

# The Pitfalls and Possibilities of Using Technology in Mediating Cross-Border Child Custody Cases

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## I. INTRODUCTION

Technology is all around us. It is becoming more commonplace and more affordable. As U.S. Secretary of State, Hillary Clinton, remarked in her January 21, 2010 speech on Internet Freedom, “[l]et us make these technologies a force for real progress the world over.”<sup>2</sup> Secretary Clinton made specific reference to the hopeful occurrence only days earlier when a young girl, who was buried in earthquake rubble in Port-au-Prince, Haiti, was pulled to safety. The girl was found because she used technology, in the form of a cell phone with text messaging to guide others to her. Technology is allowing people to have a voice, to be heard, and will no doubt be an increasingly important tool for mediators in cross-border disputes. In some cases, with a mother on one continent, a father on another, and a mediator on a third. Technology can enable people to discuss critical issues without the need to be present in the same room.

A mediator helps two parties communicate effectively to reach a mutually acceptable solution to a dispute. A family mediator is skilled in managing complex emotional issues internalized in parents debating the future of their child. As complicated as managing the issues of a domestic case can be, a family mediator working with parents in cross-border custody disputes must additionally account for the physical separation between parent and child. Adding yet another layer of complexity is the possibility of an international parental abduction—a complicated legal issue marked by urgency and perhaps hostility. Mediating an international parental abduction case is anything but easy, yet it is becoming a viable option for two parents who elect to cooperatively resolve issues related to their child without court intervention.

This paper will explore current efforts to ensure parents have the opportunity to elect voluntary mediation with a skilled international family mediator to resolve issues stemming from one parent traveling to another country with the parties’

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2. Hillary Rodham Clinton, Secretary of State, Remarks on Internet Freedom (Jan. 21, 2010), <http://www.state.gov/secretary/rm/2010/01/135519.htm>.

child, against the wishes of the co-parent. Additionally, this paper will explore, in general, the practical and substantive considerations in mediating a cross-border child custody case, with a focus on one issue of primary concern—the use of technology in these mediations. The paper will additionally include a discussion on whether technology will hinder or help resolution when considering cultural differences. Many mediators prefer to mediate a dispute face-to-face, however, that is often times impossible. One parent may be unable to travel for practical (i.e. the cost) or logistical (i.e. unable to obtain a visa) reasons. Therefore, some mediators may have no choice but to use technology to facilitate mediation between parents. By understanding the international scope of mediation and how technology is being utilized, and more importantly, can be utilized, mediators may be able to expand the number of parents able to be helped with cross-border child custody disputes.

## II. INTERNATIONAL PARENTAL ABDUCTION MEDIATIONS

### *A. Ongoing Efforts*

The Hague Conference on Private International Law<sup>3</sup> has made cross-border mediation in family matters a priority. In 2008, its Council on General Affairs and Policy requested that the Permanent Bureau of the Hague Conference begin work on a Guide to Good Practice to be used in cross-border mediation.<sup>4</sup> However, this was not the Hague Conference's first review of this topic. In October 2006, the Permanent Bureau drafted a "Note on the Development of Mediation, Conciliation, and Similar Means to Facilitate Agreed Solutions in Transfrontier Family Disputes Concerning Children Especially in the Context of the Hague Convention of 1980."<sup>5</sup> Attendees at the Fifth Meeting of the Special Commission to Review the Operation of the Hague Convention of 25 October 1980, held in early November 2006, again discussed mediating international parental abduction cases and training international mediators.<sup>6</sup> In March 2007, the Permanent Bureau

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3. See Hague Conference on Private International Law, Home page, [http://www.hcch.net/index\\_en.php?act=home.splash](http://www.hcch.net/index_en.php?act=home.splash) (last visited Oct. 29, 2010). The Hague Conference on Private International Law is an inter-governmental organization with state members. *Id.* (follow "About HCCH" hyperlink; then follow "Overview" hyperlink). Its purpose is to create and service international treaties, including several on family law matters, the most pertinent to this article being the 1980 Convention on the Civil Aspects of International Child Abduction. *Id.* (follow "Specialised Sections" hyperlink; then follow "Child Abduction Section" hyperlink; then follow "The Convention" hyperlink).

4. See COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, CONCLUSIONS AND RECOMMENDATIONS ADOPTED BY THE COUNCIL 2 (Apr. 1-3, 2008), [http://www.hcch.net/upload/wop/genaff\\_concl08e.pdf](http://www.hcch.net/upload/wop/genaff_concl08e.pdf).

5. SARAH VIGERS, NOTE ON THE DEVELOPMENT OF MEDIATION, CONCILIATION, AND SIMILAR MEANS TO FACILITATE AGREED SOLUTIONS IN TRANSFRONTIER FAMILY DISPUTES CONCERNING CHILDREN ESPECIALLY IN THE CONTEXT OF THE HAGUE CONVENTION OF 1980 (Oct. 2006), [http://hcch.e-vision.nl/upload/wop/abd\\_pd05e2006.pdf](http://hcch.e-vision.nl/upload/wop/abd_pd05e2006.pdf).

6. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE FIFTH MEETING OF THE SPECIAL COMMISSION TO REVIEW THE OPERATION OF THE HAGUE CONVENTION OF 25 OCTOBER 1980 ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION AND THE PRACTICAL IMPLEMENTATION OF THE HAGUE CONVENTION OF 19 OCTOBER 1996 ON JURISDICTION, APPLICABLE LAW, RECOGNITION, ENFORCEMENT AND CO-OPERATION IN RESPECT OF PARENTAL RESPONSIBILITY AND MEASURES FOR

conducted and reported a Feasibility Study on Cross-Border Mediation in Family Matters.<sup>7</sup> In its mid-2007 Judge's Newsletter, the Permanent Bureau focused an entire article on international parental abduction mediations, as it relates to cases falling under the 1980 Hague Convention.<sup>8</sup> In the article, representatives from several Hague signatory countries explained the general practice of international family mediation within their respective states.<sup>9</sup> The Permanent Bureau is now working on a new Guide to Good Practice in mediation, with the assistance of an expert group, hopefully to be finalized in 2010, and to be submitted to the Special Commission in 2011.<sup>10</sup>

In addition to the Permanent Bureau's work, in mid-March 2004 several countries and groups, including the Hague Conference on Private International Law, met at St. Julian's, Malta to discuss "how to secure better protection for cross-frontier rights of contact of parents and their children and the problems posed by international abduction between the States concerned."<sup>11</sup> In this meeting's Declaration, the participants agreed to facilitate, "by means of mediation, conciliation, by the establishment of a commission of good offices, or by similar means, solutions for the protection of the child which are agreed between the parents."<sup>12</sup> In two subsequent meetings, one in 2006 and another in 2009, the Malta Judicial Conference further solidified its position with regard to mediation. At the most recent Malta conference, the resulting Declaration stated that there is an urgent need to develop a more effective structure for the mediation of cross-border family disputes.<sup>13</sup> From this meeting, the Malta conference established a Working

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THE PROTECTION OF CHILDREN 30 (Oct. 30 - Nov. 9, 2006), [http://hcch.e-vision.nl/upload/wop/abd\\_2006\\_rpt-e.pdf](http://hcch.e-vision.nl/upload/wop/abd_2006_rpt-e.pdf) [hereinafter FIFTH MEETING].

7. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, PERMANENT BUREAU, FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY MATTERS (March 2007), [http://www.hcch.net/upload/wop/genaff\\_pd20e2007.pdf](http://www.hcch.net/upload/wop/genaff_pd20e2007.pdf). This study was in response to a recommendation for such a study by the Hague Special Commission on General Affairs and Policy in April, 2006. HAGUE SPECIAL COMMISSION ON GENERAL AFFAIRS AND POLICY, CONCLUSIONS OF THE SPECIAL COMMISSION OF 3-5 APRIL 2006 ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE 3 (April 3-5, 2006), [http://www.hcch.net/upload/wop/genaff\\_pd11e2007.pdf](http://www.hcch.net/upload/wop/genaff_pd11e2007.pdf).

8. Gabrielle Vonfelt, Magistrate, *Promoting Settlements and Agreements: How Can Mediation be Developed Within the Framework of the Hague Convention of 25 October 1980?*, 7 THE JUDGE'S NEWSLETTER ON INTERNATIONAL CHILD PROTECTION 44 (2007), available at <http://www.hcch.net/upload/news2007.pdf>. "The 1980 Hague Convention" is the abbreviated reference for the Convention of 25 October 1980 on the Civil Aspects of International Child Abduction. The Convention requires parties signatory to it to promptly return a child removed to or retained within its jurisdiction to the child's habitual residence. See CONVENTION ON THE CIVIL ASPECTS OF INTERNATIONAL CHILD ABDUCTION (Oct. 25, 1980), [http://www.hcch.e-vision.nl/index\\_en.php?act=conventions.text&cid=24](http://www.hcch.e-vision.nl/index_en.php?act=conventions.text&cid=24).

9. See Vonfelt, *supra* note 8, at 44.

10. WILLIAM DUNCAN, THE WORK OF THE HAGUE CONFERENCE IN THE FIELD OF INTERNATIONAL FAMILY MEDIATION 7 (Mar. 16, 2009), [http://www.coe.int/t/dghl/standardsetting/family/7th%20conference\\_en\\_files/CONF-FL-SP\(2009\)10%20E%20-%20WD-Mediation-Presentation-16%20March%202009.pdf](http://www.coe.int/t/dghl/standardsetting/family/7th%20conference_en_files/CONF-FL-SP(2009)10%20E%20-%20WD-Mediation-Presentation-16%20March%202009.pdf) (presenting to the 7th European Conference on Family Law, Council of Eur., Strasbourg).

11. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THE MALTA JUDICIAL CONFERENCE ON CROSS-FRONTIER FAMILY LAW ISSUES HOSTED BY THE GOVERNMENT OF MALTA IN COLLABORATION WITH THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, DECLARATION 4 (Mar. 17, 2004), [http://www.hcch.net/upload/maltadec12\\_e.pdf](http://www.hcch.net/upload/maltadec12_e.pdf).

12. *Id.* at 5.

13. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, THIRD MALTA JUDICIAL CONFERENCE ON CROSS-FRONTIER FAMILY LAW ISSUES HOSTED BY THE GOVERNMENT OF MALTA IN

Party to “draw up a plan of action for the development of mediation services to assist where appropriate in the resolution of cross-frontier disputes concerning custody of and contact with children.”<sup>14</sup> The United States is currently a member of this Working Party. In June 2009, member countries completed basic questionnaires.<sup>15</sup> Participating members and independent experts noted their shared concerns about the high cost of mediation, use of different languages in the process, enforceability of mediated agreements, the definition of “international family mediation,” appropriate mediation training, standards and regulation of mediators, follow-up with the parties post-mediation, locating the child, use of different mediation models, location of the mediation, long distance mediation, high travel costs, and the mediator’s knowledge of the legal and cultural implications of such cases.<sup>16</sup>

The European Union has addressed international parental child abduction mediation for some time. In 1987, the post of European Parliament (EP) Mediator for International Parental Child Abduction was created.<sup>17</sup> “The role of the mediator is to try to find a voluntary agreement between the abducting parent and the other parent, the best interests of their child(ren) always being paramount.”<sup>18</sup>

To ensure the effectiveness and professionalism of a mediation session, the EP Child Abduction Mediator helps to put together an appropriate team of mediators for each particular case. The Mediator’s ideal team would consist of: one woman, one man, one lawyer, one non-lawyer . . . both speaking both primary languages of the parties in the dispute.<sup>19</sup>

In 2004, a European Code of Conduct for Mediators was adopted. By the Fifth Meeting of the Special Commission held at The Hague in 2006, approximately one hundred mediation organizations across Europe had adopted the code of conduct.<sup>20</sup>

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COLLABORATION WITH THE HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, DECLARATION 3 (Mar. 26, 2009), [http://www.iss-ssi.org/2009/assets/files/news/maltadecl09\\_e.pdf](http://www.iss-ssi.org/2009/assets/files/news/maltadecl09_e.pdf).

14. *Id.*

15. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS - QUESTIONNAIRE I, [http://www.hcch.net/index\\_en.php?act=progress.listing&cat=7](http://www.hcch.net/index_en.php?act=progress.listing&cat=7) (follow “Working Party on Mediation in the Context of the Malta Process – Questionnaire I” hyperlink to see the actual document) (last visited Oct. 29, 2010). The questionnaire asked such things as whether mediation services exist within the jurisdiction, who provides the mediation services for international family matters, the central point of contact in an abduction case within the jurisdiction, if family mediation is regulated, restrictions on mediated agreements and agreement recognition and enforceability. *Id.*

16. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION, CONFERENCE CALL ON THURSDAY 30 JULY 2009, MEETING REPORT, [http://www.hcch.net/upload/wop/mediation\\_report1e.pdf](http://www.hcch.net/upload/wop/mediation_report1e.pdf) [hereinafter CONFERENCE CALL].

17. European Parliament, *The European Parliament Mediator for International Parental Child Abduction*, <http://www.europarl.europa.eu/parliament/public/staticDisplay.do?language=EN&id=154> (last visited Sept. 7, 2010).

18. *Id.*

19. See Justice and Home Affairs, *Mediator Gebhardt Explains How to Combat Child Abduction* (2009), <http://www.europarl.europa.eu/sides/getDoc.do?language=EN&type=IMPRESS&reference=20090126STO47093>.

20. FIFTH MEETING, *supra* note 6, at 31.

*B. Country Specific Efforts*

In addition to the efforts spearheaded by international organizations designed to further mediation in international parental abduction cases, several countries have established national programs.<sup>21</sup> In order to minimize costs for parents and ensure high quality mediation, some countries, such as the United Kingdom and Germany have established non-profit organizations. In Montreal, Quebec, the court runs a successful mediation program at little cost to the parents. In the United States, court systems vary greatly in funding and resources. Therefore, a non-profit organization may be the key to successfully mediating international parental abduction cases in the United States.<sup>22</sup> A non-profit can seek funding, and if structured properly, is not affiliated with any government and can remain impartial and trustworthy. A non-profit can ensure that mediators are of the highest caliber, conduct trainings, and manage cases from intake to follow-through post-mediation.

*i. Germany*<sup>23</sup>

Germany has engaged in several binational, cross-border child custody mediation projects. In October 1999, it began a binational mediation project with France, initially consisting of three German mediators and three French mediators.<sup>24</sup> Each mediation session involved one French parliamentary mediator and one German parliamentary mediator, along with the parents, most of whom had access disputes.<sup>25</sup> In February 2003, this program was entrusted to professional mediators, who would co-mediate each case; however, no new cases have been handled since March 1, 2006.<sup>26</sup> Germany has also successfully worked with the United Kingdom and has engaged in conversations with the United States to conduct cross-border mediations.<sup>27</sup>

At present, mediators in any German cross-border family mediation project are trained for a minimum of 160 hours as family mediators, plus advanced training in child abduction and custody cases.<sup>28</sup> The advanced training begins with

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21. This discussion herein is not exhaustive of the existing projects, but highlights some of the more successful and active programs.

22. Telephone Interview with Christoph Paul, Lawyer and Notary, Paul & Partner, Berlin, Germany (Feb. 22, 2010); Telephone Interview with Sarah Vigers, University of Aberdeen, Scotland; formerly Legal Officer of the Hague Permanent Bureau (Dec. 8, 2009).

23. As of September 1, 2009, Germany requires that, in family court proceedings regarding matrimonial and parental responsibility, the judge may order the parents to a mediator to be informed about the mediation process. See HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS QUESTIONNAIRE 6 (June 2009), [http://www.hcch.net/upload/wop/mediation09\\_de.pdf](http://www.hcch.net/upload/wop/mediation09_de.pdf) (Germany responding). This is not a requirement that the parents attend mediation. *Id.*

24. Honorable Eberhard Carl & Dr. Christina Wicke, *Mediation Projects in Hague Cases: Developments in Germany*, 7 THE JUDGE'S NEWSLETTER ON INTERNATIONAL CHILD PROTECTION 49 (2007), available at <http://www.hcch.net/upload/news2007.pdf>.

25. *Id.*

26. *Id.*

27. *Id.* at 50.

28. Telephone Interview with Christoph Paul, Lawyer and Notary, Paul & Partner, Berlin, Germany, & Dr. Jamie Walker, Mediator (Nov. 9, 2009 & Feb. 22, 2010).

fifteen hours, along with follow-up meetings related to German binational mediation projects with other countries.<sup>29</sup> The follow-up meetings serve as seminars, providing substantive education, and as a means of supervising the mediators.<sup>30</sup> Mediators are asked to commit themselves to be available for mediation in abduction matters with two weeks notice.<sup>31</sup>

Germany has created a very specific methodology for mediating a cross-border family case. It prefers each case to be handled by “one German mediator and one from the country of origin of the left behind parent,” “one of the mediators being a man and the other a woman,” and “[o]ne mediator should come from the legal, the other from the psycho-social sphere.”<sup>32</sup> Germany requires for each case, at a minimum, two mediators, “of whom at least one speaks the language of the other partner.”<sup>33</sup> “Ideally, the mediators “should also be familiar with the respective legal rules and cultural idiosyncrasies of the other country, or be prepared to familiarize themselves with them.”<sup>34</sup> The preference expressed in the German program is for mediations to be conducted entirely in person, with the parents face-to-face. To ameliorate the cost of travel, mediations are to be held in a block on one weekend when possible.<sup>35</sup> Mediations are held in the country where the child is located at present. This allows for contact between the “left behind” parent and the child in between mediation sessions.<sup>36</sup> The mediation sessions can address much more than a mere “return of the child”—it can allow parents to discuss access, custody, place of residence, child support/maintenance, holiday arrangements, contact with grandparents/other relatives, the child learning language skills, and travel and its cost, among other items.<sup>37</sup>

## ii. France

In France, the Agency for Assistance to Families in International Mediation (MAMIF)<sup>38</sup> has been providing education in mediating international family cases for at least nine years.<sup>39</sup> It provides training, including awareness-building courses for judges, and beginner and advanced courses in the practice of mediation.<sup>40</sup> Mediation is a voluntary action by both parents. MAMIF notes that “[i]nformation and training have been found to be determining factors for the growth of mediation.”<sup>41</sup> It bases its mediation on three key elements: trust, atten-

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29. *Id.*

30. *Id.*

31. Carl & Wicke, *supra* note 24, at 50.

32. *Id.* at 50-51.

33. *Id.* at 51.

34. *Id.*

35. *Id.*

36. *Id.*

37. Carl & Wicke, *supra* note 24, at 50-51.

38. See Ministère de la Justice et des Libertés, International Child Abductions, <http://www.enlèvement-parental.justice.gouv.fr/> (last visited Oct. 29, 2010) (providing information on MAMIF in stating that the Civil Service Bureau and International Business also offers assistance to international family mediation) (the website is in French, but you may use the Google bar on the top right hand of the webpage to “Translate” to English).

39. Vonfelt, *supra* note 8, at 44.

40. *Id.* at 45.

41. *Id.*

tion to the parents, and good faith.<sup>42</sup> MAMIF further elaborates on the importance of trust—trust between parents is important, but often lost due to the actions of one or both parties. Trust in the mediator is key and building that trust is what allows the mediator to work with the parents to restore trust in one another.<sup>43</sup> Another key factor in a successful cross-border mediation is the attention the mediator pays to the parties, owing to the many obstacles encountered by the parties and the strong feeling of being misunderstood, emphasized by the existence of borders.<sup>44</sup>

*iii. United Kingdom*

The United Kingdom, through its non-governmental organization, reunite International, completed a pilot mediation program in 2006, having mediated to conclusion twenty-eight cases.<sup>45</sup> For each mediated case, an application for return of the child under the 1980 Convention was already completed and an initial hearing was already heard.<sup>46</sup> Each case involved a child who was abducted to or retained within the United Kingdom. The program completed each mediation within the timeframe of the 1980 Convention.<sup>47</sup> The program followed basic norms of confidentiality, i.e. “nothing said during the mediation could be quoted in court.”<sup>48</sup> Its mediators completed training with National Family Mediation, a network of U.K. not-for-profit Family Mediation Services.<sup>49</sup> Each case was screened to determine whether mediation was an appropriate dispute resolution mechanism. The mediation was then set to occur over a two-day period lasting a maximum of three hours with two independent mediators and an interpreter, if required.<sup>50</sup> Mediations were conducted face-to-face in the United Kingdom. If an agreement was reached, the mediator memorialized it in a Memorandum of Understanding and presented it to the parties so that they could have their legal counsel reduce the Memorandum to a Consent Order in the United Kingdom and attempt to register or mirror that Consent Order in the other jurisdiction.<sup>51</sup> Of the twenty-eight cases mediated in the program, two cases were mediated by telephone.<sup>52</sup> The overall success rate was quite high, and the feedback from parents and legal counsel was

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42. *Id.*

43. *Id.*

44. *Id.* at 46.

45. REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE, MEDIATION IN INTERNATIONAL PARENTAL CHILD ABDUCTION: THE REUNITE MEDIATION PILOT SCHEME 14 (2006), <http://www.reunite.org/edit/files/Library%20-%20reunite%20Publications/Mediation%20Report.pdf>.

46. *Id.* at 41.

47. *Id.* at 4. The 1980 Convention urges jurisdictions to act expeditiously, and insist upon a decision as to the child’s return “within six weeks” of the commencement of a judicial or administrative proceeding seeking the return of that child. *Id.*

48. *Id.* at 8.

49. *Id.* at 9; *see generally* National Family Mediation, Home Page (2010), <http://www.nfm.org.uk/> (providing information and resources to help persons affected by divorce or separation).

50. REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE, *supra* note 45, at 11.

51. *Id.*

52. *Id.* at 14.

overwhelmingly positive.<sup>53</sup> Reunite now offers a broad range of mediation services in cross-border family disputes.

*iv. Australia*

Australia currently provides access to mediators in international family disputes, “including mediation . . . by a range of individuals and organisations, such as Family Relationship Centres which are funded by the Australian Government, community organisations, legal aid commissions; and government accredited individuals such as lawyers, social workers or psychologists known as family dispute resolution practitioners.”<sup>54</sup> The Australian Central Authority for administration of the 1980 Convention identifies cases suitable for mediation and arranges for mediation, or asks the appropriate court to refer the case to mediation.<sup>55</sup> For people who are in remote localities within the country, Australia can provide a national toll-free telephone number so that the person can nonetheless participate in mediation from afar.<sup>56</sup> Despite the identification of suitable cases and the accommodations made for remote participants, “mediation is not often used.”<sup>57</sup>

*v. Canada (Quebec)*

Quebec believes that international family mediation should be promoted, and in furtherance of mediation, countries should “publicise its value, its limits and requirements; create a list of accredited or trained mediators; develop complementary training for practising family mediators; adopt an ethics code for international family mediators or at distance mediators; [and] undertake an exploratory research to acquire knowledge about mediation at distance.”<sup>58</sup>

Quebec utilizes a court-annexed mediation program to aid parents in resolving family disputes. In September 1997, a new law came into force, allowing “couples with children . . . to obtain the services of a professional mediator during the negotiation and settlement of their application for separation, divorce, dissolution of the civil union, child custody, spousal or child support, or the review of an existing decision.”<sup>59</sup> For approximately the past five years, this court-annexed mediation program, housed entirely in the courthouse in Montreal, Quebec, has

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53. *Id.* at 52. Ninety-two percent of parents felt that reunite administered the mediation pilot program in a manner that was excellent or good; 90% of parents felt they were treated fairly during the mediation process; 90% of parents felt that the mediation met their expectations; 97% of parents felt that the mediation process was helpful or very helpful; 86% of parents were satisfied or highly satisfied with the outcome. *Id.*

54. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS QUESTIONNAIRE 2 (2009), [http://hcch.evision.nl/upload/wop/mediation09\\_au.pdf](http://hcch.evision.nl/upload/wop/mediation09_au.pdf) (Australia responding).

55. *Id.* at 3.

56. *Id.* at 6.

57. *Id.* at 3.

58. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS QUESTIONNAIRE 12 (2009), [http://hcch.evision.nl/upload/wop/mediation09\\_cae.pdf](http://hcch.evision.nl/upload/wop/mediation09_cae.pdf) (Canada responding).

59. Justice Québec, Family Mediation, <http://www.justice.gouv.qc.ca/english/publications/generale/mediation-a.htm> (last visited Sept. 7, 2010); see also Conversation with Lorraine Filion, Family Mediator (Jan. 27, 2010).

accepted international parental child abduction cases and cross-border family matters for mediation.<sup>60</sup> Ms. Lorraine Filion, the head of this mediation initiative, stated that many of their mediations, whether international or between different provinces within Canada, involve mediation where at least one parent participates by telephone.<sup>61</sup>

*vi. United States*

The United States supports using mediation as a means of settling cross-border family disputes. As in France, a fundamental tenet of mediation is that both parents come to the table voluntarily. At times, a court mandates mediation; however, neither party is required to reach a resolution through this process. “In mediation, this principle [of self-determination] requires that the mediation process rely upon the ability of the participants to reach their own voluntary, uncoerced agreement. Any party may withdraw from mediation at any time.”<sup>62</sup> “A mediator may provide information without giving legal or other professional advice, ask questions, identify issues, and help parties explore options.”<sup>63</sup> “A mediator cannot personally ensure that each party has made a fully informed choice to reach a particular agreement, but a mediator should make the parties aware of the importance of consulting lawyers and other professionals, where appropriate, to help them make informed decisions and review contracts of agreements.”<sup>64</sup>

Despite its support, the United States is realistic in noting potential drawbacks in using mediation. At times, a parent may use an agreement to mediate in order to delay the inevitable return of a child after a parental abduction.<sup>65</sup> It may also be difficult, expensive, or impossible to recognize and enforce an agreement in both applicable jurisdictions.<sup>66</sup> Furthermore, there are simply cases where it is not appropriate to mediate the matter, necessitating comprehensive screening processes to parse out the issues in a case in advance of the mediation.<sup>67</sup> The United States has engaged in meetings with Germany, dating back to mid-2005, to learn about Germany’s existing mediation initiatives, and to determine if it is fea-

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60. Conversation with Lorraine Filion, Family Mediator (Jan. 27, 2010).

61. *Id.*

62. Maryland Mediation and Conflict Resolution Office (MACRO), *Maryland Standards of Conduct for Mediators, Arbitrators and Other ADR Practitioners*, 1-2, <http://www.courts.state.md.us/macro/pdfs/standardsfinal.pdf> (last visited Oct. 29, 2010).

63. *Id.* at 2 cmts. M.

64. *Id.*

65. See *Cellular v. Joyce*, 603 F.3d 1142, 1143 (9th Cir. 2010) (noting that withholding fees incurred during mediation would encourage abducting parents to engage in bad-faith settlement negotiations with the purpose of delaying proceedings, and that such delay is counter to the Hague Convention’s stated interest in prompt dispute resolution).

66. See *Thompson v. Thompson*, 84 U.S. 174, 187 (1888) (holding that there is generally no implied federal cause of action to determine “which of two conflicting state custody decrees is valid,” and that judicial review is reserved for only “truly intractable jurisdictional deadlocks”).

67. See Julia Alanen, *When Human Rights Conflict: Mediating International Parental Kidnapping Disputes Involving the Domestic Violence Defense*, 40 U. MIAMI INTER-AM. L. REV. 49, 51, 84-85 (2008). Absent careful domestic violence screening, appropriate safeguards and rigorously trained mediators and attorneys, the batterer or the kidnapper may even succeed in coercing the other parent into signing a parenting accord that he or she does not truly support, and which does not serve his or her interests, or those of the child. *Id.*; see also Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN’S L.J. 235, 245 (2002).

ible to create a binational mediation pilot program between the two nations. At present, the United States is still reviewing the potential of mediation in cross-border cases and is participating in The Hague's working groups to explore the best practices for mediation.

The United States, as part of its participation in the Working Party on Mediation in the Context of the Malta Process noted that, as of June 2009, no referral service exists to send cases to a competent mediator within the country.<sup>68</sup> The United States also noted several impediments to full mediation programs in the United States, including the high cost of mediation services in the United States, the enforceability of agreements in both countries, and the difference in mediator regulation and qualifications in each U.S. state and territory.<sup>69</sup> During a conference call with the Working Party on July 30, 2009, the United States reported that it is in negotiation with various non-governmental organizations "regarding the establishment of services of a more active kind."<sup>70</sup>

### *C. What to Consider When Mediating International Parental Abduction Cases*

When mediating an international parental abduction case, one must consider many practicalities to ensure the mediation is successful. As noted above, several countries have successfully implemented mediation programs; however, the United States, in particular, has additional challenges originating from its many jurisdictions and lack of uniformity in credentials, standards, and rules. To ensure a successful mediation of a U.S. case, one must be cognizant of obstacles that could arise, and be prepared to address each in turn.

A mediator must answer one very basic question at the outset: who referred these parents to mediation? If a judge or a Central Authority<sup>71</sup> refers a case to mediation, the case may be in the midst of litigation or other proceedings and therefore may be on a strict timeline. Mediators may also receive referrals from non-profit or non-governmental organizations, attorneys, or even one of the parents in the midst of the cross-border custody dispute. A mediator must fully investigate the case and its history to ascertain its current juncture, and whether a court case, criminal charges, or applications with the Central Authority have already been filed. The mediator's investigation will also allow the mediator to assess whether this case is appropriate for mediation. A mediator must ask whether this case involves a country signatory to the 1980 Convention, and should also have the acumen to consult government compliance reports and the network

68. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, WORKING PARTY ON MEDIATION IN THE CONTEXT OF THE MALTA PROCESS QUESTIONNAIRE 3 (2009), [http://hcch.evision.nl/upload/wop/mediation\\_report1e.pdf](http://hcch.evision.nl/upload/wop/mediation_report1e.pdf) (U.S.A. responding).

69. *Id.* at 6.

70. CONFERENCE CALL, *supra* note 16, at 4.

71. *Convention on the Civil Aspects of International Child Abduction*, art. 6, <http://www.hcch.net/upload/conventions/txt28en.pdf> (last visited Oct. 29, 2010). Article 6 of the 1980 Convention requires that each signatory name a Central Authority to discharge that signatory's duties under the Convention. *Id.* In the U.S., the Department of State, Bureau of Consular Affairs, is the U.S. Central Authority for this Convention. See Hague Conference on Private International Law, Authorities, [http://www.hcch.net/index\\_en.php?act=authorities.details&aid=757](http://www.hcch.net/index_en.php?act=authorities.details&aid=757) (last visited Oct. 6, 2010).

to speak with professionals familiar with the issues at hand. This background will allow a mediator to assess the evolution of this case, what tools the mediator should have at hand, and how to enable the parents to communicate and reach a shared resolution. The mediator will not be able to steer either parent with the information he has acquired, but can ensure a fair process that protects both parents and enables them to reach informed, voluntary decisions in their children's best interests.

Cross-border mediations involve many actors, often creating a cacophony of voices that must be weighed in reaching a final decision. It may involve one mediator or co-mediators. It involves two parents, biological, adoptive, or de facto. The mediation may additionally involve several lawyers—lawyers for both parents, at times a lawyer for the child, and lawyers from multiple jurisdictions. In some circumstances, and when allowed by the mediator's code of ethics, a mediator may speak with the child at issue. Furthermore, one or both parents may want third parties present at the mediation, either in the actual sessions, in a side room, or available by phone or Internet. A parent's cultural traits may dictate that he must consult with third parties in his cultural group prior to entering into a binding agreement.<sup>72</sup> The mediator must investigate each parent's cultural traits, their communication preferences and proclivities, and additionally their gender. Finally, a mediator may need one or more interpreter(s) for the parents, third parties, or the mediator(s). It may be impossible to have all the above people present on the same day in the same room. Given the physical distance and time-sensitivity in these cases, a mediation may require the use of technology to facilitate communication—phone, e-mail, Internet, web-based software, instant messaging, etc.

Mediations will likely be conducted face-to-face, at least in part, and, therefore, a mediator should be selective in the location. A mediation may be held in a private office, an embassy, or a court-house. However, a parent may see one location as imposing and another as comforting. Will one location have the appearance of bias, for example, the embassy of the home country of one, but not the other parent? Or, will the embassy location provide necessary security and confidence in the process?

A mediator must create a timeline and game plan for the mediation. One or both parents may have filed a petition seeking the return of the child, a court case, or even criminal charges, and such pre-existing processes will affect the timeline under which the mediation must be completed. If the mediation requires interpreters, the amount of time needed to properly conduct the mediation will increase. If the mediator must stop the process to have documents translated, it could likewise increase the amount of time needed overall. If the mediation takes place across multiple time zones, or if both parents are traveling to the mediator, or the mediator is traveling to the parents, the mediation will take longer. Cognizant of the numerous time constraints, a mediator must set and keep a strict schedule. However, this may be difficult if parents are from a culture where time is viewed less linearly and more cyclically.<sup>73</sup> When a parent arrives to a mediation session

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72. Melissa Kucinski, *Culture in Mediating International Parental Kidnapping Cases*, 9 PEPP. DISP. RESOL. L.J. 555, 560 (2009).

73. Nina Meierding, M.S., J.D., Featured Speaker at An Evening With Speaker Series at the University of Baltimore: What You Need to Know About Culture: Its Impact on Communication, Negotiation, and Mediation (Mar. 22, 2010). A person may have differing views of time. *Id.* Some individu-

nearly one hour late, a mediator may interpret this to be disrespectful, however, it may be cultural. Regardless, it will affect the mediation's timeline, and require all involved to be flexible.

For any country formalizing a cross-border child custody mediation program, its paramount concern is mediator competency. A mediator must be competent to address the substance of a case (i.e., international, cross-jurisdictional, cross-cultural, emotional, child well-being), and in ethics and professionalism (i.e., mediator code of conduct and mediator processes). Not only should the mediator be prepared to address difficult conflict of laws issues, but the mediator should understand what standards must apply when mediating a case where one parent is in Country A, the second parent is in Country B, and the mediator is in Country C. In such a case, multiple countries' privacy laws and confidentiality rules may apply and conflict. For example, what if the rules conflict, particularly in the use of video or wire transmission of information that the mediator may be using to conduct the mediation? A mediator must abide by his own jurisdiction's mediator standards, but failure to also abide by the other jurisdiction's standards may be an impediment to future enforceability of an agreement should the other jurisdiction involved in the dispute have conflicting standards, or perhaps more rigid standards. Mediation standards (i.e., rules of mediator conduct, confidentiality, etc.) are distinct from the mediator's competency and certification (i.e., mediator education, training, experience).

When conducting cross-border family mediations, it is key to have consistency for both mediation standards and mediator certification,<sup>74</sup> because "[m]ediators involved in cross-jurisdictional mediations cannot be assured of what legal standards cover them, or what legal standards apply in the event of a conflict, especially with regards to confidentiality."<sup>75</sup> Furthermore, the mediator should be technologically savvy, and particularly if the technology is written (i.e., e-mail), versus spoken (i.e., video or phone conference), the mediator should have clear and effective writing skills. A mediator must also have the less tangible skills to listen, reflect, support, and empathize with the parents in mediation.<sup>76</sup> These skills may be unable to be taught in any training, and may differentiate good mediators from excellent mediators.

In the United States, each state elects its own standards and credentials for its mediators. In Maryland, for instance, mediators must meet the qualifications of the Maryland Rules of Procedure, Title 17, in order to mediate a case referred by the Maryland state courts. If a mediator is mediating a case privately, he need not meet any credentials.<sup>77</sup> A parent or his or her lawyer must thoroughly research a

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als are "monochronic" or process things in a linear, sequential order, doing things one at a time. *Id.* Other individuals are "polychronic" or they simultaneously process issues in a non-linear manner, juggling different topics or conversations at the same time. *Id.*

74. Jennifer Zawid, *Practical and Ethical Implications of Mediating International Child Abduction Cases: A New Frontier for Mediators*, 40 U. MIAMI INTER-AM. L. REV. 1, 29 (2008).

75. *Id.* at 31.

76. WATERNET ET AL., *ADVANCED MEDIATION SKILLS - COURSE BOOK 9*, 14 (2001-03).

77. MD. CODE ANN., [Alternative Dispute Resolution] § 17-103(b)(1)-(3) (LexisNexis 2010), available at <http://www.courts.state.md.us/macro/pdfs/rules.pdf>. The Maryland Rules of Procedure, in Title 17, specify procedures and requirements for mediators, mediator qualifications and selection, mediation training programs and what to expect from an adequate training program, the procedure to be approved as a court-appointed mediator, and mediator confidentiality. *Id.*

mediator's background prior to hiring him. Maryland has several groups and organizations that a mediator may join and voluntarily abide by the group's rules of conduct, credentials, and supplemental educational requirements. One such group is the Maryland Program for Mediator Excellence, which is supported by the judiciary through its Mediation and Conflict Resolution Office (MACRO).<sup>78</sup> Other states have extensive mediator credentialing programs, which include education, training, mentoring, observation, and experience.<sup>79</sup> Many states will require advanced training and/or experience before certifying a mediator to handle a child custody case.<sup>80</sup>

It may be impossible to find a mediator with knowledge in all substantive subject matters found in an international parental abduction mediation. A mediator may need to be competent in UCCJEA jurisdictional law,<sup>81</sup> the International Parental Kidnapping Prevention Act,<sup>82</sup> the 1980 Hague Convention and its case law, including the various U.S. circuits' definitions of such concepts as "rights of custody" or "habitual residence." A mediator may require substantive training and experience in immigration law, such as whether a parent may or may not be able to obtain a visa, local domestic violence law, and even have an understanding of the psychological development of a child of particular ages.

Any international parental abduction mediation program should be consistent in its: requirement of having mediators require signed agreements to mediate; case intake procedures; case assessment; determination of whether the case is appropriate for mediation; definitions used for processes and terms throughout the mediation; and follow-up after the mediation to assess implementation of an agreement and adherence to its terms. Mediators may be required to maintain certain records for a specified length of time, depending upon the mediator's jurisdiction requirements, or the referring organization's rules. If records exist, a mediator must further understand different privacy laws applicable to other's access of those records, whether through a subpoena or other court orders. A mediator must understand these issues, and should not mislead a parent under the guise of "confidentiality" when in fact the record may be easily accessed by another through the mediator's own courts or government.

Mediators may have their own personal guidelines as to when they will or will not mediate a case. Some mediators may only mediate if both parents have

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78. Maryland Program for Mediator Excellence, Mediator Excellence Council (MEC), <https://portal.mdcourts.gov/apps/mpme/aboutmpme.do?method=mec> (last visited Sept. 7, 2010).

79. See, e.g., Sixth Judicial Circuit, Alternative Dispute Resolution Program, Home Page, <http://www.jud6.org/ContactInformation/AlternativeDisputeResolution.html> (last visited Oct. 6, 2010) (explaining the Florida mediator credentialing process).

80. *Id.*

81. The Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) is a uniform law that serves to promote consistency among jurisdictions when dealing with a custody case that crosses jurisdictional boundaries. It also provides for consistent enforcement and recognition of child custody orders across jurisdictions. See Patricia M. Hoff, *The Uniform Child-Custody Jurisdiction and Enforcement Act*, 1 (The Office of Juvenile Justice and Delinquency Prevention (OJJDP)) (Dec. 2001), available at <http://www.ncjrs.gov/pdffiles1/ojjdp/189181.pdf> (citing the Uniform Child-Custody Jurisdiction and Enforcement Act (1997), <http://www.law.upenn.edu/bll/archives/ulc/uccjea/final1997act.htm>).

82. The International Parental Kidnapping Prevention Act (IPKPA) makes international parental child abduction a U.S. federal crime in some circumstances. See 18 U.S.C. § 1204 (2006).

legal counsel during the mediation.<sup>83</sup> Other mediators may only mediate a case where both parents are in a country that is a signatory to the 1980 Convention. Some mediators will only mediate cross-border child custody disputes involving cultures of which the mediator is intimately familiar.<sup>84</sup> Mediators often have sound reasons for putting these personal limitations on their mediations, allowing a mediator to handle cases competently and efficiently.

Mediators must also be specific in defining the mediation technique he is using. A mediator may be evaluative, reviewing the facts and providing pointed information about the law and potential court outcomes to guide the parents to a resolution. A mediator may be facilitative, only helping both parents to communicate with one another, but avoiding the more pointed direction an evaluative mediator may provide. The Hague Permanent Bureau states:

Mediation does not have a single established definition and can mean different things in different jurisdictions and even different things within the same jurisdiction. . . . For the purpose of this study, the term mediation is used to refer to a process in which a neutral third party (or third parties) seeks to assist the parties to reach their own agreement, whatever this procedure may be called in the jurisdiction.<sup>85</sup>

Upon review of existing cross-border mediation programs, it appears that mediation in general involves some type of *neutral* third person or persons who help two willing parties *voluntarily* reach an amicable resolution to a problem. Some will use the word “impartial” instead of “neutral” to describe a mediator, as each person brings an individual and cultural perspective to mediation, including the mediator.<sup>86</sup> Some mediators mis-use terminology—the mediator may, in fact, be using some alternative technique, such as settlement conferencing, pure facilitation, arbitration, or something entirely different. Mediation programs should be consistent with their definitions of dispute resolution techniques so that a dispute resolution professional accurately defines his role for the parents. This will allow parents to properly select a professional best in line with their case, and will allow the professional to outline the rules in their dispute resolution sessions.

As stated earlier, it is impossible for a mediator to possess all the substantive knowledge that may be needed in an international parental abduction matter. However, a mediator must know where to find such information and how to refer the parents to appropriate and competent sources for information. A mediator must know who to contact at the U.S. Department of State;<sup>87</sup> should know an immigration attorney; and should have information on local substance abuse clinics, mental health professionals, military law professionals, and domestic violence advocates, among others. Mediators should encourage the parents to seek compe-

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83. Interview with Jennifer Zawid (2009), Professor, Univ. of Miami School of Law; Interview with Preston Findlay, NCMEC (June 21, 2010).

84. Interview with Maureen Dabbagh, Dabbagh & Associates (Dec. 31, 2009).

85. HAGUE CONFERENCE ON PRIVATE INTERNATIONAL LAW, FEASIBILITY STUDY ON CROSS-BORDER MEDIATION IN FAMILY MATTERS 4-5 (2007), [http://hcch.e-vision.nl/upload/wop/genaff\\_pd20e2007.pdf](http://hcch.e-vision.nl/upload/wop/genaff_pd20e2007.pdf) (explaining a feasibility study on cross-border family mediation conducted by the Permanent Bureau).

86. Meierding, *supra* note 73.

87. U.S. Department of State, A Service of the Bureau of Consular Affairs, <http://travel.state.gov/> (last visited Oct. 29, 2010).

tent counsel to guide him or her.<sup>88</sup> Furthermore, a mediator must be careful to verify that their information is accurate. In some cases, when counsel represents the parents, the mediator may ask the counsel to provide mediation statements and positions as well as briefs as to certain legal issues that will arise in the particular case to ensure the parents are appropriately educated.<sup>89</sup>

In the United States, some jurisdictions have mandatory reporting laws for domestic violence, criminal activity, or actions that will likely cause harm to another.<sup>90</sup> Likewise, a different country may or may not have similar reporting requirements. It is imperative that a mediator accurately state the laws by which he is bound at the outset of the mediation. It may benefit any mediation program to have a uniform checklist of items that each mediator must cover during their initial meeting with the parents.

In some mediations, if a settlement is reached, the mediator will draft a Memorandum of Understanding, a draft stipulation of terms of settlement, or a full agreement. Some mediators may have the parties sign what is drafted. Others may simply provide a copy of the written terms to the parties and inform them that they must seek a lawyer to incorporate the terms into a binding document. In some U.S. jurisdictions, drafting anything may be the unauthorized practice of law. It is imperative that the mediator have a referral source so that the mediator may send the parents away with, not only an agreement, but a means of making the agreement enforceable, particularly if the parents are without attorneys. It is not the mediator's role, nor should it be, to take further steps to make the agreement enforceable. Doing so would create an ethical conflict of interest, could impose sanctions on the mediator, and would confuse the role of the mediator for the parents.<sup>91</sup>

The primary objective in mediation is to have the parents reach a shared understanding, memorialize that understanding in writing, and have it recognized in the relevant jurisdictions so if one day a party fails to abide by his obligations, the agreement can be enforced. However, there are many reasons why, some clear and some incomprehensible, a particular agreement is unenforceable in a jurisdiction. A court may want to independently assess the agreement to determine if it is truly in the child's best interest or to ensure that there was no undue coercion to enter into it. An agreement may cover terms that are forbidden under the country's laws, for instance, an award of spousal support, grounds for divorce, or providing for custody of the parties' child to a third individual. Some countries recognize same-sex marriage or adoption, but others do not. Therefore, if the parents

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88. The U.S.-based National Center for Missing and Exploited Children has a network of volunteer attorneys within the U.S. who have agreed to handle incoming abduction cases. Matters are usually handled pro bono, but some cases require the attorneys to seek reduced or full fees. See National Center for Missing and Exploited Children, *Become a Volunteer*, [http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en\\_US&PageId=250](http://www.ncmec.org/missingkids/servlet/PageServlet?LanguageCountry=en_US&PageId=250) (last visited Oct. 6, 2010).

89. Telephone interview with Marguerite Smith, Seattle, Wash. (Mar. 25, 2010).

90. Most U.S. jurisdictions are mandated by law to report child maltreatment. Each jurisdiction that requires this mandatory reporting specifies what individuals must report maltreatment, if it is disclosed to him or her. Such mandatory reporters may include social workers, teachers, physicians, and mediators. See Child Welfare Information Gateway, *Mandatory Reporters of Child Abuse and Neglect: Summary of State Laws 1-2* (2008), [http://www.childwelfare.gov/systemwide/laws\\_policies/statutes/manda.cfm](http://www.childwelfare.gov/systemwide/laws_policies/statutes/manda.cfm).

91. Interview with Nina Meierding, M.S., J.D. (Feb. 11, 2010).

reach a full agreement in mediation, this difference in laws may be an eventual impediment to enforcing that agreement.<sup>92</sup> A mediator must ask certain questions and employ certain safeguards to ensure that the parties are bargaining for a deal that can be upheld where both parties reside. The parties should always have competent legal counsel in both jurisdictions. The mediator may elect to limit the scope of the mediation to the issue of whether the child is returned to the “home” country or not. If the mediator addresses more issues than the parental abduction, the mediator could draft each issue in a separate memorandum of understanding, making each separate and severable from the other memorandums. A mediator may insert form language, for example, that the agreement will only become binding when it is properly incorporated into a court order and recognized in both jurisdictions. The mediator, however, must be careful not to cross the line into providing legal counsel to the parents, or drafting terms into a memorandum of understanding that the parties did not dictate, do not understand, or did not agree upon.

U.S. mediators often charge the same hourly rate as a good lawyer. Parents might be able to obtain low cost or free mediation services through a court system in the United States, but this requires starting litigation, and the quality and availability of a court-annexed mediation program differs dramatically from jurisdiction to jurisdiction in this country. Additionally, if both parents participate in the mediation in person, the parents must pay for airfare, hotels, and food. The mediator must budget for long distance phone calls, interpreters, translation, incidentals, such as photocopying and postage, and use of any technology needed in the mediation.

This raises the primary consideration in this paper: what role should technology play in cross-border mediations? More people own cell phones, websites, blogs, text messaging devices, and computers with high speed Internet. Many people are more likely to send an email or a text than to pick up a telephone or meet in person when communicating. People now are more adept at communicating via technology than in person more than ever before (and this can change the way mediations are done).

### III. USE OF TECHNOLOGY IN MEDIATION -

The influx of technology and technologically proficient parents could aid parties in a cross-border custody mediation. For example, in the reunite Pilot Program, reunite asked both the parents and their solicitors to complete evaluation questionnaires. In doing so, 27% of those solicitors who responded indicated that a final hearing on the 1980 Convention return petition was delayed due to the mediation process. Those comments indicated that the delay was due to “the father being unable to get a flight from New Zealand,” “the father having to apply for a passport to enable him to travel to the UK,” and “due to the mother’s difficulty in getting a flight from Ecuador to the UK.”<sup>93</sup> Technology could have aided

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92. Patricia E. Apy, Esq., Speaker at the Plenary Program, ABA Family Law Section Fall CLE meeting in Montreal, Quebec, Canada: The Hague Convention: A Parent's Salvation or a Wolf in Sheep's Clothing? (Oct. 8, 2009).

93. REUNITE INTERNATIONAL CHILD ABDUCTION CENTRE, *supra* note 45, at 34.

the parents in these cases, where, despite the parents' best efforts to be present in the same room during mediation, they could not. Despite family mediation advocates' strongly held desire to have mediations face-to-face, in some instances, conducting a mediation from afar could be successful, and is a tool that should not be overlooked, particularly when contravening forces intercede, such as in the reunite pilot program where some parents had difficulty making travel plans.

Family mediators are always seeking ways to expeditiously and efficiently mediate their cases. Technology can help. Family mediators are already successfully using technology, whether it is by telephone, Skype, e-mail or software to help the parties co-parent. We must also acknowledge that technology may be inaccessible to many parents due to expense, location, or education. A parent who lives in a rural area may not have reliable internet access. A parent who lost his job may not have the funds for a computer. A parent who is illiterate may be unable to type an e-mail expressing his opinion as to custody of his child. A parent may lack the background to successfully operate a Skype account or instant messenger, and therefore become frustrated with the process. There are some parents who simply say, "I would rather meet in person" or believe that they are able to better "present their evidence" in person.<sup>94</sup> At other times, a mediator may discuss matters with a parent face-to-face, only to have him e-mail the mediator different information and viewpoints from the safety of his home computer late at night. Knowing whether technology is appropriate or useful may mean knowing the parties prior to using the technology. In other cases, a mediator may have no option—either use technology or do not mediate.

There are numerous benefits to using technology in mediation. Through the Internet, mediators are able to advertise their services, and parents, judges, Central Authorities, or other people interested in these services are better able to research the mediator's competency.<sup>95</sup> One can use a search engine, such as Google, to research their mediator's name, to review articles, web sites, networks, practice areas, or other information about the selected mediator. Information is readily accessible, not only for parents, but for mediators. As noted in this article, it is impossible to find a mediator with substantive knowledge in every area of concern that arises in a complex international family mediation. However, with technology, a mediator is able to find information quickly and from competent sources (although a mediator must weigh the source's reliability). Mediators may use e-mail to communicate separately or jointly with the parents in a mediation, send documents to both parents, refer each to web sites or other information, craft an agreement and share that agreement with both parents and use the "track changes" editing feature so that parents may quickly and efficiently raise issues or provide comments.<sup>96</sup> Mediators may also use web chats (also called instant messaging) where the mediator and both parents are available online in "real time" to communicate with one another.<sup>97</sup>

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94. Chiara Albanese, *Cheaper, Faster: Dispute Resolution's Online Future*, COMMERCIAL DISPUTE RESOLUTION (Nov. 3, 2009), [http://www.cdr-news.com/index.php?option=com\\_content&view=article&id=324:cheap-fast-direct-dispute-resolution-is-going-online&catid=50:analysis&Itemid=1](http://www.cdr-news.com/index.php?option=com_content&view=article&id=324:cheap-fast-direct-dispute-resolution-is-going-online&catid=50:analysis&Itemid=1).

95. James Melamed, *Divorce Mediation and the Internet*, MEDIATE.COM (Jan. 2002), <http://www.mediate.com/articles/melamed9.cfm>.

96. *Id.*

97. *Id.*

Whether technology is used or not, a mediator must address the issue of confidentiality. In addition to confidentiality, in a more technologically advanced mediation, the mediator must also address a separate issue—security. “[A] mediator and any person present or otherwise participating in the mediation at the request of the mediator shall maintain the confidentiality of all mediation communications and may not disclose or be compelled to disclose mediation communications in any judicial, administrative, or other proceeding.”<sup>98</sup> This confidentiality rule, of course, has certain exceptions, which are delineated by each jurisdiction with a similar confidentiality rule to that of the U.S. State of Maryland.<sup>99</sup> When technology is used in a mediation, the mediator may have more difficulty maintaining confidentiality. A parent who participates by telephone may have an undisclosed third party listening to the conversation.<sup>100</sup> Parents may share e-mails with other third parties. Successful mediations may often require third party participants, but generally, in the United States, any third party participant must be disclosed and agreed upon by both parties to the mediation.

In addition to confidentiality rules, a mediator must recognize security issues apparent in using technology. Ms. Lorraine Filion, who leads the court-annexed mediation program in Montreal, Quebec, says that the court utilizes WebEx, an online videoconferencing product, which she believes to be very secure.<sup>101</sup> A mediator must be confident that the products he utilizes will maintain confidentiality in the mediation process. A cell phone provider who maintains text messages or an Internet service provider who maintains e-mail messages that are part of a mediation may be compelled to produce those communications through court subpoenas, depending on the jurisdiction. When a mediator uses e-mail or text messages to communicate with the parents, and the parents use the same to communicate with one another, where do mediation e-mails stop and routine parental communication e-mails begin? An inadvertent result of using e-mail or other written technology communication for the purposes of a mediation may to undermine the confidentiality process.<sup>102</sup>

Besides e-mail and telephone, parents may use web-based collaboration software, such as “Family Wizard,” which allows parents to maintain one database for notes on children’s doctors, school plays, playdates, or other activities.<sup>103</sup> J.P. Stonestreet stated that use of collaboration software will create “effective and efficient” organization for parents, and provide for a “historical communication log,” which can be referred to by both parents.<sup>104</sup> Stonestreet additionally noted that the use of web-based software allows parents to communicate, but also removes their “nonverbal behaviors” from the interactions, including “negative

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98. MD. CODE ANN., [Alternative Dispute Resolution] § 17-109(a) (LexisNexis 2010).

99. *See id.* § 17-109(c).

100. Zawid, *supra* note 74, at 41.

101. *See generally* Cisco WebEx, <http://www.webex.com> (offering a tour of how to manage phone conferences and quickly complete online tasks) (last visited Sept. 7, 2010); Conversation with Lorraine Filion, *Family Mediator* (Jan. 27, 2010).

102. Melamed, *supra* note 95.

103. *See* The Our Family Wizard website, <http://www.ourfamilywizard.com/ofw/index.cfm> (last visited Sept. 7, 2010).

104. J.P. Stonestreet, *How the Web Can Help Children of Divorce (And Their Parents...)*, *MEDIATE.COM* (June 2003), <http://www.mediate.com/articles/stonestreetJPI.cfm>.

facial expressions, crossed arms, or encroachment on personal space.”<sup>105</sup> Stone-street also noted the pitfalls of email (lack of organization that can quickly lead to “information overload”) and telephone (easily leads to “hostile interactions”), as compared to some type of web-based software that allows parents to communicate with each other behind the “protective shield of their computer screens.”<sup>106</sup>

Mediators often use a tool called a “caucus,” whereby a mediator will separate the two parents into different rooms and shuttle between the two.<sup>107</sup> A caucus allows a mediator to slow down the process and artfully craft communication between the two parents so that each parent is able to hear the substance of the other’s message without a fight ensuing over semantics or inconsequential details that may cause a stalemate. The same process may be used by a mediator who can go back and forth with each parent over e-mail.

A mediator must skillfully develop rapport with both parents in the mediation. Unfortunately, a mediator may have difficulty building rapport when the primary means of communicating with one or both parents is over e-mail or the Internet.<sup>108</sup> A mediator may want to use the phone or web-based videoconference calls to have as close as face-to-face meetings as possible. Face-to-face contact is particularly important in the mediator’s initial communications with each parent. Once the mediator establishes rapport, and trust is built into the mediator/parent relationship, then future communication in text format may be more productive and acceptable. Parents involved in an international parental abduction matter are usually distrustful of one another, and therefore rapport is key—if the parents have rapport with the mediator, the mediator can guide them to trust one another enough to resolve matters amicably.<sup>109</sup> When the primary communication is text-based, people tend to reach his own conclusion to fill in any gaps in information, using his prior perceptions of that person, including any prejudices.<sup>110</sup> “Physical presence generates feelings of positivity, warmth, and affinity necessary to develop interpersonal relationships.”<sup>111</sup>

In family law matters, particularly when a child is involved, it is imperative for parents to establish a functional ongoing relationship with one another, which is one reason why mediation is successful and often preferable. However, when the communication is not face-to-face, will the communication serve only to widen the gap that has grown between the parents? People who use e-mail and web-based communication on a routine basis grow and adapt to this means of communication, using abbreviations, symbols, and shorthand to further communicate emotion. However, an international parental abduction case is considered an emergency.<sup>112</sup> People who are not accustomed to this form of communication may be unable to adapt in sufficient time to effectively resolve a dispute, where

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105. *Id.*

106. *Id.*

107. Melamed, *supra* note 95.

108. *Id.*

109. Andrea M. Braeutigam, *What I Hear You Writing Is... Issues in ODR: Building Trust and Rapport in the Text-Based Environment*, 38 U. TOL. L. REV. 101, 102 (2006).

110. *Id.* at 106.

111. *Id.* at 108-09.

112. *Id.* at 116.

there is heightened stress and pressure to resolve a matter, with emotions running higher than in normal custody matters.<sup>113</sup>

One may view the use of technology from a different angle. "The online environment limits exposure to rapport-damaging engagements and promotes clearer, more focused communication."<sup>114</sup> If your mediation is conducted over the telephone or e-mail, it is inconsequential if one of the parties sits with crossed arms, or rolls his eyes. Those small gestures of disgust or un-receptive body language may be harmful when trying to re-build a relationship between two parents. The online environment may also focus the exchanges between two parents more so than banter back and forth in person. This allows for a cooling period between exchanges, but also may serve to break the flow of any positive exchanges if one of the parents does not timely respond to an e-mail.<sup>115</sup>

Time sensitive exchanges may also be useful for a mediator. When a mediator caucuses with one parent, the other parent will not be left sitting alone in a room wondering what is being spoken about him or her.<sup>116</sup> Instead that parent can be conducting business as usual, and return home that evening or the next morning to an artfully crafted e-mail from the mediator.<sup>117</sup> It may, however, be difficult for a mediator to keep momentum going between the parents if a parent is not forthcoming in a response, or if a parent is not artful in his wording, and a mediator spends more time going back and forth with one parent to clarify points than in actually mediating. In this regard, technology may serve to prolong the entire process. One author hypothesizes that mediating via a computer can take four to five times longer than mediating in person, face-to-face.<sup>118</sup>

Another consideration for mediators is whether to conduct a mediation where one party is present in person and the other is participating from afar via some form of technology. This may pose an unfair advantage to one parent over the other. The parent participating from afar may be more reticent to establish rapport with the mediator because he feels that the mediator may favor the in person parent. Or, will the long-distance participant over-compensate for his absence by constantly bombarding the mediator with materials, e-mails, facsimiles, and other communication explaining his story? The mediator runs the risk of appearing biased in this situation.

Another technological tool that may help in cross-border cases is online automatic translation. A web-based word processing application allows translation into any language from Arabic to Catalan to Galician to Indonesian to Swahili or Yiddish.<sup>119</sup> A mediator must verify the quality of the translation, and often, a translation fails to acknowledge slang. The translation is furthermore not a substitute for a certified translation acceptable in courts, but it may aid a mediator in helping the parties reach a final resolution. Additionally, Google has created a

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113. *Id.* at 112.

114. *Id.* at 113.

115. Braeutigam, *supra* note 109, at 114.

116. *Id.* at 120.

117. *Id.*

118. Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125, 129 (2006).

119. This translation tool is available on "Google docs," which is a web-based word processing application available through a Gmail account. See Google Translator, <http://translate.google.com/#> (last visited Oct. 6, 2010).

tool called Google Voice. Google Voice, among other features, allows for inexpensive international phone calls and conference calls.<sup>120</sup> Google also created Google Translator, a free web-based service handling fifty-two languages, which can translate websites more reliably than most online translation services.<sup>121</sup> This service is similar to the tool used in Google's word processing application.

One can utilize collaborative web-based technology to allow for communication during mediation as well. Internet videoconference applications include Skype, Google Video Chat, Gotomeeting, or Webex. In order to use these applications, a person must have a computer, the Internet, a web camera, speakers, and a microphone, and the wherewithal to find the free web-based application online and register to use it. Mediators may find that these web-based videoconferencing tools have many benefits, including low cost (assuming one has the basic tools already), the ability to reach people in remote locations, and the benefit of being able to mediate a case without the need for the mediator to travel long distances to the parties. However, a mediator who wants to use one of these tools should become familiar with it in advance of any mediation sessions. Many mediations are time-sensitive, and therefore, it may be difficult to spend half of your allotted time downloading the program, selecting an ID, and ensuring each person knows how to log in.<sup>122</sup>

When using a web-based video conference, it is also helpful to obtain an alternative phone number for the person on the other end of the video conference, to ensure your computer speakers and microphone are of sufficient quality to participate in the conference, and to assess what you will do during breaks, pauses, or caucuses to ensure confidentiality, and to ensure that each person has sufficient time to speak with the mediator and present his concerns and viewpoints.<sup>123</sup> In addition to videoconferencing applications, there is also video meeting software, that allows for multiple people to participate in a call at the same time.<sup>124</sup> These tools may be particularly useful if a mediator and both parents, their attorneys, and an interpreter are all in different locations. Finally, a mediator must always have a contingency plan should the preferred method of technology fail to operate as planned, or if the mediator finds himself unable to use the technology to its fullest capacity.

Some people believe that others "tend to lie more in email than in writing with pen and paper."<sup>125</sup> Is there a difference in the fast rhythmic typing of a computer keyboard versus the more artful cursive hand-writing that would cause a person to lie more? There is certainly a difference between written communication, of all kinds, and spoken communication. U.S. judges prefer that witnesses appear in person because a judge can then more easily assess his credibility. Credibility may be more difficult to assess over e-mail. Does a mediator need to as-

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120. Google Voice, <http://www.google.com/googlevoice/about.html> (last visited Sept. 7, 2010).

121. Miguel Helft, *Google's Computing Power Refines Translation Tool*, N.Y. TIMES, Mar. 9, 2010, at A1, available at [http://www.nytimes.com/2010/03/09/technology/09translate.html?\\_r=1](http://www.nytimes.com/2010/03/09/technology/09translate.html?_r=1).

122. Steve Mehta, *Skype Calling - Mediation in the 21st. Century* (May 2009), <http://www.mediate.com/articles/MehtaSbl20090511.cfm>.

123. *Id.*

124. John Folk-Williams, *Real-Time Online Video Meetings* (Nov. 2009), <http://www.mediate.com/pfriendly.cfm?id=5450>.

125. Christine Nicholson, *Business, Lies and Email*, <http://www.scientificamerican.com/podcast/episode.cfm?id=business-lies-and-e-mail-08-09-29> (last visited Oct. 5, 2010).

sess credibility? After all, a mediator does not make a decision at the end of the day. It may be difficult for two parties in mediation to reach a final resolution if one thinks the other is lying. Therefore, the mediator does have a stake in ensuring that both parties feel comfortable and communication is flowing properly. E-mail is in writing—it is forever. If something is in writing, it can easily be a life-long reminder of a lie. When a mediation uses e-mail, it is also easier to misunderstand a communication because tone, sarcasm, and intent do not easily translate into writing. It may be more valuable to have one person look the other in the eyes and clearly and convincingly articulate his viewpoint. One author stated, “[p]eople do not necessarily lie more in mediated interactions than in FTF [face-to-face] interactions. Researchers observed that participants lied less to familiar people when they communicated by e-mail as opposed to communicating FTF or by phone.”<sup>126</sup> The author postulates that this may be because e-mail is recorded.<sup>127</sup> It may be irrelevant as to whether the lie is in person or in writing. A liar may lie regardless of the form of communication.

Many child custody matters, and particularly child abduction cases, involve severe allegations of domestic violence. The 1980 Convention provides a defense to the return of the child to his habitual residence by demonstrating that the child would be in grave risk of harm by being returned. This has led to many, at times unfounded, allegations of domestic violence whenever a case involves child abduction. While many state court systems will not allow a case with a domestic violence allegation to proceed to court-annexed mediation, it can be valuable to allow an alleged domestic violence victim to voluntarily elect mediation. It is possible that this “victim” may feel pressure to mediate the case. However, a victim of domestic violence may also feel more comfortable in the controlled and confidential mediation environment, as opposed to the exposure of an open and public U.S. courtroom. The dominant argument against mediating domestic violence allegations is that the parties will be in a power imbalance. Yet, as reunite has found, when its mediators have proceeded to mediate these cases, the victim often becomes empowered and finds a voice, and grows during the process, more so than in a courtroom.<sup>128</sup> Technology may aid the mediation of cases with domestic violence allegations. Technology may also allow a victim to have a voice, to not fear repercussions, and to allow him or her to feel secure in their communications. A parent who experienced domestic violence may be able to state his or her fears, concerns, and viewpoint more articulately when doing so from behind the safety of a computer screen. Furthermore, communication between the parties is memorialized, and while considered confidential, there is nonetheless a measure of accountability and less room for overt intimidation.<sup>129</sup>

A final consideration is that a child of sufficient age and maturity may, depending upon the jurisdiction, be allowed or ordered to have his voice heard as to whether the child wants to return to the original “home” jurisdiction. Some juris-

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126. Nicole Gabrielle Kravec, *Dogmas of Online Dispute Resolution*, 38 U. TOL. L. REV. 125, 131 (2006).

127. *Id.*

128. Telephone Interview with Denise Carter, Director, reunite International Child Abduction Centre (Apr. 29, 2010).

129. James Melamed, *Divorce Mediation and the Internet* (Jan. 2002), <http://www.mediate.com/pfriendly.cfm?id=557>.

dictions, such as Sweden, where many mediators are trained in psychology, will order a child to speak with the mediator and then the mediator may report the child's viewpoint to the courts.<sup>130</sup> Other jurisdictions may have professionals, such as a custody evaluator, speak to a child and draft a report to be made available to the parents and the mediator.<sup>131</sup> In reunite's pilot mediation program, all mediations were to be conducted in the United Kingdom, i.e., the location of the child.<sup>132</sup> In Germany, likewise, mediations are conducted where the child is located.<sup>133</sup> However, at times, the mediation is not conducted where the child is located, or the mediator is conducting the mediation from afar. To what extent may a child communicate with a mediator over email or text message or video-conference, and is this an appropriate means to observe a child and communicate with a child? Arguably, children are more technologically savvy than most adults. Children may actually feel more comfortable, depending upon their ages, to text or e-mail a mediator than to sit in the confines of a room with a strange person. Technology may allow children to be more candid with a mediator, although a child may still have fears of being candid, believing that the mediator will show any written communication to the parents.

#### IV. SPECIAL CONSIDERATION—CULTURE

Can a mediator successfully use technology and adequately account for cultural differences in a cross-border family mediation? While technology may be useful in some mediations, parents may be unable to exhibit their cultural traits through nonverbal communication, imperceptible through some technology. If a mediator cannot see a parent's body language or facial gestures, the mediator may not know what questions to ask to get to the heart of the issues at hand.

It is impossible to classify one person as being in one "culture." The reality is that each person is an amalgamation of many cultures. However, there are cultural traits that a mediator should understand to help determine what a person is "really saying" when they are communicating with the mediator and with the other disputant. These cultural traits fall along continuums—a person may exhibit one extreme or the other, or fall somewhere between the two ends. People who study cross-cultural communication have been able to draw conclusions as to where a particular social group tends to fall on a given continuum. One example of a cultural trait continuum is that of "high-context" communication versus "low-context" communication. On the one extreme, high-context communicators tend to communicate with nonverbal cues. They say things by implying and using context. Their communication tends to be more indirect, and they often reserve their reactions.<sup>134</sup> On the other end of the continuum, low-context communicators will be specific, literal, and direct in their communication. They will verbalize

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130. Telephone Interview with Jessica Sandberg, Attorney at Law, ALW& ADVOKATBYRÅ AB (May 19, 2009).

131. reunite International Child Abduction Centre, *supra* note 45, at 53.

132. *Id.* at 10.

133. Telephone Interview with Christoph Paul, Lawyer and Notary, Paul & Partner, Berlin, Germany & Jamie Walker, Mediator (Feb. 22, 2010).

134. MICHELLE LEBARON & VENASHRI PILLAY, CONFLICT ACROSS CULTURES: A UNIQUE EXPERIENCE OF BRIDGING DIFFERENCES 35 tbl.3.1 (2006).

and say literally what they mean.<sup>135</sup> A person may communicate in a high-context manner, or a low-context manner, or exhibit traits somewhere in the middle of this continuum.

A second example of a cultural trait continuum is that of “collectivists” versus “individualists.” On the one extreme, a collectivist will value cooperation, deference towards elders, group reputation and harmony, and feel shame (a “global sense of unworthiness projected by a group”).<sup>136</sup> On the other end of the continuum, an individualist will value competition, independence, self-reliance, personal growth and feel guilt (a “particularized blame internalized by an individual”).<sup>137</sup>

It is easy to make generalities about a particular culture. For instance, one may observe that an American tends to be a low-context communicator and more individualistic. On the other hand, one may observe that a Japanese person may be more of a high-context communicator and more collectivistic. There are always variations and always exceptions, however, understanding the cultural underpinnings of a person, and the cultural communication traits that people tend to exhibit, can help a mediator determine how best to work with two individuals and ensure that they can communicate a message that is heard and understood by the other person.

Another cultural trait is that of a person who values “specificity” versus a person who values “diffuseness.” For a person who values specificity, technology that organizes life into compartmentalized activities, schedules, address books, and online “post-it notes” is very appealing. People who originate in a culture with a specific orientation “value[s] attention to efficiency, performance, task, and outcome, while the diffuse orientation values attention to process, relationships, and the big picture.”<sup>138</sup> Not all cultures value efficient resolution of a dispute. Some cultures focus on the *process* of getting to the resolution and the relationships of the people intertwined in working towards that resolution.

A mediator may have difficulty in fully exploring the relationship between parents when each parent is hidden behind a computer screen. A parent’s nonverbal behavior may ultimately hold the key to reaching a sustainable resolution between parents as to their child. While face-to-face mediation may result in argument, raising of voices, and barbs back and forth, a parent who comes from a culture that requires very expressive communication may be reluctant to reach a resolution when the mediation involves quiet contemplation and methodical typing of positions back and forth over the internet. Mediators may believe that non-visual ADR (e-mail over videoconference) spares the parties from “certain body language and facial expressions that can be counter-productive.”<sup>139</sup>

Some parents may be uncomfortable with expressing emotion, and may value the way some technology allows for more carefully crafted responses. Technology may actually empower a parent who prefers research and contemplation prior

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135. *Id.*

136. *Id.* at 38 tbl.3.2.

137. *Id.*

138. LEBARON & PILLAY, *supra* note 134, at 41.

139. Gini Nelson, *Four Questions About International Online Dispute Resolution Part Three* (Mar. 31, 2008), <http://www.mediate.com/articles/NelsonGbl200800407.cfm>.

to response.<sup>140</sup> Often times, a mediator may raise new and important issues or questions during a mediation session, and the parent requires additional time to digest this information and to develop a response. As such, it is not uncommon for a parent to do his best thinking after the children are in bed late at night. E-mail may prove to be a good means to memorialize the parent's thoughts without having to wait until further mediation sessions. Divorce attorneys understand this phenomena—it is routine for a client to emerge from a court appearance or meeting, only to send multiple emails to his or her attorney later that evening, with additional comments, questions, or information.

It is essential to a parent's identity that he retain his self worth and be treated respectfully. Many cultures emphasize the concept of "saving face." No one person wants their position belittled, and this is even more important in cultural disagreements, as people's positions stem from intrinsic ways of being. Belittling a person's position is belittling that person's identity and culture. A mediator works very hard to impress upon both parents that his existence and opinion have value. If the mediation is conducted in a condensed time period, over e-mail, written text, or through an interpreter, how is the mediator's ability to create a safe environment influenced? It may be easier, and more matter-of-fact, for a mediator to focus on facts through concise e-mails. However, this may also provide a challenge for a mediator who needs to interact more closely with a person to allow for that parent to save face. At times, a mediator may need to look a parent in his eyes and view his body language to assess what might need to be said to comfort the parent and create a safe environment. In some cultures, a third party may attend a mediation on behalf of a parent, to "allow the transgressor [parent] to still retain his role and/or status within the [cultural] group by not having to directly face his accuser [parent] or directly account for his own actions."<sup>141</sup> In this regard, it may be more important that a mediator allow parties to hide behind a computer screen in order to save face.

A mediator *must* establish rapport with both parties in mediation. Without this camaraderie, one or both parties may distrust the mediator. A parent may establish this relationship with the mediator for different reasons, most culturally based. A parent may come from a culture where education is particularly important, and as such, the parent may require that the mediator have certain experience and education. It may be important for a mediator to impart her credentials to both parents in the initial meeting, whether it be spoken, or by providing a copy of a *curriculum vitae*, which may be done via e-mail. A parent may instead come from a culture where education is less important than life experience—a mediator must hold a particular hierarchical position within that person's society or group. This may be difficult to communicate through words, and may often be better seen through wrinkles on a face or how the mediator dresses or what adornments the mediator may wear that signify status.<sup>142</sup> "In some cultures, mediators are elders who have been chosen specifically because of their existing knowledge of the specific dispute and their interest in assisting the resolution so that a group (tribe,

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140. Melamed, *supra* note 129.

141. Nina Meierding, *Mediation: Staying Culturally Relevant in a Multicultural World* (Jan. 2010), <http://www.mediate.com/pfriendly.cfm?id=5606>.

142. Interview with Maureen Dabbagh, Mediator, Dabbagh & Associates (Dec. 31, 2009).

community, church) will all benefit.”<sup>143</sup> In other cultures, a mediator who knows both parents is preferred to a mediator who is “neutral” or “impartial.”<sup>144</sup> A partial mediator who knows both parties can speak directly to their dispute and their family and what is important to each person. A partial mediator may also be familiar with the parents’ community and desire a harmonious resolution to avoid shame for either parent within the community. A mediator may also build rapport, or lose rapport, simply because of his gender, religious background (for instance, if the mediator volunteers at his Jewish temple, and his name appears on that temple’s website, that could demonstrate something culturally to the parents in a mediation), or even language skills. It may be difficult to impart colloquialisms over e-mail, and often sarcasm or other rapport-building banter may be lost.

A mediator must pay special attention to each parent’s cultural ways of communicating to assess whether technology is appropriate for the mediation and to what extent. For instance, depending upon a person’s culture, the person may not want to discuss personal information through an electronic medium.<sup>145</sup> A person may want to avoid the impersonal nature of e-mail or even videoconference. A person, depending upon their cultural leaning, may want only in-person communication. At times, a mediator may have difficulty empathizing with a parent when not meeting in person, and that parent may feel neglected or misunderstood. Mediation through technology may also be seen as more “transactional” and less of a discussion.<sup>146</sup> Furthermore, a person who values group harmony may view conflict itself as shameful to the group, and any means where the conflict is put in writing, as through an e-mail, may exacerbate the person’s desire to avoid the conflict to maintain group harmony.<sup>147</sup> A mediator must also assess how direct or indirect he should be with a parent. An e-mail that asks a specific pointed question might be welcomed by a low-context communicator, but may be humiliating or shameful to a high-context communicator who values group harmony and does not want to air a personal dispute in writing.

Mediators are also cultural individuals. As such, mediators fall along a cultural continuum and exhibit certain cultural traits. Mediators may be more inclined to communicate directly or indirectly, depending upon his culture and upbringing. If a mediator comes from a culture that prefers to avoid conflict, does not like to directly address conflict, or likes to de-personalize conflict, the mediator may be more inclined to use technology to suit his own cultural needs. If a mediator is a low-context communicator, the mediator might be uncomfortable with a parent who desires a personalized touch. A mediator may use technology to conveniently avoid this undesirable and “messy” communication where a person might not say what he means. Does the Internet also allow a mediator to ignore parents’ cultural traits for the purpose of expediting the mediation? May this have the effect of parents reaching agreements that, while acceptable on paper,

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143. Meierding, *supra* note 141.

144. Nora Femenia, *ODR and the Global Management of Customers' Complaints: How Can ODR Techniques be Responsive to Different Social and Cultural Environments*, Paper presented at the Joint Conference of the OECD, HCOPII, ICC, The Hague, Holland (Dec. 12, 2000), <http://www.mediate.com/pfriendly.cfm?id=475>.

145. *Id.*

146. *Id.*

147. *Id.*

may actually be irrational and unable to be applied to this parent's actual life circumstances?

Mediators also must pay keen attention to their own cultural identity and how it is perceived by both parents. Parents may tend to culturally identify with a mediator who shares his heritage, gender, or linguistic capacity. This may cause a parent to rest too much weight on the mediator and what he says during the mediation. For example, a mother identifies with the female mediator who is handling her case. The mother recognizes that they share the same cultural heritage and originate from the same small town. The mother identifies with the mediator's gender and feels comfortable sharing details that may otherwise be taboo to share with a male. The mediator has used culture to her advantage to build rapport and create a comfortable environment in which the mother can communicate. However, the mediator must also skillfully ensure that the mother does not blindly accept the mediator's comments or substitute the mediator's judgment for her own, thereby nullifying the entire goal of reaching a shared decision between the two parents.

In this regard, cultural identification can lead to complacency, a less than ideal situation in the mediation context. Some established mediation programs, such as in Germany, require that the co-mediators be one from each gender, one from each parent's cultural background, and one from the legal profession and one from the psycho-social profession. As one author aptly noted, however, "if a mediator is properly trained and sufficiently experienced, he should be able to effectively mediate *any* international child abduction case regardless of the gender and ethnicity of the parties involved."<sup>148</sup> A mediator must know his limitations, and additionally be prepared for potential problems that may stem from cultural identification. In this regard, would technology help or hinder a mediator? On one hand, a mediator who is "hidden" behind an e-mail message has no accent, and less of an identity. On the other hand, a mediator may have to work especially hard to build rapport with a parent when the only contact is a written message, and therefore the mediator may be more prone to sharing personal reflections and shared commonalities with the parent to establish rapport.

Another cultural issue in mediations is the "western" need for a signed agreement to resolve all issues between the parties.<sup>149</sup> At times, however, the process is more important than the result. For some cultures, a signed agreement is not necessarily as legally enforceable as it might be in a U.S. court.

[S]ome cultures see a signed contract as simply memorializing that a relationship between the parties exists. If something changes (especially something beyond the parties' control) then the contract may not be seen as binding—simply a document that a relationship exists and that the dispute will be worked out in a way that is mutually satisfying.<sup>150</sup>

When a mediation is conducted through e-mail, the ultimate agreement may not be formally drafted into a consent order or Memorandum of Understanding, but the agreement is evidenced in writing, and either parent may be hard pressed to misrepresent or disregard the terms.

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148. Zawid, *supra* note 74, at 39.

149. Meierding, *supra* note 141.

150. *Id.*

U.S. mediation ethics codes require a mediator to assess whether a person has the authority and capacity to enter into an agreement.<sup>151</sup> The mediator must further assess whether the person is entering into the agreement voluntarily and has full understanding of the terms of the agreement. In some cultures, however, “yes” does not necessarily mean “yes.” “‘Yes’, can mean, ‘I understand.’ ‘Yes’, can mean, ‘If I say ‘no’ then you will lose face, so I will say ‘yes.’ ‘Yes,’ can mean ‘I do not have the authority to give my consent, but I will lose face if I do not respond.’”<sup>152</sup> This could cause very difficult ethical issues for a mediator who is not able to understand the cultural cues that a parent is providing. It further causes problems for a mediator who may never have seen both parents face-to-face to assess the nonverbal behavior as to whether a parent might be sending cues that “yes” does not actually mean “yes.”

One of the most important reasons to conduct mediations face-to-face is literally so that one parent may look into the eyes of the other parent, re-build a broken relationship, and also to express apology, which in many cultures is the true means of resolving a high conflict dispute. Mediation tends to be more successful than in-court proceedings because there is no winner and no loser—there is only communication between two intertwined individuals who need to work together, not only now in this one dispute, but for as long as they share a child. Being able to apologize, or seeking an apology, is something more sincere done face-to-face.

One author suggests that it is important to understand the: histories, traditions, beliefs, and values of diverse cultures both in the United States and abroad. A mediator should not assume that he can research a country's cultural profile and automatically know what cultural attributes a party brings to the table—this would cause stereotypes. A mediator should never assume anything—the best mediators are curious, flexible, and patient.<sup>153</sup>

## V. CONCLUSION

Technology may be a double-edged sword in mediations—inappropriate for some parents and mediators, but an amazing tool to help others, particularly those parents who are unable to traverse many miles to meet in person to discuss difficult and contentious parenting issues. In some cases, given the proper cultural context, using technology may improve communication and provide means for a better and faster resolution.

While technology has been used successfully in numerous international parental abduction mediations, it is also being used by parents the world over to co-parent after they have agreed to a framework for living separate but parenting together. Technology will allow communication between parents in a safe, rec-

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151. See, e.g., JAMS, Mediators Ethics Guidelines, <http://www.jamsadr.com/mediators-ethics/> (last visited Nov. 9, 2010).

If the mediator perceives that a party is unable to give informed consent to participation in the process or to the terms of settlement due to, for example, the impact of a physical or mental impairment, the process should not continue until the mediator is satisfied that such informed consent has been obtained from the party or the party's duly authorized representative.

*Id.*

152. Meierding, *supra* note 141.

153. *Id.*

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ordered, and transparent environment, without face-to-face contention or putting the child directly in the middle of parental communication.