From Conference Rooms to Chat Rooms: The Need to Protect Confidentiality in Online Mediation

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I. INTRODUCTION

Imagine sitting in a room, door shut, windows covered by just enough curtain so that light shines through but any possibility of seeing in from the outside is non-existent. Within the room there are no microphones, no tape recorders, and no camcorders. All cell phones are turned off. The only people in the room are yourself, the opposing party, and a third person you have never met. The third person, a mediator, informs you and the opposing party that all communications within the mediation are confidential—you are comforted. You want to come to a resolution, but do not want anything that you may say used against you in a future judicial proceeding or publicized to a third party. You are even more comforted because nothing is recorded. There are neither tape recorders to keep a record of your statements nor video cameras to capture your expressions.

Now, imagine sitting at a desk in the comfort of your own home. You have to engage in mediation but the other party is across the country. Luckily, you discover a service online that provides mediation through an electronic interface. There is a relatively small, flat fee and the mediation is conducted asynchronously. The third person, the mediator, informs you and the opposing party that all communications within the mediation are confidential—you are comforted. However, little to your knowledge, the opposing party saves every one of your statements from the mediation, downloads them, prints them, and distributes them to the public. You also discover that the mediation service you were using has saved and used your mediation communications internally within its organization for training. You are distraught, angry, hurt, and yet you have no remedy, no recourse for the wrong that has been committed.

With the rapid pace at which new technologies develop, society has become accustomed to just about any service being provided over the Internet—from grocery shopping to dating. The same is true for legal proceedings. Currently, an individual engaged in a lawsuit can go to a website seeking legal advice, file a claim, see the status of their case, and even attempt to learn the law in order to act pro se.1 The same is true for the various forms of alternative dispute resolution (ADR). Known as Online Dispute Resolution (ODR), processes such as negotiation, arbitration, and mediation can now be conducted online for just about any legal proceeding, ranging from e-commerce to family law.2 However, despite the increasing availability of such services, one must understand that transposing a service typically provided in real time to one that is provided online is no simple task.

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2 For an example of using online mediation in non-commercial disputes, see generally, Rebecca Brennan, Mismatch.com: Online Dispute Resolution and Divorce, 13 Cardozo J. Conflict Resol. 197 (2011). See also, Andrea M. Braeutigam, Fusses That Fit Online: Online Mediation in Non-Commercial Contexts, 5 Appalachian J.L. 275, 298 (2006), examining online mediation as an appropriate forum for family and employment disputes.
While ODR consists of various dispute system processes, this article focuses primarily on the process by which mediation services are provided online. As such, Part II explores the development of online mediation, the various methods in which online mediation is conducted, and the benefits and consequences of participating in online mediation. Online mediation, like traditional mediation, relies on maintaining the confidentiality and privacy of mediation communications in order to ensure that the process is conducted effectively. However, Part III explains how current online mediation service providers’ privacy policies and legislation regarding confidentiality in mediation are inadequate to safeguard against the disclosure of online mediation communications to third parties. As a result, Part IV calls for mediation service providers to develop and utilize technologies that adequately safeguard the privacy of mediation communications. It subsequently calls for the creation of a regulatory framework that would provide minimum requirements that must be adhered to by online mediation service providers in order to ensure the safety of online mediation communications.

II. TRADITIONAL MEDIATION V. ONLINE MEDIATION

Online Dispute Resolution (ODR) has dramatically expanded since it was first introduced in 1996. Initially, ODR was created to deal with disputes that arose from online activities but has since expanded to include offline disputes as well. Despite the skepticism of developing an online forum for dispute resolution, the focus on ODR has shifted from finding parties willing to engage in the process to finding the appropriate tools that can satisfy the level of confidence, trust, and expertise needed in a wide array of contexts. This section first describes how traditional mediation is conducted and the role of the mediator within the context of mediation. It then elaborates on the most prominent technologies that are currently utilized by online mediation service providers and explores the advantages and concerns of mediation conducted online.

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7 KATSH & WING, supra note 5; KENTRA, supra note 3, at 718.
A. Adapting Traditional Mediation Processes to the Internet

Mediation is “negotiation with the assistance of a third party known as the mediator.”\(^8\) The primary function of the mediator is to help facilitate conversation between two parties and to help the parties come to a mutually satisfactory solution.\(^9\) That being said, mediation is a party-driven process whereby the parties create the agreement and propose potential solutions to their dispute.\(^10\) Nevertheless, the mediator may help draft an agreement in the case that the parties have reached a mutually satisfactory solution.\(^11\) The agreement, once signed, becomes a “binding contract [which outlines] the rights and responsibility of the parties.”\(^12\)

An experienced mediator will typically develop tools that aid her in facilitating mediation sessions.\(^13\) One such tool is a “caucus,” which is a meeting held by the mediator with each party to the dispute, individually.\(^14\) Tools such as a caucus help the mediator to identify the main issues of the dispute, facilitate conversation, and help the parties come to a solution.\(^15\) Depending on the type of mediation, a mediator can use her tools to facilitate conversation without providing advice (facilitative mediation), consider the merits of the dispute and inform each party of their possible success (evaluative mediation), or work to foster communication and trust between the parties so that each side has a better understanding of the other’s perspective (transformative mediation).\(^16\) However, despite any form of mediation, the mediator should neither directly propose solutions nor give any type of legal advice.\(^17\)

Online mediation takes the above process and transforms it so that mediation can be conducted through an online interface.\(^18\) Whether a mediator can effectively adapt the same methods and strategies that she uses in real time mediation to online mediation is subject to debate.\(^19\) Nevertheless, many academics have stressed the desire to develop various dispute resolution systems that can be utilized on the Internet to mediate, negotiate, and arbitrate various disputes.
types of conflicts. Despite the call for new design systems, many mediators currently engage in online mediation services through a variety of different platforms.

B. Current Forums Utilized for Online Mediation

The commercialization of advanced technology creates new opportunities for mediation to be conducted online. The shift from the personal computer, to the laptop, to the PDA/iPhone, and now to the Tablet, has generated a multitude of forums on which mediation can take place from a variety of locations. Even individuals who reside in different countries are able to simply log on to their computer and engage in online mediation with an individual half way across the globe. In order to meet the needs of clients, online mediation service providers typically utilize one of four methods to conduct mediation—chat rooms, virtual chat rooms (i.e., video conferencing), e-mail, or password-protected forums.

1. Chat Rooms

A common method of communication over the Internet is through chat rooms or individual instant messaging software providers. For example, the American Arbitration Association (AAA) provides online mediation services in the form of a chat room to clients with claims under $10,000 and that involve only two parties. AAA claims that their online mediation process is effective due to its speed, efficiency, and lower cost than traditional mediation. After contacting AAA, an “experienced AAA Staff Mediator” is assigned to handle the mediation within forty-eight hours. Using AAA chat rooms or Instant Messaging (IM), the mediator is able to engage in both joint and private discussions with the parties.

2. Video Conferencing

The increased use of video conferencing to engage in long distance communications is starting to be adopted for online mediation purposes. For example, Boston Chase Mediation Group (BCMG) provides online mediation services through the use of video conferencing. Through the use of video conferencing, BCMG conducts online mediation in the same manner as would be done in ordinary mediation, just without congregation in a physical space. Because the visual aids and other benefits resulting from face-to-face mediation are preserved in the video conferencing format, BCMG takes “mediation and bring[s] parties together face-to-face in real

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20 LIDE, supra note 5, at 218-19.
21 GOODMAN, supra note 14, at 12-13. Though it is a rapidly developing field, the concept of conducting cross-border online mediation is beyond the scope of this article.
24 Id.
25 Id.
26 Id.
28 Id.
time, despite distance and location.”

In addition, BCMG provides software and hardware to
clients, if needed, so that the client does not have to pay for any extra materials beyond that of
the mediator’s fee.

3. Private E-mail

Individual mediators who advertise their services for traditional mediation have begun to
provide online mediation services as well, through e-mail. Conducting mediation through e-
mail is similar to that of participating in a chat room, though the mediation is conducted
asynchronously. A lot of discussion has taken place regarding how to properly manage
mediation conducted by e-mail. It is predominantly argued that, while “email is not a panacea
for all communications, it is certainly effective for moving information in a speedy, silent,
affordable way.” E-mail can also be used for caucus discussions with one party, whereby the
mediator will e-mail only the party with whom the caucus is to be conducted and subsequently
re-engage the group back in a joint e-mail to continue the mediation. E-mail also allows for
the parties to engage in a type of discovery, allowing the parties to add attachments to the e-mails
that are sent to the mediator and to the other party.

4. Password-Protected Forums

Some online mediation service providers provide mediation through password-protected
forums that are designed specifically for the purpose of online mediation. One example is
SquareTrade, which is a service primarily mediates e-commerce disputes. The SquareTrade
process begins with the filing of a complaint followed by a subsequent e-mail being sent to the
opposing party by SquareTrade. After the opposing party is notified, both parties are given a
password to enter a secure page. The parties then participate in direct negotiation with each
other to try and reach a settlement. If the negotiation fails, the system is then transferred to

29 Id.
30 Id.
31 For a description on the mechanics of conducting online mediation through e-mail, see EISEN, supra 
note 6, at 1312-14. See also, COLE & BLANKLEY, supra note 8.
32 EISEN, supra note 6, at 1312-14.
33 Id.
34 Id.
35 GOODMAN, supra note 14, at 13. See also BRAEUTIGAM, supra note 2, at 287, “The online mediator
can caucus with participants concurrently, throughout the process, and without the other's knowledge of
when it is happening.”; See also, EISEN, supra note 6, at 1312-14.
36 EISEN, supra note 6, at 1312-14.
37 SquareTrade, PRIVACY POLICY, available at http://www.squaretrade.com/pages/ (last visited, May 5,
2012); Steve Abernethy, Building Large-Scale Online Dispute Resolution & Trustmark Systems,
GOODMAN, supra note 14, at 12; KRAUSE, supra note 5, at 462; Orna Rabinovich-Einy, Technology's
Impact: The Quest for A New Paradigm for Accountability in Mediation, 11 Harv. Negot. L. Rev. 253,
38 KRAUSE, supra note 5, at 462; RABINOVICH-EINY, supra note 37, at 257-60 (2006).
39 Id.
40 Id.
mediation where a trained mediator facilitates discussion. Once the mediator intervenes, the parties no longer communicate directly and do not see the discussion between the other party and the mediator.

C. Advantages to Online Mediation

Conducting mediation online retains some of the same benefits as that of traditional mediation, including the ability of the mediator to adapt to the process to address specific concerns of the parties. In addition, as with most services provided on the Internet, online mediation is attractive to users for many additional reasons, including convenience, cost savings, and avoidance of extreme power imbalance.

The convenience of utilizing online services is without question. Users are able to simply log on to the Internet from the comfort of their own home or favorite coffee house and participate in activities that, prior to the Internet, could only be conducted in real time. The same is true for online mediation. It is probably the most recognized benefit of online mediation that parties involved in a dispute do not have to travel lengthy distances—or any distance at all for that matter—in order to participate in mediation. In addition, mediators facilitating the dispute do not have to rent a neutral facility to conduct the mediation and all of the materials that may be needed to effectively conduct the mediation can be simply transmitted online. The convenience of being able to communicate from far-distant locations in itself proves to be attractive to participants. However, not having to travel far distances to engage in mediation also reduces the overall cost of the process.

Utilizing an online forum to engage in mediation services not only reduces costs associated with traveling, but mediators typically only charge a nominal, flat fee for their services. While traditional mediators may charge by the hour, sometimes at high rates, online mediators typically charge a flat fee because of the asynchronous nature of most online mediation forums.

The ability for parties to communicate in an environment that is non-instantaneous allows the parties to enjoy more leisure during the process of their mediation. While the process may take longer overall, the amount of time actually participating in the mediation may be significantly less. In addition, the asynchronous feature of online mediation also allows parties the ability to finalize their opinions and statements before sending them to the other party, a

\[\text{\textsuperscript{41}}\text{Id.}\]
\[\text{\textsuperscript{42}}\text{KRAUSE, supra note 5.}\]
\[\text{\textsuperscript{44}}\text{GOODMAN, supra note 14, at 13; BRENNAN, supra note 2, at 212; HANG, supra note 9, at 854.}\]
\[\text{\textsuperscript{45}}\text{GOODMAN, supra note 43, at 15.}\]
\[\text{\textsuperscript{46}}\text{Id.}\]
\[\text{\textsuperscript{47}}\text{GOODMAN, supra note 14, at 12-13.}\]
\[\text{\textsuperscript{48}}\text{Id. at 13; LIDE, supra note 5, at 220.}\]
\[\text{\textsuperscript{49}}\text{GOODMAN, supra note 14, at 12-13.}\]
\[\text{\textsuperscript{50}}\text{KRAUSE, supra note 5, at 483; HANG, supra note 9, at 854.}\]
\[\text{\textsuperscript{51}}\text{GOODMAN, supra note 14, at 13.}\]
benefit that is largely unavailable in traditional mediation.\textsuperscript{52} In traditional mediation, individuals are engaged in instant conversation back and forth, either with the opposing party and/or with the mediator.\textsuperscript{53} In real-time conversation, an individual may not adequately stop to fully think through what she might say prior to speaking. In online mediation, participants are able to respond to statements made by the mediator or opposing party at a time that is convenient for them. With this in mind, parties are able to receive a statement made by the opposing party or the mediator and, before responding, think about their statement and carefully type out a response before hitting the send button.\textsuperscript{55} While not responding instantaneously allows parties to think carefully before making statements, it also allows parties to make rationally based judgments as opposed to judgments based on emotionally charged reactions.\textsuperscript{55}

A common critique of online mediation is that it inhibits the face-to-face interaction that parties experience in traditional mediation.\textsuperscript{56} However, the inability to engage in mediation face-to-face can provide a multitude of benefits as well. For example, in the case of a mediation that involves a particularly sensitive matter, such as a divorce or child custody mediation, “the lack of emotional outpouring may…serve as an advantage”\textsuperscript{57} because the time separating the two parties’ responses may allow the mediator to refocus the parties on the long-term goals of the mediation as opposed to letting the parties respond instantaneously and emotionally.\textsuperscript{58} Furthermore, in online mediation, two parties who are engaged in a dispute can avoid a significant power imbalance that may exist in normal mediation.\textsuperscript{59} Without face-to-face interaction, individuals can engage in discussion on an equal playing field, in the same medium, and without any regard to the personal characteristics of the opposing party.\textsuperscript{60}

D. Concerns of Online Mediation

Inherent in the medium of the Internet is diminished privacy\textsuperscript{61}—despite the many benefits afforded to online mediation, critics have argued that online mediation poses significant barriers to producing an effective mediation. With the lack of a physical space to conduct the mediation, critics argue that online mediation is impersonal,\textsuperscript{62} is potentially inaccessible,\textsuperscript{63} and poses significant threats to confidentiality and privacy.\textsuperscript{64}

\textsuperscript{52} Id.; But see BRENNAN, supra note 2, at 217, finding that the asynchrony of the process could be detrimental because it “essentially permits parties to disengage, rethink, and maybe even change their minds.”
\textsuperscript{53} COLE & BLANKLEY, supra note 8, at 193.
\textsuperscript{54} GOODMAN, supra note 14, at 13; BRENNAN, supra note 2, at 219; KRAUSE, supra note 5, at 482.
\textsuperscript{55} See BRENNAN, supra note 2, at 221, explaining that asynchronous communication “allows individuals to better manage their emotions and express themselves in a more rational manner.” See also KRAUSE, supra note 5, at 482; EISEN, supra note 6, at 1326.
\textsuperscript{56} KRAUSE, supra note 5, at 481.
\textsuperscript{57} Id. at 482; LIDE, supra note 5, at 219.
\textsuperscript{58} KRAUSE, supra note 5, at 482.
\textsuperscript{59} BRENNAN, supra note 2, at 216-17.
\textsuperscript{60} LODDER & ZELEZNIKOW, supra note 13, at 302; ROGERS, supra note 22, at 365.
\textsuperscript{61} Orna Rabinovich-Einy, Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age, 7 Va. J.L. & Tech. 4 (2002); LIDE, supra note 5, at 197, “A primary concern surrounding modern online commerce is security. Stories of hacker activity and the number of perceived security threats are common.”
\textsuperscript{62} GOODMAN, supra note 14, at 14; KRAUSE, supra note 5, at 481-82; EISEN, supra note 6, at 1323.
One of the primary benefits of traditional mediation is the ability for individuals who are engaged in a dispute to be able to sit at a table and talk about their conflict with one other.\textsuperscript{65} For some disputants, the mediation may even be the first opportunity that the party has to speak to the other side.\textsuperscript{66} Traditional mediation is typically informal and the ability for individuals to interact with each other face-to-face has significant benefits as opposed to a mediation that occurs online without face-to-face interaction.\textsuperscript{67} The ability for one to depict emotion in dialogue conducted through e-mail is much more difficult, if not non-existent, for parties.\textsuperscript{68} Without the ability to understand the emotion of the other party, both parties lose the meaningful context that traditional mediation provides.\textsuperscript{69} In addition, without being able to fully understand the emotions of the parties, it may be more difficult for the mediator to assess the situation and temper any type of aggressive behavior that one party may posture.\textsuperscript{70} Given that the role of the mediator is to facilitate conversation and to listen and process oral information, “mediators [may] find it largely impossible to translate their skills to the online setting.”\textsuperscript{71}

In addition to the impersonal nature of online mediation, there is also the issue of accessibility—an individual may not have the technology to engage in mediation,\textsuperscript{72} the knowledge to do so, or the individual may not be able to afford the services provided by online mediators.\textsuperscript{73} First, despite the rapid increase in technology, not all members of society have a personal computer or connection to the Internet.\textsuperscript{74} Even if they do, the knowledge of how to best utilize the Internet for services may not be sufficient to effectively engage in online mediation.\textsuperscript{75}

\textsuperscript{63} GOODMAN, supra note 14, at 14; KRAUSE, supra note 5, at 480.
\textsuperscript{64} KRAUSE, supra note 5, at 489-90.
\textsuperscript{65} GOODMAN, supra note 14, at 14.
\textsuperscript{66} Id.
\textsuperscript{67} However, some places, like Boston Chase Mediation Group use video conferencing to conduct the online mediation, which preserves the face-to-face aspect of mediation. See Boston Chase Mediation Group, ONLINE MEDIATION, available at http://www.bostonchasemediationgroup.com/online-mediation-services/ (last visited, May 5, 2012). See also, KRAUSE, supra note 5, at 483, explaining that “[o]ne possible way to work around any shortfalls arising from lack of physical interaction is to employ video-conferencing or streaming video.”
\textsuperscript{68} See GOODMAN, supra note 43, at 21, explaining:

“For many participants, mediation is about the ‘venting’ of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom. The opportunity to tell one’s version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants…. [T]he effectiveness of cybermediation is challenged directly by the lack of an established relationship or personal connection.”

But see KRAUSE, supra note 5, at 482, noting that “the lack of emotional outpouring may also serve as an advantage in heated disputes.”
\textsuperscript{69} See note 68 and accompanying text.
\textsuperscript{70} Id.
\textsuperscript{71} GOODMAN, supra note 43, at 24.
\textsuperscript{72} See KRAUSE, supra note 5, at 480, commenting on the sophistication of ODR users; see also GOODMAN, supra note 14, at 14; COLE & BLANKLEY, supra note 8, at 198.
\textsuperscript{73} KRAUSE, supra note 5, at 480.
\textsuperscript{74} Id.; GOODMAN, supra note 14, at 14.
\textsuperscript{75} GOODMAN, supra note 14, at 14; KRAUSE, supra note 5, at 480; EISEN, supra note 6, at 1335-36; Aashit Shah, Using Adr to Resolve Online Disputes, 10 Rich. J.L. & Tech. 25, 36 (2004).
Second, even if an individual does have access to the Internet, it does not guarantee that the individual will have continued access throughout the duration of the dispute.\textsuperscript{76} Third, an individual participating in online mediation may not be able to afford the services that are being offered as fees associated with online mediation vary per provider.\textsuperscript{77} Given the nature of some online mediation disputes, a party may be unwilling to pay a price for a mediator that is equal to a significant portion of the settlement claim.\textsuperscript{78}

There is also a concern about the authenticity of the user and the ability for an individual third party to intercept the communication during the mediation.\textsuperscript{79} As new technologies develop, so does the level of knowledge of individuals who may act in opposition to the best interests of a disputant to a mediation. For example, an individual adverse to the interests of a party engaged in a dispute may retrieve that individual’s password to her e-mail address and participate in the mediation under a false identity.\textsuperscript{80} In traditional mediation, authenticity is not an issue as the parties are present in a face-to-face environment. However, the security of knowing that the person on the other end of the mediation is the actual person whom they say they are is not as prevalent in online mediation.\textsuperscript{81} Similarly, given the ability of individual users to develop technologies to hack into certain databases and electronic interfaces, the ability for a third party to intercept the mediation communications and use them in a manner adverse to the parties is not without possibility either.

Conducting mediation online poses significant threats to individual privacy and the confidentiality of mediation communications.\textsuperscript{82} Every time a statement is transmitted via the Internet, a copy of the communication is made and recorded.\textsuperscript{83} This is even more evident within the context of e-mail and chat rooms, where the intended recipients are able to download, save, and print the copy of the communication at their leisure—\textsuperscript{84} all without repercussions for doing so. In addition, there is neither a regulatory framework nor any law that adequately regulates online mediation service providers’ use of mediation communications for their own internal practices, such as training. While the use of mediation communications may be useful in providing better training to mediators, participants to the online mediation should, at the very least, be provided notice of the potential uses of their communications as well as the security measures that the online mediation service provider intends to use in order to safeguard such communications. While online mediation serves a useful purpose and may be a very successful form of dispute resolution in the future, rules and regulations regarding the safety of the

\textsuperscript{76} It is possible that in the middle of an online mediation one may lose access to the Internet due to a variety of reasons.
\textsuperscript{77} GOODMAN, supra note 14, at 15.
\textsuperscript{78} Individuals with small claims disputes may not want to pay a fee, despite it being nominal, because their claim may not be seen as worth it.
\textsuperscript{79} Privacy laws may provide protection for mediation communications against third party interception; however, such an analysis is beyond the confines of this article. However, to find out more about ways that mediation communications can be protected against third party interception, see KRAUSE, supra note 5, at 490; HANG, supra note 9, at 859-60; SHAH, supra note 75, at 32.
\textsuperscript{80} This could probably be taken care of under identity theft laws; however, such a topic is beyond the scope of this article.
\textsuperscript{81} See note 79 and accompanying text.
\textsuperscript{82} KATSH, supra note 4, at 971; GOODMAN, supra note 14, at 15.
\textsuperscript{83} KRAUSE, supra note 5, at 489-90; HANG, supra note 9, at 859-60.
\textsuperscript{84} GOODMAN, supra note 14, at 15.
participants’ communications need to be set in place before the process can be instituted in an effective and secure manner.

III. INADEQUACIES OF THE CURRENT SYSTEM

There are numerous issues relating to the confidentiality and privacy of online mediation communications that have yet to be fully discussed despite the continuing development of online mediation. Safeguarding the confidentiality of mediation communications is a foundational principle of mediation as participants in mediation may only divulge information within the mediation if they are assured that their communications will not be revealed in the future. While current privacy policies and laws touch on the issue of confidentiality, they are inadequate when applied to the online mediation context. In addition, despite the Uniform Mediation Act (UMA) being adopted in eight states and over 300 statutes enacted nationwide regarding mediation confidentiality, none adequately provide for the protection and safeguarding of online mediation communications. Furthermore, even if the law of one state permits remedies for breach of confidentiality, the Internet as a forum poses significant jurisdictional problems that need to be considered prior to the execution of any online mediation.

A. Current Privacy Policies Do Not Provide Adequate Protection

Some online mediation service providers, such as SquareTrade, utilize technology in a secured fashion in order to ensure the confidentiality of online mediation communications. This process helps to ensure the confidentiality of the communications in the case that one party to the dispute sought to record and subsequently disclose the communications. However, it must be noted that the disputes that are dealt with through SquareTrade are typically financial, e-commerce disputes that do not require the same personal interaction between the parties.

87 See KENTRA, supra note 3, at 733, finding that “[a] review of case law in all fifty states reveals that each state has one or more statute or local court rule concerning confidentiality in mediation”; BIRKE & TEITZ, supra note 16, at 197.
88 LIDE, supra note 5, at 200, “The jurisdiction problem is considered by some to be the problem of the Internet…. Recent court cases concerning Internet jurisdiction offer little guidance, and some appear to be dodging the issue.”
89 As noted above, if parties to a dispute have filed with SquareTrade and were unable to resolve their claim through direct negotiation, they can request a mediator. Once the parties are assigned a mediator, the mediator contacts the individual parties to the dispute without having any communications being revealed to the opposing party. For a more detailed analysis of the processes by which SquareTrade operates, see RABINOVICH-EINY, supra note 37, at 257.
90 RABINOVICH-EINY, supra note 37, at 255.
Nevertheless SquareTrade, like most online service providers, has a privacy policy that explains their attempts to ensure the safety of mediation communications.\textsuperscript{91} The privacy policy of SquareTrade maintains that any communications within the dispute resolution process are kept strictly confidential \textit{by SquareTrade}.\textsuperscript{92} The privacy policy continues by noting that SquareTrade will maintain the communications in the “strictest confidence” and if any personally identifiable information is collected and shared, or if there are any material changes to the confidentiality policy, the disputant will be notified.\textsuperscript{93} In addition, the individual parties to the mediation do not see the opposing party’s statements so the only communications that a party does see are their own and the mediator’s. Therefore, any worry about the opposing party recording and disseminating the communications of the opposing party are minimized.\textsuperscript{94}

However, SquareTrade’s privacy policy only goes so far. As noted in its privacy policy, SquareTrade maintains the right to share certain information with external organizations. For example, SquareTrade may share a participant’s “dispute resolution and agreement information to a marketplace such as eBay for enforcement purposes.”\textsuperscript{95} In addition, SquareTrade does not restrict the parties who participate in the mediation from sharing information from the dispute with external organizations. Nevertheless, SquareTrade’s privacy policy is fairly adequate for the services that it provides.\textsuperscript{96} Although the degree of confidentiality is low, SquareTrade at least discloses all of their information collection and sharing practices in both their privacy policy and user agreements.\textsuperscript{97}

On the other hand, AAA’s privacy policy states that at the closing of the mediation, the chat log of the mediation will be deleted and any documents submitted will only be kept online for thirty days.\textsuperscript{98} In addition, it states that the mediation will be strictly confidential and that all communications between the parties are “not admissible in any subsequent arbitral or court proceeding.”\textsuperscript{99} While the AAA provides a limited view of how it will maintain the communications’ confidentiality, it neither provides a remedy nor mentions the possibility of a party to the dispute recording and subsequently distributing a copy of the mediation

\textsuperscript{91} SquareTrade, PRIVACY POLICY, \textit{available at} http://www.squaretrade.com/pages/ (last visited, May 5, 2012); Steve Abernethy, \textit{Building Large-Scale Online Dispute Resolution & Trustmark Systems}, Proceedings of the UNECE Forum on ODR 2003, \textit{available at} http://www.odr.info/unece2003; \textit{but see} TEITZ, \textit{supra} note 1, at 998, explaining that while a significant number of ODR providers provide statements about privacy and confidentiality, the amount of information supplied overall is insufficient.

\textsuperscript{92} SquareTrade, PRIVACY POLICY, \textit{available at} http://www.squaretrade.com/pages/ (last visited, May 5, 2012).

\textsuperscript{93} \textit{Id}.

\textsuperscript{94} \textit{But see} RABINOVICH-EINY, \textit{supra} note 37, at 275, stating “[s]ince SquareTrade's mediation communications are always conducted with one party at a time, there is no distinction between joint and private sessions as exists in traditional mediation. SquareTrade mediators assume that a party's communications can be shared with the other side unless instructed otherwise.”

\textsuperscript{95} \textit{Id}.

\textsuperscript{96} \textit{See id.} at 275, “it is not surprising that SquareTrade operates on more relaxed notions of confidentiality. As the typical eBay dispute concerns technicalities and does not produce tensions and emotions that require a confidential setting for its resolution, as do, for example, disputes involving trade secrets or sexual harassment.”

\textsuperscript{97} \textit{Id.} at 276.


\textsuperscript{99} \textit{Id}.
communications to the public. In addition, it does not provide for enforcement of confidentiality and only provides a mode of enforcement for a settlement agreement, if one is reached.\textsuperscript{100}

Furthermore, private mediators may not provide a privacy policy at all regarding the confidentiality of a disputant’s communications made during the mediation.\textsuperscript{101} While many providers of online mediation services maintain that the process is strictly confidential, there is neither an enforcement mechanism to maintain such confidentiality nor is there any notice to the disputant about the possibility of the communications being recorded and subsequently distributed to the public. Maintaining confidentiality and privacy in mediation proceedings, and at the very least providing notice, is extremely important, especially when providers advertise online mediation to clients for disputes arising out of personal conflicts such as divorce and child custody. While some privacy policies, like that of SquareTrade may be adequate for disputes that are purely commercial-based and where the technology utilized for the online mediation does not allow the opposing party to see, and therefore have a copy of, the opposing party’s mediation communications, simply stating that a process is confidential without any mechanisms set in place to ensure such is misleading and should not be considered an acceptable practice.

B. The Inability to Apply the Uniform Mediation Act and Current Mediation Statutes to Online Mediation

Currently, there are over 2,500 statutes throughout the nation that regulate mediation.\textsuperscript{102} As analyzing each mediation statute throughout the nation would be impractical to do within the confines of this article, the confidentiality provisions of the Uniform Mediation Act (UMA), as well as a general overview of state statutes will be discussed to provide examples of how most confidentiality provisions that are currently enacted are inadequate to meet the demands of safeguarding online mediation communications. Even if an individual state law does provide for confidentiality, the Internet is a source of constant debate with regard to jurisdiction and choice of law issues.\textsuperscript{103} Furthermore, the lack of uniformity across the nation with regard to laws regulating mediation poses a significant barrier to the enforcement of any currently enacted mediation statute.\textsuperscript{104}

1. The Uniform Mediation Act (UMA)

Eight states and the District of Columbia have adopted the Uniform Mediation Act (UMA) to regulate the practices and procedures of mediation.\textsuperscript{105} In considering the UMA, one of

\begin{itemize}
  \item[\textsuperscript{100}] \textit{Id.}
  \item[\textsuperscript{101}] See \textit{TEITZ, supra} note 1, at 998, “The majority [of ODR service providers] do not appear to provide any method of redress for dissatisfaction with the dispute resolution services provided. The amount of information supplied about the ownership of the entity or individual ODR provider… and potential enforcement of any ultimate result is often insufficient.”
  \item[\textsuperscript{102}] \textit{KENTRA, supra} note 3, at 733; \textit{BIRKE & TEITZ, supra} note 16, at 197.
  \item[\textsuperscript{103}] \textit{KRAUSE, supra} note 5, at 473; \textit{LIDE, supra} note 5, at 200. See also \textit{TEITZ, supra} note 1, at 992, 1012, explaining how the “potential for conflicting regulation and standards is inherent in the borderless nature of cyberspace and therefore of ODR.”
  \item[\textsuperscript{104}] \textit{KENTRA, supra} note 3, at 725; \textit{BIRKE & TEITZ, supra} note 16, at 196.
  \item[\textsuperscript{105}] For a breakdown of individual state laws, see Gary Provencher, \textit{The Uniform Mediation Act: An Analysis of Current State Acts}, \textit{MAYHEW-HITE REPORT}, http://moritzlaw.osu.edu/epub/mayhew-hite/vol5iss1/student.html. See also, \textit{COLE, supra} note 86.
\end{itemize}
the debates about the confidentiality of mediation communications is whether creating a “statutory obligation to maintain the confidentiality of mediation communications...might penalize those who were unaware of it.” In addition, some have argued, “that existing contractual, ethical, or legal obligations provide adequate protection.”

The UMA provides that a mediator may not disclose any mediation communication to any party that may subsequently make a decision on the dispute that is the basis for the mediation. As noted in the Reporter’s Notes to Section 7, “the prohibition is limited to reports or other listed communications to those who may rule on the dispute being mediated.”

Consistent with the debate above, the drafters of the UMA were concerned that if a mediator was witness to certain communications that may be injurious to a party—such as those provided in a mediation for a civil matter that is connected to a larger, criminal matter—then the provision should not constrain the mediator from making a proper report to a responsible authority. Thus, while a mediator may not present any of the communications to an adjudicating body, the mediator may report the communications to appropriate authorities in the case of an immediate threat of harm.

In addition, the UMA briefly mentions confidentiality with respect to the disclosure of any mediation communications by any party, stating that mediation communications are to be confidential “to the extent agreed to by the parties or provided by other law or rule of this State.” Again, the drafters of the UMA battled with the notion of creating a statutory obligation of the parties to maintain the confidentiality of mediation communications on the one hand with the possibility of manifest injustice resulting from lack of knowledge of the provision by mediation participants on the other. In addition, the drafters were concerned that creating a rule that imposed civil liability on individuals would require an extensive list of “legitimate and appropriate exceptions” that was improbable for the drafters to appropriately and adequately create.

Though the UMA provides protection for the confidentiality of mediation communications, it does not go so far as to create any type of enforcement mechanism. As noted above, the drafters were not keen on imposing any type of civil liability on individuals who broke confidentiality and therefore left it to the parties to agree, on a case-by-case basis, whether the communications would and should be kept confidential. But, how could one expect her mediation communications to be protected if there is no enforcement mechanism or penalty for the non-compliance to such a principle? In fact, the reason why the UMA drafters decided

107 See Goldberg, Sander, Rogers, & Cole, supra note 106, at 256; In addition, courts rarely enforce confidentiality. See Cole, supra note 86, at 1421.
109 Id., Reporter’s Notes.
111 Uniform Mediation Act § 7 (2002).
112 Id. at § 8.
113 Id., Reporter’s Notes.
114 Id.
not to impose civil liability was because of the many mediation participants who “might discuss their mediations with friends and family members.” But, is this not the type of behavior that the confidentiality provision is trying to protect against—the disclosure of mediation communications to third parties?

When applied to the online mediation context, the UMA provides even less protection for the safety of mediation communications. The possibility of an individual receiving, storing, and printing out copies of mediation communications allows individual disputants to have a transcript of the mediation. While breaking confidentiality by word of mouth may pose significant threats to the effectiveness of traditional mediation, inherent within the concept of online mediation is that there is a record of everything that has been said by each party throughout the entire mediation. A paper copy may be created so that each and every statement made is preserved with the requisite metadata to verify the authenticity of the user as well as the date and time the statement was made. The potential for abuse could have severe consequences to an individual participating in online mediation and needs to be addressed before the undoubted future proliferation of the service.

For example, suppose a doctor is engaged in a divorce proceeding with her husband. Due to her hectic schedule, she participates in online mediation so that the mediation of the divorce proceeding could be conducted through e-mail, with a neutral mediator, and conducted asynchronously. The process consists of the mediator and the two parties engaged in a joint e-mail chain to discuss the matters at hand. If, at any time the mediator feels the need to engage in a caucus with one of the parties, she will do so by sending a separate e-mail to the individual party, but for the most part the communications are exchanged in a joint session. It comes out in the mediation that the doctor is suffering from alcoholism and that there may be issues with child custody. Her husband, in a fit of rage subsequent to the mediation, takes the statements she said during the mediation, prints them, and discloses them to the public. As a result, her license is suspended, her patients leave, and her practice is destroyed—not to mention she had just gone through a divorce.

While this may be an extreme example, it is the type of situation in which the need for safeguarding online mediation communications becomes prevalent. In the example above, the doctor would have no recourse—the UMA does not provide adequate protection for this type of situation nor does it provide for an enforcement mechanism to ensure that, if this type of situation were to arise, that one may have some type of remedy. Without the ability to

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116 Uniform Mediation Act § 8 (2002), Reporter’s Notes. See also, WESTON, supra note 110, at 51.
117 See KATSH, supra note 4, at 971, noting that “[t]he simplest e-mail message may or may not involve a copy being saved on the sender's hard drive, on some service provider's backup system, on some temporary storage file, as well as on the recipient's hard drive”; KRAUSE, supra note 5, at 490, “Any online communication necessarily involves the copying of transferred information in servers located over the entire world. Copies will survive, at a minimum, on the hard drives of the sender and recipient, as well as on the Internet service provider's backup system and in a temporary storage file.”
118 While it may be good to have this disclosed for the protection of patients, this example provides an example of how the dissemination of online mediation communications could have a devastating impact on a person’s livelihood. See also, HUGHES, supra note 115.
119 She could possibly file a suit for libel or defamation; however, since she is the individual who made the statements, it is unlikely she would be able to succeed.
120 Pursuant to the UMA, the parties could have engaged in a private agreement prior to the outset of the mediation. However, it is likely that such an agreement would not adequately address this type of issue or provide for any type of remedy.
maintain confidence in the process of mediation, parties may not feel comfortable divulging certain information out of fear of the public dissemination of their statements. This lack of desire to furnish information inherently weakens the process of mediation and may not allow for the process to be effective for the parties.

The UMA also does not adequately prevent online mediation service providers from using mediation communications in a manner that is adverse to the interests of the parties. For example, an online mediation service provider may store a party’s online mediation communications for future internal use, such as training. However, neither the UMA nor any other law require that online mediation service providers take any necessary precautions to notify the participant to the mediation that their communication will be used for such purposes, obtain consent from the parties, anonymize the communications prior to internal use, or properly safeguard the communications so that they are not accessed by third parties. In order to maintain the integrity and safety of mediation communications within the realm of online mediation, a regulatory framework needs to be set in place to establish minimum standards that an online mediation service provider must adhere to prior to providing the service.

2. A General Overview of State Laws Regarding Mediation Confidentiality

Every state has at least one or more statutes or local court rule governing mediation. However, many of these statutes only provide that mediation communications are privileged and are unable to be admitted in a subsequent judicial proceeding. In addition, few go so far as to require parties to maintain confidentiality outside of judicial proceedings. The fact that almost every state has a different confidentiality statute also causes confusion in terms of guaranteeing the confidentiality of mediation communications.

121 CALLAHAN, supra note 85, at 63; KENTRA, supra note 3, at 717; BIRKE & TEITZ, supra note 16, at 195.
122 HUGHES, supra note 115, at 131.
123 The UMA would still provide protection for mediation communications with respect to subsequent judicial proceedings. Despite the communications occurring online, the UMA takes a broad approach when defining mediation communication. See Uniform Mediation Act, § 2 (2002), stating that a mediation communication is “a statement, whether oral or in a record or verbal or nonverbal, that occurs during a mediation or is made for purposes of considering, conducting, participating in, initiating, continuing, or reconvening a mediation or retaining a mediator.” However, the UMA does not provide any limitations for an online mediation service provider’s internal use of the mediation communications. Cf. KRAUSE, supra note 5, at 489, “Even if not required, it will remain important for online ADR providers to maintain and provide access to meaningful records of the cases they adjudicate.”
125 KENTRA, supra note 3, at 733; for example of CA, see CALLAHAN, supra note 85.
126 DEASON, supra note 12, at 44; WESTON, supra note 110, at 44.
each state has multiple rules regarding the confidentiality of mediation communications in various contexts and for various courts, it is almost impossible to determine which rule is applicable to any given situation. Nevertheless, despite the many rules that are currently in existence, none specifically address the confidentiality of online mediation communications. It could be argued that the confidentiality statutes of a given locale may be appropriately applied to online mediation as the communications are still considered to be ‘mediation communications.’ However, as noted, most of the statutes within each state only pertain to maintaining the confidentiality of mediation communications so that they are inadmissible and sometimes indiscernable in subsequent judicial or administrative proceedings.

However, in 2004 Florida adopted a new law, the Mediation Confidentiality and Privilege Act, which increased protection for the confidentiality of mediation communications. The Florida statute provides that all mediation communications are confidential and that participants to the mediation “shall not disclose a mediation communication to a person other than a participant to the mediation or participant’s counsel.” In addition to providing the confidentiality provision, Florida has also implemented an enforcement mechanism to ensure such confidentiality.

Florida’s statute provides a good example of how to enforce and maintain security and confidence in the process of mediation. When applied to the online mediation context, the Florida statute could seemingly provide an excellent framework to ensure the safety of mediation communications; or in the alternative, provide a remedy for an individual harmed as a result of inappropriate disclosure. However, since the law was enacted to apply to traditional mediation, it does not go so far as to mention the regulation of online mediation service providers or the safety of online mediation communications. Thus, while the statute does provide more protection


129 But see, TEITZ, supra note 1, at 1007-08, explaining how there needs to be regulation of online dispute resolution because ODR providers “often fall between the cracks of regulators (government or professional) both geographically and structurally”; Todd H. Flaming, The Rules of Cyberspace: Informal Law in A New Jurisdiction, 85 Ill. B.J. 174, 177-78 (1997).

130 Using California as an example, see CALLAHAN, supra note 85.


132 COLE, supra note 86, at 1440-41.


134 See Fla. Stat. Ann. §§ 44.406 (West 2004) explaining that any participant who discloses a mediation communication in violation of the Act may be subject to civil liability including equitable relief, compensatory damages, and payment of all fees and costs incurred in preparation and during the mediation proceeding.
with regard to confidentiality than other laws, it is still inadequate when applied to the online mediation context.

IV. THE NEED TO DEVELOP NEW TECHNOLOGY AND UNIFORMLY ADHERE TO A REGULATORY FRAMEWORK

Applying unsettled principles of confidentiality in traditional mediation\(^\text{135}\) to the continuing development of online mediation is no simple task. New technologies are being consistently developed and the commercialization of such technologies makes it even more evident that users will shift away from utilizing traditional face-to-face mediation to those services provided over the Internet.\(^\text{136}\) Whether it is through e-mail, chat rooms, or videoconference software, companies and users alike need to ensure that the privacy and confidentiality of their mediation communications are safeguarded against potential abuse. As is commonly known, inherent within the concept of the Internet is that every communication sent and received is recorded. No longer are the days where an individual can just repeat what someone else had said during a mediation and the listener can choose to believe the statement or not.

With online mediation, individuals can have within their possession a complete and accurate transcript of the entire mediation, in print, and at their disposal. As a result, technology needs to be created and utilized in a manner that is consistent with the process of mediation yet also protects the privacy and confidentiality aspects that are foundational to the success and effectiveness of the mediation process. In addition to new technologies, a regulatory framework needs to be implemented in order to provide minimum standards for online mediation service providers, an enforcement mechanism to ensure the confidentiality of statements made during a mediation, and, in the case of abuse, provide remedies that an injured party may seek as a result of damage suffered from inappropriate disclosure.

A. It is Necessary to Work with Software Engineers to Create Appropriate Technologies

In the information age, technology changes by the minute. New computer software and hardware are being created constantly to ensure that the accessibility of the Internet and the interconnectivity of far-distanced individuals remain as convenient as possible. It is uncertain what the individuals in Palo Alto next hold for society in terms of technological advances and one can only speculate as to what new technologies can be used in future online mediations. Nevertheless, if the process of online mediation is to become a prominent and effective forum for dispute resolution, online mediation service providers need to work with these software developers to create technologies that allow for the proper and effective employment of mediation through the Internet.\(^\text{137}\)

There are many issues that need to be considered when developing new software technologies used for legal or alternative dispute resolution processes.\(^\text{138}\) Nevertheless, the

\(^{135}\) CALLAHAN, supra note 85, at 63; KENTRA, supra note 3, at 724; TEITZ, supra note 1, at 1008.

\(^{136}\) See LIDE, supra note 5, at 217, noting that the “[d]evelopment [of ODR forums] will not stop with e-mail and real-time chat; more ‘experiential’ media such as two-way video and audio are developing rapidly.”

\(^{137}\) MOREK, supra note 127, at 179.

\(^{138}\) Id. at 178.
following provide a couple examples of the types of technologies that could possibly be created that may satisfy both the advantages of online mediation and still protect the confidentiality and privacy of the individual participants.  

First, web-forums could be specifically designed for online mediation so that the only individuals who have access to the forum are the disputants and the mediator. These web forums would be password-protected with only the disputants and the mediator given access. These forums would include a notification function as well. Each and every time a participant logs into the forum and if any information is copied, transferred out of the forum, or in any way altered, the software will be aware of such changes and notify both the opposing party and the mediator of such access.

Second, mediation could be conducted through a special e-mail service. One of the major problems with safeguarding online mediation communications is due to the risks inherent with mediation that is conducted through private e-mail. By developing software that does not allow a party to store, download, or copy e-mail, the ability for an individual to maintain a copy of the record would be minimized. Built into the software would be a function that automatically deletes any e-mail immediately after the e-mail was read and closed out of by the user. One of the main concerns about storing and subsequently disseminating the mediation communication is not necessarily because the participant is upset about something at the time of the mediation. Rather, the user may become disgruntled by an event that occurs later, which in turn may cause the disputant to act maliciously, thereby retrieving and disseminating the previously stored mediation communication. Software that automatically deletes the statement after the e-mail was read would severely limit the potential for this type of future abuse.

These two suggestions provide a couple of the possible technologies that could be developed to help safeguard mediation communications. As noted above, these technologies may not be developed at the moment or when they are developed may incorporate more than just the functions noted. However, these examples provide possible technologies that could be utilized for online mediation that are more effective in protecting the information that is being exchanged between the parties while at the same time affording the parties a process that is similar to that of traditional mediation.

Nevertheless, software alone is not enough to protect against potential abuse. As new technologies constantly develop, adversaries will inevitably develop new ways to get around security measures in order to obtain otherwise private information. In addition, online mediation service providers must also follow certain standards that require steps to be taken to ensure confidentiality beyond the adoption of new technologies. As such, in addition to developing new technologies, a regulatory framework needs to be created that governs the confidentiality and safety of online mediation communications.

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139 SHAH, supra note 75, at 148.
140 These forums could be created in a similar fashion to the technology that companies, like SquareTrade, already use for commercial disputes. However, given the impersonal nature already inherent in online communication between individuals as a result of the lack of face-to-face interaction, non-commercial disputes such as divorce may not be effectively handled in an online atmosphere where parties have no interaction with each other. Therefore, developing software that still allows the parties to communicate with each other albeit with less risk of abuse would balance these two concepts.
141 See KRAUSE, supra note 5, at 483, describing SquareTrade’s notification feature.
142 This still does not prevent an individual from taking a picture of the e-mail as it is open, though the risk for that is probably low.
B. The Need to Uniformly Adopt a Regulatory Framework

A regulatory framework should be uniformly adopted by all online mediation service providers to ensure the confidentiality of online mediation communications. Practically, however, a regulation of this sort will likely not be adopted as law in the near future due to the inevitable battle between multiple individuals’ opinions regarding a potential statute’s language, provisions, enforcement, etc. Therefore, as a practical matter, this section encourages online mediation service providers to follow this framework and engage in self-regulation. This would thereby create a type of race between online mediation service providers towards adequate privacy and confidentiality within the process of online mediation, similar to that which is already in play with other online services.

1. A Proposed Framework

As noted above, current privacy policies and confidentiality laws do not adequately protect the confidentiality of online mediation communications. Even if one were to apply a confidentiality provision to online mediation, the lack of uniformity of the laws throughout the nation coupled with the lack of enforcement would make the adaptation somewhat superfluous.

Outlined below and attached in the appendix is a model framework that could be implemented that would: increase the safety of online mediation communications by mandating notice to the participant of possible consequences of participating in online mediation as well as notice as to what the online mediation service provider will do with the communications after the mediation is completed; provide minimum standards that online mediation service providers must adhere to in order to ensure the proper safeguarding of mediation communications; and, provide a method of enforcement to ensure that one may have recourse if injured due to the inappropriate disclosure or misuse of any communications.

143 There has been a lot of discussion amongst scholars about the feasibility of implementing a framework to regulate online dispute resolution. However, the framework proposed herein is not an attempt to regulate the industry in its entirety, rather it is designed specifically to address the confidentiality of online mediation communications. Nevertheless, for discussion regarding the implementation of a framework to govern the industry in its entirety, see MOREK, supra note 127, at 191-92. See also KRAUSE, supra note 5; TEITZ, supra note 1. In addition, the ABA has promulgated a set of best practices that call for online mediation service providers to implement with regard to maintaining confidentiality. However, these best practices neither address all of the concerns in maintaining confidentiality of online mediation communications nor do they provide very much detail on how to accomplish such security. See AMERICAN BAR ASSOCIATION TASK FORCE ON E-COMMERCE AND ADR, supra note 27 and accompanying text.

144 MOREK, supra note 127, at 191-92.

145 It could be argued that any attempt at self-regulation will inevitably fail if the service providers are not held accountable. See id. However, until a governing body adopts a rule and starts to regulate online mediation, some form of self-regulation must take place in order to ensure that the confidentiality of the mediation process, despite being online, is protected.

146 Id. at 168.
a. Notice

One of the primary concerns the drafters of the UMA had was the imposition of civil liability on mediation participants who disclosed mediation communications to friends and family that did not have knowledge of such liability. The model regulatory framework herein mandates notice to be given to potential participants by the online mediation service provider of the confidentiality provisions in effect, the possible consequences of participating in online mediation, and the resulting civil liability that may be incurred in the case of violating one of the listed confidentiality provisions.

This notice can take many forms but must be in plain language and must be acknowledged by the participant. For online mediation service providers, this could take the form of a screen that requires the participant to check a box noting that they have read, understood, and accepted the rule. In the alternative, for online mediation providers that do not participate in advanced software or who currently conduct mediation by e-mail, an electronic signature by the participant may be obtained after proper notice is given.

b. Civil Money Penalties

Similar to the Florida statute currently enacted, the proposed framework provides for civil remedies in the case of a breach of confidentiality by any of the mediation participants, including the mediation service provider. Without an enforcement mechanism such as equitable relief, the prevalence of a confidentiality provision seems almost futile. Although many would like to believe that people participating in services, such as online mediation, are inherently well intended and will follow a provision despite no penalty for not doing so, it is unlikely. This is not to say that everyone participating in online mediation would break confidentiality if there were no enforcement mechanism; however, the ability for one to seek equitable remedies in the case of an opposing party’s breach of confidentiality would strengthen and ensure more confidence in the process. In the case of a breach of one of the confidentiality provisions, such remedies would include: equitable relief, compensatory damages, payment by the breaching party of all fees (including attorney’s fees) associated with the mediation, and reasonable costs incurred as a result of the application for remedies.

c. Exception One: A Mediator’s Affirmative Duty to Report

As is the case with most laws, a general blanket rule cannot exist without some limitations and exceptions. Again, the drafters of the UMA contemplated a more stringent rule of confidentiality, but determined that doing so would create a rule that was riddled with exceptions, all of which could not have been appropriately foreseen by the drafters themselves. However, the exceptions that the UMA did provide for in response to the privileges afforded to the mediator should be adopted in the case of online mediation communications. For example, in the case of a participant to the online mediation threatening immediate bodily harm or injury or

147 Any box of this nature must be in plain language and should not be hidden within a bunch of other legal information, such as a site’s terms and conditions.
148 NENSTIEL, supra note 4, at 317-18; SHAH, supra note 75, at 48.
149 COLE, supra note 86, at 1422.
providing information that may put a child or elder in danger, the mediator would have a duty to break confidentiality and report the statement to the appropriate authority.

This exception creates an affirmative duty of the mediator to report such misconduct and the mediator could be liable if found to have violated this duty. The individual participants to the mediation should not be allowed to break confidentiality, rather it should be within the sole discretion of the mediator, as the neutral party, to determine whether the statements made did in fact put an individual at risk of harm.\footnote{This may be seen as giving the mediator too much power. Nevertheless, this duty to break confidentiality when there is a risk of harm is consistent with many mediation statutes including the Uniform Mediation Act. See e.g., Uniform Mediation Act § 7 (2002). In addition, if a disputant to the mediation was given the authority to break confidentiality whenever she thought a statement was a threat, party participants may try to use the threat exception as an affirmative defense every time a statement was disclosed. This is even more the case for party participants who are particularly sensitive and may think that everything the other party said was a threat, despite it not being so. Hence, the rule that the mediator, as a neutral party and witness to the dispute would be in the best position to determine whether a statement was in fact a threat and should be reported to the appropriate authority.}

d. Exception Two: Minimum Standards Required in the Case of Communications Retention

Another exception postulated by the drafters of the UMA was to allow mediators the ability to retain records of the mediation communications and settlement agreements for the purpose of training. This concept is even more possible with online mediation communications because every communication would be recorded. The proposed framework adopts this exception, allowing for online mediation service providers to retain mediation communications for the purpose of training. However, it is extremely limited and provides for specific procedures that need to be followed.

First, the retention of any mediation communication is allowed solely for the purpose of mediator training. The communications must be stored in a properly secured location with access to the communications granted solely to certified and approved mediators employed by the online mediation service provider.

Second, any mediation communication that is retained for training purposes must be completely anonymized. That is, any personally identifiable information relating to the individual participants or any information that, if released, could quickly identify a party participant, must be removed from the mediation communication. This includes any and all relevant metadata associated with the communications as well as anything within the substantive portion of the communication that identifies a significant element of the mediation.

Third, if an online mediation service provider retains the communications of an online mediation, the participants must be given adequate notice regarding the details of how the communication will be handled including the information that will be removed, how the communications will be stored, and for how long the communications will be stored. The participant must be able to opt-out of having their mediation communications retained for any purpose.

Fourth, an online mediation service provider should not retain any mediation communications beyond that which is reasonable for training purposes. The amount of time reasonable will depend on the type and organization of the online mediation service provider. For example, within the context of an online mediation service provider that constantly hires new
mediators, a longer retention of mediation communications may seem more reasonable as opposed to a smaller and independent mediator who only hires one mediator at the outset of practice.

e. Statute of Limitations

The ability to seek civil remedies for damages caused as a result of a breach of confidentiality by a mediation participant does not extend beyond a certain period of time. Imposing a statute of limitations on the ability to seek equitable relief encourages individuals to promptly seek legal aid and disallows a party to file a lawsuit many years after a breach has occurred. In order to comply with the statute of limitations set forth in the proposed framework, an aggrieved participant must file a claim within two (2) years after the date on which a reasonable person should have learned of the breach, but in no case after four (4) years after the date of the actual breach.

f. Waiver

If the participants to the mediation wish to avoid the confidentiality provisions and the possible civil remedies set forth in the proposed regulation, each disputant, the mediator, and disputants’ counsel (if applicable) must agree to waive their right to confidentiality prior to the outset of any mediation. This waiver could take the form as that similar to the notice provision above, requiring each participant to check a box agreeing to waiver or providing an electronic signature for the same. However, when explaining waiver to the party participants, the online mediation service provider must adequately describe in detail and in plain language, each and every provision that the party participant is agreeing to waive and possible consequences as a result of the waiver. While this may pose a small burden upon both the participants and the service provider, it would help to ensure that an aggrieved dispu tant does not come back in the future and try to hold an online mediation service provider liable for breach of confidentiality by claiming that she had failed to understand what rights she was waiving at the time she signed the waiver.

g. Enforcement and Choice of Law

With all online services comes the question of jurisdiction. Given a regulatory framework such as the one presented herein and the necessity for the participants to accept the requirements prior to participation in the online mediation, the agreement would become a binding contract enforceable at law. In the case of a breach, the remedies available would be those listed in the regulation. The choice of law and forum would need to be determined by the participants to the mediation and agreed upon in a similar manner to all other provisions of the regulation. Thus, if a party were to seek a remedy because of the opposing party’s breach of an agreement, she would be able to do so in the jurisdiction provided in the agreement and for the remedies agreed upon.
2. **Utilizing Private Agreements and Promoting Self-Regulation**

As the process by which laws are agreed upon, enacted, and actually enforced is not a process that occurs overnight, online mediation service providers should be encouraged to engage in self-regulation. In addition to the ordinary delays in enacting legislation, there is a struggle to enact privacy legislation that is sufficient to keep up with the rapid pace at which new technology develops and still provides adequate protection for consumers. For this reason, a lot of commercial enterprises rely on self-regulation and public reputation in order to adhere to the privacy interests of consumers.

Utilizing this same concept of self-regulation, online mediation service providers should be encouraged to draft adequate privacy policies or, at a minimum, require participants to accept private agreements prior to the onset of any online mediation. Such policies and private agreements would outline the policies and procedures of the service provider and should attempt to satisfy the minimum requirements laid out in the framework proposed herein. Creating such privacy policies or mandating the acceptance of private agreements will inherently cause one online mediation service provider to gain a better reputation at maintaining confidentiality. Therefore, when one company provides online mediation services but does not adequately provide for the confidentiality of the participants’ communications, the client can simply move on to another service that does.

This increased awareness of providing safeguards for the safety of online mediation communications will likely create a type of race towards adequate protection—individuals attempting to participate in online mediation will find an online mediation service provider that

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151 Most privacy legislation enacted today is industry-specific, aimed at protecting Government intrusion into personal affairs, or is very narrow in its scope as interpreted by courts. See, e.g., Gramm-Leach-Bliley Act, 15 U.S.C. §§ 6801-6809, regulating the Financial Services Industry; Health Insurance Portability and Accountability Act, 64 Fed. Reg. 59,917 (Nov. 3, 1999), regulating the Healthcare Industry; See also Electronic Communications Privacy Act, 18 U.S.C.A. § 2510 (West). Nevertheless, all privacy legislation today experiences the same problem: the necessity to properly balance the privacy interests of the individual while keeping the language of the statutes broad enough to encompass future technologies. Morek, supra note 127, at 164.

152 For example, the increased use of social networking and other online services has created large discussion among the population with regard to the safety of one’s individual privacy. If a company does not adequately provide for privacy protections of the individual consumer about to engage in its service, the individual will likely not choose to participate in the service. This mentality, in of itself, creates a type of competition between businesses for the race towards enacting adequate and well-received privacy policies. The most prominent example today of a ‘privacy race’ is between Google and Facebook. See Veracode, **Google vs. Facebook on Privacy and Security**, available at http://www.veracode.com/resources/facebook-google-privacy-security (last visited, May 5, 2012).

153 In an ideal world, a governing body or committee will develop a type of trustmark that can be displayed on the websites of online mediation service providers who meet the minimum standards for maintaining confidentiality set forth in the framework presented herein. Utilizing this type of program will better enable individuals seeking to participate in online mediation to choose a service that serves their interest of keeping their communications confidential. See Alejandro E. Almaguer & Roland W. Baggott III, **Shaping New Legal Frontiers: Dispute Resolution for the Internet**, 13 Ohio St. J. on Disp. Resol. 711, 714 (1998); see also, **Krause, supra** note 5, at 462, explaining SquareTrade’s “seal” program; but see Morek, supra note 127, at 169, arguing that such a program is not feasible and that online mediation service providers may fraudulently claim certification.
does provide adequate protection. In the event that a service does not provide adequate protection, but another does, it is likely that the potential participant will choose the provider that provides extra security for their communications.\textsuperscript{154} This, by necessity, will cause the provider who does not provide adequate protection to either increase their methods of safeguarding mediation communications or be forced out of business from a lack of clients.

V. Conclusion

The development of new technologies that may limit the ability of participants to an online mediation to download, store, and subsequently disseminate statements made during the online mediation to the public should be encouraged. However, the ability to create and effectively implement these technologies may not be enough to safeguard online mediation communications in the near future. In addition, even when newer technologies are developed and implemented, it is inevitable that adversaries to the process will develop technologies that can surpass any security barrier and gain access to the otherwise private information.

Therefore, this article proposes a regulatory framework that all online mediation service providers should uniformly adopt in order to properly safeguard the confidentiality of mediation communications while still ensuring that the process remains effective. In addition, the framework provides an enforcement mechanism by which an individual who is injured due to a breach of confidentiality may have recourse in a court of law. As noted, the practicality of having a law adopted in the near future is also something that must be considered. Given the constant battle over a statute’s language and the minute details of a particular law or regulation, it will inevitably take a significant amount of time before such a regulation can be implemented.

Online mediation service providers should therefore be encouraged to develop adequate privacy policies that must be knowingly and understandably accepted by all participants to an online mediation prior to the onset of any mediation. The agreement should include the same elements as those proposed in the framework presented herein and, upon acceptance by the parties, will become a binding contract enforceable at law. In addition, as online mediation service providers begin to implement these types of agreements, individuals seeking to participate in online mediation will likely choose to participate in the mediation service that provides adequate protection for their communications. As a result, service providers who do not adequately address the privacy concerns of potential participants will either suffer business or be forced to increase the security measures set in place for the safeguarding of online mediation communications.

Online mediation is a developing process that, if it continues on its current path, will become a widespread and useful service in the future. By the nature of providing a service online, online mediation inherently comes with advantages that outweigh much of the disadvantages and costs of participating in traditional face-to-face mediation. Nevertheless, as the service becomes more prominent online, adequate precautions need to be taken to ensure that mediation communications are adequately protected and that individuals injured as a result of a participant’s breach of confidentiality have an adequate means of recourse.

\textsuperscript{154} Still however, the problem exists of whether potential participants in online mediation will even be aware of such privacy policies and whether they will be able to decipher between which online mediation service providers provide adequate protection for their communications.