

ETHICS AND ONLINE DISPUTE RESOLUTION: FROM EVOLUTION TO REVOLUTION

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- I. INTRODUCTION

- II. DEVELOPMENT OF ONLINE DISPUTE RESOLUTION
 - A. *Early Development of ODR*
 - B. *Online Dispute Resolution Systems/Platforms*
 - 1. *Hybrid Mediation*
 - 2. *Fully Automated Dispute Resolution Processes*
 - 3. *Non-Binding Use of Technology as an Aid to Mediators*
 - C. *Recent Developments in ODR*
 - 1. *Public ODR Platforms*
 - 2. *The Fourth Party*
 - 3. *The Fifth Party*

- III. CURRENT MEDIATION ETHICAL CONSIDERATIONS
 - A. *Model Standards of Conduct for Mediators*
 - 1. *Standard I: Self-Determination*
 - 2. *Standard II: Impartiality*
 - 3. *Standard III: Conflicts of Interest*
 - 4. *Standard IV: Competence*
 - 5. *Standard V: Confidentiality*
 - 6. *Standard VI: Quality of the Process*
 - 7. *Additional Standards*
 - 8. *Effect of Model Standards on Traditional Mediation*
 - B. *Online Dispute Resolution Standards of Practice*
 - 1. *Accessibility*
 - 2. *Affordability*
 - 3. *Transparency*
 - 4. *Fairness*

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5. *Innovation and Relevance*
6. *Third Parties*
7. *General Recommendations*

IV. THE NEED FOR AN ETHICAL REVOLUTION FOR ODR

A. *Application of the Model Standards to ODR, A Case Analysis*

1. *Standard I: Self-Determination*
2. *Standard II: Impartiality*
3. *Standard III: Conflicts of Interest*
4. *Standard IV: Competence*
5. *Standard V: Confidentiality*
6. *Standard VI: Quality of the Process*
7. *Standard VII: Advertising and Solicitation*
8. *Standard VIII: Fees and Other Charges*
9. *Standard IX: Advancement of Mediation Practice*

B. *Fourth and Fifth Parties, Does New Wine Really Require New Wineskins?*

1. *No Individual Regulation of Fourth and Fifth Parties*
2. *Separate Standards of Conduct for Fourth and Fifth Parties*

V. CONCLUSION

I. INTRODUCTION

Many people conceptualize online dispute resolution (“ODR”) as an online version of ADR. While both seek to provide a forum for disputing parties to resolve conflict, ODR is revolutionizing the way disputes are managed as it provides a prompt, cost-effective, transparent, and fair dispute resolution process. More significantly, and part of a burgeoning ethical challenge, ODR involves participants and entities not otherwise involved in face-to-face conflict resolution. These metaphorical parties are referred to as the “fourth party,”¹ which is

¹ ETHAN KATSH & JANET RIFKIN, ONLINE DISPUTE RESOLUTION: RESOLVING CONFLICTS IN CYBERSPACE 93 (2001).

technology itself, and the “fifth party,” which includes those entities that create the fourth party.²

Like ADR, ODR “is a range of processes.”³ Fueled by information and communication technology (“ICT”), ODR includes online versions of arbitration, mediation, negotiation, and more,⁴ although this article is focused on what I refer to as virtual mediation. Others refer to e-Mediation, online mediation, or cyber mediation.⁵

Currently, face-to-face mediation is subject to ethical aspirations known as mediation standards of conduct. The premier set of standards is the Model Standards of Conduct for Mediators (“Model Standards”) originally promulgated in 1994 and revised in 2005 by the American Bar Association, the American Arbitration Association, and the Association for Conflict Resolution.⁶ Many states and professional organizations have developed comparable mediation standards of conduct.⁷ The Model Standards are intended to guide mediator behavior as they engage in face-to-face mediation involving disputing parties and sometimes their representatives in an advocacy role; they also are intended to “inform the mediating parties” and “promote public confidence in mediation....”⁸

² Alan Gaitenby, *The Fourth Party Rises: Evolving Environments of Online Dispute Resolution*, 38 U. TOL. L. REV. 371, 372–73 (2006) (“Scholars, such as Stephanie Bol, have recently introduced a fifth party—the provider of the technology—who plays a unique role in ODR that it does not necessarily play offline.”).

³ Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C.L. REV. 329, 339 (2016).

⁴ See Sara Rudolph-Cole & Kristen M. Blankley, *Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be*, 38 U. TOL. L. REV. 193, 193–94 (2006).

⁵ Dafna Lavi, *No More Click? Click in Here: E-Mediation in Divorce Disputes—The Reality and the Desirable*, 16 CARDOZO J. CONFLICT RESOL. 479, 480 (2015).

⁶ THE ASSOCIATION FOR CONFLICT RESOLUTION, http://www.imis100us2.com/ACR/ACR/About_ACR/About_US.aspx?WebsiteKey=a9a587d8-a6a4-4819-9752-ef5d3656db55&hkey=c52a2d0d-d1c3-4279-a03a-b4b98db0ffe4&New_ContentCollectionOrganizerCommon=3#

New_ContentCollectionOrganizerCommon (last visited 2016) (the Association for Conflict Resolution was formed in 2001 as a result of the merger of the Society of Professionals in Dispute Resolution, Inc.; the Academy of Family Mediators; and the Conflict Resolution Education Network, the successor organization to the National Institute for Dispute Resolution).

⁷ SUSAN NAUSS EXON, *ADVANCED GUIDE FOR MEDIATORS* 152 (2014).

⁸ MODEL STANDARDS OF CONDUCT FOR MEDIATORS, PREAMBLE (AM. ARB. ASS’N 2005) [hereinafter MODEL STANDARDS].

Arguably, the Model Standards may apply to virtual mediation because the preamble states that they are “designed...for persons mediating in all practice contexts.”⁹ Nonetheless, they are limited to third party mediators notwithstanding the additional fourth and fifth parties involved in virtual mediation.

As ODR continues to mature and flourish, one must ask how mediation standards of conduct apply to the ever-changing realm of virtual mediation, especially as we seek to provide guidance for mediators and provide a quality process that protects the public. How should virtual mediators be regulated in terms of ethics—the same or differently than face-to-face mediators? Are existing standards of conduct sufficient for both types of mediation? Should the fourth and fifth parties be regulated? If so, how? This article seeks to respond to these questions as it presents both an evolutionary and revolutionary approach.

Part II provides an overview of ODR and how it has developed. It concentrates on the growth and enhancement of technology used for dispute resolution. Part II demonstrates that ODR began by imitating face-to-face ADR processes combined with different contextual mediums to handle primarily online disputes; it has flourished such that the fourth and fifth parties have transformed ODR into its own process. Part II does not discuss the benefits and risks of ODR because others already have written about that topic.¹⁰ Part III addresses key mediation values found in the Model Standards. It also summarizes the Online Dispute Resolution Standards of Practice, a set of guidelines adopted in 2009 by the Center for Technology and Dispute Resolution.¹¹

⁹ *Id.*

¹⁰ See generally David Allen Larson, “Brother, Can You Spare a Dime?” *Technology Can Reduce Dispute Resolution Costs When Times are Tough and Improve Outcomes*, 11 NEV. L.J. 523 (2011) (discussing benefits and pitfalls of various types of commercially developed technology used for mediated dispute resolution). See also Lavi, *supra* note 5, at 479 (discussing e-Mediation for divorce disputes, including the advantages and disadvantages of technology and its impact on divorcing parties).

¹¹ ONLINE DISPUTE RESOLUTION STANDARDS OF PRACTICE (ICANN 2009), www.icann.org/ombudsman/odr-standards-of-practice-en.pdf [hereinafter ODR STANDARDS].

ETHICS AND ONLINE DISPUTE RESOLUTION

Part IV showcases a project conducted by Daniel Rainey¹² and his graduate students at Southern Methodist University. They annotated the Model Standards, applying the Standards to issues involved in an online environment; their intent was to engender dialogue about ethics and ODR. I critique their good work, illustrating an evolutionary approach of applying ethics to virtual mediators. Rainey and his students also query whether a new Standard X should be added to the Model Standards as they pose issues relating to the fourth and fifth parties.

In response to the proposed Standard X, I advocate for a revolutionary approach—begin discussions about whether to draft a separate set of standards specifically to guide ICT, including its programmers, designers, and service providers. With the advent of additional parties, the revolution has begun as ODR, and specifically virtual mediation, is propelling traditional mediation to new heights. The purpose of this article, in conjunction with the outstanding vision of Rainey and his students, is to use the annotated Model Standards along with my analysis to intensify the discussion about ethics for virtual mediation.

II. DEVELOPMENT OF ONLINE DISPUTE RESOLUTION

A. *Early Development of ODR*

ODR began in approximately 1996 as disputes started to occur involving Internet activity.¹³ Initially, ODR started as a means to resolve e-commerce disputes, although today ODR focuses on all types of online and offline disputes.¹⁴

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¹³ Ethan Katsh & Leah Wing, *Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future*, 38 U. TOL. L. REV. 19, 21 (2006).

¹⁴ *Id.* at 19.

During the early stages of ODR, virtual mediation looked much like face-to-face mediation in that a third-party neutral facilitated the communication of disputing parties. The differences were contextual; face-to-face communication was synchronous while virtual mediation was normally asynchronous, using email exchanges since videoconferencing had not yet become easily accessible or affordable.¹⁵

One of the earliest examples of ODR involved eBay's contract with SquareTrade to provide dispute resolution services for e-commerce consumer transactions; SquareTrade handled over 1.5 million disputes during the first four years.¹⁶ Most disputes fell within ten discrete categories, facilitating the creation of generic forms that parties could use to explain grievances and seek solutions. By providing limited space for "free text complaining and demanding," standardized forms also helped reduce emotions such as anger and hostility.¹⁷ If the parties could not reach a resolution themselves through this novel form of negotiating, they could pay a fee of \$20.00 and request the services of an experienced mediator who used email to communicate with disputing parties in much the same way as a face-to-face setting.¹⁸ Arbitration, negotiation, and other dispute resolution processes also began to use technology to enhance a face-to-face setting.¹⁹

In 2006 SquareTrade changed its focus to consumer warranties,²⁰ although eBay continues to provide ODR services using automated

¹⁵ Thomas Schultz, *Does Online Dispute Resolution Need Governmental Intervention? The Case for Architectures of Control and Trust*, 6 N.C. J. L. & TECH. 71, 74 (2004).

¹⁶ Ethan Katsh, *Bringing Online Dispute Resolution to Virtual Worlds: Creating Processes Through Code*, 49 N.Y.L. SCH. L. REV. 271, 273 (2004).

¹⁷ *Id.* at 278–79.

¹⁸ Katsh & Rule, *supra* note 3, at 329–30.

¹⁹ Susan Nauss Exon, *The Next Generation of Online Dispute Resolution: The Significance of Holography to Enhance and Transform Dispute Resolution*, 12 CARDOZO J. CONFL. RESOL. 19, 29–33 (2010) (describing various forms of ODR, including SquareTrade's "technological hybrid of negotiation and mediation," online arbitration, online ombuds, and an internet courthouse); Amy J. Schmitz, "Drive-Thru" Arbitration in the Digital Age: Empowering Consumers Through Binding ODR, 62 BAYLOR L. REV. 178, 178 (2010) (referring to online arbitration as "OArb").

²⁰ Orna Rabinovich-Einy & Ethan Katsh, *Lessons From Online Dispute Resolution for Dispute Systems Design*, in ONLINE DISPUTE RESOLUTION: THEORY AND PRACTICE: A TREATISE ON TECHNOLOGY AND DISPUTE RESOLUTION 39 (Mohamed S. Abdel Wahab et al., eds., 2012).

systems that do not require a human third-party neutral. Indeed, eBay handles over sixty million cases annually, with over eighty percent satisfactorily resolved.²¹

B. *Online Dispute Resolution Systems/Platforms*

ODR is like a stormy revolution. It started off slowly mimicking offline negotiation and mediation with various blind-bidding processes and “has evolved greatly” during its first twenty years.²² Some forms of ODR may resemble face-to-face dispute resolution processes. “ADR practitioners may employ ODR tools to supplement face-to-face meetings, but the goal of ODR is not simply to digitize inefficient offline processes. Technology changes the nature of the interaction between the parties and introduces new possibilities for helping them achieve resolution.”²³

ODR may involve disputants from different countries, encompassing a variety of cultures. These varying cultures of platform designers are most likely embedded in the underlying code.²⁴ As ODR expands from e-commerce disputes, online platforms have expanded as well, offering a variety of services. ODR, therefore, should be considered “a how, not a what.”²⁵

1. *Hybrid Mediation*

Many ODR systems are viewed as a hybrid process because they combine face-to-face interaction with complementary use of ICT. For example, online case management tools can be used to schedule mediations. A mediator may combine face-to-face interactions with email, chat, video or telephonic communications. A possible scenario is one in which the parties meet in person to mediate. If they cannot finalize the mediation in one session, they may agree to continue discussions using some form of technology. Or, perhaps a mediator

²¹ *Id.* at 54.

²² Katsh & Rule, *supra* note 3, at 330.

²³ *Id.*

²⁴ Nadja Alexander, *Mobile Mediation: How Technology is Driving the Globalization of ADR*, 27 *HAMLIN J. PUB. L. & POL'Y* 243, 255–56 (2006).

²⁵ Katsh & Rule, *supra* note 3, at 339.

meets with one party in person while the other party participates using ICT. If an agreement is reached, they may use cloud computing and other programs such as Google Docs and Basecamp text documents (formerly known as Writeboard.com) to finalize a written agreement.²⁶

2. *Fully Automated Dispute Resolution Processes*

Virtual mediation also encompasses ODR systems that are fully automated. Companies have come and gone, each developing its own type of algorithmic system. Smartsettle and Cybersettle are examples of ICT that rely on a blind-bidding process in which parties post their bidding amounts but certain aspects are kept confidential, such as a party's bottom line.²⁷

3. *Non-Binding Use of Technology as an Aid to Mediators*

In England, Graham Ross co-founded the Mediation Room in the early 2000s to offer an electronic platform for online mediation. His areas of specialty include shareholder disputes, business acquisition disputes, IT development disputes, book copywriting disputes, consumer disputes, and franchising disputes.²⁸

As of the writing of this article in 2016, Modria is probably the most innovative and sustainable ODR platform. Its team of resolution experts and technologists provide the leading online dispute resolution platform for businesses and government agencies, allowing their customers to file online disputes. Modria is not a service provider.²⁹ Using "pre-configured resolution flows, an online 'resolution room' for each issue, and a unique user experience," Modria allows parties to engage in online communication to resolve disputes. Modria claims to resolve 60-90% of e-Commerce disputes without customer service intervention.³⁰

²⁶ EXON, *supra* note 7, at 366.

²⁷ SMARTSETTLE, <https://go.smartsettle.com> (last visited May 15, 2017); CYBERSETTLE, <http://www.cybersettle.com> (site "down for maintenance" as of Oct. 19, 2016).

²⁸ THE MEDIATION ROOM, <http://www.themediationroom.com> (last visited July 8, 2016).

²⁹ *Frequently Asked Questions*, MODRIA, <http://modria.com/faq/> (last visited May 15, 2017).

³⁰ *Id.*

If disputants are unable to resolve a dispute, they may request mediation or arbitration. Modria does not provide these third-party neutrals; it partners with ADR firms so that disputants may engage the services of a mediator or arbitrator.³¹

More specifically, Modria provides a JavaScript code to add a “Modria Button” to a customer’s website. When a buyer or seller clicks the Modria Button, the code gathers all of the data relating to the disputed transaction so that the customer need not retype the information. Then, the Modria Button displays a popover, which asks questions to help diagnose the problem and collects details to open a dispute. Modria’s customers may customize questions specific to their products or services. In many cases, a Modria customer may establish policies that provide an instant resolution to its aggrieved purchaser. If resolution is not handled through set policies, Modria opens a case for the filed dispute, sends an email to the seller, and automatically establishes a “resolution room” where the buyer and seller may attempt to work out an online resolution. If they are unable to do so, the parties may request human third-party assistance, such as customer support, to attempt resolution.³²

Modria offers more than a dispute resolution platform. It tracks the following metrics for its customers to help “optimize Return on ResolutionsTM”:

- Number of disputes filed;
- Number of disputes filed by “case type” (Not As Described; Not Received; Returns, etc.);
- Number of disputes resolved;
- Number of disputes resolved by “case type”;
- Number of disputes resolved by “outcome,” such as those mutually agreed upon by buyer and seller, or resolved after escalation;
- Average time between two stages; and
- Number of disputes resolved by outcome/dispute type, by date range.³³

³¹ *Id.*

³² *Id.*

³³ *Id.*

Modria is an example of the vitality of the fourth party; it illustrates the breadth of services available to virtual mediation. As Alan Gaitenby has asserted, the fourth party is “more than code and microprocessor sustained processes, platforms, or a set of algorithms for reaching resolution.” Rather, the fourth party should provide “meaningful experiences” for its online participants.³⁴

C. *Recent Developments in ODR*

New technology does more than simply manage disputes, as shown in the description of Modria services.³⁵ It also generates data to help understand, anticipate, and plan for future disputes;³⁶ “eBay is an example of an entity that has effective tools for handling very large numbers of disputes, but the only way they can do this is to have designed a system and not merely a set of tools.”³⁷

1. *Public ODR Platforms*

The foregoing discussion focuses on private ODR platforms. The newest development of ODR is by public institutions, including governmental entities, creating another classification system of ODR: private versus public.³⁸

The United Nations Commission on International Trade Law established a Working Group to tackle ODR issues that relate to cross-border electronic commerce transactions. Since approximately 2010, Working Group III has worked extensively to draft procedural rules.³⁹

³⁴ Gaitenby, *supra* note 2, at 372.

³⁵ See THE MEDIATION ROOM, *supra* note 28; and accompanying text.

³⁶ Orna Rabinovich-Einy & Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 HARV. NEGOT. L. REV. 151, 181 (2012).

³⁷ *Id.*

³⁸ See generally Anjanette H. Raymond & Scott J. Shackelford, *Technology, Ethics, and Access to Justice: Should an Algorithm be Deciding Your Case?*, 35 MICH. J. INT’L L. 485 (2014).

³⁹ See generally Comm’n on Int’l Trade Law, Rep. of Working Group III (Online Disp. Resol.) on the Work of its Thirty-Third Session, U.N. Doc. A/CN.9/868 (2016).

ETHICS AND ONLINE DISPUTE RESOLUTION

Over 750 ADR schemes exist in the European Union.⁴⁰ To create a common structure, the European Parliament and Council of the European Union adopted new rules in 2013: a Directive on Alternative Dispute Resolution for Consumer Disputes⁴¹ and a Regulation on Online Dispute Resolution for Consumer Disputes,⁴² which took effect in July 2015 and January 2016, respectively.⁴³ The two legislative enactments set up a framework for out-of-court consumer disputes derived from online activity.⁴⁴

The ADR Directive requires EU national governments “to ensure the availability of certified ADR providers (called ADR entities) that meet the procedural standards set in the directive.”⁴⁵ It requires that certified ADR entities be able to process complaints online, be free or low-cost, and ensure effective, transparent, and fair processes that safeguard laws and liberty.⁴⁶

The ODR Regulation complements the Directive because it requires “the European Commission to run an ODR platform, which is in essence a web site that acts as a hub to channel all consumer complaints arising from e-commerce to these certified ADR entities.”⁴⁷ The platform began operating in February 2016.⁴⁸ All online merchants and marketplaces that operate within the EU must provide an accessible link to the ODR platform.⁴⁹ Some EU countries already have built national ODR platforms to complement the EU platform.⁵⁰

In the UK and Wales, the creation of online courts is now being considered as part of a Final Report released on July 29, 2016 by Lord

⁴⁰ Suzanne Van Arsdale, *User Protections in Online Dispute Resolution*, 21 HARV. NEGOT. L. REV. 107, 122 (2015).

⁴¹ Directive 2013/11, of the European Parliament and of the Council of 21 May 2013 on Alternative Dispute Resolution for Consumer Disputes and Amending Regulation No 2006/2004 and Directive 2009/22/EC, 2013 O.J. (L 165) 63 [hereinafter 2013 O.J. (L 165)].

⁴² *Id.* at 1.

⁴³ Pablo Cortes, *The Brave New World of Consumer Redress in the European Union and the United Kingdom*, 22 DISP. RESOL. MAG. 41, 41 (2016).

⁴⁴ 2013 O.J. (L 165) at 1.

⁴⁵ Cortes, *supra* note 43, at 41.

⁴⁶ *Id.*

⁴⁷ *Id.* at 42.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.*

Justice Briggs to modernize court systems.⁵¹ He recommends creating an online court to handle disputes to a ceiling of £25,000, subject to many exclusions.⁵² The intent is to launch the online court by April 2020, creating access to justice for small to modest value cases.⁵³

In Mexico, the Consumers' Protection Agency created Concilianet, which is an ODR platform to resolve consumer to business disputes. The Office of the Federal Prosecutor for the Consumer (PROFECO), supported by the judiciary, regulates the online platform.⁵⁴

A nonprofit organization in British Columbia, Canada, offers Resolution Center, an ODR platform for consumer to business disputes.⁵⁵ As a result of its success, the government created the British Columbia Civil Resolution Tribunal (CRT), which commenced operations in 2016 as the country's first online court to resolve condominium disputes and small claims matters.⁵⁶ It is set up to help diagnose a problem, enable parties to negotiate online to seek resolution, and if unable to do so, permit parties to engage the services of a case manager/facilitator who will assist the parties all the way through adjudication.⁵⁷ If none of these steps work, the parties can provide information to an independent CRT member who will decide the outcome.⁵⁸

In the United States, several federal agencies have adopted ODR practices. The National Mediation Board (NMB) facilitates labor-management disputes for U.S. railroad and airline industries.⁵⁹ It offers ODR services through the use of Web-based video conferencing and

⁵¹ See generally LORD JUSTICE BRIGGS, CIVIL COURTS STRUCTURE REVIEW: FINAL REPORT (2016), <https://www.judiciary.gov.uk/wp-content/uploads/2016/07/civil-courts-structure-review-final-report-jul-16-final-1.pdf>.

⁵² *Id.* at 115.

⁵³ *Id.* at 45–46.

⁵⁴ Van Arsdale, *supra* note 40, at 121. See *Frequent Questions*, PROFECO, <http://concilianet.profeco.gob.mx/Concilianet/faq.jsp> (last visited Aug. 3, 2016).

⁵⁵ Van Arsdale, *supra* note 40, at 121.

⁵⁶ *CRT Overview*, CIVIL RESOLUTION TRIBUNAL, <http://www.civilresolutionbc.ca/> (last visited May 15, 2017) (noting that the tribunal currently handles strata (condominium) property disputes and will accept small claims disputes on June 1, 2017).

⁵⁷ *How the CRT Works*, CIVIL RESOLUTION TRIBUNAL, <https://www.civilresolutionbc.ca/how-the-crt-works/> (last visited May 15, 2017).

⁵⁸ *Id.*

⁵⁹ *NMB Overview*, THE NATIONAL MEDIATION BOARD, <http://www.nmb.gov/about-nmb/nmb-overview/> (last visited May 15, 2017).

other ICT to enable the drafting of agreements online;⁶⁰ it also uses asynchronous online platforms for “submissions-only arbitration.”⁶¹ The Federal Mediation and Conciliation Service provides mediation and arbitration services to improve labor-management relations and facilitate collective bargaining.⁶² It enables online communication and facilitates web-based meetings using its FMCS TAGS™.⁶³ These two agencies are among the leaders and early users of ODR technology in the United States.⁶⁴

2. *The Fourth Party*

The most notable distinction of ODR is the recognition that additional parties play a vital role in virtual mediation. In 2001, Ethan Katsh and Janet Rifkin coined the “fourth party,” referring to the technology that provides communication channels for online participants. The fourth party is more than the technology itself; it “is a shared perception, a product of individual and collective consciousness empowered by a multitude of social, cultural, and technical tools.”⁶⁵ It also changes the dynamics of virtual mediation.⁶⁶

For example, automated procedures provide “assisted decision-making and negotiation support and threaded discussion technology,” which helps make decisions in situations that used to require human interpretation of factual information.⁶⁷ Elaborate decision trees are created using sophisticated “branching technology.”⁶⁸ The system asks the user a series of questions to create an accurate description of the

⁶⁰ *Online Dispute Resolution (ODR) Resources*, THE NATIONAL MEDIATION BOARD, <http://www.nmb.gov/online/online-conferencing/> (last visited May 15, 2017).

⁶¹ E-mail from Daniel Rainey, Adjunct Professor at Southern Methodist University, to Susan Nauss Exon, Professor of Law, University of La Verne College of Law (Sept. 6, 2016, 09:39 a.m. PST) (on file with author).

⁶² FEDERAL MEDIATION & CONCILIATION SERVICE, <https://www.fmcs.gov/> (last visited May 15, 2017).

⁶³ *Overview*, FEDERAL MEDIATION & CONCILIATION SERVICE, <https://www.fmcs.gov/services/resolving-labor-management-disputes/eservices-tags/overview/> (last visited May 15, 2017).

⁶⁴ E-mail from Daniel Rainey, *supra* note 61.

⁶⁵ Gaitenby, *supra* note 2, at 371.

⁶⁶ Alexander, *supra* note 24, at 250.

⁶⁷ *Id.*

⁶⁸ *Id.*

dispute.⁶⁹ By applying law or other standards to the factual description, the system provides a conclusion in the form of a likely outcome.⁷⁰ This conclusion provides greater access to justice because it allows lawyers to offer better advice to clients and facilitates more informed decisions.⁷¹ Additionally, the software creates a record so that participants may review statements and offers made by various parties, and the sequence in which those statements and offers were made. A virtual mediator may capitalize on the recorded language by reintroducing it to illustrate the extent to which parties' interests are aligned.⁷²

The fourth party also enables mediators to modify their behavior. Mediators may conduct concurrent caucuses simultaneously with a joint session, avoiding parties' frustrations with the amount of time a mediator may spend with others or interruptions in the flow of negotiations.⁷³

Mediators may engage in "pre-communication reframing."⁷⁴ This technique allows mediators to capitalize on the asynchronous text-based nature of virtual mediation by directing reframed communication back to the sending party before being communicated to the other party, providing a means to coach good communication skills. Pre-communication reframing differs from similar face-to-face communication in which a party communicates to the other party directly and then the mediator reframes in front of everyone.⁷⁵

One easily can see how ODR, including virtual mediation, is changing. No longer does virtual mediation simply imitate face-to-face mediation. The fourth party is creating its own dispute resolution process.

⁶⁹ *Id.* at 251.

⁷⁰ *Id.*

⁷¹ Alexander, *supra* note 24, at 251.

⁷² *Id.*

⁷³ *Id.* at 251–52.

⁷⁴ *Id.* at 250.

⁷⁵ *Id.*

3. *The Fifth Party*

Whereas the fourth party is technology, the fifth party is the provider of the technology. For instance, the mediator may own third party tools. The fifth party normally provides a website to enable email, chat, and/or other communication capabilities.⁷⁶ Visualize the fifth party as the supplier of a technique since the fifth party does not use the e-mail or chat facilities.⁷⁷

III. CURRENT MEDIATION ETHICAL CONSIDERATIONS

The study of mediation ethics is rooted in mediation standards of conduct, which are aspirational in nature. They do not carry the force and effect of law although the standards may create a duty of care because they may be adopted by trade associations and in some instances by governmental units. Even though the government may be involved, mediation standards of conduct lack enforceability because no state has a licensing scheme for mediators.⁷⁸

As previously mentioned, the Model Standards are the principal set of standards for mediators; their stated purpose is to “guide the conduct of mediators; to inform the mediating parties; and to promote public confidence in mediation as a process for resolving disputes.”⁷⁹ The Model Standards were developed before ODR was even considered. To date, no ODR standards of conduct exist,⁸⁰ although the National Center for Technology and Dispute Resolution adopted recommended Standards of Practice for ODR, which are to be “considered as principles, and not necessarily as individual operational frameworks.”⁸¹ This Part III sets forth a general summary of each set of Standards.

⁷⁶ Stephanie H. Bol, *An Analysis of the Role of Different Players in E-mediation: The (Legal) Implications*, in JOHN ZELEZNIKOW & ARNO R. LODDER, SECOND INTERNATIONAL ODR WORKSHOP 23–29 (2005).

⁷⁷ *Id.*

⁷⁸ EXON, *supra* note 7, at 341.

⁷⁹ MODEL STANDARDS, *supra* note 8, at Preamble.

⁸⁰ See EXON, *supra* note 7, at App. J (researching and updating all state mediation standards of conduct listed in Appendix J and as of July 1, 2016, no set of standards refers to ODR).

⁸¹ See generally ODR STANDARDS, *supra* note 11.

A. *Model Standards of Conduct for Mediators*

The Model Standards include nine separate values. As one considers each value, keep in mind that mediation is a voluntary, consensual process as opposed to adversarial processes such as arbitration and litigation. Moreover, the Model Standards apply only to mediators; they do not apply to any other mediation participant.⁸²

1. *Standard I: Self-Determination*

The hallmark of mediation is the concept of party autonomy. Hence, Standard I: Self-Determination, is the guiding principle of mediation. “Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome.”⁸³ Self-determination means that the parties have the right to select a mediator of their choice, decide whether to go to mediation, stay in mediation, withdraw from the process, and decide any substantive outcome.⁸⁴

2. *Standard II: Impartiality*

Standard II: Impartiality, requires a mediator to act without “favoritism, bias or prejudice,” avoiding even the appearance of partiality.⁸⁵ Additional comments instruct a mediator to maintain impartiality in respect to the participants’ “personal characteristics, background, values and beliefs, or performance at a mediation, or any other reason.”⁸⁶ Impartiality applies to all conduct at mediation, including both verbal and nonverbal communication. Thus, a mediator should approach all parties with equal respect, openness, and curiosity, carefully considering the manner in which questions are phrased and positions and interests are summarized or reframed. A mediator should remain impartial to the information she receives from the parties. Impartiality also applies to other aspects of mediation, such as the use

⁸² MODEL STANDARDS, *supra* note 8, at Preamble.

⁸³ *Id.* at Standard I.

⁸⁴ *Id.*

⁸⁵ *Id.* at Standard II.A.

⁸⁶ *Id.* at Standard II.B.1.

and arrangement of furniture, seating assignments, and methods to greet participants as they arrive at mediation.⁸⁷

3. *Standard III: Conflicts of Interest*

Standard III instructs mediators to avoid conflicts of interest, including the appearance of a conflict during and after a mediation.⁸⁸ Conflicts of interest may arise from a mediator's involvement with the subject matter of the dispute or from a relationship that the mediator may have with any mediation participant, "whether past or present, personal or professional, that reasonably raises a question of a mediator's impartiality."⁸⁹ A mediator must disclose any actual or potential conflict of interest that may raise a question about the mediator's impartiality. If the parties agree after disclosure, the mediator may proceed. If at any time the mediator believes that a conflict of interest is affecting the integrity of the mediation, the mediator "shall withdraw from or decline to proceed with the mediation...."⁹⁰

4. *Standard IV: Competence*

Consistent with the autonomous nature of mediation, Standard IV: Competence, states that a mediator shall mediate when she has the "necessary competence to satisfy the reasonable expectations of the parties."⁹¹ Special attention should be paid to a mediator's overall qualifications such as training, mediation experience, skills, and cultural understandings. A continuing obligation exists for mediators to maintain and enhance their competence. Competence, therefore, applies to two perspectives: first, a mediator must be competent before beginning to mediate; and second, a mediator has a continuing

⁸⁷ See Karen A. Zerhusen, *Reflections on the Role of the Neutral Lawyer: The Lawyer as Mediator*, 81 KY. L.J. 1165, 1169–70 (1993) (noting that mediator impartiality applies to all aspects of the mediation process, from the arrangement of furniture to the way the mediator poses positioning statements).

⁸⁸ MODEL STANDARDS, *supra* note 8, at Standard III.A.

⁸⁹ *Id.*

⁹⁰ *Id.* at Standard III.E.

⁹¹ *Id.* at Standard IV.A.

obligation to maintain and enhance her skills through educational programs.⁹²

5. *Standard V: Confidentiality*

Standard V: Confidentiality, requires a mediator to “maintain the confidentiality of all information obtained by the mediator in mediation, unless otherwise agreed to by the parties or required by applicable law.”⁹³ Mediation confidentiality is important for a number of reasons. It promotes candor by the parties, encouraging them to communicate and exchange information for settlement purposes. Consistent with Federal Rule of Evidence 408, confidentiality also helps prevent the use of mediation statements as admissions of liability or some other claim of weakness.⁹⁴

Many states classify their rules of confidentiality in legislation, creating several categories. First, confidentiality may be deemed “absolute” or “blanket confidentiality,” which prevents disclosure of any mediation communications.⁹⁵ Texas legislation falls into this category: “Unless the parties agree otherwise, all matters, including the conduct and demeanor of the parties and their counsel during the settlement process, are confidential and may never be disclosed to anyone, including the appointing court.”⁹⁶ Second, “enumerated confidentiality” is classified as “nearly absolute confidentiality, subject to enumerated exceptions....”⁹⁷ Each jurisdiction may vary in its exceptions. Finally, “qualified confidentiality” allows for confidentiality but acknowledges judicial discretion to order disclosure in particular situations.⁹⁸ For instance, although Wisconsin’s statute generally protects mediation communications, the statute expressly allows a judge to make an exception if it is “necessary to prevent a manifest injustice of sufficient magnitude to outweigh the importance

⁹² Exon, *supra* note 7, at 156.

⁹³ MODEL STANDARDS, *supra* note 8, at Standard V.A.

⁹⁴ Maureen A. Weston, *Confidentiality’s Constitutionality: The Incursion on Judicial Powers to Regulate Party Conduct in Court-Connected Mediation*, 8 HARV. NEGOT. L. REV. 29, 44 (2003).

⁹⁵ *Id.* at 49.

⁹⁶ TEX. CIV. PRAC. & REM. CODE ANN. § 154.053(c) (2015).

⁹⁷ Weston, *supra* note 94, at 49.

⁹⁸ *Id.*

of protecting the principle of confidentiality in mediation proceedings generally.”⁹⁹ Louisiana legislation allows limited disclosure of mediation communications in mediator reports to courts, in connection with motions for sanctions, and to determine meaning or enforceability of a mediated agreement.¹⁰⁰

6. *Standard VI: Quality of the Process*

Standard VI: Quality of the Process, is a critical standard because it cross-references many of the other individual standards. It requires a mediator to conduct a mediation that “promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.”¹⁰¹ In particular, a mediator should “promote honesty and candor” of all parties and not misrepresent any “material fact or circumstance” that occurs during mediation.¹⁰² The mediator should be careful not to mix any other role with that of mediator. If the mediator wants to change her role, she shall inform the parties and obtain their consent. In this context, it is critical that the mediator specifically identify when her role as mediator is ending and a new role, such as that of arbitrator, is beginning.¹⁰³ If a mediation is being used to further criminal conduct or if a mediator is made aware of domestic abuse or violence, she should “take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”¹⁰⁴

7. *Additional Standards*

I do not intend to analyze the final three standards because they are deemed to apply with equal force to both face-to-face mediation and virtual mediation. Standard VII relates to advertising and solicitation. Standard VIII discusses fees and other charges. Finally, Standard IX

⁹⁹ WIS. STAT. ANN. § 904.085(4)(e) (2017).

¹⁰⁰ LA. REV. STAT. ANN. § 9:4112(B)(1) (2016).

¹⁰¹ MODEL STANDARDS, *supra* note 8, at Standard VI.A.

¹⁰² *Id.* at Standard VI.A.4.

¹⁰³ *Id.* at Standard VI.A.5–8.

¹⁰⁴ *Id.* at Standard VI.A.9 & B.

recommends that mediators should take some action to advance the mediation practice.

8. *Effect of Model Standards on Traditional Mediation*

The Model Standards illustrate that traditional mediation, i.e., face-to-face mediation, attempts to balance four basic features: fairness, effectiveness, quality, and access. First, mediation should promote fairness. Think of fairness in terms of preserving party choice. A mediation process may be deemed fair if it is based on the parties' choices, and the outcome may be deemed fair because it is a result of the parties' mutual decision. This is known as party self-determination.¹⁰⁵

Second, mediation should evoke effectiveness. Consider looking beyond a particular mediation to the cumulative effects of mediation. Some consider effectiveness in terms of how mediation affects settlement rates,¹⁰⁶ alleviates court costs and court backlogs,¹⁰⁷ impacts the average expenses incurred by parties,¹⁰⁸ and affects party relationships.¹⁰⁹

Third, mediation conveys quality, typically relating to what constitutes a "good" or "high quality" mediation involving a competent mediator. In terms of mediator competence, we think of mediation standards of conduct and other ethical provisions that guide mediator behavior. In terms of mediator qualifications, we look to qualification

¹⁰⁵ See *supra* notes 83–84; and corresponding text (discussing Model Standard I: Self-Determination).

¹⁰⁶ See generally Katherine Doornik, *A Rationale for Mediation and Its Optimal Use*, 38 INT'L REV. L. & ECON. 1 (2014) (proposing an economical explanation for how pre-trial mediation might increase the likelihood of settlement).

¹⁰⁷ Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 277 (2006) (noting that ADR practices were developed to minimize court backlog, reduce excessive litigation costs and party dissatisfaction with litigation, and address delay issues).

¹⁰⁸ See Doornik, *supra* note 106, at 2 (noting that the reduced expenses incurred by parties in pre-trial mediation increases the probability of a successful settlement).

¹⁰⁹ See Lavi, *supra* note 5, at 495 (discussing how mediation is beneficial for divorce disputes because the process may prevent the escalation of poor relationships between parties).

standards, especially as a requirement to enter the field.¹¹⁰ Quality control is important to protect consumers. It focuses on competencies and adds integrity to the mediation field. Skeptics, however, believe quality control will create an elitist field, inhibit diversity and flexibility, and become expensive making the process less accessible.¹¹¹

Fourth, mediation should provide access. This feature typically relates to the parties' ability to afford mediation as part of their access to the justice system.

B. *Online Dispute Resolution Standards of Practice*

Like traditional mediation, virtual mediation strives to balance fairness, effectiveness, quality, and access, albeit from a different context. From the ODR perspective, fairness and effectiveness address the virtual process in terms of transforming communication standards and use of appropriate ODR/ICT platforms. Mediator competence adds a technology component for the virtual mediator; she must be well-versed in the type of platform used for mediation. Access focuses primarily on technology in terms of both affordability and available technological resources. Transparency is an additional requirement that, from the ODR standpoint, will overlap with fairness, effectiveness, and quality factors.

Technology creates a whole new framework in which to conduct mediation. Yet, no ODR standards of conduct exist. In 2009, the Advisory Committee of the National Center for Technology and Dispute Resolution issued Online Dispute Resolution Standards of Practice ("Standards of Practice"), which serve as "guidelines" regarding ODR. Building on the Standards of Practice, in 2016 the

¹¹⁰ Only a small percentage of U.S. states have promulgated some type of mediation qualification standards; most are tied to a court panel of mediators. Some of these progressive states include Arkansas, California, Florida, Georgia, Maryland, New Hampshire, North Carolina, Pennsylvania, Utah, and Virginia. EXON, *supra* note 7, at 344–46.

¹¹¹ Juliana Birkoff, Robert Rack & Judith M. Filner, *Points of View: Is Mediation Really a Profession?*, DISP. RESOL. MAG., Fall 2001, at 10; Paula Young, *Take It or Leave It, Lump It or Grieve It: Designing Mediator Complaint Systems that Protect Mediators, Unhappy Parties, Attorneys, Courts, the Process, and the Field*, 21 OHIO ST. J. ON DISP. RESOL. 721, 728 (2006) (citing Sarah Rudolph Cole, Nancy H. Rogers & Craig A. McEwen, *MEDIATION: LAW POLICY & PRACTICE* 11–12 (2d ed. 2005)).

National Center for Technology and Dispute Resolution issued Ethical Principles for Online Dispute Resolution (“Ethical Principles”). Despite some overlap between the Standards of Practice and the Ethical Principles, the Standards of Practice focus primarily on “behavior,” while the Ethical Principles “are aimed at [overall mediation] principles.”¹¹²

Because this article focuses on mediator behavior as set forth in the Model Standards, only the Standards of Practice are examined. They catalog their recommendations according to seven proposed principles: accessibility, affordability, transparency, fairness, innovation and relevance, third parties, and general recommendations.

1. *Accessibility*

Accessibility means that “ODR systems should be accessible in that they are easy to find and access, but accessible also in the sense that they address geographical and language barriers...striv[ing] to become media neutral in order to encourage the widest access.”¹¹³ Access also means parties should have access to justice. Nonetheless, technology should not be imposed on those who cannot interact with technology nor discourage those who can profit from using ODR.

2. *Affordability*

Affordability means that ODR should “provide access to justice where formal channels are not available,” as an economic alternative to formal dispute resolution processes. ODR should provide prompt dispute resolution and cost savings.¹¹⁴

3. *Transparency*

Transparency includes numerous components. It must make clear what dispute resolution process is being used. Clarity of identities must

¹¹² Email from Daniel Rainey, Adjunct Professor at Southern Methodist University, to Susan Nauss Exon, Professor of Law, University of La Verne Coll. of Law (Aug. 3, 2016, 03:23 a.m. PST) (on file with author).

¹¹³ ODR STANDARDS, *supra* note 11.

¹¹⁴ *Id.* at Proposed Principles: Affordability.

be present. For example, ODR schemes must clearly identify ODR providers and affiliations, “identities and affiliations of the interveners and managers of the ODR systems, and the security efforts undertaken by the ODR provider to safeguard user data and identity.”¹¹⁵ ODR service providers should identify their physical location and contact information. Finally, parties should have the right to representation and should disclose that representation to others involved in the ODR process.¹¹⁶

4. *Fairness*

Fairness means that “ODR systems and providers must create a fair redress environment, unbiased toward any individual participant in the process. Software algorithms must similarly be designed to offer no systemic benefit to one party over another.”¹¹⁷

5. *Innovation and Relevance*

Unlike traditional mediation, ODR including virtual mediation should be innovative and relevant. In other words, ODR systems “must remain at the cutting edge of service delivery and technological innovation,” complying with community and institutional requirements as well as relevant legal frameworks.¹¹⁸ Where appropriate and feasible, ODR schemes should be funded by public entities to “[enhance] trust and peace in society.”¹¹⁹

6. *Third Parties*

The third party principle is analogous to competence for traditional mediation because it requires third parties to possess requisite skills and training to perform their professional function. The principle acknowledges that the ODR practitioner need not possess a license. Third parties should be impartial with respect to an outcome and

¹¹⁵ *Id.* at Proposed Principles: Transparency.

¹¹⁶ *Id.*

¹¹⁷ *Id.* at Proposed Principles: Fairness.

¹¹⁸ *Id.* at Proposed Principles: Innovation and Relevance.

¹¹⁹ *Id.*

independent in terms of relationship issues. Third parties also should provide information about their credentials and experience to the parties.¹²⁰ Finally, ODR service providers, in particular, “shall incorporate procedures for saving harmless providers and third parties who may be unbiased in a dispute or have any other causes which may harm the fair use of ODR.”¹²¹

7. *General Recommendations*

The ODR Standards include general provisions. For instance, the ODR scheme “must promote respectful online communication,” and should promote a “consensual process.”¹²² Yielding to transparency, the ODR schemes “must provide for confidentiality and data security as required by national, regional and international law.”¹²³

IV. THE NEED FOR AN ETHICAL REVOLUTION FOR ODR

Recognizing that ODR “is essentially a change in venue rather than in approach,” in 2006 two scholars from Jordan asserted that commerce is helping to evolve dispute resolution rather than create radical changes.¹²⁴ I agreed with that assumption while speaking at the 2014 annual conference of the American Bar Association’s Section of Dispute Resolution, yet now believe that virtual mediation, a form of ODR, is indeed revolutionizing dispute resolution, taking the evolutionary path to new heights.

¹²⁰ ODR STANDARDS, *supra* note 11, at Proposed Principles: Third Parties.

¹²¹ *Id.*

¹²² *Id.* at Proposed Principles: General.

¹²³ *Id.*

¹²⁴ Haitham A. Haloush & Bashar H. Malkawi, *Internet Characteristics and Online Alternative Dispute Resolution*, 13 HARV. NEGOT. L. REV. 327, 332 (2008) (Noting that ODR “would thus not represent a major shift, and the choice for the parties between online ADR and ADR would be dictated by considerations of economics and convenience, informed by the relative importance that they ascribe to face-to-face interaction.”).

A. *Application of the Model Standards to ODR, A Case Analysis*

Daniel Rainey, Adjunct Professor at Southern Methodist University, among the many professional hats that he wears,¹²⁵ challenged and guided his graduate students to annotate the Model Standards as a way to begin discussions about whether and how to extend the Model Standards to ICT used in virtual mediation.¹²⁶ The entire set of Model Standards, including footnoted annotations, is attached to this article as Appendix A. This Part IV presents quoted excerpts from the Model Standards with accompanying quoted annotation that Rainey and his students have added. The annotations are denoted in italics. I insert my assessment after the italicized annotations.

1. *Standard I: Self-Determination*

“A. A mediator shall conduct a mediation based on the principle of party self-determination. Self-determination is the act of coming to a voluntary, uncoerced decision in which each party makes free and informed choices as to process and outcome. Parties may exercise self-determination at any stage of a mediation session, including mediator selection, process design,(8) participation in or withdrawal from the process, and outcomes.

1. Although party self-determination for process design is a fundamental principle of mediation practice, a mediator may need to balance such party self-determination with a mediator’s duty to conduct a quality process in accordance with these Standards.(9)

...

¹²⁵ For a detailed biography of Daniel Rainey, see *supra* note 12.

¹²⁶ Daniel Rainey, *Model Standards of Conduct for Mediators [Annotated for Online Dispute Resolution Practice in 2016]*, 3 INTERNATIONAL J. OF ONLINE DISPUTE RESOL. 30 (2016). Rainey’s article is an updated version of the Annotated Standards attached as Appendix A because he accepted many of the recommendations I made in this article.

B. A mediator shall not undermine party self-determination by any party for reasons such as higher settlement rates, egos, increased fees, or outside pressures from court personnel, program administrators, provider organizations, the media or others.”(10)

8. *Questions of process design have traditionally revolved around issues related to the North American Model, the degree to which a mediator is “evaluative” or “facilitative,” etc. The introduction of ICT into the process of mediation introduces the concept of “computer literacy” and the capacity to understand the implications of using or not using ICT as part of the mediation process. If the parties are able to exercise self-determination in process design, it is imperative that the third party be able to describe the use of ICT or the decision not to use ICT, in a way that is understandable to the parties.*
9. *For the mediator, this may mean not avoiding the use of ICT because of a personal bias or proclivity, and not pressing the use of ICT as a result of the mediator’s personal preference.*
10. *Does the decision to use an ICT platform for which the mediator has paid to purchase or for which he or she is paying an ongoing fee, risk the perception of bias? If the mediator suggests using a platform for which he or she is paying, and the fee for services is used to cover the overhead cost of that platform, can that be considered or is the cost of the platform merely overhead in the same way the cost of an office or conference room is considered overhead?*

I agree with the basic premise of footnotes 8 and 9. These two footnotes acknowledge the parties' right to participate in the mediation process, going beyond the general concept that parties have the choice to decide whether mediation is an appropriate forum in the first place, engage in mediation, and withdraw at any time. Parties cannot make these decisions unless they understand and accept the ICT proffered by the mediator. Footnote 8 appropriately recognizes that the parties must possess a certain level of computer literacy such that they can understand the ICT that the mediator suggests. Footnote 8 should not be limited to "process design." Rather, footnote 8 should be moved to the end of the sentence so that in addition to process issues, the parties adequately understand the ODR/ICT platform in a way that helps with substantive outcomes.

Footnote 9 is important in that it recognizes personal biases of a mediator and that these biases should not cloud the decision whether or not to use ICT. It is important that when a mediator discusses use of an ODR/ICT platform, she does so in a neutral and impartial manner.

Footnote 10 raises concerns that, at first blush, seem more appropriately aligned with separate standards relating to impartiality and fees. Yet it is suitably placed and phrased to recognize that use of an ODR/ICT platform should not risk the perception of bias. The last sentence of footnote 10 raises a question. Does it matter whether the fee for services is used to cover the overhead cost of the ODR/ICT platform or is it merely an overhead cost absorbed by the mediator? That's a pivotal question. If the cost of ODR/ICT is anything other than overhead cost, the mediator should be transparent and disclose any extra fees or costs to enable the parties' decision whether to engage in virtual mediation.¹²⁷ To ensure party autonomy in virtual mediation, I would add the following sentence to the end of Footnote 10: "If the mediator charges parties any cost or fee to use an ICT platform, that fact may affect a party's decision to engage in ODR, and therefore, should be disclosed."

¹²⁷ See MODEL STANDARDS, *supra* note 8, at Standard VIII (2005) (instructing mediators to provide "complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.").

2. *Standard II: Impartiality(11)*

“A. A mediator shall decline to mediate if the mediator cannot conduct it in an impartial manner. Impartiality means freedom from favoritism, bias or prejudice.”(12)

11. *The fourth party and the program designers for ODR/ICT have an obligation to design platforms and systems that do not demonstrate bias toward users with advanced computer literacy skills, and perhaps more importantly, that do not build in the culturally specific assumptions about process behind the North American Model in such a way that they cannot be adapted to other culturally driven forms of mediation. For example, immediately naming the issue and framing the point of conflict, having all decision makers at the table, having a third party who is “neutral”, and proceeding toward a formal, written agreement, are all elements of our basic North American Model that in some instances are not culturally comfortable or acceptable. Developers and designers should have an obligation to create fourth party applications that are as flexible as the third party can be in a traditional face-to-face session.*

12. *Just as a mediator may show overt or unintended bias toward a party due to clearly observable cultural signs or expressed opinions, the mediator may show bias toward a party who does or does not agree with the mediator’s bias regarding the use of ICT for mediation.*

Rainey and his students recognize in Footnote 12 that everyone brings their own implicit biases to their activities, including

mediators.¹²⁸ Mediators and the program designers that they choose, however, should not assert their personal biases on any party. Footnote 11 addresses this concern, albeit in a limited way because the first sentence refers specifically to “users with advanced computer literacy skills.” Mediators also should be wary of attempting to overcompensate for those parties who may exhibit problems using ICT. Arguably, if a mediator helps or coaches one party more than another, he or she is not behaving impartially.¹²⁹ This problem can be reconciled by changing the phrase to, “users with advanced or limited computer literacy skills....”

The detail of Footnote 11 is absolutely necessary to illustrate the impact that an ODR/ICT platform may have regarding impartiality requirements. It is written to apply to the fourth party and program designers of ODR/ICT. Since the Model Standards apply only to third-party neutrals, the virtual mediator should assume the obligation to select an ODR/ICT platform that provides the flexibility described in Footnote 11. The best way to highlight this important information is to keep the Footnote 11 language intact (with the small modification described in the preceding paragraph) and add a final sentence, which reads: “With the foregoing in mind, the virtual mediator has an obligation to select an appropriate ODR/ICT platform that meets the needs of the parties in an evenhanded manner.”

The addition of one sentence to Footnote 11 does not end the challenge. Rainey and his students propose adding a new Standard X applicable to fourth and fifth parties. The same concept outlined in Footnote 11—providing a flexible and neutral ODR/ICT—should be incorporated into the obligations of these additional parties.

The modification to Footnote 11—that a virtual mediator does not exhibit favoritism to parties with advanced or limited computer literacy skills—should carry over into Footnote 12, which should be modified to read as follows: “Just as a mediator may show overt or unintended bias toward a party due to clearly observable cultural signs, expressed opinions, *or ability to use ICT*, the mediator may show bias toward a

¹²⁸ Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 WASH. U. J.L. & POL’Y 71, 74, 102–03 (2010).

¹²⁹ Bernie Mayer, *Symposium: The Future of Court ADR: Mediation and Beyond: What We Talk About When We Talk About Neutrality: A Commentary on the Susskind-Stulberg Debate*, 2011 Edition, 95 MARQ. L. REV. 859, 861–63 (2012).

party who does or does not agree with the mediator's bias regarding the use of ICT for mediation." Alternatively, a new footnote could be added to Part B.1 of Standard II. That subsection states: "A mediator should not act with partiality or prejudice based on any participant's personal characteristics, background, values and beliefs, *or performance at a mediation . . .*"¹³⁰ The new footnote to Standard II.B.1 would state: "A Mediator should confirm each participant's level of comfort with, and ability to perform using, ICT prior to engaging in ODR and remain free from favoritism, bias, or prejudice regarding a party's performance using ICT." A good way for the mediator to confirm appropriate comfort levels with the ODR/ICT platform is to administer a tutorial prior to any party's acceptance of the platform. Either of these alternatives makes clear that a mediator's use of an ODR/ICT platform should not create favoritism toward any party, whether possessing advanced or limited computer literacy skills.

The foregoing suggestions adequately annotate Standard II regarding Impartiality. Virtual mediators also must remain cognizant about the neutrality of their written word, which becomes the focal point of virtual mediation. Mediators must carefully select written words that do not show favoritism, bias, animus, or negativity if they are to engender trust from participants. They should convey clear, transparent, professional, and well-organized messages.¹³¹ The existing language in Standard II adequately covers these specific duties of virtual mediators.

3. *Standard III: Conflicts of Interest*

"A. A mediator shall avoid a conflict of interest or the appearance of a conflict of interest during and after a mediation session. A conflict of interest can arise from involvement by a mediator with the subject matter of the dispute or from any relationship between a mediator and any mediation participant, whether past or present, personal or professional, that reasonably raises a question of a mediator's

¹³⁰ MODEL STANDARDS, *supra* note 8, at Standard II.B (emphasis added).

¹³¹ Susan Nauss Exon, *Maximizing Technology to Establish Trust in an Online Non-visual Mediation Setting*, 33 U. LA VERNE L. REV. 27, 63 (2011).

impartiality.(13)

- B. A mediator shall make a reasonable inquiry to determine whether there are any facts that a reasonable individual would consider likely to create a potential or actual conflict of interest for a mediator. A mediator's actions necessary to accomplish a reasonable inquiry into potential conflicts of interest may vary based on practice context.(14)
- C. A mediator shall disclose, as soon as practicable, all actual and potential conflicts of interest that are reasonably known to the mediator and could reasonably be seen as raising a question about the mediator's impartiality.(15) After disclosure, if all parties agree, the mediator may proceed with the mediation."

13. A mediator's relationship with a fourth party or a designer/provider could be perceived as a conflict.

14. A mediator's use of ICT outside the mediation session may create the perception of a conflict of interest. For example, postings on social media sites where "friends" are identified or where messages regarding the mediator's practice may be posted can create the impression of relationships and interests that could be perceived by one or more of the parties as biased or prejudicial. In the practice of law, the issue of online "friendship" creating a conflict of interest has been handled differently by various venues, and posting of "reviews" on social media have become an issue in advertising and promotion. The same issues apply to the use of social media by mediators.

In an age where social media is ubiquitous, it

may be unrealistic to completely avoid having an online profile (although some practitioners have decided to have no active social media presence for just this reason), but it is certainly the case that practitioners should carefully consider their use of social media.

15. *Disclosure should include information about any platform, system, or company in which the mediator has invested, or for which the mediator has been in a consulting or advisory relationship. Disclosure should also include any ICT/ODR platforms for which the mediator has an ongoing financial responsibility (license fee or purchase cost).*

When considering a potential conflict of interest, one should focus on relationship issues, whether personal or professional, as well as subject matter issues.¹³² Footnote 13 appropriately recognizes that if a mediator has a relationship with a fourth party, a conflict of interest may arise. In an attempt to be more comprehensive, I would not limit Footnote 13 to perceptions of a conflict. A more inclusive approach would refer to both an actual and perceived conflict of interest. I would revise Footnote 13 to read: “A mediator’s relationship with a fourth party or a designer/provider could result in a conflict of interest or the perception of a conflict of interest.”

Another way to create inclusivity would be to include a definition section at the beginning of the Model Standards. This new section could define terms such as “mediator” and “parties.” It also could define “participants” to include all those individuals who attend or participate in mediation, including ODR/ICT platforms and designers/providers of those platforms. By defining “participants” to include fourth parties and designers and providers, no need exists for proposed Footnote 13 because the text of Standard III.A would be all-inclusive.

Footnote 14 aptly refers to two challenges posed by social media, which is defined as online communities, such as Facebook, LinkedIn, and Twitter, in which participants may post photographs, videos,

¹³² MEDIATION ETHICS 277–78 (Ellen Waldman & Jossey-Bass eds., 2011).

ETHICS AND ONLINE DISPUTE RESOLUTION

essays, and other types of communication to share personal, professional, political and social ideas and messages with family, friends, and colleagues.¹³³ First, may a mediator “friend” someone on social media who has or will interact in mediation with the mediator? The most common challenge is when mediators, especially when they are also lawyers, “friend” other lawyers who may appear before the mediator. Although this specific issue has not been addressed regarding mediators, it has been the subject of ethics opinions regarding judges and lawyers, which may be analogized to mediators.

Preliminarily, the mere fact that a judge maintains a social connection does not create a conflict of interest because many reasons exist for a judge to participate in social media, i.e., stay in contact with family, friends, and college acquaintances.¹³⁴ “As the California Judicial Ethics Committee has observed, ‘[i]t is the *nature* of the [social] interaction that should govern the analysis, not the *medium* in which it takes place.’”¹³⁵

Authorities cite to challenges posed by judges “friending” lawyers on social media because it could project an appearance that the lawyer in some way may influence the judge. Notwithstanding the prejudicial appearance of influence, some states allow judges to “friend” lawyers although the judges are cautioned not to participate as fully on social media as the general public.¹³⁶ A sampling of states include Arizona,¹³⁷

¹³³ Pa. Bar Ass’n, *Ethical Obligations for Attorneys Using Social Media*, FORMAL OP. 2014-300 (2014) at 1.

¹³⁴ Md. Jud. Ethics Comm., *Judge Must Consider Limitations on Use of Social Networking Sites*, OP. NO. 2012-07 (2012) at 5.

¹³⁵ Cal. Judges Ass’n Judicial Ethics Comm., *Online Social Networking*, OP. NO. 66 (2010) at 11.

¹³⁶ Ky. Ethics Comm. of the Ky. Judiciary, *Judge’s Membership on Internet-Based Social Networking Sites*, FORMAL OP. JE-119 (2010) at 3.

¹³⁷ Ariz. Supreme Court Judicial Ethics Advisory Comm., *Use of Social and Electronic Media by Judges and Judicial Employees*, ADVISORY OP. 14-01 (2014) at 4 (“Arizona Code of Judicial Conduct does not impose a per se disqualification requirement in cases where a litigant or lawyer is a ‘friend’ or has a similar status with a judge through social or electronic networks. Judges must be mindful, though, of Rule 3.1(B), which requires them to avoid activities that will lead to frequent disqualification. If social or electronic media associations will necessitate frequent disqualification, the judge must consider whether continuing that relationship is appropriate.”).

California,¹³⁸ Connecticut,¹³⁹ Kentucky,¹⁴⁰ Maryland,¹⁴¹ Massachusetts,¹⁴² New York,¹⁴³ Ohio,¹⁴⁴ Oklahoma,¹⁴⁵ South Carolina,¹⁴⁶ and Utah,¹⁴⁷ some with specific admonitions.

Judges, however, are cautioned to maintain the appearance of

¹³⁸ Cal. Judges Ass'n Judicial Ethics Comm., *supra* note 135 at 2 (“Canon 4A: A judge shall conduct all of the judge’s extrajudicial activities so that they do not 1) cast reasonable doubt on the judge’s capacity to act impartially; 2) demean the judicial office; or 3) interfere with the proper performance of judicial duties. Canon 4A Commentary: Complete separation of a judge from extrajudicial activities is neither possible nor wise; a judge should not become isolated from the community in which the judge lives”).

¹³⁹ Conn. Comm. on Judicial Ethics, *Extrajudicial Activities; Electronic Social Media; Facebook*, INFORMAL OP. 2013-06 (2013) (“Although participating in social networking sites and other ESM clearly is fraught with peril for Judicial Officials because of the risks of inappropriate contact with litigants, attorneys, and other persons unknown to the Judicial Officials and the ease of posting comments and opinions, the Code does not prohibit such participation.”).

¹⁴⁰ Ky. Ethics Comm. of the Ky. Judiciary, *supra* note 136 at 3 (“The consensus of this Committee is that participation and listing alone do not violate the Kentucky Code of Judicial Conduct...However, this Committee believes that judges should be mindful.”).

¹⁴¹ Md. Jud. Ethics Comm., *supra* note 134 at 1 (“A judge must recognize that the use of social media networking sites may implicate several provisions of the Code of Judicial Conduct and, therefore, proceed cautiously.”).

¹⁴² Mass. Judicial Ethics Comm., *Facebook: Using Social Networking Web Site*, OP. 2011-6 (2011) (allowing judges to only friend lawyers for whom they would recuse themselves if the lawyer appeared before the judge).

¹⁴³ N.Y. Advisory Comm. Jud. Ethics, OP. NO. 08-176 (2009) (“A judge must, therefore, consider whether any such online connections, alone or in combination with other facts, rise to the level of a ‘close social relationship’ requiring disclosure and/or recusal.”).

¹⁴⁴ Sup. Ct. of Ohio Bd. of Comm’rs. on Grievances & Discipline, OP. 2010-7 (Dec. 3, 2010) at 7 (“As with any other action a judge takes, a judge’s participation on a social networking site must be done carefully.”).

¹⁴⁵ Okla. Judicial Ethics Advisory Panel, *Judicial Ethics Opinion*, OP. 2011-3 (2011) (“We believe that public trust in the impartiality and fairness of the judicial system is so important that it is imperative to err on the side of caution where the situation is ‘fraught with peril’.”).

¹⁴⁶ S.C. Advisory Comm. on Standards of Judicial Conduct, *RE; Propriety of a Magistrate Judge being a Member of a Social Networking Site such as Facebook*, OP. 17-2009 (2009) (“A judge may be a member of Facebook and be friends with law enforcement officers and employees of the Magistrate as long as they do not discuss anything related to the judge’s position as magistrate.”).

¹⁴⁷ Utah Judicial Ethics Advisory Comm., INFORMAL OP. 12-01 (2012) at 11 (“Social media have become so prevalent and in many ways an important form of communication. Similar to other public settings, judges should be permitted to enter. Once they have entered, judges must be cautious.”).

ETHICS AND ONLINE DISPUTE RESOLUTION

“prudence, discretion, and decorum”; when in doubt, judges should disclose or recuse.¹⁴⁸ The test is to maintain dignity and public confidence in the court,¹⁴⁹ and to “avoid conduct that would create in reasonable minds a perception of impropriety.”¹⁵⁰ In California, for example, if a lawyer has a case pending before a particular judge, that judge must unfriend the lawyer pending the outcome of the case.¹⁵¹

Florida holds the minority view because it precludes a judge from “friending” a lawyer on social media when it could be seen by others that the two are “friends.” The Florida Advisory Committee adopts the position that when judges “friend” lawyers who appear before them, it “reasonably conveys to others the impression that these lawyer ‘friends’ are in a special position to influence the judge.”¹⁵² Florida’s concern seems to be with the appearance of impropriety regarding the court rather than whether an actual relationship exists between the judge and lawyer.¹⁵³

The judicial opinions all rely on their relevant judicial ethical standards even though the standards do not specifically refer to online conduct or social media. Indeed, these standards do not differentiate between face-to-face conduct and online conduct.

By analogy, the Model Standards should apply to mediators whether engaged in face-to-face or virtual mediation. In either type of mediation, a mediator should use social media carefully to maintain professionalism and avoid even the appearance of partiality, which could create a conflict of interest. Specifically, a mediator should never comment about a pending case. To the extent a mediator wants to comment about a past case, she must do so in such a manner as to avoid a reasonable likelihood that parties may be personally recognized.¹⁵⁴

¹⁴⁸ N.Y. Advisory Comm. Jud. Ethics, *supra* note 143.

¹⁴⁹ Sup. Ct. of Ohio Bd. of Comm’rs. on Grievances & Discipline, *supra* note 144 at 2.

¹⁵⁰ Md. Jud. Ethics Comm., *supra* note 134 at 1.

¹⁵¹ Cal. Judges Ass’n Judicial Ethics Comm., *supra* note 138 at 11.

¹⁵² Fla. Supreme Court Judicial Ethics Advisory Comm., OP. NO. 2009-20 (Nov. 17, 2009) at 3.

¹⁵³ *Id.*

¹⁵⁴ N.Y. Bar Ass’n, *Ethical Duties of Lawyer-Mediator; Confidentiality as to Work of Fiction*, OP. 1026 (Oct. 1, 2016) at 4 (permitting a lawyer to write fiction stories as long as the publication does not create a “reasonable likelihood that the reader will be able to ascertain the client’s identity”).

Returning to the proposed footnote 14, it is good to recognize the challenges posed by social media. Footnote 14 includes a suitable phrase, “that could be perceived by one or more of the parties as biased or prejudicial,” because it is all about public perception no matter what relationship may exist between a mediator and those who are “friends” on social media.

Footnote 14 raises a second issue—the posting of reviews on social media for promotional purposes. Several jurisdictions permit lawyers to endorse other lawyers in social media and otherwise comment on or respond to reviews or endorsements made about them.¹⁵⁵ From a promotional standpoint, lawyers may solicit the reviews and may endorse others as long as they do not otherwise violate rules of professional conduct, i.e., are accurate, not misleading, and do not violate attorney/client confidentiality.¹⁵⁶

The last sentence of footnote 14 is a bit nebulous; noting that some practitioners avoid a social media presence really does not add substance. I suggest revising the last sentence to read: “In an age where social media is ubiquitous, it may be unrealistic to completely avoid having an online profile; however, practitioners who choose to use social media should do so in a manner that is reasonably likely to maintain the integrity of mediation consistent with these Standards.”

Rainey and his students limit references of social media to Standard III: Conflicts of Interest. Yet, some ethics opinions relating to lawyers and social media generally respond to queries about what a lawyer may post online regarding a litigated matter. For example, may a lawyer tout his or her success rate when receiving a favorable jury verdict? By analogy, may a mediator tout his or her success rate in mediation by discussing a satisfactory resolution to a mediated dispute? Relying on confidentiality rules, authorities preclude lawyers from disclosing confidential client information without a client’s consent, “regardless of the context.”¹⁵⁷ Arguably such a rule does not apply to mediators

¹⁵⁵ Lawyer’s Acceptance of Recommendations on Professional Networking Website. NC Eth. Op. 8 (2012), <https://www.ncbar.gov/for-lawyers/ethics/adopted-opinions/2012-formal-ethics-opinion-1/>. See generally Penn. Bar Ass’n *Ethical Obligations For Attorneys Using Social Media*, OP. 2014-300 (2014).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 13 (advising that attorneys may not disclose confidential information “while posting celebratory statements about a successful matter”).

because parties are not deemed clients of a mediator.¹⁵⁸

Mediation, however, includes its own confidentiality rules. Mediators should not post anything that may engender a “reasonable likelihood that the reader will be able to ascertain the client's identity.”¹⁵⁹ I suggest adding an annotation to Standard V; Confidentiality. In the same vein, any potential conflict of interest is inexorably intertwined with a mediator’s obligation to remain impartial; therefore, a reference about social media also should be added to Standard II: Impartiality. Finally, Footnote 14 should not be limited to virtual mediators. Those engaged in face-to-face mediation also should be cautious when using social media.

Footnote 15 is fine as it is stated. It embraces the notion that when a conflict exists or may be perceived to exist, the mediator should disclose any interest that he or she may have in an ODR/ICT platform.

4. *Standard IV: Competence*

“A. A mediator shall mediate only when the mediator has the necessary competence to satisfy the reasonable expectations of the parties.

1. Any person may be selected as a mediator, provided that the parties are satisfied with the mediator’s competence and qualifications. Training, experience in mediation, skills, cultural understandings and other qualities are often necessary for mediator competence. A person who offers to serve as a mediator creates the expectation that the person is competent to mediate effectively.”(16)

16. There is a basic question of what “competence” means for mediators generally. Is the number of cases mediated a measure? Does the fact that one has done 1000 cases mean one is competent,

¹⁵⁸ N.Y. Bar Ass’n, *supra* note 154, at 2–3 (recognizing that lawyer mediators do not represent mediation parties nor provide legal advice to the parties).

¹⁵⁹ *Id.*

or has one merely done 1000 cases badly? There are in every state accepted 40-hour courses in mediation required before accepting court referred mediation cases. Is completing one of these courses proof of competence? There are more than 200 degree programs in the U.S. offering degrees in conflict resolution of one kind or another, most of which at least address mediation. Is having one of these degrees proof of competence? If the situation is not clear for mediation generally, adding ODR to the mix does not make it any clearer. At a minimum, the mediator should be competent to use any platform he or she proposes at a high level, so that the use of the platform does not unduly take attention away from the substance of communication with the parties. How one demonstrates this is less clear. A concrete recommendation, one that is urgent, is to include modules on the impact of ICT on the practice of mediation in every mediation training course.

I agree with the basic premise articulated in Footnote 16. It acknowledges that the very essence of mediator competence is difficult to quantify; therefore, every mediation training course should include a module regarding the impact of ICT on the practice of mediation. I agree with that suggestion. It also recognizes that “[a]t a minimum, the mediator should be *competent* to use any platform he or she proposes at a high level....” I also agree with this basic premise, although the use of the word, “competent,” to describe competence creates ambiguity. Although merely a matter of semantics, I would replace “competent” with “proficient.”

Attaining a level of competence should not be limited to reaching that level in the first instance, as Footnote 16 suggests by the phrase, “include modules on the impact of ICT on the practice of mediation in every mediation training course.” As previously discussed, a mediator’s level of competence can be measured in terms of education and training to prepare one to enter the mediation field; it also should be a continuing

obligation as a mediator seeks to enhance her knowledge and skills.¹⁶⁰

I would add a footnote to the end of Standard IV, Section A.2, which states: “A mediator should attend educational programs and related activities to maintain and enhance the mediator’s knowledge and skills related to mediation.” To meet this objective, a proposed new footnote to Standard IV.A.2 could read: “Mediators should attend trainings and other programs to prepare to enter the mediation field, and continuing education to enrich one’s ability to mediate. The knowledge and skills related to mediation should include information about online dispute engagement, various ODR platforms, and information and communication technology.”

5. *Standard V: Confidentiality*(17)

17. This is, perhaps, the most difficult standard with which to deal regarding the mediator’s knowledge and practice. There are certain steps that apply specifically to ODR that are basic and which should be integrated into the rules:

- *The mediator should make himself or herself aware of the security standards used by any online platform that will pass through or hold information generated by the parties and the mediator during a mediation session.*
- *The mediator should educate herself or himself on the basics of computer security, including the security protocols used by online providers, and including the stated “ownership” of information passed through the online channel.*
- *The mediator should be able to explain, in language the parties can understand, the perceived and actual risks to privacy and confidentiality inherent in using online or computer-based platforms or applications.*

¹⁶⁰ See *supra* notes 91–92; and accompanying text.

- *Before beginning mediation, the mediator should create a protocol agreement that spells out the parties' understanding of the process, any ODR technology to be used, the actual risks to their information, and the responsibility of the mediator as it relates to confidentiality and the ability to shield online data from discovery.*
- *The mediator should avoid using or recommending online or computer-based platforms or applications that do not meet reasonable industry standards for security and privacy protection.*

Rainey and his students aptly recognize the importance of, and difficulty to sustain, confidentiality in an online environment. The onerous nature of this task applies no matter how a jurisdiction defines confidentiality, i.e., absolute, enumerated, or qualified.¹⁶¹ The biggest problem is that confidentiality and security in an online environment is beyond the sole responsibility of a mediator. To a great extent, it is outside of the mediator's control, relegated to the fourth and fifth parties and necessitating the mediator and parties to take extra precautions.

The detail of Footnote 17 appropriately requires a mediator to be aware of security standards of ODR/ICT platforms, educate oneself about basic computer security, be able to explain to virtual mediation participants the perceived and actual risks to privacy and confidentiality, create a protocol agreement, and do all of these tasks in a reasonable manner consistent with industry standards. I agree with each of these proposed recommendations.

Unlike face-to-face mediation, virtual mediation participants have to be as proactive as mediators. Participants must possess a sufficient level of technological sophistication to accurately interact using ICT. They must be trained on the ODR/ICT platform. They also must take "reasonable precautions" to protect the confidentiality of virtual mediation. For example, participants should carefully check names and addresses of intended recipients when using e-mail and other written

¹⁶¹ See *supra* notes 94–100; and accompanying text (classifications of absolute confidentiality, enumerated confidentiality, and qualified confidentiality).

forms of ICT to ensure that a message is sent to the intended recipient.¹⁶² All participants should safeguard the manner in which they use an ODR/ICT platform to preserve security and confidentiality. To preclude an outsider, whether deemed a hacker or not, from viewing an online discussion, participants should not stay logged in or leave an ODR platform open while away from a computer.

Other issues may impact confidentiality concerns. Mediators must be cognizant of power imbalances, whether technological or otherwise, including available bandwidth, language fluency, comfort with technology, typing speed, and more.

In light of these significant admonitions, I believe that the subparagraph of Footnote 17 regarding the creation of a protocol agreement should be moved into its own separate footnote to be added at the very end of Standard V.D, which allows mediators to create a “particular set of expectations.” Alternatively, Footnote 17 could remain intact as proposed by Rainey and his students and a new footnote could be added to Standard V.D, stating: “Because of the sensitive nature of ICT, a mediator may dictate a set of expectations designed to foster security and confidentiality.” By creating a “protocol agreement” or some set of expectations, a mediator may include specific precautions and instructions to the first and second parties so that they can be as proactive as reasonably necessary to preserve confidentiality and security of their virtual mediation process.

6. *Standard VI: Quality of the Process*

“A.A mediator shall conduct mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, presence of the appropriate participants, party participation, procedural fairness, party competency and mutual respect among all participants.

1. A mediator should agree to mediate only when the mediator is prepared to commit the attention

¹⁶² Colin Rule, *Ethics in ODR*, ADRHUB.COM (Oct. 15, 2010 at 5:42 PM), <http://www.adrhub.com/forum/topics/ethics-in-odr>.

essential to an effective mediation.(18)

...

3. The presence or absence of persons at a mediation depends on the agreement of the parties and the mediator. The parties and mediator may agree that others may be excluded from particular sessions or from all sessions.(19)

...

7. A mediator may recommend, when appropriate, that parties consider resolving their dispute through arbitration, counseling, neutral evaluation or other processes.(20)

...

- C. If a mediator believes that participant conduct, including that of the mediator, jeopardizes conducting a mediation consistent with these Standards, a mediator shall take appropriate steps including, if necessary, postponing, withdrawing from or terminating the mediation.”(21)

18. An element related to insuring a quality process in ODR is having a mediator who is herself or himself comfortable with and able to use ODR technology without damaging the process.

19. For ODR, this includes agreement on who will be “in the room” for audio or audio/video sessions, and who will have access to any information stored online as part of the mediation.

20. Referral to an ODR forum should be one of the referral options for traditional mediation.

21. For an ODR session, inappropriate conduct

might include flaming, lack of responsiveness, allowing access to parties not agreed to in the protocol agreement, and other behavior that exists uniquely in an online environment.

Footnote 18, as it relates to Standard VI.A.1, is a cross-reference to mediator competence.¹⁶³ As previously discussed, a virtual mediator's competence means something more than the level of competence required for face-to-face mediation. In addition to knowledge and skills related to mediation, including communication and a certain amount of psychology, a virtual mediator must have a sophisticated level of technological prowess to be able to manage ICT without damaging the mediation process. Footnote 18, therefore, seems appropriate.

Footnote 19 illustrates that Standard VI.A.3 takes on new meaning with respect to ODR. Unlike face-to-face mediation, during which participants can see who is present in the room, ODR presents numerous challenges. First, like face-to-face mediation, parties can agree on who will be in the room. In virtual mediation, trust is paramount that everyone abides by such an agreement. For instance, when engaged in nonvisual, written mediation, how can a mediator or opposing party verify who is at the keyboard or whether an unauthorized person is leaning over the shoulder of a party typing at the keyboard? In an audio form of mediation, how can one verify whether someone is sitting next to a party in a coaching capacity? Even audiovisual platforms pose challenges; an unauthorized individual can easily sit outside the viewing area of the video camera.

I agree with the basic ideal of Footnote 19; however, it should be more inclusive. Rather than limit it to "audio or audio/video sessions," it also should include nonvisual, written communications involved in virtual mediation.

The second phrase of Footnote 19 refers to access of information. This, too, is a critical component of virtual mediation because, no matter the type of ICT used, the communications are permanently recorded. The parties absolutely must agree on the participants who shall be given access to the information. It needs to go farther, considering not only

¹⁶³ For a discussion of mediator competence pursuant to Model Standard IV: Competence, see *supra* Part IV.A.4.

access issues but how should the information be stored, by whom should information be stored, and what is the period of duration before destruction.

Footnote 20 appropriately includes ODR as a possible referral process. Since I agree with the text of Footnote 20, no changes are needed.

Footnote 21 raises serious concerns inherent in an online environment, especially because trust is a critical component of virtual mediation. All parties must trust that appropriate individuals—ones on whom the parties have agreed—are attending the virtual mediation without influence from unauthorized individuals.

As with face-to-face mediation, virtual mediation also requires parties and their representatives to communicate in a respectful, civil, and professional manner. Whereas some mediators caution participants about yelling, name-calling, and other bad faith behavior, this type of passionate conduct can appear as “flaming” in an ODR/ICT platform. Additionally, parties must agree to timely interaction when involved in ODR. Footnote 21’s reference to “lack of responsiveness,” therefore, is appropriate. Finally, an ability to trust is related directly to responsiveness. For example, research conducted in online team learning environments showed that students were more likely to trust when others responded to online communications on a prompt, consistent basis.¹⁶⁴

I am not certain what is meant by “other behavior that exists uniquely in an online environment.” Otherwise, I agree with the text of Footnote 21.

Standard VI.A requires a mediator to “conduct mediation in accordance with these Standards and in a manner that promotes diligence, timeliness, safety, ...party participation, procedural fairness, [and] party competency....” A new footnote should be included at the end of the main paragraph A of Standard VI that requires a virtual mediator to exercise a duty of care when selecting and recommending an ODR/ICT platform.¹⁶⁵ Such a footnote might read as follows: “Prior

¹⁶⁴ Saniye Tugba Bulu & Zahide Yildirim, *Communication Behaviors and Trust in Collaborative Online Teams*, 11 EDUC. TECH & SOC’Y 132, 133 (2008).

¹⁶⁵ Allan E. Barsky, *The Ethics of App-Assisted Family Mediation*, 34 CONFLICT RESOL. QUARTERLY 31, 33–34 (2016).

to referring parties to an ODR/ICT platform, a mediator should exercise due diligence to ensure that the platform is effective and suitable for the parties and promotes a quality, trustworthy process in accordance with these Standards.” This type of requirement means that a mediator should conduct research regarding the quality and efficacy of ICT to ensure that the ICT promotes a quality process and is of a level that parties may easily understand and use.¹⁶⁶

7. *Standard VII: Advertising and Solicitation(22)*

22. Incorporating the language and issues raised in conjunction with other elements of the model rules, this Standard can stand as it is.

I agree with the text of Footnote 22 because advertising and solicitation obligations should apply with equal force to both face-to-face mediation and virtual mediation. Thus, no further discussion is necessary.

8. *Standard VIII: Fees and Other Charges*

“A. A mediator shall provide each party or each party’s representative true and complete information about mediation fees, expenses and any other actual or potential charges that may be incurred in connection with a mediation.

1. If a mediator charges fees, the mediator should develop them in light of all relevant factors, including the type and complexity of the matter, the qualifications of the mediator, the time required and the rates customary for such mediation services.”(23)

23. If the use of ODR technology is provided as part of the overhead for a mediation practice, there is

¹⁶⁶ *Id.*

probably no need to itemize the cost of the technology. However, if there are special costs or fees associated with the use of an online platform, or if the use of the platform is handled as a separate item, disclosure of costs and any other ramifications of signing up for a platform must be disclosed.

Footnote 23 is consistent with the discussion regarding self-determination.¹⁶⁷ I, therefore, agree with Footnote 23 as written.

9. *Standard IX: Advancement of Mediation Practice(24)*

24. *This standard is one that bedevils almost as much as “competence.” Whether one likes it or not, the practice of mediation is now conducted using a variety of ICT tools and platforms. Even if one only uses email (a very insecure and undesirable channel) or a mobile phone, one is engaged in the practice of ODR. Although there are many legitimate issues one may raise regarding the integration of ICT into mediation, the most common complaint is that the use of online tools risks losing nonverbal nuance. This observation is so obvious as to not even rise to the level of being a critique of ODR. Of course the non-verbal elements will change online, not just for ODR, but for all social interaction. This has been true with every advance in communication technology since the printing press, and society seems to have been able to adapt to each of the changes, as we will adapt to new online communication channels. If parties can buy airline tickets online, do their banking online, and find mates to marry online, they will want to deal with mediators online. The questions for our*

¹⁶⁷ See *supra* Part IV.A.1.

practice, and the ethics of practice, involve how we work in this new environment in a way that does not compromise the basic principles that drive the practice of mediation.

In order to advance the practice of mediation it is necessary to first recognize and admit the inevitable nature of the use of ODR technology, and second to engage in meaningful discussions about the way in which the technology should be further integrated into the practice of mediation.

I agree with the text of Footnote 24. No further discussion is necessary.

*B. Fourth and Fifth Parties, Does New Wine Really Require New Wineskins?*¹⁶⁸

Annotating the Model Standards to apply to ODR is an evolutionary process; Rainey and his students tackled the Model Standards with careful precision and passion, identifying and targeting specific nuances for the virtual mediator. Instead of modifying the substance of the Model Standards, they created greater inclusivity by explaining why and how to extend existing mediation standards of conduct to virtual mediation. Keep in mind that the Model Standards, even when annotated, apply only to mediators so the work of Rainey and his students is evolutionary in nature.

With the recognition of the fourth and fifth parties in ODR, the mediation field is taking on whole new dimensions, causing the ODR revolution. These new parties have functions that in many ways are different from traditional third-party neutrals who share face-to-face contact and communication with those involved in conflict. The quandary is how to apply mediation standards of conduct to the fourth and fifth parties.

¹⁶⁸ See generally Kimberly Kovach, *New Wine Requires New Wineskins: Transforming Lawyer Ethics for Effective Representation in a Non-Adversarial Approach to Problem Solving: Mediation*, 28 *FORDHAM URB. L.J.* 935 (2001) (noting that over a decade ago, Kimberly Kovach analogized the transformation of lawyer ethics as she argued that new wine required new wineskins).

1. *No Individual Regulation of Fourth and Fifth Parties*

One way to seek accountability is to follow the lead of Daniel Rainey and his students—annotate the Model Standards to apply to the virtual mediator. First, take a step backwards to when the Model Standards were originally conceived. Mediators were human; and therefore, much thought surrounded communication and other interactional and relational behaviors as the Model Standards were initially crafted and subsequently revised.¹⁶⁹ Indeed, the April 10, 2005 Reporter’s Notes, attached as Appendix A to the Report regarding the American Bar Association’s adoption of the revised Model Standards in August 2005 refer to “persons mediating”¹⁷⁰ and repeatedly refer to a mediator as an “individual.”¹⁷¹

Nonetheless, the Model Standards only apply to mediators and, by the suggested annotation, to virtual mediators, subjecting only them to ethical and reputational accountability and possibly legal, disciplinary, or monetary consequences.¹⁷² For the most part, mediation is a self-regulated system. The dilemma is how to hold mediators accountable for their actions when they are not licensed professionals.

Professionals such as licensed attorneys are responsible for the actions of their agents—secretaries, paralegals, and others whom they hire.¹⁷³ Likewise, can mediators be held accountable for the ODR/ICT platforms that they use and for the actions of the designers, programmers, and service providers of those platforms? One may argue that since mediators are not licensed, they have nothing to risk in the event of unethical or inappropriate conduct of others associated with them. Self-regulation, however, has the forte of reputation and

¹⁶⁹ See MODEL STANDARDS, *supra* note 8, at Reporter’s Notes 37 (“In performing the mediator’s role, an individual displays multiple analytical and interpersonal skills...”).

¹⁷⁰ *Id.* at 18.

¹⁷¹ *Id.* at 12, 37, 38, 42, 45, 48.

¹⁷² Orna Rabinovich-Einy, *Technology’s Impact: The Quest for a New Paradigm for Accountability in Mediation*, 11 HARV. NEGOT. L. REV. 253, 262 (2006) (citing Lawrence Susskind, *Environmental Mediation and the Accountability Problem*, 6 VT. L. REV. 1, 4 (1981)).

¹⁷³ MODEL RULES OF PROF’L CONDUCT r. 5.03 (AM. BAR ASS’N 2005); *In re Flack*, 272 Kan. 465, 472–73 (Kansas 2001) (noting that lawyers are responsible for the work product of agents whom they hire such as secretaries, investigators, law student interns, and other paraprofessionals).

credibility.

For example, if word gets out that a mediator, whether virtual or not, exhibits biases in favor of one party or breaches a pledge of confidentiality, her integrity and credibility will falter, resulting in a loss of reputation and/or business. Similarly, if a fourth or fifth party creates algorithms that are not neutral or fails to create or maintain the highest security and confidentiality of virtual proceedings, its inappropriate conduct will most certainly affect the hiring mediator.

To create a standard of care on behalf of the mediator as the principal, a new standard could be added to the Model Standards, requiring mediators to exercise due diligence when selecting an ODR/ICT platform. Under this principal/agent rationale, additional standards of conduct are not needed for the fourth and fifth parties. Instead, mediation's self-regulating system will dictate that traditional and virtual mediators will be held accountable for the actions of those whom they hire. Thankfully, Daniel Rainey and his students raise questions as to whether a mediator, the principal, may be held responsible for actions by the fourth and fifth parties.¹⁷⁴

2. *Separate Standards of Conduct for Fourth and Fifth Parties*

A second alternative—the revolution—is to begin a dialogue about the need to create new and separate standards of conduct designed specifically to hold the fourth and fifth parties accountable for their actions. Professor Carrie Menkel-Meadow believes it is too soon to create separate standards;¹⁷⁵ she analogizes her opinion to a 2009 essay in which she queried, among other concerns, whether a standardized set of ethics could apply to dispute system design in light of the range of processes needed to meet a variety of party goals within diverse contexts.¹⁷⁶

¹⁷⁴ See *infra* Part IV.B.2 of this article and the last paragraph of Rainey's proposed Standard X, Fourth Parties, Designers, Programmers, and Service Providers.

¹⁷⁵ Carrie Menkel-Meadow commented at the 10th annual AALS ADR Works-in-Progress Conference at Marquette University on September 23, 2016, that it is too early to write standards for ODR.

¹⁷⁶ Carrie Menkel-Meadow, *Are There Systemic Ethics Issues in Dispute System Design? And What we Should (Not) Do About It: Lessons from International and Domestic Fronts*, 14 HARV. NEGOT. L. REV. 195, 202–16 (2009) (discouraging the development of a uniform code of ethics for dispute system design).

Rainey and his students propose adding a new standard to the Model Standards. In doing so, they suggest the following issues raised by fourth parties and fifth party designers, programmers, and service providers:

*Standard X: Fourth Parties,
Designers, Programmers, and Service
Providers*

If it is true that ODR technology is the “fourth party” it may be necessary to establish standards of practice or model rules that go beyond the primary parties and the third party/mediator. Some of the issues related to these rules may be as follows:

Fourth Party

- *Ease of access*
- *Ease of use*
- *Not culturally biased*
- *Not expensive or inaccessible to low income parties*
- *Stable and reliable*
- *Secure and capable of ensuring confidentiality*

Designers/Programmers

- *Knowledge of the mediation process (and other dispute engagement modes)*
- *Knowledge of the standards and rules for third parties*
- *Strong “user experience” skills*

Service Providers

- *High levels of data security*
- *History of ethical business practice*
- *Acknowledgement of mediation/dispute engagement special requirements*
- *Commitment to maintaining confidentiality(25)*

A basic question for mediators using fourth (and fifth, etc.) parties has a parallel in the practice of law. It is the case that actions of “agents” of an attorney (paralegals, investigators, etc.) are the responsibility of the attorney. Is the relationship between the mediator and the fourth party similar? Can the mediator be held responsible for data/confidentiality breaches or other actions that could be perceived as harmful to the parties?

25. *In some cases it may not be clear that mediator confidentiality transfers to the service provider. For example, if a party approaches the mediator with a discovery order or a request for information and the mediator prevails due to confidentiality provisions in her or his locale, is it possible for the requesting party to in turn seek to retrieve information from an online service provider who may or may not be afforded the same confidentiality protection as the mediator?*

Rainey and his students raise excellent issues; keep in mind their intent to promote dialogue and discussion. More work needs to be done to envision holding the fourth and fifth parties accountable for their participation in ODR; drafting specific standards for these additional parties is beyond the scope of this paper. Nevertheless, I do want to begin the dialogue with a few recommendations.

Rather than create an additional Standard within the Model Standards for fourth and fifth parties, I would create a separate set of standards for fourth and fifth parties, cross-referencing them with the Model Standards. The reason for separate standards is because the work conducted by these additional parties is different from that of a third-party neutral, creating nuanced dimensions for some principles and radically different dimensions for others.¹⁷⁷ Creating a separate set of standards will alleviate concerns about a one-size-fits-all set of ethical

¹⁷⁷ See *supra* notes 65–77; and accompanying text.

standards applicable to multiple types of parties or entities.¹⁷⁸ Recall the discussion in Part III.B of this article about the Online Dispute Resolution Standards of Practice, issued by the Center for Technology and Dispute Resolution.¹⁷⁹

The ODR Standards of Practice share commonalities with the Model Standards, striving to balance fairness, effectiveness, quality, and access. These are nuanced dimensions insofar as the principles are the same albeit different in context. In the proposed Standard X, Rainey and his students raise issues relating to these principles as they refer to confidential, non-biased, and “strong ‘user experience’ skills” (implying competence). Principles of effectiveness and quality can be seen in references to “stable and reliable.”¹⁸⁰ Rainey and his students also suggest that designers and programmers possess knowledge of third-party standards and rules. Likewise, they advocate that service providers possess a “history of ethical business practice” and acknowledge “mediation/dispute engagement special requirements.”¹⁸¹ Such requirements imply effectiveness, quality, and—to some degree—competence.

Nevertheless, technology, the essence of fourth parties, poses specific challenges not otherwise covered in the Model Standards. Principles of access for mediation, whether face-to-face or virtual, mean disputants have access to justice as they seek to resolve conflict. Accessibility in terms of technology is significantly different. Not only must language barriers and geographical regions be considered but also ease of use of computers and other technological devices, bandwidth capabilities and connectivity, and the parties’ technological skills in the first place.¹⁸² Technological accessibility, therefore, is completely different from general access to justice issues, requiring its own individual standard. Rainey and his students signify the importance of

¹⁷⁸ See Katherine A. Mills, *Can a Single Ethical Code Respond to All Models of Mediation?*, 21 BOND DISPUTE RESOLUTION NEWS 5 (2005) (arguing that a single code of ethics cannot address discreet mediator models—evaluative, therapeutic, and facilitative—because the three types of mediators function in different ways, seeking to achieve different objectives).

¹⁷⁹ See *supra* notes 112–23; and accompanying text.

¹⁸⁰ See MODEL STANDARDS, *supra* note 8, at Standard X (2005).

¹⁸¹ *Id.*

¹⁸² See ODR STANDARDS, *supra* note 11, at Accessibility Principle (discussing how technology transforms and inspires requirements of accessibility).

accessibility by fourth parties in their references to “ease of access,” “ease of use,” and “stable and reliable.”

Rainey and his students raise an issue that a fourth party not be “expensive or inaccessible to low income parties.” Recall “affordability” as the second principle of the ODR Standards of Practice, advocating that ODR “must provide an economical alternative to formal dispute resolution processes....”¹⁸³ This principle adheres to the notion that mediation is an efficient, cost-effective, and convenient alternative to adversarial dispute resolution processes,¹⁸⁴ but it is proposed as an ethical guideline for virtual mediation as opposed to a basic premise that is not imposed by the Model Standards.

Rainey and his students do not raise an issue about transparency, despite being one of the seven principles in the ODR Standards of Practice.¹⁸⁵ Significant to transparency in virtual mediation are issues of participant identity and physical location, which are nonissues in face-to-face mediation where everyone knows who is participating in mediation and all are physically present. A third part of transparency requires ODR providers to identify security efforts embedded in ODR platforms. Transparency, and specifically security, is not covered in the Model Standards, although confidentiality is closely related to security concerns.

Scholars have examined various degrees of transparency, cataloging them as “mediator tasks” rather than ethical responsibilities.¹⁸⁶ Due to the significance of transparency in virtual mediation, it should be a separate standard for the fourth and fifth parties. Care must be paid when drafting a transparency standard to avoid intrusions on confidentiality mandates.

Innovation and relevance are important to the ODR Standards of Practice because of the ever-evolving technological processes. Rainey and his students refer to a “stable and reliable” fourth party, which could

¹⁸³ ODR STANDARDS, *supra* note 11, at Affordability Principle.

¹⁸⁴ Andrea M. Braeutigam, *Fusses that Fit Online: Online Mediation in Non-Commercial Contexts*, 5 APPALACHIAN J.L. 275, 277 (2006) (citing Frank E.A. Sander, *Varieties of Dispute Processing*, 70 F.R.D. 79, 113–14 (1976)).

¹⁸⁵ See *supra* Part III.B.3 for a discussion of transparency as a principle of the Online Dispute Resolution Standards of Practice.

¹⁸⁶ See generally Michael Moffitt, *Casting Light on the Black Box of Mediation: Should Mediators Make Their Conduct More Transparent?*, 13 OHIO ST. J. ON DISP. RESOL. 1 (1997) (discussing process-transparency and impact-transparency).

infer innovation and relevance. Notwithstanding semantics, it is imperative that both the fourth and fifth parties remain vigilant of the progressive nature of ODR to account for the fast-paced changes in ICT. One may try to equate innovation and relevance of the fourth party to the third-party's competence, yet they are quite distinguishable because the third and fourth parties function in different capacities.

Rainey and his students raise interesting ethical issues for the fourth and fifth parties involved in ODR. I believe their proposed Standard X evokes a strong case for developing separate standards of conduct for fourth and fifth parties because of the ingenuity and responsibility assumed by ODR/ICT platforms in conjunction with their designers, programmers, and service providers.

Additional topics also should be discussed. For instance, Rainey and his students refer to a flexible platform in their annotation to Standard II: Impartiality. A corresponding principle should be included in standards for fourth and fifth parties, cross-referencing it back to the impartiality discussion for virtual third parties.

Trust is another topic that has been raised in this article. The topic of trust should be explored for the fourth party as well as ODR designers, programmers, and service providers.

The fourth party should provide an independent and impartial ODR/ICT platform, especially when specialized algorithms are incorporated. Rainey and his students refer to "not culturally biased" in proposed Standard X regarding the fourth party. Incorporating the words "independent and impartial," to this principle help make it more inclusive.

Many jurisdictions grant mediators immunity from liability. This immunity should be extended to virtual mediators, but I am not certain that designers, programmers, and service providers should enjoy the same immunity. This topic should be explored.

Topics from other proposed guidelines also should be explored. The Ethical Principles for Online Dispute Resolution, issued in 2016 by the National Center for Technology and Dispute Resolution includes topics such as: accountability, empowerment, equality, honesty, integration, legal obligation, neutrality, and protection from harm.¹⁸⁷ The Principles

¹⁸⁷ ETHICAL PRINCIPLES FOR ONLINE DISPUTE RESOLUTION, http://odr.info/ethics-and-odr/#_ftn2 (last visited Oct. 19, 2016).

ETHICS AND ONLINE DISPUTE RESOLUTION

for ADR Provider Organizations were developed in 2002 by the CPR-Georgetown Commission on Ethics and Standards of Practice in ADR.¹⁸⁸ In addition to topics previously discussed, these Principles include a discussion of complaint and grievance mechanisms as well as false or misleading communication. All of these topics should be examined and explored in relation to the fourth and fifth parties.

Finally, whether the proposed topics relate to ethical duties, norms, or general service criteria is a topic for consideration. It seems difficult to compartmentalize all of the suggestions regarding fourth and fifth parties into ethical duties. Any dialogue, therefore, should include a discussion of the framework in which duties and obligations of fourth and fifth parties are structured—ethical standards, a set of best practices, or something else.

V. CONCLUSION

ODR has evolved during the past twenty years and is on the cusp of a revolution. To date, no specific ethical standards have been developed for ODR or ICT other than the suggested principles in the Online Dispute Resolution Standards of Practice and the newly developed Ethical Principles for Online Dispute Resolution, both developed by the National Center for Technology and Dispute Resolution. Neither set of principles binds mediators, ODR/ICT platforms, or the designers, programmers, and service providers of those platforms.

This article seeks to spread the word to which Daniel Rainey and his students aspired when they annotated the Model Standards to apply to virtual mediation as a form of ODR. It is time for mediation practitioners and regulators to dialogue about whether and how to create ethical standards for the fast-paced progression of virtual mediation. The basic dilemma is evolution versus revolution—whether to apply existing ethical standards to virtual mediation or to create new ones, developed specifically for ICT and the designers, programmers and service providers of ICT.

As can be seen in Part IV of this article, Rainey and his students

¹⁸⁸ CPR-Georgetown Commission on Ethics and Standards of Practice in ADR, *Principles for ADR Provider Organizations*, INTERNATIONAL INSTITUTE FOR CONFLICT PREVENTION & RESOLUTION (May 1, 2002), <https://www.cpradr.org/news-publications/articles/2010-07-06-principles-for-adr-provider-organizations>.

have prepared outstanding suggestions that easily translate most of the individual Model Standards to the virtual mediator—the evolutionary alternative, for which I advocate. One of the largest hurdles relates to confidentiality and security concerns. In face-to-face mediations, mediators caution participants about the confidential nature of mediation, instructing them not to discuss information gleaned during mediation outside of that setting. Virtual mediation presents a different scenario in that participants now must be proactive to take specific measures to maintain confidentiality and security; to the extent parties and their representatives must be proactive when using technology, their actions are beyond the control of the third-party neutral, as well as the fourth and fifth parties.

The revolution is beginning. Practitioners are beginning to realize the important role that technology plays in ODR and specifically virtual mediation. As shown in this article, evolutionary action helps only to a certain extent. It is now time to revolutionize ODR by dialoguing about the need for ethical regulation of the fourth and fifth parties to ensure the best ethical process for all involved.