ Mediating online is an excellent forum when dealing with family problems. Family disputes tend to be emotionally charged and high conflict, a combination that often leads to communication barriers and impasses. Family disputes are unique in that the parties are not strangers to one another (as may be the case with an e-commerce dispute, such as a transaction over eBay). Rather, parties in family disputes have often known and lived with one another for years and are familiar with how the other will communicate. Further, unlike e-commerce disputes where the relationship ceases to exist upon resolving the issues, the parties in family disputes often have an ongoing relationship. When disputes are emotionally charged, the parties have an ongoing relationship (at least to some extent), and the parties are unable to freely communicate, online mediation is a great tool for lawyers to use.⁸⁶

Another reason people prefer to use online mediation has to deal with distance. Distance comes into play in two specific ways: first, by creating distance, and second, by eliminating the distance barrier. Online mediation creates distance by separating the parties and not allowing them to meet face-to-face. This is particularly useful in domestic violence situations and when parties are not able to communicate amicably. Those who are unwilling or unable to meet face-to-face may choose this option and use cyberspace as a buffer. On the other end of the spectrum, online mediation eliminates distance by allowing parties to communicate when they otherwise may not be able to. An example of this is when a divorce occurs and one of the parties relocates to another city or state. When children are involved, the parties will need to maintain contact with one another for a number of reasons that may arise. As children grow older and circumstances change, a modification of the court’s order may be necessary to better serve the children’s best interest. Online mediation allows the parties to work out their issues in a less confronta-

⁸⁴ Braeutigam, *supra* note 59, at 296, citing Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 NEGOT. J. 133 (2000).

⁸⁵ *Id.* at 293.

⁸⁶ *Id.*

tional manner that tends to focus more on the issues at hand and often results in greater success when dealing with these issues.

Distance is an important part of online mediation when faced with a power imbalance or when dealing with parties who handle conflict differently. Without the benefit of communicating online, many people become “conflict-avoidant” and shy away from conflict and make concessions when confronted by the dominant party.⁸⁷ Online, however, an interesting thing happens. Those who are generally passive in social settings, for example, will become assertive in an attempt to project their “best self.”⁸⁸ While a submissive party will generally make concessions offline so as to avoid confrontation with the dominant party, online, with the Internet providing a safe distance barrier, a once submissive party feels a sense of empowerment and will communicate directly, more assertively, and be less likely to make concessions.⁸⁹

While there are certainly many benefits to mediating online, it is not without its downfalls. One drawback of online mediation is that it advantages the computer savvy and those who have access to a computer and the Internet. Technology has enabled the field of mediation to advance tremendously in recent years, however, there are still those who are without computer access.⁹⁰ Some parties simply do not have access to a computer, whereas others who do have access to a computer may not be comfortable using the technology for the purpose of mediating online.⁹¹ Some people would just prefer to communicate in person and may find it easier to communicate with spoken words. Still others prefer to do it online because they believe that communicating electronically allows them to better express themselves by availing themselves of a less-hostile environment. Ultimately, when deciding which forum to use, people should seek a forum which best suits their strengths and one which will best enable them to reach their goals.

⁸⁷ Braeutigam, *supra* note 59, at 293.

⁸⁸ *Id.* at 294, citing Robert Gordon, *The Electronic Personality and Digital Self*, 56 DIS. RES. J. 8, 17 (Apr. 2001).

⁸⁹ *Id.*

⁹⁰ Cole, *supra* note 57, at 206.

⁹¹ *Id.*

The key to online dispute resolution is to facilitate information processing along with efficiencies of transmission.⁹² Mediating online promotes clearer, more focused communication in a less hostile environment, and its attributes make it particularly attractive to high-conflict matters. Because of these advantages, an increased use of mediation programs in courts, and an overarching acceptance of mediation throughout the legal community, authorities believe that both the quantity and variety of disputes mediated online will increase.⁹³

V. Conclusion

Undoubtedly, the Internet has had a profound impact on the legal profession. From its humble beginnings, the Internet has evolved into a vast communications medium which most people in industrialized nations could not do without. The Internet has become transparent, and is in fact everywhere. For attorneys to survive in this highly competitive field, adapting alongside their competitors is not enough. Attorneys need to embrace these technological changes and be at the forefront of innovation. As Michael Dell once said, all businesses must tap into the power of the Internet and those “that don’t embrace these changes will end up road-kill on the information superhighway.”⁹⁴

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⁹² LEONARD RISKIN, ET AL, DISPUTE RESOLUTION AND LAWYERS 780 (Thomson/West, 2005), *citing* ETHAN KATSH, ONLINE DISPUTE RESOLUTION, HANDBOOK OF DISPUTE RESOLUTION 425-437 (2005).

⁹³ Braeutigam, *supra* note 59, at 275, *citing* ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE (2001).

⁹⁴ Nye, *supra* note 10, at 196 n.4; *citing* MICHAEL DELL, DIRECT FROM DELL 217 (1999).

