

A New Agreement to Mediate: Guidelines for Ethical Practice in the Digital Space

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I. INTRODUCTION

As the technological universe at our fingertips continues to expand, so too does the pool of practicing mediators making use of Internet-facilitated communication to resolve disputes. Many have moved mediation processes completely online with the help of online

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dispute resolution (ODR) platforms, while thousands more use information communication technology (ICT) tools to aid face-to-face dispute resolution.¹ Despite the growing prevalence of technology-assisted mediation, however, mediators' online practice is left largely to their own discretion.² Although scholars, regulatory bodies, and member organizations are working to create a set of standards guiding the practice of this rapidly expanding field, no authoritative set of standards has yet emerged.³ When such a set does materialize, standards currently proposed by the ODR community suggest it will focus more on ODR system design rather than on mediator-party communication.⁴ ODR platform providers have, for the most part, failed to fill gaps left by the community as a whole in communicating information to mediators and parties regarding ethical best practices. In the midst of this muddied regulatory landscape, mediators making use of ODR platforms and ICT tools have scant guidance on how to ethically use technological tools in dispute resolution. Specifically, mediators are left largely without resources regarding transparent communication with parties about the online mediation process and its unique ethical considerations. Mediators using online tools are in need of clearer guidelines for their ethical implementation.

This paper reviews the most important ethical ODR principles for online mediators, the standards that members of the ODR community have been working to create, and the ways in which ODR platforms and online mediation programs have (or, in most cases, have not) put those standards into practice. It will build on existing ODR scholarship in formulating a "new agreement to mediate," including ODR-specific terms mediators should discuss with parties before they enter into an online or technology-assisted mediation. Part II discusses the development of online mediation and its relationship to the nascent field of ODR ethics. Part III sets out the ODR ethical principles relevant to practicing mediators. Part IV examines proposed ODR standards set out by scholars, regulatory bodies and

1. See Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 69 S. CAROLINA L. REV. 329, 341 (2016).

2. See Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes—the Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 535 (2015) (discussing the consequences of this discretion in the field of online divorce mediation).

3. See discussion *infra* Part IV.

4. See ICANN, ONLINE DISP. RESOL. STANDARDS OF PRACTICE, <https://www.icann.org/en/system/files/files/odr-standards-of-practice-en.pdf> (last visited April 8, 2018) (hereinafter ICANN Standards) (referring primarily to ODR schemes rather than providers).

member organizations, and analyzes a sample of major ODR platforms and mediation programs to conclude that mediators may not be effectively putting those standards into practice when communicating with parties. Finally, Part V proposes a “new agreement to mediate” that takes into account key ethical principles informing online mediator-party communication. A sample agreement to mediate is also attached as an appendix to this paper, as are representative agreements published by two mediation programs.

II. THE DEVELOPMENT OF ONLINE MEDIATION AND ODR ETHICS

Online dispute resolution (ODR) first emerged in the 1990s as a tool to manage the proliferation of e-commerce disputes that accompanied the rise of online shopping. Primarily used by large companies like eBay and Amazon, it began as a way to resolve small-dollar conflicts that arose online between geographically distant parties.⁵

While online mediation was originally envisioned to resolve the same types of disputes as ODR systems generally, it has also shown to be a powerful tool for resolving disputes not originally contemplated for online mediation, like those involving parties who are not separated by geographical distance and disputes where emotional aspects predominate.⁶ Online mediation has also grown from non-binding, out-of-court dispute resolution between private parties to encompass binding resolution of in-court disputes of many types, including landlord-tenant, small claims, and domestic disputes.⁷ Companies have also increasingly turned to technological tools to resolve workplace disputes.⁸

As the field of ODR broadened, so too did the scholarly debate about issues that arise from resolving disputes online. In 1994, the American Bar Association, the American Arbitration Association, and the Society of Professionals in Dispute Resolution promulgated the Model Standards of Conduct for Mediators, an ethical code based on several states’ existing mediator codes that sought to “serve as a guide for the conduct of mediators,” “inform the mediating parties,”

5. *Online Disp. Resol. and the Courts* (Nat’l Ctr. for State Courts), JOINT TECH. COMM. NEWSLETTER, Apr. 30, 2016, at 2, available at <http://www.ncsc.org/~media/files/>.

6. Noam Ebner, *E-Mediation*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE 375 (Mohamed S. Abdel Wahab, Ethan Katsh & Daniel Rainey eds. 2012).

7. *Online Disp. Resol. and the Courts*, *supra* note 5, at 2.

8. See Ebner, *supra* note 6, at 363 n.24 (citing K. Bollen and M.C. Euwema, *Angry at Your Boss or Fearing Your Employee? Negative Affect in Hierarchical Conflicts and Modeling Role of E-Supported Mediation*, Kyoto, IACM 2009).

and “promote public confidence in mediation as a process for resolving disputes.”⁹ The standards cover nine major ethical subject areas: self-determination, impartiality, conflicts of interest, competence, confidentiality, quality of the process, advertisements and solicitation, fees, and obligations to the mediation process.¹⁰ While many states have adopted the Model Standards in regulating mediators, scholars have criticized the standards for their breadth and vagueness, their failure to create a clear hierarchy of ethical duties and concerns for mediators, and their potential to lead to an increase in malpractice suits against mediators.¹¹

In the shadow of this debate, ODR scholars in the late 1990s recognized online-specific ethical quandaries, like those attendant with managing complaints on e-commerce platforms, safeguarding electronic health records, designing dispute management systems for businesses and government agencies and employing email, electronic calendars, brainstorming software and video conferencing during arbitration and mediation.¹² Additionally, the ODR community became increasingly preoccupied with the expanding pool of stakeholders in dispute resolution processes that move online.¹³ Specific to mediation, scholars are concerned with how the “fourth” and “fifth” parties—that is, ODR platforms and technological providers—must act in order to provide an ethical process for parties in dispute.¹⁴

9. MODEL STANDARDS OF CONDUCT FOR MEDIATORS PREAMBLE (AM. ARB. ASS'N, A.B.A., ASS'N FOR CONFLICT RESOL. 2005).

10. Andrea C. Yang, *Ethics Codes for Mediator Conduct: Necessary but Still Insufficient*, 22 GEO. J. LEGAL ETHICS 1229, 1235 (2009).

11. See, e.g., Michael L. Moffitt, *The Wrong Model, Again: Why the Devil is Not in the Details of the New Model Standards of Conduct for Mediators*, 12 DISP. RESOL. MAG. 31–33 (2006).

12. Leah Wing, *Ethical Principles for Online Dispute Resolution: A GPS Device for the Field*, 3 INT'L J. ON ONLINE DISP. RESOL. 12, 13 (2016).

13. See *id.* at 22 (“Blurred boundaries requires that dispute resolution systems design is more responsive to and reflective of . . . a constantly changing constellation of stakeholders – most of whom may not be aware of dispute resolution traditions and standards and instead carry . . . principles and practices grounded in other disciplines.”); see also Orna Rabinovoch-Einy & Ethan Katsh, *Digital Justice: Reshaping Boundaries in an Online Dispute Resolution Environment*, 1 INT'L J. ONLINE DISP. RESOL. 5, 6 (2014).

14. Susan Nauss Exon, *Ethics and Online Dispute Resolution: From Evolution to Revolution*, 32 OHIO ST. J. ON DISP. RESOL. 609, 621 (2017); Daniel Rainey, *Third-Party Ethics in the Age of the Fourth Party*, 1 INT'L J. ONLINE DISP. RESOL. 37, 40 (2014).

III. ODR ETHICAL PRINCIPLES

In response to a growing need to construct an ethical framework informing online dispute resolution practice, Leah Wing, senior lecturer at the University of Massachusetts-Amherst and co-director of the National Center for Technology and Dispute Resolution, created 17 ethical principles for online dispute resolution, designed to enhance the quality, effectiveness, and scope of ADR with online components. Her principles were adopted by the National Center for Technology and Dispute Resolution.¹⁵ According to Wing, they are “not offered as standards or codes of conduct, but rather as an articulation of shared values,” and are meant to serve as a basis for further work in governing the field of ODR.¹⁶ In particular, she hoped to draw the ODR community’s attention to differential access to justice, power imbalances, cultural differences, marginalization, and inclusion in decision-making that takes place both in ODR system design and in its implementation, and to reinforce the continuation of the shared values of ADR within the ODR framework.¹⁷ Wing’s ethical principles of ODR are intended to serve as a “GPS” to guide the development of such rules or standards in the future, not as rules or standards themselves for mediators resolving conflict online.¹⁸ Each of Wing’s principles is also relevant to face-to-face mediation, but pose particular considerations in an online context.¹⁹

IV. ETHICAL PRINCIPLES IN PRACTICE

A. *The Development of Standards for Online Mediators*

Wing suggests that the ethical principles she developed for the National Dispute Resolution Center be viewed as flexible, non-rules based principles allowing for differences across cultures, sectors, and jurisdictions, but also providing a stimulus for the creation of rules-

15. *Ethics and ODR*, NAT’L CTR. FOR TECH. AND DISP. RESOL., <http://odr.info/ethics-and-odr/> (last visited Dec. 19, 2017).

16. *Id.*

17. Wing, *supra* note 12, at 19-20.

18. *Id.* at 13 n.1.

19. Wing’s ethical principles are as follows: accessibility, accountability, competence, confidentiality, empowerment, equality, fairness, honesty, impartiality, informed participation, innovation, integration, legal obligation, neutrality, protection from harm, security, and transparency. For a detailed explanation of each principle, see *Ethics and ODR*, *supra* note 15.

based standards.²⁰ Some scholars have since formulated modifications to the Model Standards for Mediators that address these principles. Susan Nauss Exon focuses on ethical considerations not only for “third party” mediators facilitating the use of ODR, but also for “fourth” and “fifth” parties.²¹ Daniel Rainey, another leader in the ODR community, worked with students at Southern Methodist University to annotate the Model Standards of Conduct for Mediators in order to reflect ODR-specific considerations.²² Rainey’s standards highlight particular concerns with mediator impartiality, competence, confidentiality, and process quality.²³ Other scholars have focused on regulating which types of disputes can be resolved online and which require face-to-face resolution.²⁴

A number of regulatory bodies and member organizations have also taken up the charge to create a set of standards instructing the practice of ODR. No one “model” set of standards has yet emerged, but the increasing volume of efforts to regulate ODR practice shows a targeted intent to put Wing’s ethical principles into effect.

The international community has worked hard in recent years to help inform the ethical practice of ODR providers, including foreign governmental entities using ODR platforms to settle disputes with citizens. The United Nations Commission on International Trade Law (UNCITRAL) commissioned a working group regarding online dispute resolution that met for 33 sessions from 2010-2016.²⁵ The group never put together binding standards for ODR providers, but it did draft a “non-binding descriptive document” reflecting the elements it would like to see in an ODR process, emphasizing the importance of security in the context of ODR.²⁶ The International Mediation Center, a global certifying body for mediators, also provides a set of standards for certified practitioners. Currently, the Center’s Rules for Mediation contain no mention of technology or

20. Wing, *supra* note 12, at 23.

21. Exon, *supra* note 14, at 656.

22. Daniel Rainey, Annotation, MODEL STANDARDS OF CONDUCT FOR MEDIATORS (2015) (hereinafter Annotated Model Standards), available at <http://danielrainey.us/wp-content/uploads/2016/08/MODEL-STANDARDS-ANNOTATED-FOR-ODR-AUGUST-2016.pdf>.

23. *Id.*

24. Scott J. Shackelford & Anjanette H. Raymond, *Building the Virtual Court-house: Ethical Considerations for Design, Implementation, and Regulation in the World of ODR*, 2014 WIS. L. REV. 615, 619 (2014).

25. UNCITRAL, *Report of Working Group III (Online Dispute Resolution) on the Work of its Thirty-third Session*, <https://documents-dds-ny.un.org/doc/UNDOC/GEN/V16/014/73/PDF/V1601473.pdf?OpenElement> (February 29-March 4, 2016).

26. *See id.*

ODR platforms.²⁷ However, the group is in the process of drafting both a set of standards for training online mediators and a set of standards for practice.²⁸

In the United States, no single set of standards for ODR providers prevails, but three major legal and conflict resolution organizations are each discussing ways to best guide online mediators and ODR practitioners generally. The American Bar Association is thinking carefully about how to amend the Model Standards for Mediators to reflect the ethical issues surrounding online mediation. At a recent meeting discussing how to improve the Model Standards, ODR scholars raised questions as to how the introduction of ICT tools affects existing standards addressing the quality of the mediation process (that is, whether the parties are fully comfortable with the technology and have agreed to use it), its cost, confidentiality, and impartiality.²⁹

The American Arbitration Association, despite being the first ADR institution to partner with an online dispute resolution system in 1995, has yet to articulate a set of standards specific to online dispute resolution.³⁰ The Association for Conflict Resolution, which publishes a collection of model standards for various types of mediation practice, similarly has no resources available about online mediation or ODR generally.³¹ However, both groups are discussing ways to integrate ODR standards into their practice guidelines.³²

In 2009, the Advisory Committee of the National Center for Technology and Dispute set out a number of standards of practice for online dispute resolution.³³ These standards focus almost exclusively

27. See *Int'l Mediation Inst.*, IMI MODEL MEDIATION RULES 2016, <http://www.imimmediation.org/practitioners/mediation-rules/> (last visited Dec. 2, 2017).

28. Telephone Interview with Daniel Rainey, Fellow, National Center for Technology and Dispute Resolution (Nov. 28, 2017).

29. Course Materials, "Mediation's Model Standards are Failing: What Should We Do About It?" American Bar Association Continuing Legal Education Webinar, July 11, 2017, available at https://www.americanbar.org/content/dam/aba/events/dispute_resolution/cle_and_mtg_planning_board/teleconferences/2016-2017/DR1705_materials.authcheckdam.pdf.

30. Debi Miller-Moore, *ODR at the AAA: Online Dispute Resolution in Practice*, 38 U. Tol. L. Rev. 395, 395 (2007).

31. See *Ass'n for Conflict Resol.*, MODEL STANDARDS, https://www.acrnet.org/ACR/Resources/Model_Standards/ACR/Resources/Model_Standards.aspx?hkey=315fc2bd-2cac-422b-82bf-b3160b6a1b08 (last visited Dec. 11, 2017).

32. Telephone Interview with Leah Wing, Co-Director, National Center for Technology and Dispute Resolution (Nov. 28, 2017).

33. See ICANN Standards, *supra* note 4. The National Center for Technology and Dispute Resolution also publishes these principles. See *Ethics and ODR*, *supra* note 15. Additionally, the International Council for Online Dispute Resolution (ICODR)

on system design rather than on implementation, and are framed as general principles rather than operational frameworks for practice. However, some of the principles they identify are useful for practitioners, like the idea that technology should never be forced upon a party who is not comfortable using it, and that ODR providers should be transparent about their processes.³⁴

Finally, the Conference of State Court Administrators, the National Center for State Courts, and the National Association for Court Management have formed a Joint Technology Committee in order to establish ICT standards for courts and improve online court processes. The committee raises ethical considerations, like privacy and access, along with more practical concerns, like efficiency and the preservation of administrative resources.³⁵

B. *ODR Ethical Principles in Practice: A Sample of “Agreements to Mediate”*

While the ODR community is deep in thought about how best to craft standards governing the ethical practice of online mediation, the principles discussed above may not be making their way to the everyday practice of most online mediators. A review of current ODR providers’ “agreements to mediate”—that is, the information parties view and agree to before entering into online mediation—shows many parties may not be informed of online-specific ethical concerns.³⁶

One leading ODR platform directs parties through AI-facilitated negotiation before introducing a human mediator.³⁷ Most parties resolving disputes using the platform settle before reaching the mediation stage, so information about mediation is not immediately available to disputing parties.³⁸ Some companies and government agencies who provide mediation through the platform have parties sign “terms and conditions” before entering into the mediation phase

has created a list of all standards explicitly based on Wing’s Ethical Principles for Online Dispute Resolution. See *ICODR*, ICODR STANDARDS, <http://icodr.org/index.php/standards/> (last visited April 8, 2018).

34. See ICANN Standards, *supra* note 4.

35. *Online Dispute Resolution and the Courts*, *supra* note 5, at 8.

36. Agreements to mediate are used both to establish the scope of privileged information to be shared in mediation and setting expectations of parties, including ethical expectations. The ODR platforms examined in this section will be discussed anonymously to protect privacy concerns.

37. The platform will be discussed anonymously for privacy purposes.

38. Information identifying the platform has been removed for privacy purposes.

of the ODR process.³⁹ However, there is little to suggest those terms resolve any ethical questions specific to online mediation. For example, the terms and conditions of one court-run online dispute resolution program (attached as Appendix B) discuss confidentiality, voluntariness, and legal representation in mediation, but make no mention of the technology to be used during the mediation, about parties' differential access to or understanding of that technology, or about online-specific security or privacy concerns.⁴⁰

Another platform, originally used overseas as a way to resolve labor disputes using online negotiation, is being piloted in the U.S. for certain family mediation cases. When both parties in the pilot program have agreed to try mediation, each are sent an email outlining the process.⁴¹ However, it is not clear whether technology-specific concerns are addressed before the parties begin mediation, nor do the platform's terms of service address ethical issues attendant with online mediation.⁴²

Mediators using ICT tools to assist face-to-face mediation in the United States are likely not communicating information regarding the ethical use of ICT any more effectively than are creators and users of more ODR-specific platforms. The American Arbitration Association's "ClauseBuilder" tool, which allows parties to create arbitration or mediation clauses governing existing or future disputes in contracts and to preview, edit, and archive ADR agreements online, contains no options for online dispute resolution clauses or agreements to mediate digitally.⁴³ Additionally, Mediate.com, a resource hub for practicing mediators, includes a sample agreement to mediate that can be used in practice. The agreement (annotated by the author to reflect ODR concerns in Appendix A) has not been meaningfully updated since 1998, and contains no mention whatsoever of technology.⁴⁴

While it appears that mediators in the United States have yet to make significant strides in communicating (at least through writing)

39. Information identifying the platform has been removed for privacy purposes.

40. *Terms and Conditions*, MICHIGAN COURTS OFFICE OF DISPUTE RESOLUTION (provided Nov. 15, 2017). Identifying information about the specific court system involved has been redacted to protect the privacy of the ODR platform it uses.

41. Information identifying the platform has been removed for privacy purposes.

42. Information identifying the platform has been removed for privacy purposes.

43. *ClauseBuilder Tool*, AM. ARB. ASS'N, <https://www.clausebuilder.org> (last visited Dec. 11, 2017).

44. *Sample Agreement to Mediate*, MEDIATE.COM, <https://www.mediate.com/articles/melamed6.cfm> (last visited Dec. 18, 2017).

online mediation's major ethical considerations with parties, one international entity has gone much further in integrating these principles in practice. Mediate BC, a large-scale program by the British Columbia government to move much of its dispute resolution infrastructure toward mediation, sought to bring together the province's sparsely distributed population with an online mediation program. Called The Distance Mediation Project, the 6-year pilot program connected remote parties in family disputes with mediators using technology, and allowed them to resolve their disputes through text-and video-based tools.⁴⁵ Parties used more traditional technological tools more frequently in earlier phases of the project, and switched to primarily web conferencing in later years.⁴⁶

After a lengthy initial screening, participating parties were asked to sign an agreement to mediate.⁴⁷ The project's designers included a sample agreement to mediate in their standards for participating practitioners (attached as Appendix C).⁴⁸ Suggested terms focused on confidentiality, rules governing the use of technology during the mediation sessions, and who would bear the costs of the ICT.⁴⁹ Since the project's completion, Mediate BC has partnered with Royal Roads University to create an online course designed to teach experienced mediators how to conduct mediation online.⁵⁰

V. A NEW AGREEMENT TO MEDIATE

To effectively put the ethical principles of ODR into practice, the growing number of mediators using ODR platforms and augmenting face-to-face mediation with ICT tools should ask themselves how best to communicate important considerations involving online mediation

45. British Columbia Mediator Roster Society, *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project* ii (May 2010), available at <http://www.mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Mediation-Project—Evaluation-Report.aspx>.

46. British Columbia Mediator Roster Society, *Report on Phase III of the Technology-Assisted Family Mediation Project 2* (Mar. 2013), available at <http://www.mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Family-Mediation-Evaluation-Report-FINAL.aspx>.

47. *See id.* at 8-9.

48. British Columbia Mediator Roster Society, *Mediating from a Distance: Suggested Practice Guidelines for Family Mediation* 54-59 (Nov. 2012) (hereinafter *Suggested Practice Guidelines*) available at http://www.mediatebc.com/PDFs/1-14-Family-Mediation—FAQs/Guidelines_Mediating-from-a-Distance-%28Second-edition.aspx.

49. *See id.*

50. *Professional Advancement*, ROYAL ROADS UNIVERSITY, <https://secure.royalroads.ca/cscourses/online-facilitation-skills-for-mediation-mediate-bc-online> (last visited Dec. 14, 2017).

with parties. Some may already be thinking about these concerns, but many practitioners may be repurposing agreements to mediate or opening remarks to parties from a time before technology began pervading every aspect of the ODR landscape. The moment is ripe for reform. I propose a new “agreement to mediate,” to be used to guide mediators making use of ICT when communicating with disputants. In crafting their own agreements to mediate with parties, mediators moving online may consider terms like those I propose in communicating the ODR ethical principles most important to mediator-party communication: confidentiality, informed consent, and impartiality.⁵¹

A. *Suggested Terms for a New Agreement to Mediate*

Confidentiality. Before beginning a technology-assisted mediation, practitioners should recognize the privacy-based limitations and risks of the technology they plan to use (and attempt to find less risky alternatives). In the agreement to mediate, mediators may explain those risks to parties and set out a safety protocol to minimize data breaches.⁵² Mediators should think carefully about security breaches that could occur during the course of the mediation they will and will not be held liable, and may specify them in the agreement.⁵³ Finally, mediators thinking about these issues may caution parties against recording or electronically storing any confidential information shared during mediation.⁵⁴

Informed consent. Central to the concept of informed consent in online mediation is the question of whether technology is sufficiently simple for both parties to master, no matter their differences in technological competence, geography, Internet accessibility, language, or culture. For best results in mediating online, mediators should ensure their own comfort and familiarity with an ODR platform or an ICT tool before using it in mediation. Parties should affirmatively agree that they are comfortable using the technological tools chosen, or else online mediation may not be an ethical option.⁵⁵ Mediators should also make clear to parties that if they experience any

51. Interview with Daniel Rainey, *supra* note 28.

52. Annotated Model Standards, *supra* note 22, at 5.

53. *See id.*; *see also* Exon, *supra* note 14, at 659.

54. *Suggested Practice Guidelines*, *supra* note 48, at 54-59.

55. Ebner, *supra* note 6, at 379.

problems with, or have any questions or concerns about, the ICT used during mediation, they should raise them with the mediator.⁵⁶

Another vital tenant of informed consent especially relevant to ODR is the parties' right to counsel. Mediation that includes no face-to-face component whatsoever provides a particular risk to unrepresented parties: one party could be represented or seeking the advice of counsel, and the other party may be completely unaware.⁵⁷ An online agreement to mediate, especially in mediations that are conducted entirely on ODR platforms or via ICT tools, could therefore include a term requiring parties to disclose whether counsel is assisting them and reminding parties of their right to seek counsel.

Access. Also bound up with the question of informed consent are considerations of access. Particularly in low-dollar, court-ordered online mediation processes, where vulnerable or underserved populations may have little choice in the ODR technology used, mediators should ensure that all parties have access to a technological device that can support the software. For many Americans without a laptop or desktop computer, a smartphone is the only way they can access ICT tools.⁵⁸ Mediators should test out technology to be used during the mediation on a smartphone, and confirm that all parties will have an electronic device with which they can effectively participate in the mediation. Mediators should also plan for a backup technological platform, should digital technology fail or should parties express discomfort with other ICT applications. Telephone is an obvious choice: the Distance Mediation Project observed that parties with limited digital capabilities were most comfortable resolving at least some aspect of a dispute by phone.⁵⁹ Parties should also communicate any language differences or difficulties they anticipate experiencing to the mediator.⁶⁰

Finally, mediators should consider how to disclose the cost structure of online mediations. While some ICT tools may be free to use,

56. Interview with Daniel Rainey, *supra* note 28. Rainey notes that text-based, asynchronous tools of communication make it especially difficult to ascertain if parties are experiencing discomfort with an online platform.

57. See, e.g., Brian Farkas, *Old Problem, New Medium: Deception in Computer-Facilitated Negotiation and Dispute Resolution*, 14 CARDOZO J. CONFLICT RESOL. 161, 189 (2012) (discussing ways in which parties can lose the mediator's trust in online mediation).

58. WHITE HOUSE COUNCIL OF ECON. ADVISERS, ISSUE BRIEF: MAPPING THE DIGITAL DIVIDE 6 (2015), https://obamawhitehouse.archives.gov/sites/default/files/wh_digital_divide_issue_brief.pdf.

59. *Report on Phase III*, *supra* note 46, at 19.

60. CANADA DEPT. OF JUSTICE, DISP. RESOL. REF. GUIDE (2012), available at <http://www.justice.gc.ca/eng/rp-pr/csj-sjc/dprs-sprd/res/drrg-mrrc/10.html>.

others will require a subscription fee. Mediators should decide ahead of time whether they plan to pass on the cost of ICT to parties, and parties should affirmatively agree to take on any necessary technological costs before beginning mediation.⁶¹

Impartiality. Asynchronous communication increases the potential for mediators to exhibit a lack of neutrality, unnoticed by the other party. Such potential, left unaddressed, can cause a loss of trust between parties and third-party neutrals.⁶² Therefore, mediators may consider including a provision in their agreement to mediate confirming that they will communicate digitally with both parties on an impartial basis.⁶³ Additionally, mediators should stress their impartiality as to the parties' comfort or familiarity with any ICT tools used, and that his or her choice of ICT was made without bias toward any one particular cultural worldview or method of processing information.⁶⁴ Finally, mediators should make clear that they do not endorse or will not benefit from the use of any particular technology, to avoid the appearance of a conflict of interest.⁶⁵

B. *Suggestions for Future Practice*

Some important best practices for online mediators cannot be encapsulated in an agreement to mediate. The differences between online and face-to-face mediation may require a re-imagining of the mediation process when it moves online. Noam Ebner suggests creating a new mediation process stage in which parties are walked through an ODR platform or technological tool used and given an introduction to the online mediation environment, in order to increase their satisfaction and comfort with both the technology and the mediator using it.⁶⁶ Elements of a "test run" might include a site tour and tutorial, a discussion of communication ground rules, and comments

61. *Suggested Practice Guidelines*, *supra* note 48, at 21.

62. Ebner, *supra* note 6, at 379.

63. Some in the ADR community have recently moved away from focusing on neutrality and impartiality and toward focusing on balance between parties. Jo Demars, Susan Nauss Exon, Kimberlee K. Kovach & Colin Rule, *Virtual Virtues: Ethical Considerations for an Online Dispute Resolution (ODR) Practice*, 17 DISP. RESOL. MAG. 8 (2010).

64. Parties who adopt an intuitive-experiential mode of processing information may not respond as well to asynchronous, text-based communication than those who process information in an analytical-rational mode, relying on logic and deductive thinking. A.M.G. Hammond, *How Do You Write 'Yes'? A Study on the Effectiveness of Online Dispute Resolution*, 20 CONFLICT RESOL. Q. 261-286 (2003).

65. *Suggested Practice Guidelines*, *supra* note 47, at 56.

66. Ebner, *supra* note 6, at 388.

regarding language, time zones, synchronous and asynchronous communication, and expectations and technological support available to parties.⁶⁷

Those designing training programs may also consider thinking of online-specific concerns: mediators moving online may need to learn a number of skills, both technical and emotional, to fit an online environment. Necessary emotional skills may include the ability to build trust online, to deal with online-specific expressions of anger and other emotions, and to understand the limitations and rhythms of asynchronous technology.⁶⁸ Mediators should also ask themselves whether they should learn new, online-appropriate methods for active listening, asking questions, and reframing.⁶⁹ Training opportunities specifically designed for ODR practitioners are currently lacking, as are any standards to guide practitioners providing training.⁷⁰ Colin Rule, Vice President of Online Dispute Resolution at Tyler Technologies, suggests online mediators be trained with a combination of studying, simulated online mediations, mentoring, discussions, and sharing of language to be used in ODR processes.⁷¹

Anyone thinking carefully about the ethical practice of online mediation should also turn his or her attention to ODR system design. While this discussion is beyond the scope of this paper, which is limited to practical considerations for third parties, the “fourth party’s” ethical responsibility is a major topic in the ODR community and is becoming ever more relevant as more platforms switch to automated dispute resolution using artificial intelligence.⁷² Mediators should stay abreast of this conversation while it develops, and be careful to choose ODR platforms and ICT applications that have been shown to adhere to ethical principles.⁷³

67. *Id.*

68. *See id.* at 390, citing Andrea M. Braeutigam, *What I Hear You Writing is. . . Issues in ODR: Building Trust and Rapport in the Text-Based Environment*, 38 U. Tol. L. Rev. 101, 124 (2006).

69. Ebner, *supra* note 6, at 390.

70. *See id.* at 393.

71. *Id.* at 393, citing Colin Rule & Craig Villamore, *The Importance of Language in Online Dispute Resolution*, Special Supplement 2004, ICC INT’L COURT OF ARB. BULL.

72. *See, e.g.*, Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 69 S. CAROLINA L. REV. 329, 331 (2016); Shackelford & Raymond, *supra* note 24, at 633; ETHAN KATSH & JANET RIFKIN, *ONLINE DISPUTE RESOLUTION: RESOLVING DISPUTES IN CYBERSPACE* 93 (John Wiley ed. 2001); Janet Rifkin, *Online Dispute Resolution: Theory and Practice of the Fourth Party*, 19 CONFLICT RESOL. Q. 117, 119 (2001).

73. Exon, *supra* note 14, at 656.

VI. CONCLUSION

The ODR community is still working to catch up to the explosion of technological tools and processes within the dispute resolution framework. While Wing's ethical principles provide important guidance for the ODR field, and while domestic and international scholars, regulatory bodies, and member organizations are making significant strides toward a set of standards to guide system designers and practitioners, online mediators remain without guidance regarding how best to inform parties of ethical concerns that arise in an online mediation setting. Nor have ODR platforms or mediation providers stepped in to fill the void in most instances. A need for clearer standards, especially regarding the information to which mediators and parties must agree before beginning mediation, is clear. In designing their agreements to mediate online, mediators using ODR platforms or other ICT tools should consider borrowing from the growing body of scholarship regarding ODR ethics, and from successful online mediation projects like the Distance Mediation Project, to devise terms focusing on confidentiality, informed consent, and impartiality. But a technology-appropriate agreement to mediate is only the beginning: mediators moving into the online space, and those regulating them, should also be thinking carefully about process concerns, mediator training, and system design issues unique to online mediation.

APPENDIX A: SAMPLE AGREEMENT TO MEDIATE⁷⁴

AGREEMENT TO MEDIATE

This is an Agreement between _____ and _____ and _____, hereinafter “mediator,” to enter into mediation with the intent of resolving the following issues:

_____.

The parties and the mediator understand and agree as follows:

1. Nature of Mediation

The parties hereby appoint and retain _____ as mediator. The parties understand that mediation is an agreement-reaching process in which the mediator assists parties to reach agreement in a collaborative and informed manner. It is understood that the mediator has no power to decide issues for the parties. The parties understand that mediation is not a substitute for independent legal advice. The parties are encouraged to secure such advice throughout the mediation process and are advised to obtain independent legal review of any formal mediated agreement before signing that agreement. The parties understand that the mediator has an obligation to work on behalf of all parties and that the mediator cannot render individual legal advice to any party and will not render therapy nor arbitrate within the mediation.

2. Scope of Mediation

The parties understand that it is for the parties, with the mediator’s concurrence, to determine the scope of the mediation and this will be accomplished early in the mediation process.

3. Mediation is Voluntary

All parties here state their good faith intention to complete their mediation by an Agreement. It is, however, understood that any party may withdraw from or suspend the mediation process at any time, for any reason.

The parties also understand that the mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or unreasonable result; if the mediator feels that an impasse

74. Edited and annotated by the author (annotations in bolded, underlined, and italic text). Original agreement: *Sample Agreement to Mediate*, MEDIATE.COM, <https://www.mediate.com/divorce/pg39.cfm> (last visited Dec. 18, 2017).

has been reached; or if the mediator determines that he can no longer effectively perform his facilitative role.

4. Technology Used

In this mediation, the following Information and Communications Technology (ICT) tools will be used: _____

The mediator has reviewed and tested each ICT tool, and is comfortable both using these tools and teaching parties to use them for purposes of this mediation. The mediator does not endorse any form of technology used. All parties have reviewed the ICT tools used and are comfortable operating them. If any party experiences any problems with, or has any questions or concerns about, the ICT tools used during mediation, he or she should raise them with the mediator. If needed, all parties agree to utilize voice conferencing by telephone as a substitute for other ICT tools used.

4. Confidentiality

It is understood between the parties and the mediator that the mediation will be strictly confidential. Mediation discussions, any draft resolutions and any unsigned mediated agreements shall not be admissible in any court or other contested proceeding. Only a mediated agreement signed by any parties will be so admissible. The only other exceptions to this confidentiality are if all parties waive confidentiality in writing or in an action brought by any party against the mediator. The parties agree not to call the mediator to testify concerning the mediation or to provide any materials from the mediation in any court proceeding between the parties. The mediation is considered by the parties and the mediator as settlement negotiations. All parties also understand and agree that the mediator may have private caucus meetings and discussions with any individual party, in which case all such meetings and discussions shall be confidential between the mediator and the caucusing party.

Both parties and the mediator recognize that, because on-line applications will be used during this mediation, complete security of information may not be ensured. The mediator has reviewed the security protocols of all technological platforms and applications to be used in this mediation with all parties, and all parties understand the risks of the technology to be used. The following technological tools and systems present

specific risks:

No party will make any recording of this mediation or digitally share any information exchanged during this mediation with any unauthorized parties. Both parties and the mediator verify that they will do everything in their power to protect the information shared during this mediation from being viewed or used by anyone not party to this agreement.

5. Full Disclosure

Each party agrees to fully and honestly disclose all relevant information and writings as requested by the mediator and all information requested by any other party, if the mediator determines that the disclosure is relevant to the mediation discussions. In family mediation cases, each party agrees to fully and accurately disclose all income, assets and debts. ***Parties must also disclose the presence of any other persons present in the room, or with whom they are communicating remotely, during remote portions of this mediation.***

6. Mediator Impartiality

The parties understand that the mediator must remain impartial throughout and after the mediation process. Thus, the mediator shall not champion the interests of any party over another in the mediation nor in any court or other proceeding.

Additionally, the mediator will show no bias toward either party with regard to that party's comfort or familiarity with or approval of ICT tools and processes used. When communicating with parties using text-based tools, such as email or online chat applications, the mediator will maintain neutrality and communicate with both parties equally. If either party experiences problems using ICT during this mediation or has concerns about the use of technology, he or she should discuss these concerns with the mediator.

7. Coordination with Legal Counsel

The parties agree that the mediator may discuss the parties' mediation process with any attorney any party may retain as individual counsel. Such discussions will not include any negotiations unless the parties instruct the mediator that their attorney(s) have negotiating

authority. The mediator will provide copies of correspondence, draft agreements and written documentation to independent legal counsel at a party's request.

All parties confirm that they have shared with the mediator whether they will be represented or assisted by counsel during any remote portions of this mediation. If parties seek the advice or representation of counsel during the remote portions of this mediation, and/or if counsel is present in the room during remote sessions of the mediation, parties must disclose this fact to the mediator.

8. Mediation Fees

The parties and the mediator agree that the fee for the mediator shall be \$____ per hour for time spent with the parties and for time required to study documents, research issues, correspond, telephone call, prepare draft and final Agreements, and do such other things as may be reasonably necessary to facilitate the parties reaching full Agreement. The mediator shall also be reimbursed for all expenses incurred as a part of the mediation process, **including one-time or recurring subscription fees for any ICT tools used throughout the mediation.**

A payment of \$____ toward the mediator's fees and expenses shall be paid to the mediator along with the signing of this agreement. Any unearned amount of this retainer fee will be refunded to the parties. The parties shall be jointly and severally liable for the mediator's fees and expenses. As between the parties only, responsibility for mediation fees and expenses shall be: _____

_____.

The parties will be provided with a monthly accounting of fees and expenses by the mediator. Payment of such fees and expenses is due to the mediator no later than 15 days following the date of such billing, unless otherwise agreed in writing. There shall be a 1.0% monthly service charge on accounts not paid by the last day of the month.

Should payment not be timely made, the mediator may, in his sole discretion, stop all work on behalf of the parties, including the drafting and/or distribution of the parties' Agreement, and withdraw from the mediation. If collection or court action is taken by the mediator to collect fees and/or expenses under this Agreement, the prevailing party in any such action and upon any appeal therefrom shall be entitled to attorney fees and costs therein incurred.

DATED this ____ day of _____, 201__.

APPENDIX B: AGREEMENT TO MEDIATE USED BY CLIENT
OF MAJOR ODR PLATFORM⁷⁵

TERMS AND CONDITIONS

The Michigan Office of Dispute Resolution (ODR) coordinates alternative dispute resolution services of the State Court Administrative Office. ODR oversees the administration of the legislatively created Community Dispute Resolution Program (CDRP). This website, hosted and maintained by ODR, provides an online mediation process to assist parties in working out their disputes. By proceeding with this filing, you are agreeing that you understand the below points:

1. **About mediation:** Mediation is designed to assist disputing parties to reach a fair and constructive agreement that resolves their dispute(s) in a collaborative, consensual and informed manner. The Mediator is neutral in this dispute. The Mediator does not decide disputed issues.
2. **Legal Representation:** the Mediator does not provide legal advice to either party and does not represent either party. If the parties want legal advice, they must retain their own lawyer outside of this process.
3. **Voluntary:** Mediation is voluntary. Any party may withdraw from or suspend the mediation at any time, for any reason. In addition, the Mediator may suspend or terminate the mediation if he feels that the mediation will lead to an unjust or unreasonable result; that an impasse has been reached; or that he can no longer perform his facilitative role.
4. **Confidentiality:** The mediation is a settlement negotiation and will be strictly confidential. No party may disclose any statements made by any other participant in the mediation, and any content from the mediation is not admissible in a court process.
5. **Settlement Agreement:** If the Parties reach a Settlement Agreement, they shall (with the assistance of the Mediator) sign a written Settlement Agreement. No Settlement Agreement shall be enforceable unless it is accepted by the Parties.

75. *Terms and Conditions*, MICHIGAN COURTS OFFICE OF DISPUTE RESOLUTION. Information identifying the specific court system involved has been removed to protect the privacy of the ODR platform it uses.

APPENDIX C: AGREEMENT TO MEDIATE FOR THE DISTANCE
FAMILY MEDIATION PROJECT⁷⁶

Agreement to Mediate for the Distance Family Mediation Project, Mediate BC

Because:

- i) The parties wish to settle matters in dispute between them without an adversarial process. The parties, their lawyers and the Mediator will make a serious attempt, in mediation, to resolve all issues fairly.
- ii) The parties and/or the Mediator are at a distance from each other and intend to mediate from different locations.

The Parties Agree:

1. Process

i) _____
will be the Mediator.

ii) The Mediator will act as an impartial facilitator to assist the parties in a negotiation aimed at the resolution of issues between them. All parties will work with the Mediator to isolate points of agreement and disagreement, to identify their interests and to explore solutions.

iii) The parties understand that the Mediator may have separate meetings with each of them and/or with their lawyers at any time during the mediation.

2. Disclosure of Information

i) The parties acknowledge that full disclosure of all relevant information is essential to the mediation process, and they agree to fully, completely and honestly disclose all relevant information to each other and to the Mediator.

ii) The parties understand that any agreement arising out of mediation may be set aside if full and frank disclosure has not been made.

3. During the Mediation Process

i) The parties agree that they will not, without first obtaining the written consent of the other party and advising the Mediator:

76. *Suggested Practice Guidelines, supra* note 47, Appendix A at 54-59.

- a) make any change to the residence or lifestyle of the child(ren) during the mediation process; or
- b) dispose or diminish any asset in which the other party has an interest or may have an interest.

4. Confidentiality of Information Disclosed to the Mediator

i) It is agreed that the Mediator may disclose to any party any information provided by the other party which the Mediator believes to be relevant to the issues being mediated.

ii) The Mediator will treat as confidential all information supplied to, obtained by, or which comes to the knowledge of the Mediator as a result of his or her participation in mediation, except:

- a) as required by law, including reporting a child in need of protection as defined by the *Child, Family and Community Service Act*;
- b) when the information discloses an actual or potential threat to human life or safety;
- c) with the written consent of all participants;
- d) for research, statistical, accreditation or educational purposes, provided the information does not directly or indirectly disclose the identity of any participant; or e) for any certificate or report that the Mediator is required to prepare.

5. Without Prejudice Communications and Inadmissibility

i) All communications between the parties and with the Mediator are part of an effort to settle issues and are conducted on a without prejudice basis.

ii) All communications occurring in the context of the mediation are confidential and are inadmissible in any legal proceeding. No party will subpoena the Mediator to give evidence. Nor will any party seek to introduce into evidence, or compel the Mediator to produce, any records, documents or notes made or held by the Mediator and arising out of or related to the mediation.

iii) Without limiting the generality of the foregoing, no party will disclose or attempt to compel disclosure of:

- a) any views expressed or suggestions made by another party in respect of the possible settlement of the dispute;
- b) any admissions made by a party in the course of the mediation;
- c) the fact that another party had indicated a willingness to accept a proposal made by any party to the mediation; or
- d) any notes, e-mails or any other communications made by a party or the Mediator during the mediation process.

6. The Use of Information and Communication Technologies

i) The Mediator and the parties will rely primarily upon information and communication technologies to communicate with the parties and their counsel, and to conduct or participate in the mediation.

ii) The Mediator, Mediate BC Society and the Distance Family Mediation Project do not endorse any of the information and communication technology products or services used to conduct the mediation. Because the Mediator is “testing” the use of information and communication technologies under the auspices of the Distance Family Mediation Project, there may be process issues and disruptions. The Mediator and the parties will make efforts to minimize the impact of any such disruptions on the mediation process.

7. Confidentiality of Information

i) Each party agrees not to have another person in the room or within hearing distance when using any information and communication technology to participate in the mediation.

ii) In particular, each party agrees none of their children will be present or within hearing distance, unless that child will be participating in some way in the mediation, and this has been expressly agreed upon by the parties beforehand.

iii) If either party wishes to have another person in the room, they will obtain permission of the Mediator and the other party prior to the mediation session beginning.

- iv) Where all the parties agree that the other person will be privy to the mediation process, that person must sign the Agreement to Mediate and is bound by the terms of agreement,
- v) Each party recognizes that, given the use of information and communication technology, it is not possible to ensure that all communications will be confidential.
- vi) Each party commits to minimizing the chance of inappropriate disclosures, including protecting access to any e-mails, notes or other information relating to the mediation which may be stored in their computers or elsewhere, and to minimizing the consequences of any such disclosures should they occur.
- vii) Each party understands that, given the use of information and communication technology, it is not possible to completely control where or how some personal information may be collected, stored or accessed.
- viii) By signing this Agreement, each party specifically agrees to the Mediator using information and communication technologies in the context of the mediation, and releases the Mediator from any liability in the event of any inadvertent disclosure.

8. Reaching a Resolution

- i) Where a resolution of some or all of the issues is reached, the Mediator, the parties or their counsel will reduce the terms of consensus to writing as soon as possible, by way of an agreement, a memorandum of understanding or in a court order.

9. Independent Legal Advice

- i) The Mediator does not act as legal counsel for any party during the mediation. Each party is encouraged to obtain independent legal advice to ensure that legal rights, legal obligations and the consequences of any potential resolution are fully understood.
- ii) Each party will be responsible for the costs of obtaining his or her own independent legal advice.

10. Ending the Mediation

- i) Participation in mediation is voluntary. A party or the Mediator may end mediation at any time.

ii) The Mediator will communicate promptly to the parties that the mediation has ended.

11. Mediation Fees

i) The cost of the Mediator will be shared by the parties, and will be paid directly to the Mediator as follows:

- a) For the first ten (10) hours of mediation (including pre-mediation), the fee will be \$_____ per hour plus HST, shared equally between the parties.
- b) If the mediation has not resolved within the first ten (10) hours, and the parties choose to continue mediating, the fee will be \$_____ per hour plus HST, shared equally between the parties.

ii) All other costs, including disbursement costs, will be shared equally by the parties and paid directly to the Mediator.

iii) If either party is unable to attend a mediation session, that party will notify the Mediator and the other party at least _____ before the scheduled mediation session. If the cancelling party fails to give proper notice of cancellation, that party will pay the Mediator \$ _____ for the missed mediation session.

iv) The parties will be required to provide the Mediator a retainer of \$_____ for fees and costs.

12. Participation in Evaluation

i) The parties agree that they will participate in the Distance Family Mediation Project's evaluation by completing and submitting the Project's evaluation survey.

ii) The Mediator will supply the parties' names and contact information to the Project Evaluator so that the parties may be contacted to participate in the evaluation survey.

iii) The parties understand that the information being collected for the Project is solely for research purposes, and that none of the information in the evaluation report will directly or indirectly disclose the identity of any participant.

13. Counterparts

i) This Agreement may be entered into by each party signing a separate copy and delivering it to the other party and the Mediator by fax, scanned e-mail attachment, or other means.