

VIRTUAL MEDIATION: THE ONLY DOOR NEEDED IN THE MULTI-DOOR COURTHOUSE?

Sarah R. Cole* and Amanda Spangler**

I. INTRODUCTION

In 1976, Frank Sander introduced the concept of the multi-door courthouse.¹ In a multi-door courthouse, a screening clerk reviews each case to determine the most appropriate dispute resolution process, or processes, that best support the parties in resolving their dispute.² Once the clerk completes the case analysis, she directs the disputant and her adversary to that process or processes.³ Sander, later working with Stephen Goldberg, determined that the multi-door courthouse clerk's job is not as difficult as it might first appear because, for the vast majority of disputes, the clerk should simply recommend mediation.⁴ Sander and Goldberg concluded that mediation should be the presumptive dispute resolution process because it is cheaper, more efficient, non-binding, and significantly more likely to address parties' underlying interests and needs.⁵

As we emerge from the worldwide COVID-19 pandemic, it may be time to add a new door⁶ to the multi-door courthouse by reconsidering Sander and Goldberg's presumptive mediation rule.

* © 2023, All rights reserved. Michael E. Moritz Chair in Alternative Dispute Resolution, Moritz College of Law, Ohio State University. Thank you to Mandy for her hard work on this project and to Douglas R. Cole for his feedback and comments. Thank you also to the Moritz College of Law for its support of my research.

** © 2023, J.D. Candidate, Moritz College of Law, Ohio State University, 2023; B.A., Case Western Reserve University.

1. Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 131 (1976).

2. *Id.*

3. *Id.*

4. Frank E.A. Sander & Stephen B. Goldberg, *Fitting the Forum to the Fuss: A User-Friendly Guide to Selecting an ADR Procedure*, 10 NEGOT. J. 49, 50 (1994).

5. *Id.* at 51, 59–60.

6. While we wish we could claim credit for adding the new door to the multi-door courthouse, as with many ideas connected to online dispute resolution (“ODR”), Professor Amy Schmitz noted this development much earlier. See generally Amy J. Schmitz, “Drive-Thru” Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178 (2010) (discussing adding a “virtual” door to the multi-door courthouse).

A new option, which would supplant in-person mediation as the presumptive process, is *virtual* mediation. The label “virtual mediation” does not encompass all (or even most) online mechanisms,⁷ like Matterhorn,⁸ that help resolve the parties’ dispute using a click-through computer-generated process.⁹ Instead, this Article suggests that virtual mediation in an online platform, like Zoom or Microsoft Teams, along with a human mediator, parties, and lawyers present, may be the best option for most disputes.

II. PRE-PANDEMIC VIRTUAL MEDIATION

The pandemic-triggered rapid development and spread of virtual mediation was arguably one of the few benefits that emerged from the pandemic. The almost mandatory use of virtual mediation during the pandemic transformed the process from a little-used tool in the dispute resolution toolbox to a hammer—the most efficient and least expensive dispute resolution process available. As this process appears to have staying power, the Article considers experts’ views about the expected benefits and potential drawbacks of the dramatically increased use of virtual mediation. Next, the Article will consider empirical studies conducted during the pandemic to assess mediator, lawyer, and participant attitudes toward and experiences with virtual mediation. The Article will then assess survey results against concerns raised about virtual mediation more generally—is it an accessible, fair, impartial, and effective method of dispute

7. While there is certainly a place for the use of online wizards, which could provide resolution through case diagnostics, this Article focuses on slightly more complex disputes, which would suggest the need for a more extended facilitation process. See Amy J. Schmitz, *Measuring “Access to Justice” in the Rush to Digitize*, 88 *FORDHAM L. REV.* 2381, 2383 (2020). The National Center for Technology and Dispute Resolution recently published *Framing the Parameters of Online Dispute Resolution* in which they provide a framework for defining various types of ODR, including virtual mediation. *Framing the Parameters of Online Dispute Resolution*, NCTDR (2022) [hereinafter *NCTDR Report*], https://odr.info/wp-content/uploads/2022/05/Framing-the-Parameters-of-Online-Dispute-Resolution_NCTDR_2022.pdf; see also *Online Dispute Resolution Standards of Practice*, ICANN (2009) [hereinafter *ICANN Standards*], <https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf>; *Online Dispute Resolution Standards*, NCTDR [hereinafter *NCTDR Standards*], <https://odr.info/standards/> (last visited Jan. 21, 2023); *ODR Standards*, ICODR (Dec. 12, 2022) [hereinafter *ICODR Standards*], <https://icodr.org/standards/>.

8. MATTERHORN, <https://getmatterhorn.com/> (last visited Jan. 21, 2023) (describing Matterhorn’s widely-adopted online dispute resolution platform).

resolution? Finally, the Article concludes that, because the empirical research on virtual mediation makes it so apparent that the benefits of virtual mediation outweigh any potential drawbacks, it should be the presumptive dispute resolution choice.

Virtual mediation's origins pre-date the pandemic.¹⁰ Online commercial transactions have been commonplace for over thirty years.¹¹ While the Internet created the opportunity for engagement among people from all over the world, even at its earliest stages, disputes inevitably arose. When they did, it was not practical to sit down together and work out a mutually beneficial solution. Because of the distances involved, the costs and complexity of filing a legal action in a foreign country and invoking jurisdiction of a court to hear the case or enforce the judgment, online, informal dispute resolution processes had to be developed. And, of course, they were.¹²

In fact, pre-pandemic, parties utilized a variety of online dispute resolution (“ODR”) fora to mediate disputes as mundane as those arising from internet transactions and ecommerce¹³ to complex divorce cases involving allegations of violence, domestic violence, and rape.¹⁴ Throughout this period of growth and development, commentators constantly debated and discussed the benefits and shortcomings of ODR.¹⁵ Many of those discussions focused on the ways in which ODR increased and decreased access to resolution processes for those with fewer resources, as well as

10. For more background on online dispute resolution, see ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE* (2001).

11. SARAH R. COLE ET AL., *MEDIATION: LAW, POLICY & PRACTICE* § 15:16 (3d ed. 2011 & Supp. 2021–22).

12. *See id.* §§ 15:17–15:20.

13. Amy J. Schmitz, *Building Trust in Ecommerce Through Online Dispute Resolution*, in *RESEARCH HANDBOOK ON ELECTRONIC COMMERCE LAW* 307, 307–09 (Edward Elgar Publishing 2016).

14. Haley Benson, *Abuse Just Out of Frame: The Impact of Online Dispute Resolution on Domestic Violence*, 2022 *J. DISP. RESOL.* 83, 84 (2022) (discussing problems with using ODR in cases that involved domestic violence); Dafna Lavi, *Till Death Do Us Part?: Online Mediation as an Answer to Divorce Cases Involving Violence*, 16 *N.C. J.L. & TECH.* 253 (2015); Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 *OHIO ST. J. ON DISP. RESOL.* 349 (2009).

15. Amy J. Schmitz, *Remedy Realities in Business-to-Consumer Contracting*, 58 *ARIZ. L. REV.* 213 (2016) (discussing the benefits and drawbacks of using ODR to resolve B2C disputes including issues regarding access to technology by age and race, costs of implementing ODR systems, privacy concerns, and ethics of ODR systems); AMY J. SCHMITZ & COLIN RULE, *THE NEW HANDSHAKE: ONLINE DISPUTE RESOLUTION AND THE FUTURE OF CONSUMER PROTECTION*, at xi–xii (2017).

on the unique ethical issues that may emerge when dispute resolution occurs in an online setting.¹⁶

The COVID-19 pandemic dramatically increased the adoption of virtual processes, including virtual mediation.¹⁷ COVID-19 shut courtroom doors and discouraged mediators from facilitating resolution of disputes in person.¹⁸ Yet, the need for mediation did not decrease—if anything, the courtroom closures amplified the value of mediation for parties forced to resolve disputes online and away from the traditional courtroom process.¹⁹ Mediators simply had to adapt. For the past three years, parties, lawyers, and mediators had little choice but to implement virtual mediation processes—flaws and all—as the default practice. As the pandemic subsides, most mediators have accepted and even embraced the concept of virtual mediation, at minimum agreeing that it should

16. NCTDR compared the benefits of greater ODR use, which include increasing access and improving efficiency, with the potential drawbacks, including data security risks and artificial intelligence-driven bias. *NCTDR Report*, *supra* note 7, at 2. Additional resources on this topic can be found at *Publications*, NCTDR, <https://odr.info/publications/> (last visited Jan. 21, 2023). Other concerns include inequality of access to internet infrastructure and technological devices, lack of transparency and lack of accountability. *NCTDR Report*, *supra* note 7, at 3.

17. Kristi J. Paulson, *Mediation in the COVID-19 Era: Is Online Mediation Here to Stay?*, 51 SW. L.J. 142, 143 (2021).

18. *Id.*

19. *See, e.g.*, Gina Jurva, *The Impacts of the COVID-19 Pandemic on State & Local Courts Study 2021: A Look at Remote Hearings, Legal Technology, Case Backlogs, and Access to Justice*, THOMAS REUTERS INST. 9 (2021), https://legal.thomsonreuters.com/content/dam/ewp-m/documents/legal/en/pdf/white-papers/covid-court-report_final.pdf (noting that roughly 40% of state, county and municipal courts surveyed in June 2021 indicated they were offering some form of virtual mediation services or self-help services, in addition to virtual hearings); Christopher L. Dodson et al., *The Zooming of Federal Civil Litigation*, 104 JUDICATURE 12, 13 (2020) (observing that the pandemic “has pushed lawyers and judges toward videoconferencing on a scale and at a speed never before seen, without the deliberation and care that usually has attended the legal community’s acceptance and incorporation of technological innovation”); BAKER MCKENZIE, COVID-19: IMPLICATIONS FOR THE FUTURE OF DISPUTE RESOLUTION 8 (2020), <https://www.bakermckenzie.com/-/media/files/insight/publications/2020/07/covid19-implications-for-the-future-of-dispute-resolution.pdf> (predicting significant growth for online mediation, and in particular noting that “COVID-19 poses an opportunity for online mediation to be adopted more commonly in disputes that would ultimately be referred to international arbitration, as mediation has until now tended to be more common in the litigation context than in arbitration”); Dodson et al., *supra*, at 13 (predicting that “efficiency gains and cost savings of videoconferencing are likely to prevail routinely for internal meetings, witness interviews, court conferences, simple oral arguments, and uncontentious depositions, especially when travel is required”).

continue as a common, or even the presumptive, dispute resolution mechanism once COVID-19 enters our collective past.²⁰

III. VIRTUAL MEDIATION DURING THE PANDEMIC

At the start of the COVID-19 pandemic, most mediators did not mediate virtually.²¹ Understandably then, when COVID-19 necessitated the switch to virtual mediation, some commentators and mediators were skeptical, while others were enthusiastic and eager to engage in the process. Ultimately, moving exclusively to virtual mediation made abundantly clear that virtual mediation's benefits vastly outweighed most, if not all, of the articulated concerns.

A. Common Concerns About Virtual Mediation

At the outset of the pandemic, mediators and dispute resolution provider organizations, like the American Arbitration Association ("AAA") and International Institute for Conflict Prevention & Resolution ("CPR"), accepted that the shift to virtual dispute resolution, including virtual mediation, was inevitable and necessary.²² Within weeks, practitioners and alternative dispute resolution ("ADR") provider organizations circulated practical guidance for mediators conducting virtual mediations and offered countless trainings to support inexperienced practitioners with the unexpected transition to a virtual format.²³ Even with considerable support, however, some mediators were apprehensive during COVID's early months. Mediators worried about how to manage

20. Noam Ebner, *The Human Touch in ODR: Trust, Empathy and Social Intuition in Online Negotiation and Mediation*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 73 (2d ed. 2021), <https://ssrn.com/abstract=3760782>.

21. See James Claxton, *Mediators Like Online Mediation and Other Verifiable Facts*, *MEDIATE.COM* (June 4, 2021), <https://www.mediate.com/mediators-like-online-mediation-and-other-verifiable-facts/> (noting that in his survey of nearly 500 mediators, 54% of respondents had no experience with virtual mediation prior to the coronavirus pandemic).

22. See, e.g., *AAA-ICDR Rises to the Challenge, Having Held 10,000+ Virtual Hearings Since the Beginning of the Pandemic*, *PRNEWSWIRE* (June 10, 2021, 9:08 PM), <https://www.prnewswire.com/news-releases/aaa-icdr-rises-to-the-challenge-having-held-10-000-virtual-hearings-since-the-beginning-of-the-pandemic-301309469.html>.

23. See, e.g., *Virtual Institute*, *ISCT*, <https://www.transformativemediation.org/Virtual-Institute> (last visited Jan. 21, 2023); John Lande, *Basics of Mediation and Arbitration with Zoom*, *INDISPUTABLY* (Apr. 4, 2020), <http://indisputably.org/2020/04/basics-of-mediation-and-arbitration-with-zoom/>; *Online Practice Tools*, *ABA*, https://www.americanbar.org/groups/dispute_resolution/resources/resources-for-mediating-online/ (last visited Jan. 21, 2023).

virtual mediation, expressing concerns about how to facilitate the process, including how to use modern technology and how to conduct virtual mediations in an ethical manner. Mediators also expressed concern about protecting a fundamental element of mediation—confidentiality.

1. *Facilitating the Process: Does the Absence of Human Connection Impact Process and Outcomes?*

Prior to the pandemic, commentators and mediators expressed skepticism about virtual mediation because they were concerned that the use of technology might undermine the myriad therapeutic benefits the traditional mediation process offers.²⁴ Many worried that the lack of face-to-face interaction would negatively impact the way parties experience mediation's transformative process.²⁵

For example, the limited party and mediator interaction in a virtual space might diminish mediation's efficiency because both the mediator and the parties may have more difficulty perceiving and evaluating participants' nonverbal communications, like

24. See, e.g., Ayelet Sela, *Streamlining Justice: How Online Courts Can Resolve the Challenges of Pro Se Litigation*, 26 CORNELL J.L. & PUB. POL. 331, 375 (2016) (Self-represented litigants perceive that they receive greater procedural justice in an asynchronous process where they send text and receive video from a third party neutral (Judicial Officer).); Rachel I. Turner, *Alternative Dispute Resolution in Cyberspace: There is More On the Line, Than Just Getting "Online,"* 7 ILSA J. INT'L & COMPAR. L. 133, 147–48 (2000) ("The predominant criticism is that the technology will detract from the human aspect needed in ADR . . ."). But see Arno R. Lodder & John Zeleznikow, *Developing an Online Dispute Resolution Environment: Dialogue Tools and Negotiation Support Systems in a Three-Step Model*, 10 HARV. NEGOT. L. REV. 287, 302 (2005) ("ODR's lack of in-person interaction can actually be an advantage . . .").

25. See, e.g., Debbie Damen et al., *The Effect of Perspective-Taking on Trust and Understanding in Online and Face-to-Face Mediations*, 29 GRP. DECISION AND NEGOT. 1121, 1121 (2020) (showing that parties' trust in and understanding of negotiating partner improved more in face-to-face mediations than virtual mediations); Amy S. Moeves & Scott C. Moeves, *Two Roads Diverged: A Tale of Technology and Alternative Dispute Resolution*, 12 WM. & MARY BILL RTS. J. 843, 866 (2004) (noting "[ODR] removes the face-to-face aspect of alternative dispute resolution that many disputants may find satisfying, or even healing"). But see Ebner, *supra* note 20.

visual cues,²⁶ body language, and facial expressions.²⁷ A mediator's inability to perceive parties' body language and other nonverbal communications might, in turn, interfere with the settlement process. The virtual format might also inhibit a mediator's ability to build trust and rapport with the parties,²⁸ further jeopardizing the likelihood of a settlement because the lack of trust might result in less engaged party participation or insufficient energy to persist with the process long enough to achieve resolution.²⁹ In addition, parties participating virtually might have less empathy or appreciation for the other party's experience because the opposition appears two-dimensional. Virtual presence may inhibit the creation of a human connection—and the empathy, compassion, and understanding that are an integral part of more three-dimensional interactions—that often is essential to mediation success.³⁰ In a recent federal case, one party argued that mediation on Zoom would be less effective than in-person mediation for a different reason: “being actually present at the negotiation table facilitates mediation because the parties are physically confined with each other and . . . invest a significant amount of energy to attend mediation.”³¹ The court rejected these claims but decided to order in-person mediation because the parties' unwillingness to cooperate generally might be particularly

26. Making and maintaining eye contact is a “nearly ubiquitous subconscious method of affirming trust” and is more difficult in a virtual setting. Llewellyn Joseph Gibbons et al., *Frontiers of Law: The Internet and Cyberspace: Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message*, 32 N.M. L. REV. 27, 34 (2002). See generally Ebner, *supra* note 20, at 65–67.

27. See, e.g., Patrick R. Kingsley & Stradley Ronan, *How Effective Is Electronic Mediation in the Age of COVID-19?*, LEGALTECH NEWS (Apr. 14, 2020, 7:00 AM), <https://www.law.com/legaltechnews/2020/04/14/how-effective-is-electronic-mediation-in-the-age-of-covid-19/>.

28. See Damen et al., *supra* note 25, at 1121 (finding that pre-pandemic research showed that in an experimental setting, parties' sense of trust and understanding of their “interaction partner” improved more when the mediation was in person rather than online); Rosemary Howell, *Changing the Frame—A Tool for Rapport Building in an Age of Distance*, KLUWER MEDIATION BLOG (May 22, 2020), <http://mediationblog.kluwerarbitration.com/2020/05/22/changing-the-frame-a-tool-for-rapport-building-in-an-age-of-distance/>; MOHAMED S. ABDEL WAHAB ET AL., *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION* 211 (2012); Aashit Shah, *Using ADR to Resolve Online Disputes*, 10 RICH. J.L. & TECH. 25, 31 (2004); Joseph A. Zavaletta, *Using E-Dispute Technology to Facilitate the Resolution of E-Contract Disputes: A Modest Proposal*, 7 J. TECH. L. & POL'Y 1, 22 (2002) (“[O]nline communications could be misinterpreted, thus driving parties further apart.”).

29. See Ebner, *supra* note 20, at 47–48.

30. *Id.* at 52–59.

31. *Genreis, Inc. v. Brown*, No. 8:22CV74, 2022 U.S. Dist. LEXIS 126930, at *4 (D. Neb. July 18, 2022).

difficult to overcome in a videoconference mediation because in videoconference mediation “a party can simply walk away from the camera.”³²

Other problems might arise. Participants might distrust the Internet or dislike appearing online. Parties’ discomfort with the Internet could cause them to distrust the mediation process when it takes place in a virtual setting, reducing the likelihood that parties will be sufficiently candid and forthcoming to reveal overlapping interests.³³

Despite these potential problems with virtual mediation, many commentators were more optimistic, even at the outset of the pandemic, that mediators could overcome these issues by the choices they make during mediation.³⁴ Use of oral cues, such as “mmhmm” or “uh-huh” could, to some degree, be substituted for the eye contact and gaze that would convey attention in a face-to-face setting.³⁵ Ensuring that parties are comfortable with the technology and taking ample time to explain the implemented technology might encourage greater trust among parties in the virtual mediation process.³⁶

Others suggested that where the *quality* of personal interaction is limited due to a virtual format, mediators might attempt to mitigate the deficiency by increasing the *quantity* of their personal interactions, such as through greater emphasis on pre-mediation and post-mediation videoconferences with each party.³⁷

Some commentators emphasized that the development and availability of virtual mediation highlights the importance of autonomy in the mediation process. They contend that mediators

32. *Id.* at *5.

33. See Ebner, *supra* note 20, at 90.

34. See generally *id.* at 73.

35. Charlie Irvine, *Who Am I Looking At? Gaze in Online Mediation*, KLUWER MEDIATION BLOG (July 10, 2020), <http://mediationblog.kluwerarbitration.com/2020/07/10/who-am-i-looking-at-gaze-in-online-mediation/>.

36. Leslie Ann Berkoff, *Taking Your Mediation Practice Online in the Face of COVID-19*, BUS. L. TODAY (Mar. 30, 2020), <https://businesslawtoday.org/2020/03/taking-mediation-practice-online-face-covid-19/>.

37. Donald R. Frederico, *Virtual Mediation (Part 2): The Challenge of Establishing Trust*, THE NAT'L L. REV. (Apr. 13, 2020), <https://www.natlawreview.com/article/virtual-mediation-part-2-challenge-establishing-trust-0>.

should keep this principle in mind when mediating virtually.³⁸ When parties have feelings or thoughts to express, or at the very least something to say, in a virtual mediation, it may be even more important for them to raise such concerns.³⁹ Mediators can support this and encourage communication by inviting contributions more frequently than when mediating in person,⁴⁰ such as by asking whether anyone has anything to add or if everyone is ready to move on with the agenda.⁴¹

2. Confidentiality and Security: Is Zoom Good Enough?

At the start of the pandemic, many videoconference platform users, both inside and outside the mediation community, expressed concerns about platform security.⁴² Apprehension about platform security was especially prevalent among mediators.⁴³ Mediators worried about “Zoom-bombing,” the practice of an unintended user hijacking control of the Zoom meeting, usually displaying inappropriate images and messages through the program.⁴⁴ Zoom-bombing, or other interferences, might undermine mediation confidentiality, inhibiting the virtual mediation process.⁴⁵ Yet various measures could be taken to ensure confidentiality even when mediating online.⁴⁶ At the same

38. Greg Bond, *Feeling the Non-Verbal: Analogue and Digital Communication in Mediation, Facilitation and Training*, KLUWER MEDIATION BLOG (June 24, 2020), <http://mediationblog.kluwerarbitration.com/2020/06/24/feeling-the-non-verbal-analogue-and-digital-communication-in-mediation-facilitation-and-training/>.

39. *Id.*

40. *Id.*

41. *Id.*

42. Kari Paul, *Worried About Zoom's Privacy Problems? A Guide to Your Video-Conferencing Options*, THE GUARDIAN (Apr. 9, 2020), <https://www.theguardian.com/technology/2020/apr/08/zoom-privacy-video-chat-alternatives>.

43. *See, e.g.*, Rick Weiler, *Is Zoom Good Enough for Mediation?*, KLUWER MEDIATION BLOG (Apr. 6, 2020), <http://mediationblog.kluwerarbitration.com/2020/04/06/is-zoom-good-enough-for-mediation/>; Turner, *supra* note 24 at 145. Likewise, computer glitches could undermine virtual mediation's effectiveness. Cheri M. Ganeles, *Cybermediation: A New Twist on an Old Concept*, 12 ALB. L.J. OF SCI. & TECH. 715, 739 (2002).

44. Stephen Moses, *ODR and the Law of Unintended Consequences*, CONTRA COSTA CNTY. BAR ASS'N (June 2020), <https://ccba.org/article/odr-and-the-law-of-unintended-consequences/>.

45. *See* Weiler, *supra* note 43.

46. *See, e.g.*, Don Philbin, *Tailoring Zoom to Mediation for the Moment*, ADRTOOLBOX.COM (Mar. 31, 2020), <http://www.adrtoolbox.com/2020/03/tailoring-zoom-to-mediation-for-the-moment/> (recommending various internal Zoom settings, like making a personal ID and passcode, using a paid subscription, requiring encryption, and disabling

time, videoconferencing platforms quickly improved their security and privacy features.⁴⁷

Beyond technological confidentiality and security concerns, virtual mediation of certain types of disputes raised additional confidentiality concerns. For example, virtual family and divorce mediation created a unique set of privacy concerns that arose because the pandemic forced everyone to remain in their homes. Privacy might have been at risk because participants in virtual family mediations joined from home. For example, parties' children could be present in the parties' homes, especially during the pandemic, when most schooling occurred at home.⁴⁸ It could also have been more difficult to conduct a private mediation with children in the room (or coming in and out of the room). This same privacy concern would be less likely to arise when parties schedule in-person mediations around sitters or school schedules.⁴⁹ Protecting privacy in virtual divorce mediations might be particularly challenging post-pandemic because limited resources may force divorcing parties to participate in mediation from the same location.

An overarching concern in mediation is that, when parties are from different states, different and potentially inconsistent laws governing confidentiality may apply.⁵⁰ When a confidentiality

recording features); Alan Limbury, *Mediating Online—Is It Time to Move from Improvising to a Dedicated Platform?*, KLUWER MEDIATION BLOG (Apr. 22, 2020), <http://mediationblog.kluwerarbitration.com/2020/04/22/mediating-online-is-it-time-to-move-from-improvising-to-a-dedicated-platform/> (recommending MODRON Spaces as an alternative to Zoom for virtual mediation).

47. See, e.g., Paayal Zaveri, *Zoom Is Making Its Security Features Easier to Access, as It Moves to Improve the Privacy of Its App and Stop All the 'Zoombombing,'* BUS. INSIDER (Apr. 8, 2020), <https://www.businessinsider.com/zoom-security-features-easier-access-stop-zoombombing-eric-yuan-2020-4>; Mike Snider, *Zoom Boosts Security Features, Encryption Amid Coronavirus Crisis Video Conferencing Boom*, USA TODAY (Apr. 22, 2020), <https://www.usatoday.com/story/tech/2020/04/22/coronavirus-crisis-drives-zoom-use-new-upgrade-increase-security/3005558001/>.

48. Shalini Nangia & Julia A. Perkins, *Mediation in Family Law Cases During COVID-19*, THE NAT'L L. REV. (Apr. 23, 2020), <https://www.natlawreview.com/article/mediation-family-law-cases-during-covid-19>.

49. *Id.*

50. COLE ET AL., *supra* note 11, § 8:13 (One of the UMA drafters' goals was to eliminate the risk of inconsistent law application when mediation involves parties from different jurisdictions); Jeff Kichaven, *Mediator Confidentiality Promises Carry Serious Risks*, LAW360 (July 20, 2020) [hereinafter Kichaven, *Mediator Confidentiality*], <https://www.law360.com/articles/1293390/mediator-confidentiality-promises-carry-serious-risks>; Jeff Kichaven et al., *What You Say In Online Mediation May Be Discoverable*, LAW360 (June 30, 2020, 5:09 PM), <https://www.law360.com/articles/1287508/what-you-say-in->

issue arises from a virtual mediation involving participants from multiple states, such as in commercial cases, it is more difficult to say *where* the mediation actually occurs, and thus which laws apply.⁵¹ A court adjudicating that claim may have discretion to choose the law of the state that makes mediation-related evidence admissible even if the mediator promised that the process was confidential and/or the parties agreed that the proceedings would remain confidential.⁵²

3. *Pre-Pandemic Ethics Concerns*

Ethics issues in virtual mediation did not emerge for the first time during the pandemic. Pre-pandemic, commentators and policymakers actively engaged in discussions about the unique ethics issues that ODR creates.⁵³ Commentators raised myriad potential issues that include platform security and questions about the mediator’s ability to address power imbalances and participant safety issues. In response, Leah Wing proposed the idea of a “living” code of principles for ODR to address access, fairness, and equality issues.⁵⁴ Wing discussed the need for principles that adapt to changes in technology yet remain rigid enough to guide mediators.⁵⁵ But Wing suggested that the guidelines should be just that—guidance, a kind of “GPS” rather than a set of rules, governing party and mediator behavior.⁵⁶ Wing also created a set of ethical principles for ODR, an early step toward broad adoption

online-mediation-may-be-discoverable; Barry Miller, *Does What Happens in Mediation Stay in Mediation?*, FREEMAN MATHIS & GRAY LLP (Aug. 14, 2020), <https://www.fmglaw.com/cyber-privacy-security/does-what-happen-in-mediation-stay-in-mediation/>.

51. Kichaven, *Mediator Confidentiality*, *supra* note 50.

52. *Id.*

53. Noam Ebner & John Zeleznikow, *No Sheriff In Town: Governance for Online Dispute Resolution*, 32 NEGOT. J. 297, 327 (2016) (stating that ODR ethical challenges include creating guidance to determine what platforms are acceptable for conducting virtual mediation, including protecting security).

54. Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 J. INT’L J. ON ONLINE DISP. RESOL. 12, 25–27 (2016).

55. *Id.* at 23.

56. *See id.* at 12–29 (examining the benefits and challenges of articulating a set of ethical principles to guide the development and implementation of ODR systems, technology and processes); *see also* NCTDR Standards, *supra* note 7; ICODR Standards, *supra* note 7 (addressing many of these same issues but as standards rather than principles or values).

of a code of ethics.⁵⁷ However, Wing emphasized that these principles were not intended to be standards of conduct but rather “an articulation of shared values.”⁵⁸ Wing was not alone in addressing virtual mediation ethics issues. The American Bar Association, the American Arbitration Association, and the Advisory Committee of the National Center for Technology and Dispute Resolution, three of the largest relevant regulatory bodies, actively grappled with virtual mediation ethics before the pandemic began.⁵⁹

Pre-pandemic, other commentators focused on the ways ODR ethical codes could be applied to “fourth” and “fifth” parties.⁶⁰ One author annotated the Model Standards of Conduct for Mediators to address unique ODR issues.⁶¹ Others raised concerns about how ODR utilizes artificial intelligence.⁶² Ultimately, though, pre-pandemic, ODR and virtual mediation operated and expanded without a clear system of governing regulations.⁶³

B. Benefits Outweigh Concerns: Virtual Mediation Worked Effectively

Despite these commonly shared concerns about virtual mediation, mediators nevertheless appreciated virtual mediation’s benefits and, ultimately, became quite enthusiastic about virtual

57. Wing, *supra* note 54, at 25–27. The principles are: accessibility, accountability, competence, confidentiality, empowerment, equality, fairness, honesty, impartiality, informed participation, innovation, integration, legal obligation, neutrality, protection from harm, security, and transparency. *Id.*

58. *Id.* at 17.

59. Amanda First, *A New Agreement to Mediate: Guidelines for Ethical Practice in the Digital Space*, 23 HARV. NEGOT. L. REV. 405, 411–12 (2018).

60. Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. ON DISP. RESOL. 609, 655 (2017).

61. Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT’L J. ONLINE DISP. RESOL. 37, 40 (2014).

62. Ayelet Sela, *Can Computers Be Fair? How Automated and Human-Powered Online Dispute Resolution Affect Procedural Justice in Mediation and Arbitration*, 33 OHIO ST. J. ON DISP. RESOL. 91, 117–18, 122 (2018) (raising concerns that ODR’s use of automation and artificial intelligence may impact mediation integrity by unintentionally harming parties of different genders, cultures, or other factors).

63. One notable exception was an EU regulation implemented in 2016. The regulation established an ODR platform for cross-border consumer disputes. See European Commission, Press Release, *Solving Disputes Online: New Platform for Consumers and Traders* (Feb. 15, 2016), https://ec.europa.eu/commission/presscorner/api/files/document/print/en/ip_16_297/IP_16_297_EN.pdf.

mediation.⁶⁴ The vast majority of mediators eventually determined that virtual mediation was an effective way to continue mediating, at least while courts remained closed or access was limited.⁶⁵

For many mediators and parties, virtual mediation allowed meaningful participation both in traditional disputes as well as in lower-value cases where traditional mediation would not ordinarily be economically feasible.⁶⁶ Because virtual mediation empowers parties to participate from their homes, offices, or anywhere with an internet connection, virtual mediation dramatically reduces, if not eliminates, the travel-related time and expenditures associated with participating in a mediation.⁶⁷ And because of the expansion in the use of smartphones and internet access, parties were able to participate in virtual mediation using any one of a vast number of devices and applications they likely already owned and used.⁶⁸ For this reason, scheduling was and is far easier for virtual mediations, further increasing the accessibility of this format.⁶⁹

Mediators also praised the technological features of the videoconferencing software commonly used in virtual mediations.⁷⁰ Virtual mediation, particularly over Zoom, offered

64. See Linda Gerstel, *Don't Let a Crisis Go to Waste: Time to Explore Expansion of ODR for ADR*, N.Y. L.J. (Mar. 17, 2020, 11:45 AM), <https://www.law.com/newyorklawjournal/2020/03/17/dont-let-a-crisis-go-to-waste-time-to-explore-expansion-of-odr-for-adr/>; Peter Vaira, *Changes in the Law Practice After COVID-19 . . . What Will Be the New Normal?*, THE LEGAL INTELLIGENCER (May 11, 2020, 12:36 PM), <https://www.law.com/thelegalintelligencer/2020/05/11/changes-in-the-law-practice-after-covid-19-what-will-be-the-new-normal/> (noting that prior to COVID-19, many participants had resisted virtual mediation because of an unfamiliarity with the technology).

65. Jenna Blackmon, *Guest Blog: Online Mediation During the COVID-19 Pandemic and Beyond*, LEXBLOG (Mar. 31, 2020), <https://www.lexblog.com/2020/03/31/guest-blog-online-mediation-during-the-covid-19-pandemic-and-beyond/>.

66. Alaina Lancaster, *How the COVID-19 Crisis Is Reshaping Alternative Dispute Resolution*, THE RECORDER (Mar. 27, 2020, 06:52 PM), <https://www.law.com/therecorder/2020/03/27/how-the-covid-19-crisis-is-reshaping-alternative-dispute-resolution/>.

67. See Raychel Lean, *Get Used to Online Litigation: It Could Become Florida's New Normal*, DAILY BUS. REV. (Mar. 25, 2020, 03:45 PM), <https://www.law.com/dailybusinessreview/2020/03/25/get-used-to-online-litigation-it-could-become-floridas-new-normal/>.

68. Dominic L. Cruciani & Perrin B. Fourmy, *Effective Mediation During COVID-19*, LEXBLOG (Apr. 2, 2020), <https://www.lexblog.com/2020/04/02/effective-mediation-during-covid-19/>.

69. *Id.*

70. See, e.g., Robin Gise, *Effective Mediation by Videoconference: A Neutral's Use of Zoom During the Coronavirus (COVID-19) Crisis*, JD SUPRA (Apr. 3, 2020), <https://www.jdsupra.com/legalnews/effective-mediation-by-videoconference-41600/>.

mediators benefits that otherwise would not be available during traditional mediation.⁷¹ The breakout room feature on Zoom, for example, allows private conversations between the mediator and parties,⁷² and the chat function allows the mediator to “chat” with participants in a different break-out room when necessary.⁷³ Although frequent use of videoconferencing raised concern about “Zoom fatigue,”⁷⁴ parties praised certain videoconferencing features because they mitigated the very fatigue videoconferencing may cause.⁷⁵ Because participants in virtual mediation are in separate locations, during breakout room sessions or during breaks in the mediation, participants can move around, make lunch or coffee, and feel less constrained than when trapped in an unfamiliar location for a lengthy in-person mediation.⁷⁶

Taken together, virtual mediation’s benefits led many mediators to consider it as both a viable option and potentially a more effective process than traditional mediation even just a few months into the pandemic.⁷⁷

C. Training and Guidance

Although mediators both praised and critiqued virtual mediation at the start of the pandemic, during COVID-19’s first few months, most blogs and mediation websites focused on sharing guidance, training, and advice for navigating virtual mediation.⁷⁸

71. *Id.*

72. *Id.*

73. *Id.*

74. See, e.g., Phyllis Pollack, *One Year Later: Zoom Fatigue*, MEDIATE.COM (Mar. 19, 2021), <https://www.mediate.com/one-year-later-zoom-fatigue/>. But see E. PATRICK MCDERMOTT & RUTH OBAR, U.S. EQUAL EMP. OPPORTUNITY COMM’N, *MEDIATION PARTICIPANTS EXPERIENCE IN ONLINE MEDIATION AND COMPARISON TO IN-PERSON MEDIATION* (2022) (little observation of zoom fatigue).

75. See John de Waal, *Remote Mediations: Making Them Work*, THOMAS REUTERS: PRACTICAL LAW DISP. RESOL. BLOG (May 7, 2020), <http://disputeresolutionblog.practicallaw.com/remote-mediations-making-them-work/>.

76. *Id.*

77. See, e.g., John Sturrock, *Mediations, Using Zoom – a Revelation?*, KLUWER MEDIATION BLOG (May 29, 2020), <http://mediationblog.kluwerarbitration.com/2020/05/29/mediations-using-zoom-a-revelation/>.

78. See CADREworks, *Using the Zoom Platform to Conduct Online Mediations*, YOUTUBE (Apr. 13, 2020), <https://www.youtube.com/watch?v=PIEv2TkOfbo>; *How to Set-Up a Zoom Mediation Meeting* MITCHELL HAMLINE SCH. OF L.: MEDIATION CLINIC, <https://mitchellhamline.edu/dispute-resolution-institute/wp-content/uploads/sites/18/2020/05/1-How-to-Set-Up-a-Zoom-Mediation.pdf> (last visited Feb. 4, 2023).

In many ways, these actions reflected a shared sense of inevitable acceptance, at least for the time being, of virtual mediation as the standard practice.

Much of this guidance was technical in nature, focusing on how to use videoconferencing technology and its features.⁷⁹ Mediators and organizations shared guidance about facilitating a mediation using Zoom,⁸⁰ how Zoom's breakout room feature could be effectively used for caucusing,⁸¹ how to format the screen with Zoom to observe all parties,⁸² and how to use the Zoom waiting room function to admit participants.⁸³

At the same time, practitioners also shared ideas about ways to compensate for some of the perceived drawbacks of virtual mediation. Advice ranged from methods to effectively understand body language while mediating online,⁸⁴ create chemistry with parties during virtual mediation,⁸⁵ better maintain the values of accessibility, competency, confidentiality, impartiality, and security while mediating online,⁸⁶ improve parties' comfort level while virtually mediating,⁸⁷ and prepare for mediation in the virtual format.⁸⁸

79. CADREworks, *supra* note 78.

80. *How to Set-Up a Zoom Mediation Meeting*, *supra* note 78.

81. CADREworks, *supra* note 78.

82. Karl A. Folkens & Richard Hinson, *Helpful Hints for Using Zoom for Remote Mediations*, N.C. JUD. BRANCH, <https://www.nccourts.gov/assets/inline-files/ODR-Article-from-SC-mediators.v2.pdf?SBKYGERzVejtH09dVyeAEjmlL1pBxjJW> (last visited Jan. 21, 2023).

83. Susan Guthrie, *A Zoom Waiting Room and Breakout Room Tutorial for Dispute Resolution*, YOUTUBE (May 17, 2020), https://www.youtube.com/watch?v=4F_t7JAdExA.

84. David S. Ross, *From Eye-Rolls to Grimaces: Understanding Body Language in Virtual Mediations*, JAMS: ADR INSIGHTS (Aug. 10, 2020), <https://www.jamsadr.com/blog/2020/the-mind-of-the-master-mediator-from-eye-rolls-to-grimaces-understanding-body-language-in-virtual-mediations>.

85. Jeff Windsor, *Creating Chemistry in Online Mediation*, CONTRA COSTA CNTY. BAR ASS'N (June 2020), <https://ccba.org/article/creating-chemistry-in-online-mediation/>.

86. Phyllis Pollack, *Some Practical Considerations When Mediating Online!*, MEDIATE.COM (July 28, 2020), <https://www.mediate.com/some-practical-considerations-when-mediating-online/>.

87. *See, e.g.*, Douglas C. Mintz & D. Charles Stohler, *Top 10 Recommendations for a Successful Online Mediation*, LEXBLOG (May 27, 2020), <https://www.lexblog.com/2020/05/27/top-10-recommendations-for-a-successful-online-mediation/>.

88. Ebony S. Morris, *Five Tips for Successful Virtual Mediations*, ABA (Nov. 30, 2020), <https://www.americanbar.org/groups/litigation/committees/pretrial-practice-discovery/practice/2020/five-tips-for-successful-virtual-mediations/>.

IV. WHERE WE ARE NOW: PERSPECTIVES ON VIRTUAL MEDIATION

As the pandemic unfolded, mediators, lawyers, and participants came to enthusiastically embrace virtual mediation. The positive reception of virtual mediation can be summarized in two words: efficient and accessible.⁸⁹ The virtual format is frequently less expensive and often faster. In addition, parties avoid the physical “wear and tear” that often accompanies traditional, in-person mediation.⁹⁰ Virtual mediation also facilitates easier, and usually cheaper, participation of experts throughout the mediation process.⁹¹ And experience demonstrates that the time-saving benefits of virtual mediation came not only from the reduction in travel time,⁹² but also from the shorter time typically spent in a virtual mediation. In the online format, one mediator reported, “there is less posturing, It’s more business. There’s just something about sitting in front of a computer screen where people want to get business done.”⁹³

Videoconferencing technology also proved adept at helping a mediator facilitate a multi-stage mediation process—in which “discrete parts of the mediation are tackled at different times.”⁹⁴

89. See, e.g., PON Staff, *Using E-Mediation and Online Mediation Techniques for Conflict Resolution: Technology Makes Online Mediation and Professional Dispute Resolution More Accessible*, HARV. L. SCH. PROGRAM ON NEGOT. (June 13, 2021), <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>.

90. Mike McKnight, *Remote Mediation I’m 62. I Wasn’t Looking to Zoom. I’m Glad I Did.*, MINN. STATE BAR ASS’N. (Dec. 2021), <https://www.mnbar.org/resources/publications/bench-bar/2020/05/27/remote-mediation-i-m-62-i-wasn-t-looking-to-zoom-i-m-glad-i-did>.

91. *Online Dispute Resolution Moves Cases Forward Despite Court Backlog*, CONCORD L. SCH. (Aug. 16, 2021), <https://www.concordlawschool.edu/blog/news/online-dispute-resolution-moves-cases-forward/>.

92. Hon. Patrick J. Mahoney, *Virtual Hearings and Mediations Are Here to Stay*, JAMS: ADR INSIGHTS (May 20, 2021), <https://www.jamsadr.com/blog/2021/virtual-hearings-and-mediations-are-here-to-stay>. John M. Noble, a mediator who conducted 564 mediation sessions in 26 months during the pandemic found that, “the nontravel benefits alone have proven life-altering.” He also found that plaintiffs are “expressly more comfortable in their own homes.” Mylene Chan, *The EEOC Set to Release Two Reports Comparing Online and In-Person Mediation*, CPR SPEAKS BLOG (May 27, 2022), <https://blog.cpradr.org/2022/05/27/the-eeoc-set-to-release-two-reports-comparing-online-and-in-person-mediation/>.

93. Scott Silverman & Hon. Rebecca Westerfield, *Where Do We Go From Here? The Future of Virtual ADR*, JD SUPRA (Apr. 16, 2021), <https://www.jdsupra.com/legalnews/podcast-where-do-we-go-from-here-the-1108466/>.

94. Marc E. Isserles, *The Growing Appeal of a Multi-Stage Mediation Process*, LEXOLOGY (Oct. 12, 2020), <https://www.lexology.com/library/detail.aspx?g=892d9099-b00b-4b76-9162-1be2eac28377>.

Multi-stage mediation can enhance substantive engagement, allowing time between mediation stages for “homework,” like research, fact gathering, or reflection, and can decrease the likelihood of buyer’s remorse.⁹⁵ Virtual mediation also made hybrid mediation possible. Hybrid mediation allowed parties to participate either in person or online and facilitated greater participation by higher-level decision makers who ordinarily would be unable (or unwilling) to travel to participate in an in-person mediation.⁹⁶

Attorneys also appreciated the benefits of virtual mediation during the pandemic. Most significantly, attorneys reported that virtual mediation was considerably more efficient than in-person mediation. Instead of waiting in a courthouse or conference room while the mediator caucused with other parties, in the remote format, attorneys were able to work productively while waiting in a separate virtual breakout room for caucusing to complete.⁹⁷ Mediation participants also viewed virtual mediation positively because it saved resources and time, as compared to in-person mediation.⁹⁸ For some, virtual mediation enabled parties to focus on the issues, rather than on safety concerns or personality conflicts with the other party. The Zoom platform created a buffer zone between the parties, giving them the separation needed to facilitate effective participation.⁹⁹

And, as the pandemic continued, mediators observed new benefits stemming from the increased use of virtual mediation. Some mediators noted that virtual mediation has the potential to increase access to justice for persons with some disabilities,

95. *Id.*

96. Caroline Antonacci, *Virtual Mediation in Today’s World: A Pandemic Success Story*, LEXOLOGY (Nov. 19, 2021), <https://www.lexology.com/library/detail.aspx?g=f22aad0d-ad43-4034-b575-caf6a0f9ba6d>.

97. Will Sylanteng, *Litigation After the Pandemic, Part 2: Technology’s Time Has Come*, THE LEGAL INTELLIGENCER (May 27, 2021, 12:19 PM), <https://www.law.com/thelegalintelligencer/2021/05/27/litigation-after-the-pandemic-part-2-technologys-time-has-come/>.

98. See MCDERMOTT & OBAR, *supra* note 74, at 7 (noting that The EEOC found that “the ODR preference is often related to non-pandemic factors such as flexibility, location convenience, safe space, and efficiency”); Diane M. Welsh, *Why Virtual Mediation is Here to Stay*, JAMS: ADR INSIGHTS (Jan. 5, 2021), <https://www.jamsadr.com/publications/2021/welsh-legalintelligencer-why-virtual-mediation-is-here-to-stay-2021-01-05>.

99. See Meredith McBride, *ODR in the Era of COVID-19*, ABA (Oct. 27, 2020), https://www.americanbar.org/groups/family_law/committees/alternative-dispute-resolution/odr/.

especially those with disabilities impacting physical mobility.¹⁰⁰ Virtual mediation allows persons with mobility issues to participate in mediation from the comfort of their home¹⁰¹ and eliminates physical movement to the mediation site, and within the mediation, as when the parties move from joint sessions to caucuses.

Commentators also observed that virtual mediation is particularly useful in certain legal contexts. In construction cases, for example, virtual mediation facilitates the participation of the numerous parties often involved in a construction dispute, especially when they hail from different geographic locations.¹⁰² And, because construction cases tend to be complex, virtual mediation allows the involvement of various project leaders to engage in more meaningful factual exchanges, which often encourages settlement.¹⁰³

In the context of insurance or employment disputes, virtual mediation may facilitate the involvement of a party with settlement authority,¹⁰⁴ as well as participants like coverage counsel, witnesses, and experts.¹⁰⁵

A virtual platform may work more effectively in some divorce and domestic disputes as well. In those disputes, the distance between the parties may be especially critical, as it may decrease the emotions and stress involved and allow the parties to communicate calmly.¹⁰⁶ The physical distance typically associated

100. Stephen P. Sonnenberg, *The Surge in Workplace Disputes Under Disability Discrimination Laws: Good News or Bad News?*, JAMS: ADR INSIGHTS (Oct. 15, 2021), <https://www.jamsadr.com/blog/2021/the-surge-in-workplace-disputes-under-disability-discrimination-laws-good-news-or-bad-news>. Virtual mediation likely presents greater challenges to those with hearing, sight or other disabilities. David Larson, *ODR Accessibility for Persons with Disabilities: We Must Do Better*, ONLINE DISP. RESOL.: THEORY & PRAC. (June 20, 2020), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3614838. (discussing best practices for ODR accessibility and relevant law).

101. Sonnenberg, *supra* note 100.

102. Brian R. Gaudet, *The Future of Mediation by Video Conference*, CONSTR. L. LETTER, Nov.–Dec. 2021, at 15–16, <https://mcmillan.ca/fr/wp-content/uploads/sites/7/2020/07/Unscrambling-the-egg-Nov-Dec-2021.pdf>.

103. *Id.*

104. The benefits of including a person with settlement authority in a mediation are not limited to these types of disputes. See MCDERMOTT & OBAR, *supra* note 74, at 7.

105. Steven R. Gilford, *Benefits of Virtual ADR in Insurance Disputes: Ten Reasons to Consider Resolving Disputes Virtually*, JAMS: ADR INSIGHTS (Mar. 25, 2021), <https://www.jamsadr.com/blog/2021/benefits-of-virtual-adr-in-insurance-disputes-ten-reasons-to-consider-resolving-disputes-virtually>.

106. See McBride, *supra* note 99 (noting that the accessibility of ODR is especially helpful in cases involving intimate partner violence); Welsh, *supra* note 98 (observing that virtual mediation can help de-escalated tensions in emotionally charged cases).

with virtual mediation also helps reduce power imbalances among the parties, placing them on a more level playing field.¹⁰⁷

Not surprisingly, many courts adopted virtual mediation pilot programs during the pandemic because of their numerous potential benefits.¹⁰⁸ Agencies, like the Equal Employment Opportunity Commission (“EEOC”) also developed similar virtual mediation pilot programs.¹⁰⁹

V. SURVEY SAYS . . . VIRTUAL MEDIATION IS HERE TO STAY

In the previous sections, the Article discussed commentators’, mediators’, and participants’ pandemic-informed views of virtual mediation’s benefits and drawbacks. For almost every benefit identified, however, a commentator or mediator also emphasized a drawback. For example, participating at home makes it easier for a poorly resourced person to participate in mediation because they do not have to travel to a court, hire a sitter or take a day from work. At the same time, participating from home created the potential for distractions and, for some, the lack of internet access proved problematic. The surveys discussed below, conducted throughout the pandemic, provide evidence of mediators’, lawyers’, and parties’ attitudes toward the process after participating in it.

107. Jenna Blackmon, *Guest Blog: Online Mediation During the COVID-19 Pandemic and Beyond*, HELLODIVORCE (Mar. 31, 2020), <https://hellodivorce.com/online-mediation-coronavirus/>; see also Lavi, *supra* note 14, at 300 (noting that videoconferencing-based mediation may “replicate face-to-face contact while removing the real and perceived threat of violence”). *But see* Nangia & Perkins, *supra* note 48.

108. Connecticut adopted a virtual mediation program during the coronavirus pandemic. See Robert Storace, *New Court Pilot Program Encourages Participants to Resolve Small Claims Online*, CONN. L. TRIB. (Nov. 20, 2020, 04:43 PM), <https://www.law.com/ctlawtribune/2020/11/20/new-court-pilot-program-encourages-participants-to-resolve-small-claims-online/> (describing the Connecticut Judicial Branch’s online pilotage program to provide free mediators to parties who are willing to engage in the online dispute resolution of their claims); see also *Frequently Asked Questions*, STATE OF CONN. JUD. BRANCH, https://www.jud.ct.gov/odr/ODR_FAQs.htm (last visited Jan. 21, 2023). Ohio also announced a similar online mediation pilot program during the coronavirus pandemic. See Stephanie Warsmith, *Akron Court Piloting New Online Mediation Program*, AKRON BEACON J. (Apr. 12, 2021, 5:08 PM), <https://www.beaconjournal.com/story/news/2021/04/12/akron-court-piloting-new-online-mediation-process/7188295002/>; *OH-Resolve: Ohio’s Online Dispute Resolution Pilot Project*, THE SUP. CT. OF OHIO & THE OHIO JUD. SYS., <https://www.supremecourt.ohio.gov/courts/services-to-courts/dispute-resolution/oh-resolve/> (last visited Jan. 21, 2023).

109. Marvin Schuldiner, *EEOC Extends Video Mediations*, LEXBLOG (Feb. 2, 2021), <https://www.lexblog.com/2021/02/02/eec-extends-video-mediations/>.

The survey results provide useful insight into whether virtual mediation will continue in the post-pandemic world and do much to refute the concerns many had about its viability. Survey results show that mediators, attorneys, and parties overwhelmingly support the use of a virtual platform for mediation and that most mediators plan to continue using virtual mediation in their practices moving forward. The EEOC's comprehensive study, in particular, provides an emphatic rebuttal of many of the concerns discussed above. As we emerge from the pandemic, it has become apparent that mediators, parties, and lawyers are equally enamored with the process—the surveys revealed that all concerned recognize and appreciate the benefits of virtual mediation.

A. Mediator Surveys: Golann, Claxton, NADN, and EEOC

At least two academics and two institutions surveyed mediators about their pandemic mediation experiences—Dwight Golann, James Claxton, the National Academy of Distinguished Neutrals (“NADN”), and the EEOC. All found that, despite some initial skepticism that virtual mediation would be less effective and, consequently, less successful in achieving a settlement, and that mediators could not adapt to technology, mediators embraced virtual mediation and expressed their desire to continue to use it, perhaps as a primary mode of mediation, post-pandemic.

About a year after the pandemic began, Dwight Golann interviewed twenty mediators from the United States, Canada, and Britain to gauge mediator attitude toward virtual mediation.¹¹⁰ Golann found that mediators liked virtual mediation much more than they predicted they would at the start of the pandemic.¹¹¹ For some mediators, the shift was as drastic as moving from feeling “very, very skeptical” at the start of the pandemic, to “[s]urprisingly, I am a huge fan,” after about a year of mediating online.¹¹²

Golann determined that mediators' attitudes toward virtual mediation changed for several reasons. First, experience with

110. Dwight Golann, “*I Sometimes Catch Myself Looking Angry or Tired . . .*”: *The Impact of Mediating by Zoom*, 39 ALT. TO THE HIGH COST OF LITIG. 73, 73 (2021), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3839088.

111. *Id.*

112. *Id.*

virtual mediation helped many mediators overcome their fears about connecting effectively with parties in a virtual environment.¹¹³ Second, mediators realized that parties were often more relaxed and therefore amenable to resolution in a virtual setting, because they were in the comfort of their own homes.¹¹⁴ Third, mediators discovered that interruptions that often accompany the virtual format, like pets and children entering the room, helped many mediators relate better to the parties.¹¹⁵ Finally, mediators observed that in virtual mediation parties tended to play a greater and more active role in the mediation, perhaps again because of their increased comfort mediating from their homes.¹¹⁶

Because parties and their attorneys must also watch themselves when mediating over Zoom, many mediators also noticed an improvement in mediation participant behavior.¹¹⁷ At the same time, party decision makers were more likely to participate in the mediation than in traditional, in-person mediations.¹¹⁸ Not surprisingly, decision-maker participation increased the likelihood of settlement.

Professor James Claxton initiated another mediator survey in December 2020, which received about 500 responses by May 2021. Claxton's survey confirmed Golann's findings that most mediators appreciated the benefits associated with virtual mediation.¹¹⁹ Approximately 83% of respondents indicated their experience with virtual mediation was either positive or highly positive, while only 5% of respondents had an unpleasant experience with virtual mediation.¹²⁰

Eighty-one percent of respondents observed an improvement in access to participants, confirming Golann's interview findings, and 80% noted improvement in time efficiency. Seventy-two percent noted an improvement in cost efficiency.¹²¹ Some mediators even observed an increase in party comfort when joining the mediation from their homes. The most frequently reported

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* at 2.

117. *Id.* at 3.

118. *Id.*

119. *See* Claxton, *supra* note 21.

120. *Id.*

121. *Id.*

disadvantage of virtual mediation was technical problems, with 65% of respondents stating that they had experienced that disadvantage.¹²² Forty-three percent of respondents experienced interruptions while mediating virtually, 42% indicated difficulty in building rapport online, and 28% of respondents indicated a lack of party engagement in the online format.¹²³

Mediators' responses also indicated that the mediation process and procedures tended to change when mediators shifted to a virtual setting. Forty-one percent of responding mediators used more private sessions while 18% used more joint sessions than in their traditional practice.¹²⁴ Mediators indicated that they were also more likely to mediate through asynchronous proceedings, co-mediation, and mediation with the presence of experts when mediating online.¹²⁵ And, despite the change in mediation format, about 71% of respondents stated that their settlement rate when mediating online was roughly equal to that achieved with in-person mediation.¹²⁶

Notably, 67% of respondents planned to use virtual mediation more frequently after the pandemic, and 18% stated that they would use virtual mediation as their default format moving forward.¹²⁷ Only 4% of respondents indicated they would use virtual mediation less than before the pandemic.¹²⁸ Both academic surveys concluded that mediators favored the virtual mediation process and planned to continue its use post-pandemic.

In its June 2021 member survey, the National Academy of Distinguished Neutrals discovered a similar consensus among mediators. Mediators responding to the survey reported that the move to virtual mediation was beneficial to their business. Sixty percent of surveyed members reported adding clients from outside their local area due to the convenience of a virtual mediation practice.¹²⁹

122. *Id.*

123. *Id.*

124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *National Survey of Members*, NAT'L ACAD. OF DISTINGUISHED NEUTRALS, at slide 10 (June 2021), <https://www.disputingblog.com/wp-content/uploads/2021/07/NADN-2021MemberSurvey-Report.pdf>. Of course, this evidence does not mean that all mediators are benefitting equally from the use of virtual mediation. Unless there is ongoing increased

More than half of surveyed mediators expressed a preference for continuing their mediation practice primarily online. In fact, 47.4% of mediators indicated their preference for future practice was mostly virtual mediation, with in-person mediation if parties insist, while 41.5% preferred that their future mediation practice be mostly in person, with virtual mediation if parties insist.¹³⁰ Interestingly, only 7.4% of mediators preferred an entirely virtual future mediation practice, and only 3.6% indicated a preference for an entirely in-person mediation practice.¹³¹ More significant was the finding that 78.4% of mediators reported that their settlement rate for virtual mediation was about the same as their settlement rate for in-person mediations.¹³²

The EEOC, which received completed surveys from 139 mediators (a mix of contract, staff, and pro bono mediators), concluded that virtual mediation is an effective alternative to traditional, in-person mediation, and may be “superior . . . [and] is clearly preferred by the mediators.”¹³³ Mediators appreciated virtual mediation’s flexibility. Mediators found that the scheduling flexibility of virtual mediation, which allowed them to continue with a mediation late into the evening or reconvene a mediation, was useful for maintaining settlement momentum.¹³⁴ Mediators found that platform flexibility, which allowed for the physical separation of the parties and facilitated the participation of decision makers, enhanced the likelihood of resolution.¹³⁵ Moreover, mediators reported no decrease in settlement rate or quality and found that the online platform did not derail or undermine the parties’ ability to achieve resolution.¹³⁶

The EEOC survey further revealed that virtual mediation offered greater access to justice than would in-person mediation because more employer representatives and decision makers are able to participate and charging parties (employees) have an easier

mediation overall, that mediators can compete over a broader geographic area may help some mediators, but only at the expense of other mediators. Increased geographic scope of competition is not a win-win for all mediators. Expansion of virtual mediation will likely have distributional consequences.

130. *Id.*

131. *Id.*

132. *Id.*

133. MCDERMOTT & OBAR, *supra* note 74, at 7.

134. *Id.*

135. *Id.*

136. *Id.* at 9.

time accessing the process.¹³⁷ Mediators also noted that charging parties had greater comfort with the virtual process *because of* rather than *despite* the online platform. Mediators concluded that the virtual platform provides charging parties a safe space and sense of protection from conflict.¹³⁸

Importantly, too, mediators' experiences rebutted many commentators' concerns about the virtual mediation process. Mediators did not observe "Zoom fatigue," nor did they perceive problems with power imbalances between the parties.¹³⁹ In fact, mediators' open-ended comments suggested that the virtual space evens the playing field, helping charging parties feel more comfortable.¹⁴⁰ Technological problems also did not interfere with the mediation process or results in a significant way.¹⁴¹ Finally, mediators reported that they could successfully interpret parties' body language in the virtual setting.¹⁴²

Mediator surveys reveal a surprising truth—mediators prefer virtual mediation over in-person mediation because it is flexible and enhances access to justice while, at the same time, achieving settlement rates identical to or better than in-person mediation. With few, if any, downsides, and so many potential benefits, the various surveys strongly suggest that mediators will continue to embrace the virtual mediation process.

B. Lawyer and Party Attitudes Toward Virtual Mediation

Mediation participants, both lawyers and parties, are equally enamored with virtual mediation. Both the NADN Surveys and the EEOC survey establish that lawyers, like mediators, have embraced the virtual mediation process and appreciate its results.

In September 2020, the National Academy of Distinguished Neutrals surveyed approximately 500 litigators about their attitudes toward the use of virtual mediation.¹⁴³ In June 2021, the

137. *Id.*

138. *Id.*

139. *Id.* at 8.

140. *Id.*

141. *Id.*

142. *Id.*

143. Presentation, Nat'l Acad. of Distinguished Neutrals, "The Customer Is Always Right(?)" (Sept. 2020) (on file with author); *see also* Beth Graham, *NADN Conducts "The Customer Is Always Right(?)" Survey of Litigators*, DISPUTING BLOG (Jan. 6, 2021), <https://www.disputingblog.com/nadn-conducts-the-customer-is-always-right-survey-of-litigators/>.

NADN also surveyed 782 of its members on this same topic.¹⁴⁴ In the September 2020 litigator survey, the NADN found that while only 2% of litigators attended an arbitration or mediation by videoconference prior to the coronavirus pandemic, after six months, almost 95% of surveyed litigators were primarily attending meetings through videoconference.¹⁴⁵

Approximately 68% of surveyed litigators reported that the virtual format did not impact their ability to advocate effectively for their client while 27.8% reported that the virtual format negatively impacted their advocacy.¹⁴⁶ Those reporting a negative experience typically cited the loss of “casual downtime contact” and excessive focus on the software, rather than the case.¹⁴⁷

Most litigators concluded that a mediator’s effectiveness in resolving disputes did not change when mediating through videoconference rather than in person. Seventy-two percent of surveyed litigators found that mediators were equally effective in virtual mediation, while 25% reported that mediators were less effective at resolving conflicts when videoconferencing was used.¹⁴⁸ The most common explanation for mediation failure was the mediator’s inability to build rapport with easily distracted participants.¹⁴⁹

In addition, 65.6% of surveyed litigators stated that they would consider using a videoconferencing software for future mediations and arbitrations after the pandemic is over,¹⁵⁰ while 74% of litigators expressed a desire to attend at least 50% of future mediations and arbitrations online.¹⁵¹

The EEOC conducted a major survey of charging parties (employees), representatives and employers who utilized the EEOC’s virtual mediation program during the pandemic.¹⁵² The EEOC reported that 92% of employees and 98% of employers would use EEOC virtual mediation again and that the vast majority of

144. *National Survey of Members*, *supra* note 129, at slide 2.

145. Presentation, Nat’l Acad. of Distinguished Neutrals, *supra* note 143, at slides 3–4.

146. *Id.* at slide 5.

147. *Id.* at slide 6.

148. *Id.* at slide 7.

149. *Id.* at slide 8.

150. *Id.* at slide 9.

151. *Id.* at slide 10.

152. MCDERMOTT & OBAR, *supra* note 74, at 11–12. The EEOC sent out 2,387 surveys to mediation participants and received 1,197 (or 50%) of the surveys back. Participation was fairly even across the parties and counsel (about 18–20%) except that 41% of employers’ counsel responded to the survey. *Id.*

both employees and employers found the process to be both procedurally just and distributively fair.¹⁵³ In addition, 60% of employees and 72% of employers were satisfied with the results of the mediation, and 70% of participants preferred an online process to an in-person process for a future mediation, if provided the option.¹⁵⁴ The EEOC concluded that virtual mediation improved access to justice because of its flexibility, accessibility, and ability to facilitate greater employer participation.

VI. PRESUMPTIVE VIRTUAL MEDIATION

Empirical studies of virtual mediation during the pandemic establish that virtual mediation is more flexible, less expensive, and as (or more) efficient than traditional mediation. The parties can be located anywhere and participate in the mediation much more easily, eliminating travel costs and reducing the risk of scheduling issues.¹⁵⁵ Virtual mediation's flexibility and convenience further increases accessibility without appearing to sacrifice quality of procedure or substantive result. Members of low-income populations who may struggle to arrange childcare, take time off work, or afford transportation costs have an improved ability to schedule and participate in the virtual mediation process. Other populations for whom travel to the court is burdensome, such as those with physical disabilities and rural populations, have easier access as well.¹⁵⁶

In addition, mediators and parties discovered that the platforms where virtual mediation is conducted are sufficiently

153. *Id.* at 13–14. (Eighty-six percent of Charging Parties (“CPs”) and 94% of Employers view the ODR procedures used by EEOC mediators as fair. Eighty-two percent of CPs and 91% of Employers view the overall ODR mediation as distributively fair.).

154. *Id.* at 13–15.

155. *E.g.*, Daniel Rainey, *ODR and Culture*, in *ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE* 200 (Mohamed Abdel Wahab, Ethan Katsh & Daniel Rainey, eds., 2012); María Mercedes Albornoz & Nuria González Martín, *Feasibility Analysis of Online Dispute Resolution in Developing Countries*, 44 *U. MIA. INTER-AM. L. REV.* 39, 45 (2012); Turner, *supra* note 24, at 143; Ganeles, *supra* note 43, at 738; Zavaletta, *supra* note 28, at 19; Robert C. Bordone, *Electronic Online Dispute Resolution: A Systems Approach—Potential Problems, and a Proposal*, 3 *HARV. NEGOT. L. REV.* 175, 191–92 (1998); Shah, *supra* note 28, at 29.

156. AMANDA R. WITWER ET AL., *ONLINE DISPUTE RESOLUTION: PERSPECTIVES TO SUPPORT SUCCESSFUL IMPLEMENTATION AND OUTCOMES IN COURT PROCEEDINGS* 5 (2021), https://www.rand.org/pubs/research_reports/RRA108-9.html; *see also* Hon. Elizabeth D. Laporte, *Access to Justice and Lesson Learned During a Pandemic*, *JAMS: ADR INSIGHTS* (Oct. 19, 2020), <https://www.jamsadr.com/blog/2020/access-to-justice-and-lessons-learned-during-a-pandemic>.

neutral. Unlike a law firm conference room or other setting, neither party controls the Zoom room. As a result, the neutral platform reduces potential power imbalances.¹⁵⁷ In addition, the Internet's impersonal process may actually lessen tensions associated with highly emotional disputes.¹⁵⁸ For example, parties who are not in close proximity to each other may avoid hostile interactions.¹⁵⁹ And the EEOC's comprehensive study indicated that settlement outcomes and rates are similar (or better) than those achieved in virtual mediation without a sacrifice in either distributional or procedural justice.

Some challenges remain, particularly with respect to access to inexpensive technology and ethics issues, especially ethics concerns raised by the participation of the fourth and fifth parties—the Internet and the platform. For those without ready access to broadband, computers, or smart phones, the switch to digital legal services during the pandemic interfered with access to legal assistance and the courts.¹⁶⁰ Interestingly, the pandemic prompted many in the justice system to address the digital divide. New York's courts are developing kiosks for parties who do not have access to computers or the Internet.¹⁶¹ At least one Michigan county installed digital kiosks at local libraries to provide

157. COLIN RULE, ONLINE DISPUTE RESOLUTION FOR BUSINESS: B2B, E-COMMERCE, CONSUMER, EMPLOYMENT, INSURANCE, AND OTHER COMMERCIAL CONFLICTS 64 (2002); Shah, *supra* note 28, at 30; Noam Ebner & Daniel Rainey, *ODR and Mediation*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 409, 433 (Daniel Rainey et al. eds., 2d ed. 2021) (discussing how some studies have shown that online processes help eliminate the asymmetry of hierarchy in workplace disputes).

158. Zavaletta, *supra* note 28, at 19; Lodder & Zeleznikow, *supra* note 24, at 302. Once thought to be inappropriate for ODR, family disputes have seen high rates of both settlement and party satisfaction when mediation was conducted through an online medium. Ebner & Rainey, *supra* note 157, at 409, 433.

159. LUCILLE M. PONTE & THOMAS D. CAVENAGH, CYBERJUSTICE: ONLINE DISPUTE RESOLUTION (ODR) FOR E-COMMERCE 25 (2005); RULE, *supra* note 157, at 67; Zavaletta, *supra* note 28, at 20.

160. LEGAL AID INTERAGENCY ROUNDTABLE, ACCESS TO JUSTICE IN THE AGE OF COVID-19: A ROUND TABLE REPORT 18 (2021), <https://www.justice.gov/ag/page/file/1445356/download>.

161. Donna Erez-Navot, *Reimagining Access to Justice: Should We Shift to Virtual Mediation Programs Beyond the COVID-19 Pandemic Especially for Small Claims?*, NYSBA (Feb. 16, 2022), <https://nysba.org/reimagining-access-to-justice-should-we-shift-to-virtual-mediation-programs-beyond-the-covid-19-pandemic-especially-for-small-claims/> (noting that ensuring accessibility may also require the availability of interpreter services during virtual mediation, providing equal access to process, and providing legal information throughout the mediation).

mediation services to county residents.¹⁶² Nonprofits, like the Minnesota Legal Services Coalition, similarly installed legal kiosks in community locations to help Minnesotans with limited access to technology and transportation seek legal advice and appear virtually at courtroom and administrative proceedings.¹⁶³ The Cleveland Housing court installed kiosks for residents to attend virtual hearings in areas of the city without widespread internet access.¹⁶⁴ Given the benefits of virtual processes, this trend is likely to continue.

Even with those efforts, however, one might imagine that, for some parties, the instant dispute may be the first time they have used this kind of technology. As the years unfold, particularly post-pandemic, it seems less and less likely that parties will be unfamiliar with technology—at least it will be the rare case that the use of technology creates a significant risk of unfairness to the inexperienced party. Should such a case arise, the mediator could take time to ensure that all parties have sufficient resources and skills to participate in a meaningful way.

A more challenging issue, but one that ODR professionals are confronting,¹⁶⁵ is ensuring quality within the mediation—both in

162. *Resolve a Dispute Online with MI-Resolve*, MICH. CTS., <https://www.courts.michigan.gov/administration/offices/office-of-dispute-resolution/mi-resolve/> (last visited Jan. 21, 2023); Jack Springgate, *New MI Resolve Kiosks Making Small Claims Disputes Easier for Berrien County Residents*, WNDU, <https://www.wndu.com/2021/04/07/new-mi-resolve-kiosks-making-small-claims-disputes-easier-for-berrien-county-residents/> (Apr. 7, 2021, 5:00 PM) (discussing the installation of digital kiosks at some Michigan local libraries aimed at providing access to mediation services to residents to resolve small claims cases without going to court).

163. Nonprofits, like the Minnesota Legal Services Coalition, are also working to address the digital divide in access to legal services by installing legal kiosks in community locations to help Minnesotans with limited access to technology and transportation seek legal advice from Legal Aid and appear to court and administrative hearings virtually while represented by Legal Aid attorneys. See LEGAL KIOSK PROJECT, <https://www.legalkiosk.org/about> (last visited Jan. 21, 2023).

164. Tiarra Braddock, *Cleveland Housing Court Judge Hopes to Close Digital Divide by Adding Kiosks in Communities Without Internet Access*, CLEVELAND 19 (July 23, 2021, 6:22 PM), <https://www.cleveland19.com/2021/07/23/cleveland-housing-court-judge-hopes-close-digital-divide-by-adding-kiosks-communities-without-internet-access/>; Karin Connelly Rice, *Housing Court Is in Session at the Cleveland Public Library*, FRESHWATER (July 14, 2022), <https://www.freshwatercleveland.com/breaking-ground/HousingCourtCPLKiosks071422.aspx> (noting that in 2021, 1124 defendants used virtual kiosks at the Cleveland Housing Court).

165. In 2017, the Administration and Fellows of the National Center for Technology and Dispute Resolution joined others to create ICODR, the International Council of Online Dispute Resolution. ICODR has a formal governance structure, with a focus on promoting uniform worldwide principles and standards to promote ethical ODR design and practice.

terms of mediator quality and process quality. Virtual mediation, and ODR more generally, developed rapidly. The development of rules and regulations to govern mediators and the mediation process trailed the demand for virtual mediation. Nevertheless, policymakers have now produced standards of conduct for mediators conducting virtual mediation.¹⁶⁶ Although these standards have yet to be widely adopted, administering organizations appear poised to implement these new ethical guidelines where gaps in ethical code coverage exist.¹⁶⁷ In the meantime, the existing Model Standards of Mediator Conduct is likely to suffice, particularly because mediator unethical behavior is rare and there is little evidence that mediators are facing any major impediment in maintaining confidentiality within virtual mediation.

V. CONCLUSION

The pandemic unquestionably accelerated the use of virtual mediation. As a result, however, parties, mediators and those who study mediation processes learned that virtual mediation is as, or even more, effective, accessible, and fair as traditional mediation. On every measure, virtual mediation performed as well or better than traditional mediation. And, unquestionably, it is less expensive and easier to access. As a result, moving forward, virtual

ICODR's activities include promotion of access, use, and public understanding/education of ODR, engaging diverse communities in ODR development, promulgation of standards and best practices for ODR programs, self-certification of ODR programs against those standards, memberships for ODR practitioners, providers, academic programs, and businesses, training and continuing education for ODR practitioners, and mentoring and career services for ODR professionals. In 2016, NCTDR and ICODR published a set of "values, not rules or standards" intended to improve quality, effectiveness and scope of dispute resolution processes that have technological components. In 2022, NCTDR followed up on these reports with ODR Standards designed to supplement existing ethical standards for dispute resolution when facilitated using technology. *NCTDR Standards*, *supra* note 7; *ICODR Standards*, *supra* note 7. Designed to apply to ODR practitioners and technological platforms alike, the standards' emphasis is on ensuring accessible (easy to access and minimized costs), accountable (auditable by institutions the systems serve), competent (expertise in dispute resolution, law and technology), confidential (keeping data confidential and articulating policies to users), equal, fair and impartial, legal, secure and transparent (especially with respect to the role of artificial intelligence in the dispute resolution process). *NCTDR Standards*, *supra* note 7; *ICODR Standards*, *supra* note 7.

166. See, e.g., *ICANN Standards*, *supra* note 7; *ICODR Standards*, *supra* note 7.

167. See, e.g., U.N. COMM'N ON INT'L TRADE L., UNCITRAL TECHNICAL NOTES ON DISPUTE RESOLUTION (2017), https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf (recommending standard guidelines for ODR conduct).

mediation should be the presumptive choice for parties seeking an alternative to litigation for dispute resolution.