

# ONLINE MEDIATION AND THE OPPORTUNITY TO RETHINK SAFETY IN MEDIATION

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## I. INTRODUCTION

Our standards for mediator conduct are aging while our procedures for mediation are zooming forward. A year before the pandemic, I was leading discussion groups on the merits and drawbacks of online mediation. In those groups, many practitioners expressed discomfort with the idea of mediating online, while a few often extolled the ease and efficiency of an online mediation practice. By the middle of 2020, few mediators were left with much of a choice about whether to conduct their sessions remotely—with public health guidelines preventing even small groups from gathering in many locations and buildings shutting down, mediators and their clients were forced to either postpone their mediations or develop socially distanced alternatives.

Remote technology largely rose to the occasion, perhaps because it was mostly in place before the pandemic began. The participants, however, needed more time. Unfortunately, the pandemic has given the world plenty of time to become used to interacting more online. Now, I speak with practitioners who tell me they will never go back to mediating in person. Given this great shift, it seems like an ideal time to revisit mediator guidelines, such as the American Bar Association (“ABA”) Standards of

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\* © 2022, All rights reserved. Associate Professor of Law, The University of Detroit Mercy School of Law. All opinions expressed in this Article are my own and do not reflect the views of any organization or group in which I am a member, including the American Bar Association Dispute Resolution Section or the State Bar of Michigan Dispute Resolution Section. My thanks to the tremendous student organizers of the *Stetson Law Review* Symposium *Is Remote Justice Still Justice?* I have attended many hybrid symposia over the past few years and none had as much audience participation and editorial support as this one. The *Law Review* is truly to be commended on their work in promoting these important conversations.

Mediator Conduct, in light of the continued use of online mediation platforms.<sup>1</sup>

Early in the pandemic, my mediation co-trainer, Zena Zumeta, and I pivoted to conducting our mediation trainings online. In fact, we served as part of a pilot project with the State Court Administrative Office (“SCAO”) of Michigan to determine whether the state’s forty-hour General Civil Mediation training could be successfully conducted online.<sup>2</sup> We were lucky that prior to the pandemic, SCAO had been actively working with the state’s community dispute resolution centers to provide online platforms for mediations, and the groundwork and infrastructure was already in place for a transition to online mediation.

Much has been written about the rise of online dispute resolution (“ODR”).<sup>3</sup> This Article looks at one small piece of that landscape, based largely on numerous anecdotal observations that have been made to me by family mediators, and also commercial mediators, about how much more they enjoy the process of mediating disputes online.

The profession is having broader discussions about whether ODR is the forum (or fora<sup>4</sup>) of the future—with courts, arbitrations, mediations, and all manner of dispute resolution processes moving online.<sup>5</sup> I think it likely that mediation will be an area that sees a significant number of practitioners remain online, even as other processes trickle back to more in-person

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1. The American Bar Association Section on Dispute Resolution, for example, has created a resource page for mediating online. *Online Practice Tools*, AM. BAR ASS’N, [https://www.americanbar.org/groups/dispute\\_resolution/resources/resources-for-mediating-online/](https://www.americanbar.org/groups/dispute_resolution/resources/resources-for-mediating-online/) (last visited Nov. 13, 2022). The Section also created an ODR Task Force that released guidance to improve online mediation systems and technology. *Guidance for Online Dispute Resolution (ODR)*, AM. BAR ASS’N 1 (Oct. 2022), <https://odr.info/files/aba.pdf>.

2. Michigan, as it so happens, has been a hotbed for court-annexed dispute resolution online. See *Online Dispute Resolution in the United States: Data Visualizations*, AM. BAR ASS’N CTR. FOR INNOVATION 2 (Sept. 2020), <https://www.americanbar.org/content/dam/aba/administrative/center-for-innovation/odrvisualizationreport.pdf>.

3. See generally ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE (Mohamed S. Abdel Wahab et al. eds., 2012); AMY J. SCHMITZ & COLIN RULE, THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION (2017); ETHAN KATSH & ORNA RABINOVICH-EINY, DIGITAL JUSTICE: TECHNOLOGY AND THE INTERNET OF DISPUTES (2017); Amy J. Schmitz, *A Blueprint for Online Dispute Resolution System Design*, 21 J. INTERNET L. 3, 3 (2018).

4. “Fora” is the proper plural with the Latin declension, but since the rest of this Article is in English, the anglicized “forums” would be equally correct. Allow my time spent memorizing Latin declensions its brief moment on the printed page.

5. For a lengthy list of ODR platforms, see *Provider List*, THE NAT’L CTR. FOR TECH. & DISP. RESOL., <https://odr.info/provider-list/> (last visited Nov. 13, 2022).

meetings in the post-pandemic era. It seems especially important, then, that we seize the opportunity that online mediation offers us to revisit our ethical standards. This Article examines the ways in which the profession can revisit safety in the online mediation era.

## II. ODR, MEDIATION, AND SAFETY CONCERNS

Scholars and dispute resolution providers have made great progress over the last decade in building out platforms and creating policies and usage guidelines around ODR. But what is ODR, really? What kinds of processes does it encompass, and is online mediation even part of what is considered contemporary ODR?

At its simplest, ODR is exactly what the name suggests: using the Internet as the platform on which a dispute is resolved. Typically, the implication is that the Internet is the exclusive platform for the proceedings and not merely one means among many by which those working to resolve a dispute operate. For example, the National Center for State Courts (“NCSC”) defines court-related ODR as “a public facing digital space in which parties can convene to resolve their dispute or case,” and it emphasizes that an ODR program should operate “exclusively online,” be “explicitly designed to assist litigants in resolving their dispute or case, rather than a technology platform to support judicial court or staff decision-making,” and be “hosted *or* supported by the judicial branch.”<sup>6</sup> In other words, both the negotiation and the resolution of the dispute should happen online. As NCSC explains elsewhere, “Common features of ODR include the ability to exchange information and documents; to negotiate asynchronously using chats or text messages; and to populate forms to memorialize details of settlement agreements.”<sup>7</sup>

Why does it matter whether online mediation is considered part of ODR more broadly? For this Article, it matters because there has been tremendous development of standards for ODR

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6. *What is ODR?*, NAT’L CTR. FOR STATE CTS., <https://www.ncsc.org/odr/guidance-and-tools> (last visited Nov. 13, 2022).

7. *Eight Lessons to Consider for ODR Implementation*, NAT’L CTR. FOR STATE CTS. 1, [https://www.ncsc.org/\\_data/assets/pdf\\_file/0020/58016/8-Lessons.pdf](https://www.ncsc.org/_data/assets/pdf_file/0020/58016/8-Lessons.pdf) (last visited Nov. 13, 2022). On the other hand, this document does appear to contemplate online mediation as a component of court-related ODR programs: “Similarly, ODR platforms can accommodate online mediation services for litigants, but the court must supply and train mediators who are authorized and comfortable with providing services in an online environment.” *Id.* at 2.

processes over the last two decades, much more progress, frankly, than there has been in developing and updating the ABA Mediator Standards of Conduct, which have largely remained static in the nearly two decades since their latest revision. Although there have been efforts to update the ABA Standards, either through actual revisions to the rules themselves or through comments to the rules, none of those efforts have yielded much in the way of actual changes.<sup>8</sup> Moreover, examining the differences between ODR and online mediation suggests that online mediation may still be sufficiently rooted in traditional in-person mediation as to require considering it as a separate, or at least hybrid, category of alternative dispute resolution (“ADR”). While the procedure may be conducted wholly online, many of the same concerns about physical proximity to other parties and the need for real-time accommodations for party security and comprehension remain.

Early discussions of the use of ODR often seem to imply or assume that the parties taking part in the process would be geographically distant, so that one of the key benefits of the particular online process would be that parties who were far apart would save on travel time and costs in resolving their dispute online rather than in person.<sup>9</sup> Perhaps this is because the earliest uses of ODR were on commercial platforms like eBay, in which the disputing parties were not known to one another and were typically located some distance apart.<sup>10</sup> This more commercially focused context may explain why early ODR guidelines place little, if any, focus on the physical, or even emotional, safety of the parties. If parties are engaged in one-off transactions far apart from one another and are unlikely to ever see each other in person, then the physical and emotional safety concerns are fewer.

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8. Omer Shapira, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, 100 MARQ. L. REV. 81, 85 (2016). Right around the time Shapira’s article was published, the then-Chair of the American Bar Association Section of Dispute Resolution, Professor Nancy Welsh, an expert in ADR ethics, began to convene discussions among stakeholders about whether there was interest in revisions to the Model Standards of Conduct for Mediators. Perhaps with the change in mediation practice, this conversation can be renewed for the Zoom mediation era.

9. See, e.g., David Allen Larson, “Brother Can You Spare a Dime?” *Technology Can Reduce Dispute Resolution Costs When Times Are Tough and Improve Outcomes*, 11 NEV. L.J. 523, 541 (2011). Larson uses the term “technology mediated dispute resolution” (TMDR) rather than ODR. *Id.* at 524.

10. Harvard L. Sch. Ctr. on the Legal Pro., *Separating the People from the Problem: Colin Rule and the Rise of Online Dispute Resolution*, PRACTICE, July/Aug. 2020, at 1; see also SCHMITZ & RULE, *supra* note 3, at 34–35.

However, ODR has also been on the rise for some time in the family law context.<sup>11</sup> Interestingly, many of the early platforms emphasized asynchronous and/or text-based communication, in which the focus was the exchange of information and helping the parties make decisions about the dissolution of their relationship and the care of any children, without requiring much real-time, face-to-face communication. This is similar to the early eBay models. Take for example Modria, a well-known ODR platform developed by the same designers as eBay's that emphasizes automation of divorce cases.<sup>12</sup> It specifically touts the asynchronous communication as "giv[ing] the parties time to more thoughtfully consider their responses and avoid overly emotional comments."<sup>13</sup> Modria co-founder Colin Rule describes the platform as "walk[ing] the participants through a Turbo Tax-style diagnosis process . . . to pre-negotiate issues in advance of a formal hearing or mediation."<sup>14</sup> The idea behind these products and processes is to help parties identify and resolve issues without engaging in the in-person and/or real time discussions commonly associated with mediation.<sup>15</sup>

Even with these ODR processes, then, there is still a need to refer unresolvable (and, thus, thornier) issues to mediation or the courts to resolve. Traditionally, those sessions, whether court or private mediator, would have been conducted in person, where court security personnel or the mediator (and her staff, if any) could provide some oversight over the physical safety of the parties. However, with the jump to Zoom and other platforms to provide mediation services, this kind of in-person, physical oversight of parties is no longer as available. Mediators must become more proactive than ever in addressing these concerns.

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11. Amy J. Schmitz & Leah Wing, *Beneficial and Ethical ODR for Family Issues*, 59 FAM. CT. REV. 250, 256 (2021) ("[A]fter two decades serving e-commerce, ODR is finally infiltrating family law and family ADR processes.").

12. *Modria: Online Dispute Resolution*, TYLER TECHS. 2, <https://www.tylertech.com/Portals/0/OpenContent/Files/4080/Modria-Brochure.pdf> (last visited Nov. 13, 2022).

13. *Id.* at 4.

14. Colin Rule, *Online Dispute Resolution and the Future of Family Law*, FAM. LAW. MAG. (Mar. 17, 2020), <https://familylawyermagazine.com/articles/online-dispute-resolution-and-the-future-of-family-law>.

15. One could draw an analogy between this kind of software and shuttle mediation, in which the mediator moves back and forth between the parties, often using techniques like negotiation coaching and neutralizing language in conveying information between rooms. See Jonathan E. Pearl, *To Shuttle, or Not to Shuttle*, CONCORDIAN GLOB. MEDIATION SERVS. (Oct. 12, 2020), <https://www.concordian.net/post/to-shuttle-or-not-to-shuttle>.

Perhaps it should not be surprising that moving to online mediation and the development of updated standards has seemed easier in the family and domestic relations space. This area has long been a source of innovation, with numerous online products and platforms popping up over the past decade to aid families in navigating divorce and co-parenting. For example, one of the best-known co-parenting apps in the United States is Our Family Wizard.<sup>16</sup> Although this app is focused on ongoing parent communication after a divorce, family mediation practitioners may recommend this as a resource for clients to use either before mediation begins or during the mediation process.<sup>17</sup>

One reason I believe I am hearing so much positivity around online mediation in the domestic relations space revolves around concerns about safety in mediation. In family mediation, fears about power imbalance and intimidation are acute. Indeed, some of the earliest critiques of the widespread use of mediation came from mediators like Trina Grillo who were concerned that mediation might be used to coerce women into settling for worse outcomes than could be obtained at trial.<sup>18</sup> Dafna Lavi has an excellent discussion about the use of online mediation as a means of addressing concerns around family mediation in her book *Alternative Dispute Resolution and Domestic Violence: Women, Divorce and Alternative Justice*.<sup>19</sup> She notes that physical distance between the parties “is likely to expand the spectrum of cases that can be dealt with in a mediation process,” though she seems to assume that much of the communication will be asynchronous and written, rather than in a real-time videoconference format.<sup>20</sup>

Yet online mediation can create safety hazards as well. In the symposium on which this Article is based, Kelly Browe Olsen and

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16. OUR FAM. WIZARD, <https://www.ourfamilywizard.com/> (last visited Nov. 13, 2022).

17. *Mediators and OFW*, OUR FAM. WIZARD, <https://www.ourfamilywizard.com/knowledge-center/solutions/mediators-and-ofw> (last visited Nov. 13, 2022).

18. Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, 100 YALE L.J. 1545, 1550 (1991). Grillo’s work has been truly fundamental to the field of mediation and social justice more broadly. For an example of contemporary scholarly reactions to this article, see the comments to Trina Grillo, *The Mediation Alternative: Process Dangers for Women*, in DISCUSSIONS IN DISPUTE RESOLUTION: THE FOUNDATIONAL ARTICLES 157–73 (Art Hinshaw et al. eds., 2018). Many practitioners believe that ADR offers a better path for addressing domestic violence issues. See, e.g., DAFNA LAVI, ALTERNATIVE DISPUTE RESOLUTION AND DOMESTIC VIOLENCE: WOMEN, DIVORCE AND ALTERNATIVE JUSTICE 4 (2018).

19. LAVI, *supra* note 18, at 184.

20. *Id.* at 188.

Andrea Schneider both addressed concerns with participant safety in remote mediation.<sup>21</sup> One issue that was particularly striking was the lack of wrap-around services that often accompany certain types of mediation, such as domestic relations mediation or special education mediation. In these areas, parties are often connected to a range of services, of which the actual mediation itself is only a part, and the lack of access to in-person meetings can hamper critical feedback about the well-being of parties.<sup>22</sup> As mediators, we may need to be more aware of mediation's embedded role in a network of services, be prepared to question parties more thoroughly as to their safety, and make greater efforts to connect parties to services.

Safety in mediation is a perennial topic and certainly not one confined to domestic mediation.<sup>23</sup> Some mediators proactively address the issue of mediation safety, particularly the possession of guns or other weapons, in their Agreements to Mediate. Unlike court-annexed mediation, which often takes place in a courthouse with security screenings and rules against possessing weapons, most private mediations take place in offices without such screenings. That places a greater onus on mediators themselves to work proactively with parties on creating a safe and secure mediation environment. For example, Michigan's Institute of Continuing Legal Education ("ICLE") has a clause in its sample Mediation Agreement addressing weapons: "All parties to this Agreement represent they will not secretly or overtly make any type of audio or video recording of any of the mediation proceedings and that they will not carry or bring firearms or weapons into the mediation facility or site."<sup>24</sup> Interestingly, this clause shows the ways in which two types of "safety" have become conflated, or at

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21. See Kelly Browe Olson, *Stetson Symposium Links*, *INDISPUTABLY: LINKING DISP. RESOL. SCHOLARSHIP, EDUC., & PRAC.* (Apr. 6, 2022), <http://indisputably.org/2022/04/stetson-symposium-links/>.

22. See Andrea Kupfer Schneider et al., *Remote Justice & Domestic Violence: Process Pluralism Lessons from the Pandemic*, 52 *STETSON L. REV.* 231 (2022).

23. The issue of weapons in mediation came to the fore a decade ago, when Phoenix-based attorney Mark Hummels and his client were killed by the opposing party after walking out of a commercial mediation. Martha Neil, *Fatal Shooting After Mediation Leaves Lawyer and Client Dead*, *A.B.A. J.* (Jan. 31, 2013, 2:29 PM), [https://www.abajournal.com/news/article/lawyer\\_shot\\_client\\_executive\\_killed\\_after\\_mediation\\_session\\_with\\_suspected\\_](https://www.abajournal.com/news/article/lawyer_shot_client_executive_killed_after_mediation_session_with_suspected_).

24. Tracy L. Allen, *Mediation Agreement*, *INST. OF CONTINUING LEGAL EDUC.*, <https://www.icle.org/modules/formbank/fmdetail.aspx?ID=GEN1052&FROM=AWOP> (Aug. 2022).

least interrelated, in mediation practice—the physical safety of the participants and the security of the participants’ data.

Keeping things confidential and trying to prevent data leaks has become as much a part of the sense of safety, perhaps of emotional safety, in mediation as the physical concerns. These concerns become more acute in the online space, in which the potential for hacking, surreptitiously recording, or “Zoom bombing” a meeting create new ways to breach the confidentiality of the session.<sup>25</sup> Simply put, it is incredibly hard to know what is happening off-screen during a video conference. This supervisory gap presents concerns both for the physical safety of participants and for the confidentiality and security of the discussions taking place.

### III. SAFETY IN THE NEW ONLINE MEDIATION

As parties continue to use online mediation in greater and greater numbers, the profession needs to think critically about how safety will play into mediator training and guidelines. Broadly, we need to rethink what the “physical” environment of mediation is, expand our definition of safety beyond physical harm, and revise our standards to help mediators provide spaces that address these issues in-person and online. Here are a few suggestions.

#### A. Think Critically About the Physical Environment of Participants

Although mediations are increasingly taking place on online platforms, participants are logging in from a physical location. As mediators, we need to coach the parties both before and during the mediation about using a safe space, not merely one that is free of distractions, but one in which the parties are free from influence or intimidation during their session. The physical issues that mediating online presents for participants range from the small to the more serious. Beyond the more serious issues of simply having access to the Internet and a connected device, like a computer, smart phone, or tablet, on which to participate, parties to a

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25. See Exon’s discussion of Fourth and Fifth parties *infra* pp. 17–18. It is possible to prevent recording of videoconferences in platforms like Zoom, but that does not prevent participants from having a separate device capturing the video on their computer.



mediation may find themselves uncomfortable for many reasons, from bad lighting to a lack of privacy.<sup>26</sup>

One challenge of online mediation is that we, as mediators, lose some of the cues that we ordinarily use to assess parties' sense of safety. There has been considerable and longstanding debate about whether the use of online processes robs mediators of valuable content cues about participants' emotional states. In the early 2000s, David Allen Larson began looking at the ways in which the Internet was changing how young people communicate with one another and considered how those changes might impact communication in ODR.<sup>27</sup> He notes that while some raise concerns about the lack on nonverbal cues in online communication, others argue that participants adapt and develop new cues.<sup>28</sup> He also points out that dispute resolution professionals already deploy technology like telephones, faxes, and emails, and highlights some cutting edge technology, like "tele-immersion" in which holographic images of participants may converse, that have yet to gain much use in current mediation practice.<sup>29</sup> Noam Ebner and Jeff Thompson suggested in 2014 that while "e-mediation" presents a somewhat similar environment to in-person mediation, mediators should be mindful of how they can focus on building trust with parties online, offering concrete suggestions for how to use video-conferencing, such as dragging the screen with the party talking close to the mediator's webcam so that that the mediator appears to be looking at the speaker.<sup>30</sup> Even these seemingly small

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26. See, e.g., Lee Tarte Wallace, *Virtual Mediation: A Practitioner's Guide*, LEXIS+, <https://plus.lexis.com/api/permalink/f22a6b39-a1a8-49b8-ba6b-94f798f1acec?context=1530671> (Nov. 1, 2021) ("Even when participants have computers, people who have seldom used Zoom may feel slightly ill at ease throughout the mediation, which can draw their focus away from the issues that need to be addressed. Additionally, they may not have proper lighting or know-how to project a positive image in an online format."). This practice note has useful advice on the preliminary questions to ask parties to an online mediation, though with little focus on safety. See *id.*

27. See generally David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): A New Paradigm for ADR*, 21 OHIO ST. J. ON DISP. RESOL. 629 (2006) [hereinafter Larson, *A New Paradigm*]; David Allen Larson, *Technology Mediated Dispute Resolution (TMDR): Opportunities and Dangers*, 38 UNIV. TOL. L. REV. 213 (2006) [hereinafter Larson, *Opportunities and Dangers*].

28. Larson, *A New Paradigm*, *supra* note 27, at 650–51; Larson, *Opportunities and Dangers*, *supra* note 27, at 228.

29. Larson, *Opportunities and Dangers*, *supra* note 27, at 213, 215–16.

30. Noam Ebner & Jeff Thompson, *@Face Value? Nonverbal Communication and Trust Development in Online Video-Based Mediation*, 1 INT'L J. ONLINE DISP. RESOL. 103, 118–23 (2014).

suggestions can go a long way toward creating a more comfortable physical space for online mediation.

The mediator's obligation to provide a safe mediation space has been a topic in every mediation training I have taught, and much of that discussion revolves around the physical layout of the mediation space and access to emergency services. For example, mediator and scholar Kristen Blankley begins her discussion of mediation safety with a reminder to "Know [y]our [s]urroundings."<sup>31</sup> She encourages thinking specifically about the physical environment, including considering how to make a quick exit (e.g., who sits closest to the door) and removing "scissors, pencils, letter openers, and other ordinary objects that may be used as weapons."<sup>32</sup> I typically coach trainees to know where they are relative to room and building exits and to have a plan for how they will excuse parties after the mediation to minimize parties' unsupervised time in close physical proximity. As mediators, we need to think about how these ideas translate to the online space. For example, are participants in a space where they will not be subject to unexpected attacks from behind them while they are looking at their screens?<sup>33</sup>

The Michigan State Court Administrative Office ("SCAO") began to encourage the state's community dispute resolution centers to use Zoom for mediations shortly before the COVID-19 pandemic began. In *Using Zoom to Conduct Online Mediation*, SCAO noted that mediators have "[l]ess control over [the] physical environment" and "[n]o control over participant's environment," which could impact things like the "[m]ediator's ability to control and direct the conversation," the confidentiality of the mediation, and the mediator's ability to intervene if one of the parties has an

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31. Kristen Blankley, *How to Make Mediation Safer in Cases of High Conflict*, MEDIATE.COM (Aug. 2, 2016), <https://www.mediate.com/how-to-make-mediation-safer-in-cases-of-high-conflict/>.

32. *Id.* (emphasis omitted) ("Before you mediate, be sure that you have become familiar with the location where you will be conducting the session. Do you know where all of the *doors* and *emergency exits* are located? Can you locate the *fire alarm* or *telephone*? Will anyone be at that location if you are mediating at *night*? Will anyone be screening the parties for *weapons*? Is the *parking lot* well lit?").

33. One of my favorite anecdotes that I shared with my law students early during the pandemic was from a mediator who had a party's significant other walk out of the bathroom nude while that party was participating in a Zoom call. Always have a wall without a door behind you if you can manage it.

emergency.<sup>34</sup> It is worth thinking creatively about the things we can do as mediators to regain or establish more control over the physical environment. Can we invite parties who desire it to come to a physical location, like our office, while still mediating online? Can we have a pre-mediation session in which we ask parties to show us their mediation location and ask questions or offer advice on how to make that location more secure? For example, we might ask questions like:

- (1) Does the door to their room lock?
- (2) Is any sensitive information visible on screen?
- (3) If using a computer or tablet, does the participant have a separate phone available to call for help if needed?
- (4) How will the participant communicate with the mediator if the participant is being threatened by someone off-screen during the mediation?<sup>35</sup>

It is important for mediators to ask parties in advance, if possible, if parties have any safety or security concerns about their planned mediation spot and to see if there are ways that the mediator can help address those concerns. For example, parties who are concerned about their safety or privacy might come into a community mediation center or use a room at a local library. If a participant is responsible for watching children during the mediation, mediators might work through whether a friend or relative could help watch the children, or whether a party could provide the children with something to distract them for some period of time, being mindful to schedule breaks in the session to check on children. If parties are concerned that they will be interrupted or intimidated off-camera during a mediation, they could work with their mediator to come up with a code phrase, like

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34. State Ct. Admin. Off.: Off. of Disp. Resol., *Using Zoom to Conduct Online Mediation: Considerations and Resources for Community Dispute Resolution Program Centers*, MICH. SUP. CT. 1 (Apr. 2020), <https://www.courts.michigan.gov/496a4e/siteassets/odr-temporary/documents/zoom-online-mediation-considerations-v1.pdf>.

35. A slightly cynical view might be that while mediators cannot control participants' physical settings, the mediators are more in control of the mediation space than ever since they have the power to physical silence parties or even remove them from the mediation virtual room, if necessary.

“I need to go check the dishes,” to indicate that there is an unauthorized third party in the room.

As part of ensuring a quality process, mediators also need to ensure that mediation communications are not taking place in a public area. Put another way, mediators need to pay extra attention to the confidentiality of the mediation.<sup>36</sup> This is complicated when parties want to take part in a mediation while running errands. For example, one of my trainees shared that she had a party who wanted to mediate while shopping at the supermarket. On the one hand, I wondered whether the party may have felt more comfortable speaking in a public market than she would have been at home. On the other, I cannot imagine that the other party to the mediation felt like the shopper was taking the mediation seriously. I have also heard stories of participants—including attorneys—participating in mediations from moving vehicles. This presents both issues of attention, but also fundamentally, an increased risk of accidents or harm to the participants and fellow motorists. Mediators need to emphasize, repeatedly, in advance that parties need to participate from a reasonably private and safe space.

#### B. Adopt an Expansive Approach to Safety in Mediation Practice

People feel comfortable when things are safe and secure. In mediation, this includes both their physical safety as well as the security of the data they are communicating during their mediation sessions. While much ODR discussion has centered around data security in the online environment, the profession has been slower transitioning our notions of physical safety in an in-person environment to that of online mediation. The pandemic and its rapid adoption of Zoom and other online platforms for mediation presents us with an opportunity to start thinking about what physical safety looks like online.

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36. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard V.C. (AM. BAR ASS'N 2005) calls for the mediator to “promote understanding among the parties of the extent to which the parties will maintain confidentiality of information they obtain in a mediation.” Many state rules also provide for mediation confidentiality or privilege. *See, e.g.*, NADJA M. ALEXANDER ET AL., *MEDIATION: LAW, POLICY & PRACTICE* §§ 8:1–8:49 (2021–2022 ed.). Michigan court rules, for example, provide that mediation communications are confidential in court referred mediations. MICH. CT. R. 2.412(C).

It also allows us to begin incorporating notions of emotional safety into our mediation sessions. Many mediators take time to speak with parties separately before beginning a joint session.<sup>37</sup> In some ways this is even easier in the online environment, in which even day-of referrals allow easy separation of parties for a pre-mediation caucus prior to a joint discussion. During these sessions, we as mediators need to ask parties both to describe their physical environment from which they will be participating as well as check in on how they are feeling about their ability to safely complete the mediation session in that space.

Those familiar with the ABA Standards of Conduct for Mediators, which were jointly adopted by the Association for Conflict Resolution in 2005 based on a decade-older version, will know that there is no specific provision on a mediator's obligation to provide a safe process or to ensure participant safety in a mediation. The only mention of safety comes in Standard VI, Quality of the Process, which calls for the mediator to "conduct a mediation in accordance with these Standards in a manner that promotes diligence, timeliness, *safety*, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants."<sup>38</sup> As I discussed above, most mediators take their responsibility to provide a safe process seriously and would terminate a session if they felt that any of the participants were not safe, but it is not enumerated as a core standard.

The commonly used Standards of Practice for Professional Family Mediators, adopted by the Academy of Professional Family Mediators in 2014, do specifically reference participant safety, notably in Standard IX on Domestic Violence, which calls for mediators to establish "protocols that attempt to ensure the safety of the parties" and to "maintain the mediation process as a safe environment."<sup>39</sup> The mediator is supposed to consider terminating

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37. For a discussion of some of the benefits of even short separate pre-mediation meetings with parties in dealing with emotional issues, see Jill S. Tanz & Martha K. McClintock, *The Physiologic Stress Response During Mediation*, 32 OHIO ST. J. ON DISP. RESOL. 29, 62 (2017).

38. MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI.A. (AM. BAR ASS'N 2005) (emphasis added).

39. STANDARDS OF PRAC. FOR PRO. FAM. MEDIATORS, Standard IX (ACAD. OF PRO. FAM. MEDIATORS 2014).

the mediation if there are any threats to participant safety.<sup>40</sup> Perhaps the decade gap in adoption between the Standards of Conduct for Mediators and the Standards of Practice for Professional Family Mediators and the increased use of mediation in court-annexed settings may explain the increased focus on safety as a specific process goal, but it feels like an omission not to address safety outright in the Standards of Conduct for Mediators.

Some states, such as Michigan, where I currently practice, have included additional safety obligations in their adoption of the ABA Model Standards.<sup>41</sup> Michigan's is quite lengthy, and is reproduced at the end of this Article, but the meat of it is an obligation that "reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues."<sup>42</sup> This use of "physically or emotionally unsafe" is worth considering for future revisions to the ABA Model Standards as it addresses intimidation and other forms of behavior that may not present physical safety or security issues. The field as a whole could use the opportunity to step back and think about the ways mediator choices around appropriate behavior impact the process.<sup>43</sup> In particular, mediators should be cautious in taking an overly broad stance on impediments that fail to respect parties' self-determination and should avoid labeling or diagnosing participants during a mediation. Michigan's Standard VI lists "[e]xamples of impediments to the mediation process [which] include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness or other mental impairment; and inability to understand or communicate in the language in which mediation will be conducted."<sup>44</sup> It is important to emphasize that these

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40. STANDARDS OF PRAC. FOR PRO. FAM. MEDIATORS, Standard X.A.1. (ACAD. OF PRO. FAM. MEDIATORS 2014).

41. See MICH. STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI (OFF. OF DISP. RESOL. 2013). The standard is reproduced in its entirety in Appendix A.

42. *Id.* at Standard VI.A.

43. Sharon Press and Ellen E. Deason have ably situated this discussion in the context of race in their 2021 article. See generally Sharon Press & Ellen E. Deason, *Mediation: Embedded Assumptions of Whiteness?*, 22 CARDOZO J. CONFLICT RESOL. 453 (2021). For example, they talk about the potential of mediators to engage in tone policing in ways that stymie communication and legitimate expressions of anger. *Id.* at 459–64.

44. MICH. STANDARDS OF CONDUCT FOR MEDIATORS, Standard VI.A (OFF. OF DISP. RESOL. 2013).

“impediments” do not mean that participants who exhibit any of these characteristics cannot successfully take part in a mediation.<sup>45</sup> Rather, mediators must be proactive in thinking about how they can address these impediments in order to provide physical and emotional safety for parties.

One aspect of the Michigan safety rules that I find particularly compelling is the requirement that mediators consider parties’ inability to understand or communicate in the language in which the mediation is being conducted. Connecting the safety of parties to their ability to fully take part in the mediation is an expansion of our typical notions of safe participation. Arguably, this could be included just as easily under standards like party self-determination, but its inclusion in a safety standard highlights the importance of language and translation services as a key component of parties’ comfort in mediation.<sup>46</sup> One further aspect of language and emotional safety that is worth noting is the ability of some mediation platforms, particularly those in which communication is primarily written and asynchronous, to flag inflammatory language for parties before it is sent to the other party.<sup>47</sup> Mediators, of course, do the same thing in real-time mediation through verbal reminders to the parties. Online videoconferencing adds the ability for mediators to send reminders in the chat and to physically mute parties.

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45. Mediator and mental health advocate Dan Berstein talks about myths around mental illness in his book, DAN BERSTEIN, *MENTAL HEALTH AND CONFLICTS: A HANDBOOK FOR EMPOWERMENT* (2022). In it, he tackles the myth that “the presence of a mental health problem carries with it some risk of challenging behavior, be it violence or a disconnect or general disruptions.” *Id.* at 103. He recommends mediators think about how they will respond to challenging behaviors (and not diagnoses) in advance and create “objective behavior plans” for how the mediator intends to act when challenging behaviors do present themselves. *Id.* at 108.

46. Self-Determination is the first of the ABA Mediator Standards of Conduct. See MODEL STANDARDS OF CONDUCT FOR MEDIATORS, Standard I (AM. BAR ASS’N 2005). The new ABA ODR guidance mentions language support in advising courts that many online litigants “will require language and interpretation support and legal or other information.” *Guidance for Online Dispute Resolution (ODR)*, *supra* note **Error! Bookmark not defined.**, at 11.

47. Lavi provides some examples of parties continuing to express strong emotions in written language, such as the use of ALL CAPS writing. LAVI, *supra* note 18, at 202. For a platform example, see Sarah Perez, *CoParenter Helps Divorced Parents Settle Disputes Using AI and Human Mediation*, TECHCRUNCH (Mar. 15, 2019, 2:06 PM), <https://techcrunch.com/2019/03/15/coparenter-helps-divorced-parents-settle-disputes-using-a-i-and-human-mediation/> (“The tech will jump in to flag curse words, inflammatory phrases and offensive names to keep a heated conversation from escalating . . .”).

C. Update the ABA Model Standards to Include Safety, Online and In-Person

Any updates to the ABA Model Standards would require extensive vetting among stakeholder groups, especially with so many organizations representing mediation providers. However, with the ongoing shift to online mediation, this seems like an ideal time to incorporate both physical safety and data security requirements into mediator guidelines.

One place we need to look as part of this discussion is the development of ODR standards more broadly. The National Center for Technology & Dispute Resolution (“NCTDR”) runs one of the largest clearing houses and think tanks on ODR. Founded by Ethan Katsh, a pioneer in the field of ODR,<sup>48</sup> and directed by Leah Wing, a Political Science professor at UMass Amherst,<sup>49</sup> the NCTDR has been working with the International Council for Online Dispute Resolution (“ICODR”) to create worldwide standards for ODR.<sup>50</sup> The ICODR has promulgated a list of ODR Standards for platforms and processes, which includes the following requirements: Accessible, Accountable, Competent, Confidential, Equal, Fair and Impartial, Legal, Secure, and Transparent.<sup>51</sup>

Leah Wing and Amy Schmitz give a more detailed discussion of these standards in their article, *Beneficial and Ethical ODR for Family Issues*.<sup>52</sup> A key focus in these ODR standards is the safety and security of data online, a concern that mediation scholars have long recognized.<sup>53</sup> In these ODR standards, the requirement of confidentiality, in particular, requires that any breaches of parties’ data be disclosed to parties.<sup>54</sup> Participants’ physical safety does not

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48. *Ethan Katsh, Founder*, THE NAT’L CTR. FOR TECH. & DISP. RESOL., <https://odr.info/ethan-katsh/> (last visited Nov. 13, 2022).

49. *Leah Wing, Director*, THE NAT’L CTR. FOR TECH. & DISP. RESOL., <https://odr.info/leah-wing/> (last visited Nov. 13, 2022).

50. *International Council for Online Dispute Resolution (ICODR)*, THE NAT’L CTR. FOR TECH. & DISP. RESOL., <https://odr.info/icodr> (last visited Nov. 13, 2022).

51. ONLINE DISP. RESOL. STANDARDS (INT’L COUNCIL FOR ONLINE DISP. RESOL. 2022).

52. Schmitz & Wing, *supra* note 11, at 257.

53. See Exon’s discussion *infra* pp. 17–18.

54. Schmitz & Wing, *supra* note 11, at 257. Without branching too far into a completely different topic, it is worth thinking about the ways in which European data collection and data privacy models contrast with American ones. Although confidentiality of data is a core tenant of mediation, for example, which often includes layers of confidentiality within the process through techniques like caucusing, such confidentiality is often a matter of private



appear to be a major concern in this framework, though as noted above that may be because the underlying envisioned use of many ODR platforms was more focused on the long-distance commercial context. In their article, Wing and Schmitz do note that there is room for the development of best practices in areas like family ODR, including practices like screening for domestic violence.<sup>55</sup>

Practitioners have for many years been discussing the ways in which our ethical guidelines for mediators should be adapted to meet the needs of online practice. Susan Nauss Exon has written extensively on the importance of updating our ethical standards to reflect ODR.<sup>56</sup> In her 2017 article, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, Exon examines the Model Standards at length.<sup>57</sup> A core concern of Exon's is the ability of the "fourth party," the technology of mediation platforms, and the "fifth party," those who design the platforms, to provide a quality mediation experience.<sup>58</sup> She reviews a project by Daniel Rainey and his students at Southern Methodist University to propose revisions and comments to the Model Standards to reflect ODR.<sup>59</sup> With respect to participants' physical settings, Exon notes that:

[s]ignificant to transparency in virtual mediation are issues of participant identity and physical location, which are nonissues in face-to-face mediation where everyone knows who is participating in mediation and all are physically present. . . . Transparency, and specifically security, is not covered in the

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agreement, through an NDA or the Agreement to Mediate, rather than a statutory or regulatory requirement. See, for example, Europe's General Data Protection Regulation ("GDPR") Article 82, which impose fines for data breaches. For a discussion of the role of platforms in protecting data, see Jean-François Roberge & Véronique Fraser, *Access to Commercial Justice: A Roadmap for Online Dispute Resolution (ODR) Design for Small and Medium-Sized Businesses (SMEs) Disputes*, 35 OHIO ST. J. ON DISP. RESOL. 1, 30-31 (2019). In the absence of regulatory requirements in most states, it falls on mediators to provide confidentiality protections contractually, which most do.

55. Schmitz & Wing, *supra* note 11, at 261.

56. See, e.g., Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. ON DISP. RESOL. 609, 632 (2017). Exon uses the term "virtual mediation" in her work, and notes that others use terms like "e-Mediation, online mediation, or cyber mediation." *Id.* at 611.

57. See *id.* at 624-29.

58. *Id.* at 611-12.

59. *Id.* at 633; see also Daniel Rainey, *Model Standards of Conduct for Mediators*, 3 INT'L J. ON ONLINE DISP. RESOL. 30 (2016).

Model Standards, although confidentiality is closely related to security concerns.<sup>60</sup>

Mediators working online need to be creative about how to maintain confidentiality when we cannot know for sure who is in the room. Our pre-mediation agreements with parties should make it very clear that parties may not bring unauthorized parties into the mediation session. Mediators should also communicate in advance via individual sessions with parties as to who will be in the mediation locations and how each party will ensure privacy. Finally, mediators should confirm with parties at the start of the session that they are not recording or including unacknowledged parties.<sup>61</sup>

Omer Shapira has been one of the most ardent proponents of revisions to the Model Standards. In his 2016 article, *A Critical Assessment of the Model Standards of Conduct for Mediators (2005): Call for Reform*, he ably summarizes the many and varied critiques of the Model Standards and attempts to open the discussion for how future revisions could improve them.<sup>62</sup> However, he does not critique the Model Standards for their lack of explicit obligation or instruction to mediators to guard the safety of the parties. For instance, he points out the discussion of party competency in Standard VI.A and the mediator's obligation to explore accommodations, which he believes ought to be covered under the Self-Determination standard.<sup>63</sup> He does not connect those accommodations to areas such as disability or language use, or to notions of accommodations to create a sense of safety in the mediation. Of course, Shapira is attempting a full-scale overhaul of the Model Standards, so his attention is pulled in many directions.

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60. Exon, *supra* note 56, at 661.

61. Mediators have long relied on the honor system regarding confidentiality. We cannot control what people say about the mediation once it is over, and short of searching participants bags, we can do little to prevent surreptitious recording even in in-person settings. However, clearly laying out that this is prohibited in our agreements to mediate does give parties injured by a breach of confidentiality grounds to sue and bolsters the claim that such information be inadmissible in court. Most mediation communications should fall within the privilege protections found in most jurisdictions for settlement negotiations or within explicit protections for mediations such as Rule 408 of the Federal Rules of Evidence, its state analogs, and the Uniform Mediation Act Section 4. *See, e.g.*, FED. R. EVID. 408; UNIF. MEDIATION ACT § 4 (UNIF. L. COMM'N 2003).

62. *See* Shapira, *supra* note 8. Shapira also served as editor on the recent compilation. *MEDIATION ETHICS: A PRACTITIONER'S GUIDE* (Omer Shapira ed., 2021).

63. *Id.* at 107–08.

I wonder whether the obligation to provide a safe space for the mediation itself strikes many ethicists as so fundamental that it does not appear to merit explicit discussion in written mediator standards. Does incorporating safety standards risk stating the obvious? Does it risk committing mediators to obligations that are too broad to be easily defined and put into practice? At the end of the day, it is worth noting that the ABA Model Standards of Conduct for Mediators are little more than model ethical guidelines. While these guidelines find some teeth in their use as models for mediator rosters, such as in state court mediation programs, they are largely aspirational.<sup>64</sup> Yet there is value in stating and reassessing “obvious” concepts. The current shift in the way in which much of mediation is being conducted here in the United States and abroad merits reconsideration and renewed attention even to obvious notions of mediator practice. Their aspirational value is one of the best reasons for updating standards such as the Model Standards of Conduct to better reflect the growth of online mediation.

#### IV. CONCLUSION

ADR policymakers have been planning for nearly two decades for the widespread adoption of ODR. It is finally happening, and the profession needs to take this opportunity to update our practice guidelines to better reflect the challenges and concerns of online mediation. Given the substantial advances that have been made in considering mediators’ safety obligations since the last revisions of the ABA Model Standards nearly twenty years ago, the time is ripe to make revisions that reflect modern mediation practices both in person and online.

Humbly, I do believe that Michigan is a leader in this area of considering mediators’ obligations to provide a safe process. My hope is that this Article will inspire others to consider whether something like Michigan’s “Safety of Mediation” standard is worth incorporating into their own mediation guidelines, be it at a state, national, or international level. We also need to work on providing training materials and guidance to mediators on the kinds of

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64. Exon refers to them as “ethical aspirations known as mediation standards of conduct.” Exon, *supra* note 56, at 611.

questions to ask parties to help them plan for a safe online mediation.

Much has changed in the past five years. The conversation does not need to begin or end with safety, but safety is an area where there is space to fill large gaps in the current ethical guidelines and frameworks. While this should be part of a larger discussion, sometimes such discussions need a place to start. There are existing models and language to look at for guidance as to what safety standards might look like. It is time to start the conversation in earnest.

## APPENDIX A

### Michigan Mediator Standards of Conduct VI:

#### Safety of Mediation

A. Consistent with applicable statutes, court rules, and protocols, reasonable efforts shall be made throughout the mediation process to screen for the presence of an impediment that would make mediation physically or emotionally unsafe for any participant, or that would impede the achievement of a voluntary and safe resolution of issues. Examples of impediments to the mediation process include: domestic abuse; neglect or abuse of a child; status as a protected individual or vulnerable adult; mental illness or other mental impairment; and inability to understand or communicate in the language in which mediation will be conducted.

1. In general, “reasonable efforts” may include meeting separately with the parties prior to a joint session or administering screening tools.
2. In domestic relations cases, “reasonable efforts” should include meeting separately with the parties prior to a joint session and administering the “Mediator Screening Protocol” for domestic violence, published by the State Court Administrative Office.
3. If an impediment to mediation exists and cannot be overcome by accommodations that specifically mitigate it, the mediation process should not be continued unless:
  - a. After being provided with information about the mediation process, a party at risk freely requests mediation or gives informed consent to it;
  - b. The mediator has training, knowledge, or experience to address the impediment;
  - c. The mediator has discussed with the party at risk whether an attorney, advocate, or other support person should attend the mediation; and

d. The mediator has assessed that a party can determine and safely convey and advocate for his or her needs and interests without coercion, fear of violence, or other repercussions or consequences that would put the party at risk.

B. Where it appears that minor children or vulnerable adults may be affected by an agreement, a mediator should encourage participants to consider their safety.