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Enemy at the Gates: Online Dispute Resolution in the Time of COVID-19

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Introduction

At one time, Online Dispute Resolution (ODR) was considered the future of dispute resolution. With the arrival of COVID-19, the future has rushed up to meet us. Even before the pandemic, the benefits of ODR—convenience, comfort, efficiency, and more equal power distribution—were gradually increasing its popularity. But the arrival of COVID-19 has caused this popularity to spike, transforming ODR from a convenient novelty into an absolute necessity for dispute resolution.

But ODR is subject to the limitations of its online platform. Dispute resolution methods may not function online the same way they do in person. With this difference of function in mind, I will assess the effectiveness of ODR by analyzing its ability to host an effective mediation. What

makes a mediation effective is subjective, to an extent, and varies with the circumstances and style of mediation practiced. With that said, an effective mediation has some base qualities: the parties can engage in dialogue, introduce topics and interests they would like to discuss, and come to a self-determined and mutual outcome (if they so desire). These qualities are contingent on the parties trusting the process and the mediator because, without trust, the parties will be unwilling to cooperate.

With this precondition of trust-building in mind, I will examine two significant challenges to online mediation. First, I will determine whether two ODR platforms—text "chat rooms" and videoconferencing, respectively—allow the mediator to build trust with participants. Second, I will consider whether these platforms are capable of hosting evaluative mediation and transformative mediation. Although my observations mostly rely on academic articles and studies, I supplement this research with several informal discussions with lawyers and mediators. This analysis will find that, though online text-based and videoconferencing platforms face obstacles in hosting mediation, knowledgeable and attentive mediators can overcome these obstacles.

I.   *Online dispute resolution*

The definition of Online Dispute Resolution (ODR) is broader than its name may first suggest. ODR is not merely the use of "online" internet technology to assist in dispute resolution, but the application of *any* communications technology in resolving a dispute. For example, Colin Rule describes ODR as "the use of information and communications technologies to help parties resolve their disputes."[1] And Gramatikov and Klaming describe it as "two or more parties communicating by electronic means in an attempt to reach an agreement."[2] This broad definition encapsulates the application of any number of dispute resolution processes upon any communication technology platform. Therefore, ODR includes negotiations conducted over email, mediation held on a "chat" platform, arbitration hosted by a videoconferencing platform, and so on.[3]

1.   *The two branches of ODR*

There are "two major branches" of ODR. Under the first branch, technology proposes solutions to the dispute. More specifically, the parties

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1.   Colin Rule, "Is ODR ADR? A Response to Carrie Menkel-Meadow" (2016) 3:1 Intl J of Online Dispute Resolution 8 at 8 [Rule, "ODR"].
2.   Martin Gramatikov & Laura Klaming, "Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation" (2012) 14:1 JL & Fam Stud 97 at 99.
3.   Sara Rudolph Cole & Kristen M Blankley, "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be" (2006) 38:1 U Tol L Rev 193 at 193.

use computers as a tool that suggests possible dispute resolutions. For example, imagine both the parties "logging into a website and entering bids they would accept to resolve a dispute," at which time the website calculates "an optimized resolution to the case that they as parties can accept as a solution."[4]

In the second branch of ODR, the parties use technology to "facilitate communication." When practicing ODR under this branch, the parties may meet on a platform that enables them to communicate via text, audio, video, or some combination. The technology does not suggest how to resolve the dispute but instead serves as a "virtual meeting space."[5] My discussion of ODR below refers only to this second branch.

2. *The benefits of ODR*

The benefits of ODR—for the disputants, mediators, and legal counsel— are considerable. First among these benefits is increased convenience. No matter where the participants are, ODR allows them to meet in a virtual location. ODR thus overcomes "the hindrance of needing personal attendance at a specific place and time."[6] When utilizing ODR, the participants can attend from their home or office via computer or smartphone.

The ability to participate in ODR from anywhere in the world creates a fringe benefit for the parties: comfort. Lawyers and mediators have anecdotally reported that ODR allows the disputants to be more comfortable for three reasons. First, when attending from their own home, participants are understandably more comfortable with the setting: they have easy access to refreshments and may even have family members or pets nearby.[7] Second, when there is a lull in the dispute resolution process, the disputant can do something else (perhaps, for example, go for a relaxing walk) until the lawyer calls them back to the virtual table.[8] And third, an ODR session may reduce the participants' perceived formality requirement, making them less apprehensive about participating.[9]

ODR can also hasten the resolution of conflicts, particularly for individuals who live in isolated communities or have busy schedules. As

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4.   Frank Fowlie, Colin Rule & David Bilinsky, "Online Dispute Resolution: The Future of ADR" (2013) 22:1 Can Arbitration & Mediation J 51 at 51.
5.   *Ibid.*
6.   Karolina Mania, "Online Dispute Resolution: The Future of Justice" (2015) 1:1 Intl Comparative Jurisprudence 76 at 79.
7.   Basia Solarz in discussion with author (12 November 2020). Ms. Solarz is a mediator at the Nova Scotia Health Authority in Halifax, NS; Owen Lewis in discussion with author (9 November 2020). Mr. Lewis is a lawyer at KMSC Law in Grande Prairie, AB.
8.   Lewis, *supra* note 7.
9.   Solarz, *supra* note 7.

Doug McQuiston and Sharon Sturges observe, small, isolated communities face two difficult challenges when organizing in person dispute resolutions: first, accessing professional mediators is difficult; and second, closing the great distance between the parties can be time-consuming and even dangerous, depending on the driving conditions.[10] I spoke with two lawyers operating out of Grande Prairie, Alberta, which is the most populous city in the province north of Edmonton. Grande Prairie is located about 458 kilometres from Edmonton and holds approximately 63,000 people. Both lawyers stated that ODR allowed them to schedule dispute resolution sessions (be they court-related or not) much more quickly than if they were to coordinate an in-person session.[11] This scheduling benefit may also apply to parties with busy schedules. Basia Solarz, a mediator for the Nova Scotia Health Authority, works almost exclusively with medical professionals who have busy and erratic schedules. Thus, Ms. Solarz often struggles to schedule timely in-person dispute resolution sessions. ODR, however, has allowed her to schedule dispute resolution sessions much more quickly.[12]

In dispute resolution and the law, time is money: lawyers and mediators bill by the hour. ODR can increase temporal and monetary efficiency in several ways. In ODR, lawyers and mediators do not have to travel and thus do not have to charge travel time to their clients.[13] Lawyers can also save time and money by virtually appearing in court. When lawyers physically attend court, they must travel to the courthouse, wait for court to begin, wait for their matter to be heard, represent their client, then return to their office. Though the lawyer may have only "worked" on the client's file for a half-hour, they may charge the client a full hour or more. But when attending virtual court, lawyers can "sign into" the courtroom and work on another file while waiting for the court to hear their case.[14] ODR, then, allows both lawyers and mediators to save themselves time and their clients' money. In doing so, ODR helps address the access to justice crisis in Canada and elsewhere: if dispute resolution is more affordable, it will be easier for citizens to access justice.[15]

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10.   Doug McQuiston & Sharon Sturges, "Online Dispute Resolution: A Digital Door to Justice or Pandora's Box? Part 1" (2020) *Colo Lawyer 30 at 31.*
11.   Lewis, *supra* note 7; Narnia King in discussion with author (9 November 2020). Ms. King is a lawyer at KMSC Law in Grande Prairie, AB.
12.   Solarz, *supra* note 7.
13.   Gramatikov & Klaming, *supra* note 2 at 99.
14.   Erik Compton in discussion with author (November 9 2020). Mr. Compton is a lawyer at KMSC Law in Edmonton, AB.
15.   Amy Schmitz, "ODR through the Lens of A2J: Who Benefits?" (23 October 2020) at 00h:08m:30s, online (video): *Vimeo* <https://vimeo.com/472683866> [https://perma.cc/2K62-UJGD].

Lastly, ODR may equalize the power distribution among the parties. In offline dispute resolution, wealthy parties can better afford the expenses associated with in-person meetings. But that does not matter in the world of ODR. So long as they can afford the required communication device and have access to reasonable internet speeds, any party can participate. Furthermore, when the participants meet in person, they often use "the office of either a party or that party's lawyer," and this location "could determine who is in the position of power." [16] ODR eliminates this "home court advantage" by providing a virtual and neutral meeting place.[17]

3.   *The rise of ODR*

a.   *Before COVID-19*
Because of its benefits and constant improvements in technology, ODR has gradually risen in prominence. In 2006, Katsh and Wing wrote that there was "an ongoing and growing need for ODR" to assist with resolving "disputes stemming from online activities."[18] Only ten years later, Katsh and Rule observed that ODR was "the fastest growing area of dispute resolution," being applied not only in online disputes but also in "offline and higher value disputes."[19] Rule attributes the growth in ODR to a decreased resistance to communication technology:

> Over the last decade, […] the resistance to computer-mediated communication has mellowed significantly. We now do things online we never would have considered only a few years ago. Cell phones have democratized access to the Internet, so now many people can afford to be connected all the time. The younger generation, in particular, is comfortable with online communication in a way their parents may never be.[20]

Indeed, Rule so believes in the continued growth of ODR that he has described it as "the future of ADR [Appropriate Dispute Resolution]," declaring that it "offers the strongest opportunity for ADR to expand and deliver on its fullest potential."[21]

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16.   Aashit Shah, "Using ADR to Resolve Online Disputes" (2004) 10:3 Rich JL & Tech 1 at para 24.
17.   *Ibid*; see also Rudolph Cole & Blankley, *supra* note 3 at 204.
18.   Ethan Katsh & Leah Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future" (2006) 38:1 U Tol L Rev 19 at 20.
19.   Ethan Katsh & Colin Rule, "What We Know and Need to Know about Online Dispute Resolution" (2016) 67:2 SCL Rev 329 at 329.
20.   Rule, "ODR" *supra* note 1 at 6.
21.   Rule, "ODR" *supra* note 1 at 11.

b.   *After COVID-19*

Rule's belief was not misplaced, though probably not for the reason he thought. The global COVID-19 pandemic has fundamentally changed how we feel about the world outside our homes, making ODR more relevant now than ever before. Soon after the onset of COVID-19 in North America, public health measures prohibited in-person meetings in some way or another. One year later, in-person dispute resolution is still unthinkable for many people and may continue to be even after the pandemic has "ended": the risk of being infected by the other participants is too high.

Our society has continued to operate in a (relatively) stable fashion largely because of communications technology.[22] Likewise, lawyers, mediators, and parties have been practicing all forms of dispute resolution from their homes and offices.[23] Before this pandemic, dispute resolution and the legal profession had not yet "been fundamentally challenged by technology." Without an "'enemy at the gates,' so to speak, there was no pressing need" to examine how we resolve disputes.[24] Now the enemy is here is forcing us to adapt our practices to the virtual sphere. But this enemy brings the potential of change: COVID-19 is a crisis, and "crises and disasters have continually set the stage for change, often for the better."[25]

COVID-19 may require that ODR be the presumed platform of dispute resolution at least until a vaccine is widely distributed. The question remains, however, whether increased usage of ODR is a positive change or just a necessary one. I have enumerated the benefits of ODR. But this paper's purpose is to determine if these pros outweigh any possible cons and thus justify the increasing and continued use of ODR after the pandemic's end. Before COVID-19, ODR had resolved a small minority of disputes, but it has never proven itself as the platform for resolving a majority of disputes.

II.   *Online mediation*

1.   *Introduction to online mediation*

To determine the future viability of ODR, I will consider the effectiveness of mediation (one of the most popular forms of dispute resolution) in the

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22.   See Zaheena Rashid, "Our lives after the coronavirus pandemic" (26 March 2020), online: *Al Jazeera* <https://www.aljazeera.com/news/2020/03/world-coronavirus-pandemic-200326055223989.html> [https://perma.cc/5F38-EMWZ].

23.   Lewis, *supra* note 7; Compton, *supra* note 14; Solarz, *supra* note 7; Ron Pizzo in discussion with author (9 November 2020). Mr. Pizzo is a lawyer and mediator at Pink Larkin in Halifax, NS.

24.   Noam Ebner, "Negotiation Is Changing" (2017) 2017:1 J Disp Resol 99 at 126.

25.   Peter C Baker, "We Can't Go Back to Normal: How will coronavirus change the world" (31 March 2020), online: *The Guardian* <https://www.theguardian.com/world/2020/mar/31/how-will-the-world-emerge-from-the-coronavirus-crisis> **[https://perma.cc/FS7T-RFCC].**

virtual sphere. More specifically, I will discuss the effectiveness of text-based mediation (TBM) and videoconferencing mediation (VCM), which both take place online. I will then discuss the ability of TBM and VCM to host evaluative mediation and transformative mediation, respectively.

Mediation is a negotiation between parties conducted "with the assistance of a third party known as the mediator." Traditionally, mediation occurs "in person with all affected parties 'at the table.'"[26] However, mediators can also assist parties in resolving their disputes online.

For any mediation to be successful in the real or virtual world there must be trust among participants:

> the participants […] must trust everyone enough to engage in productive communication and negotiation. They must trust both the mediator and the process enough to share personal, confidential information anticipating that the mediator will offer a third-party, neutral perspective.[27]

In other words, if the parties trust the mediator and the process, they will be more likely to cooperate and therefore help resolve the dispute at hand. And conversely, if the parties do not trust the mediator or process, there will be "low amounts of cooperation."[28] This lack of trust makes communication, interpersonal understanding, and resolution far less likely.

Moving mediation into the online sphere, however, has the potential to change its nature. Lawrence Lessig observes that the architecture of the world regulates our behaviour. For example, the architecture of a "highway [that] divides two neighborhoods limits the extent to which the neighborhoods integrate." Architecture also regulates behaviour in the online world. "The architecture of cyberspace, or its code, regulates behaviour in cyberspace" by functioning as a "set of constraints on how one can behave."[29] Therefore, online mediation is likely subject to a whole set of virtual constraints that are not relevant to in-person mediation. ODR commentators have espoused this opinion. Katsh and Rule write that "ODR is no more 'Online ADR' than the online versions of banking, education, or gaming are simply the offline versions of those systems moved online. Once a process moves online, its very nature begins to change."[30]

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26. Rudolph Cole & Blankley, *supra* note 3 at 194, 195.
27. Susan Nauss Exon & Soomi Lee, "Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution" (2019) 49:1 Stetson L Rev 109 at 120.
28. Susan Nauss Exon, "Maximizing Technology to Establish Trust in an Online, Non-Visual Mediation Setting" (2011) 33:1 U of La Verne L Rev 27 at 41, 42 [Nauss Exon, "Maximizing Technology"].
29. Lawrence Lessig, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113:2 Harv L Rev 501 at 507, 509.
30. Katsh & Rule, *supra* note 19 at 330.

Indeed, other commentators find the online environment so consequential to ODR that they refer to the technology platform "that provides communication channels for online participants" (eg, Zoom, email, etc) as the dispute's "fourth party." This "fourth party" can alter "the dynamics of virtual mediation" in meaningful ways.[31] For example, consider two VCM platforms. The first allows the parties and their counsel to meet in private virtual rooms where the mediator can visit them and discuss the mediation's progress, the second does not. In this simple difference, we can see the fourth party's influence. The first platform allows parties to periodically regroup and reconsider their position, strategy, and goals with counsel and the mediator. Contrastingly, it is much more difficult for the parties to have such conversations on the second platform. Admittedly, it is not impossible. The parties could leave the VCM, speak with each other and the mediator over another platform (such as a three-way phone call)—but it would be more stilted and disruptive to the mediation's flow.

Because moving mediation online could change its functionality, we cannot assume online mediation functions the same as in-person mediation or can build trust between the mediator and participants in the same way. Therefore, we must determine whether and how the online format alters the mediation process and its trust-building capability. We can accomplish this by analyzing the two forms of online mediation, TBM and VCM, and their ability to build trust between the mediator and the disputants.

2.   *Text-based mediation*

TBM is mediation conducted on an online, text-based platform. That platform may be email or an application specifically designed to host mediations. In TBM, the communications are written, and the participants can never see nor hear each other. Furthermore, the messages are often sent and received asynchronously—that is, "there is delay between responses, much like the exchange of written letters."[32]

TBM faces unique challenges in building trust. When face-to-face, parties use "body language and verbal interaction to help them build trust," but such indicators are not available in text. The parties cannot rely on any "non-verbal cues," including "facial expressions, bodily gestures, and tone of voice or language." [33] Some critics argue that the lack of non-verbal

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31.   Susan Nauss Exon, "Ethics and Online Dispute Resolution: From Evolution to Revolution" (2017) 32:4 Ohio St J Disp Resol 609 at 621.
32.   Andrea M Braeutigam, "What I Hear You Writing Is…Issues in ODR: Building Trust and Rapport in the Text-Based Environment" (2006) 38:1 U Tol L Rev 101at 105.
33.   Philippe Gilliéron, "From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy" (2008) 23:2 Ohio St J Disp Resol 301 at 316, 326.

cues makes miscommunication more likely and that miscommunication negatively affects "participants' ability to trust one another and the mediator."[34] Studies support this. For example, Susan Nauss Exon reports that studies have shown "email communication tends to inhibit trust,"[35] and Noam Ebner observes "that people using technology to communicate at a distance tend to experience low levels of interpersonal trust."[36]

Graham Ross identifies another obstacle to building trust regarding TBM's asynchronous nature. When mediation occurs in person, "all parties are together in the same building over a fixed period of time. No one goes absent. Their commitment to the process is clear."[37] Not so in TBM. Because TBM is designed around sending and waiting for messages, participants may step away from their computer during the TBM, delaying their response to a received message. As Ross observes, this delay "may give the wrong impression to the other party of a negative reaction to comments/proposals they have made or, worse, to the process." Ross believes, however, that a mediator can mitigate such effects by advising parties to "declare advanced notification of any absence […] so as much as possible everyone can maintain a sense of continuing and mutual involvement." Ross further advises that, if a participant has not warned of a delay but is still not responding, the mediator should call the party to sort out their absence.[38]

Though there may be challenges to building trust in TBM, Nauss Exon has developed "Six Building Blocks of Trust" that can help the mediator earn the parties' trust in the mediator and the TBM process.[39] These building blocks suggest that though it may be more difficult for the mediator to engender trust in TBM, it is not impossible. First, mediators can "establish online reputation and credibility" by, for example, crafting an approachable and accessible website.[40] Second, mediators can encourage trust by establishing an online "social presence," by building a website that contains "pictures, photographs, and descriptive language."[41] Third, the mediator can bolster their credibility by skillfully crafting their

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34.   Susan Nauss Exon, "Maximizing Technology," *supra* note 29 at 34.
35.   *Ibid* at 41.
36.   Noam Ebner, "Trust-Building in E-Negotiation" (2007) in L Brennan & V Johnsons (eds), *Computer-Mediated Relationships and Trust: Managerial and Organizational Effects* (Hershey, PA: Information Science Publishing) 139 at 144.
37.   Graham Ross, "Building Trust Online: How to Adapt Mediation and Negotiation Techniques to The Virtual Environment" (2010) [unpublished, archived at < https://perma.cc/Z7UV-WKUA>] 79 at 84.
38.   *Ibid.*
39.   Susan Nauss Exon, "Maximizing Technology," *supra* note 29 at 31, 32.
40.   *Ibid* at 43.
41.   *Ibid* at 46, 50.

written messages. Because the mediator cannot utilize any non-textual communications, these messages must be clear, precise, and easy to understand.[42] Fourth, the mediator should model "positive behaviour" for the disputants by displaying "optimism [and] excitement" for the process, increasing the chance that participants will "respond in kind."[43] Fifth, to earn the participants' trust, the mediator must display ethical competence and an understanding of the online forum.[44] Finally, the mediator should ensure the specific application hosting the mediation promotes a trustworthy environment. For example, the mediator may ensure that the platform does not allow for "leakage" of the participants' "private, confidential information."[45]

Research suggests TBM is a valid alternative to in-person mediation. Andrea Braeutigam argues that certain aspects of TBM aid "the mediator in building trust and rapport between the parties and with the mediator."[46] Braeutigam observes that to earn "the disputants' cooperation," the mediator must "establish rapport with the disputants and work to gain their trust."[47] While Braeutigam admits that relationship-building between participants is a natural process in an in-person environment, TBM also contains certain features that also promote trust-building.[48] Anne-Marie Hammond conducted a simulation of online mediation processes, during which real mediators helped participants resolve fictional disputes in a "chat room."[49] The mediators found that they could easily adapt the same skills used in face-to-face meetings in developing trust for themselves and between the parties.[50] Furthermore, "70 percent of the disputants said they were able to overcome the lack of nonverbal cues" and encountered no difficulties "expressing themselves in writing." Many even preferred communicating with written messages as opposed to speaking.[51] And perhaps most convincingly, 14 per cent of the disputants believed that face-to-face mediation would have been a better way of resolving their dispute.[52]

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42.   *Ibid* at 51-53.
43.   *Ibid* at 56-57.
44.   *Ibid* at 60-62.
45.   *Ibid* at 63-64.
46.   Braeutigam, *supra* note 32 at 102.
47.   *Ibid*.
48.   *Ibid* at 104, 113.
49.   Anne-Marie G Hammond, "How Do You Write Yes: A Study on the Effectiveness of Online Dispute Resolution" (2003) 20:3 Conflict Resolution Q 261 at 263-264.
50.   *Ibid* at 269.
51.   *Ibid* at 276.
52.   *Ibid* at 278.

Therefore, while it may initially appear that TBM does not engender trust due to its lack of face-to-face interaction and asynchronous nature, these assumptions are not reflected in the literature. Nauss Exon suggests that by adopting specific practices, mediators can earn trust in this environment with some specific practices, other commentators believe TBM has aspects that naturally engender trust among the disputants.[53] But most convincing is those studies in which disputants report that TBM is capable of supporting trust between the parties and mediator.[54]

3. *Videoconferencing mediation*

VCM has recently become accessible to the general public: "Real-time, conventional, 'everyone is there' mediations online, using simple, inexpensive web conferencing tools, are available to anyone with a laptop, tablet, or mobile phone and dependable broadband or cellular data availability."[55] According to McQuiston and Sturges, a reliable process has emerged for staging VCMs. Participants are sent an email invitation with a link directing them to the mediation room, where they will virtually meet the other participants. At this point, the mediator may conduct preliminary discussions, and afterwards may send the disputants into private "rooms" where they can speak privately with their counsel. The mediator can "virtually shuttle" between these rooms to discuss the mediation with each participant without the other participant present. Additionally, "the mediator may […] share documents through his or her screen."[56]

VCM, as a visual medium, has an inherent advantage over TBM in that it can host participants' facial expressions and changes in tone. That said, VCM's ability to communicate some non-verbal, visual signals does not necessarily mean it engenders the same amount of trust as face-to-face communication.[57] As Ebner and Thompson observe, while videoconferencing, the parties' communication is more limited than it would be if they were speak face-to-face.[58] We can separate these limitations into two categories. First, the only sensory information available is "sight and sound"; there is no "odour and touch." And second, the sight and sound available are constrained by technology, including "the definition

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53.   Nauss Exon, *supra* note 29; Braeutigam, *supra* note 32.
54.   Hammond, *supra* note 49.
55.   McQuiston & Sturges, *supra* note 10 at 31-32.
56.   *Ibid* at 32.
57.   Noam Ebner & Jeff Thompson, "Face Value—Non-Verbal Communication and Trust Development in Online Video-Based Mediation" (2014) 1:2 Intl J of Online Dispute Resolution 103 at 105.
58.   *Ibid* at 120.

of webcams, the sensitivity of microphones and the quality of Internet connection."[59]

Chief among the second category's limitations is videoconferencing's inability to establish eye contact between the participants and mediator, which is critical for establishing trustworthiness. Conversely, when someone avoids our gaze, we think of them as untrustworthy. However, when we videoconference, we must look at our webcams and thus cannot make eye contact with the other participants. In other words, if a mediator is looking at the screen, even "looking directly into the party's eyes, [the mediator] will appear to be looking elsewhere to the party" because webcams are "not located behind the screen," but somewhere else, usually above the screen.[60] Thus, the idea goes, the camera will capture the mediator looking below the camera, not directly into the camera, and therefore not into the "eyes" of the disputants.[61]

Though the above are legitimate concerns, VCM appears to be capable of building trust. Exon and Lee conducted a study to determine "the extent to which parties can trust a mediator" when communicating via "telepresence" technology, which is videoconferencing designed to approximate a face-to-face setting as much as possible.[62] The study found that the participants' "mode of communication" had "no impact" on whether they trusted the mediator. In other words, the "participants who communicated with the mediator through telepresence and face-to-face [were] equally likely to trust the mediator."[63]

The remaining question, however, is *why* VCM (at least, in the form of telepresence) can engender the same amount of trust as face-to-face mediation. There appears to be a dearth of research on this topic. However, I suggest that the reason is that the two categories of limitations are not as considerable as may first appear. The first limitation of not having "odour and touch" available is not a significant obstacle to communication. When parties resolve disputes in person, they rarely touch each other or the mediator; at most, they may shake hands or embrace at the session's beginning and end.[64] In addition, while I struggle to think when odours may assist a mediation, I can think of scenarios when they may interrupt

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59. *Ibid.*

60. Ebner & Thompson, *supra* note 57 at 121.

61. *Ibid.*

62. Nauss Exon & Lee, *supra* note 27 at 111, 112.

63. *Ibid* at 136.

64. Admittedly, this will vary from culture to culture. For some cultures, holding hands, hugging, and other forms of physical touching may be integral parts of the process. But I would contend that, in general, the absence of touch is a barrier ODR is capable of surmounting.

one. Consider, for example, how disruptive to mediation it may be if a participant smells like marijuana or alcohol.[65]

The second category, which includes the audio and visual limitations emerging from using a webcam and microphone, may no longer be significant. Even low-quality microphones allow for intelligible communication. In this era of ubiquitous video calls, etiquette regarding eye contact in videoconferencing may be evolving to the point that genuine "eye contact" does not necessarily engender trust. People are now generally aware that when someone is "looking" directly at you during a video call, they are staring straight into their webcam lens and cannot see you at all. Conversely, by trying to establish "eye contact" by looking into the camera, you are prevented from gauged from reading the reactions of the other participants.

People do not use videoconferencing this way. Instead, a new etiquette has emerged, where all participants look at their screens, focusing on the person they are speaking to or the speaker. I suggest that this eyes-to-screen approach is a new form of etiquette that is the videoconferencing equivalent of real-life eye contact. When people interact in person (in the Western European context), eye contact shows we are engaged in the conversation and are listening to the speaker. In videoconferencing, it may be that having our eyes directed to the screen and reacting to the proceedings with body language—for example, by nodding your head and leaning in—is the new way of showing such respect and engagement. The more widespread videoconferencing becomes, the more these new norms will become inherent within our distanced communication.

Despite its limitations, VCM seems able to engender trust between the mediator and the disputants. Academics have criticized videoconferencing's ability to engender such trust due to its format limitations.[66] But research and studies have not borne these criticisms out; rather, it suggests they may be wrong them.[67] Though there is no definitive research on why videoconferencing can engender trust, I suspect it is because the limitations are no limitations at all.

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65.   For a discussion of the (limited) ability of odor to communicate aspects of our personality, see Agnieszka Sorokowska, Piotr Sorokowski & Andrzej Szmajke, "Does Personality Smell? Accuracy of Personality Assessments Based on Body Odour" (2012) 26:5 Eur J Pers 496. And for an explanation of smell's (restricted) ability to communicate our emotional states, see Denise Chen & Jeannette Haviland-Jones, "Human Olfactory Communication of Emotion" (2001) 91:3 Perceptual and Motor Skills 771.

66.   Ebner & Thompson, *supra* note 57 at 105.

67.   Nauss Exon & Lee, *supra* note 27 at 136.

III. *Evaluative and transformative mediation in text-based mediation and*
   videoconference mediation

Having determined that it is possible to engender trust in TBM and VCM,
it remains to be seen whether these text-based and videoconference
platforms can effectively host different mediation styles. Mediation models
lie "on a continuum from the least interventionist to the most." [68] To cover
the broadest possible application of online mediation and thus capture a
more complete picture of ODR's effectiveness, we will discuss the use
of evaluative mediation (the most interventionist) and transformative
mediation (the least interventionist) in TBM and VCM.

Evaluative mediation and transformative mediation have entirely
different concepts of what makes a mediation effective. The underlying
theory of evaluative mediation is that the mediator should do everything
possible to resolve the participants' conflict.[69] This theory is reflected
by the evaluative mediator, who seeks settlement above all. To achieve
a settlement, mediators will advise the parties about the dispute's likely
outcome at trial and encourage the parties to accept settlement proposals
she deems reasonable. Resultantly, the parties attempt to convince the
mediator of their arguments' strength; if one party does so successfully,
the mediator may pressure the other party to accept their proposal.

The fundamental premise of transformative mediation is that conflict
causes parties to feel weak and self-absorbed.[70] Resultantly, and in direct
contrast with evaluative mediation, the transformative mediator's goal is
not to resolve the participants' conflict but to support the parties as they
transform weakness into strength and self-absorption into responsiveness.
The transformative mediator may achieve this goal by providing each
participant with the opportunity to consider the other's perspectives and
by allowing the participants to control the mediation's content, pace, and
conclusion.

1. *Evaluative mediation*

As stated above, evaluative mediation is the most interventionist style
of mediation. Evaluative mediators seek to "help the parties understand
the strengths and weaknesses of their positions and the likely outcome of
litigation."[71] In pursuit of this task, an evaluative mediator "gives advice,

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68.   Steven C Etcheson, "Transformative Mediation: A New Current in the Mainstream" (1999) 27:2
Policy Studies J 393 at 393.
69.   Leonard L Riskin, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid
for the Perplexed" (1996) 1 Harv Negot L Rev 7 at 26.
70.   Ian Goodhart, Tom Fisher & Lawrie Moloney, "Transformative Mediation: Assumptions and
Practice" (2005) 11:2 J of Family Studies 317 at 318, 319.
71.   Riskin, *supra* note 69 at 26.; see also Kimberlee K Kovach & Lela P Love, "'Evaluative'

makes assessments, [and] states opinions" as to the "likely court outcome" of the dispute.[72] Furthermore, evaluative mediators are highly interested in achieving a settlement of the dispute. To that end, they may urge parties to settle or accept a certain settlement proposal or range.[73] By discussing the strengths of each party's case and proposing possible resolutions of the dispute, evaluative mediators (incidentally) encourage the parties to act as adversaries. Thus, the parties may use confrontational and aggressive tactics to convince the mediator of their position.[74]

a. *Evaluative mediation in text-based mediation*

TBM may be the ideal platform for evaluative mediation because it tends to deemphasize a conflict's emotion and emphasize its resolution. As observed above, the evaluative mediator is primarily concerned with achieving a resolution of the dispute. Several researchers have found that, while participating in TBM, parties focus less on the emotional conflict and more on the logistics of a resolution. While studying divorce cases resolved via TBM, Gramatikov and Klaming found that the text-based medium forced couples going through a divorce to resolve the important issues and not be distracted by the emotional nature of the relationship.[75] Likewise, Braeutigam's research found that TBM's "are more businesslike, impersonal, and emotionally sparse."[76] More specifically, she found that whereas in-person (or videoconference) mediation can lead to "sarcastic, angry, or insulting" comments "in heated moments," TBM can encourage more thoughtful responses.[77] Though it is easy to say an ill-considered comment in an angry moment, it is more difficult to type out and send such a message. Additionally, because of TBM's asynchronous nature, disputants do not have to respond immediately to a comment they find infuriating. Instead, they can "think carefully about what they want to say, to formulate responses privately, slowly, and non-defensively, accepting some arguments and proposals and rejecting others."[78] This process of consideration can lead to "more fully informed and lasting agreements."[79] Furthermore, in asynchronous TBM, mediators often review sent messages

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Mediation Is An Oxymoron" (1996) 14:3 CPR Institute for Dispute Resolution 31 at 31.

72. Lela P Love, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24:4 Florida State ULR 31 937 at 938.

73. Riskin, *supra* note 69 at 31.

74. Kovach & Love, *supra* note 71 at 31.

75. Gramatikov & Klaming, *supra* note 2 at 100.

76. Braeutigam, *supra* note 32 at 109.

77. *Ibid* at 114.

78. Robert J Condlin, "Online Dispute Resolution: Stinky, Repugnant, or Drab" (2017) 18:3 Cardozo J of Conflict Resolution 717 at 739./.

79. *Ibid* at 740.

before allowing the other party to review them; thus, they can prevent angry, unproductive messages from being received. By filtering out the emotion of a dispute, TBM may allow disputants to "focus on the content of their communications rather than emotional cues that are potentially disruptive to the process," which leads to "clearer, more focused exchanges."[80]

b. *Evaluative mediation in videoconference mediation*

VCM may also serve as a good host for evaluative mediation. As observed above, VCM is as close an approximation of in-person mediation as current technology allows. Logic suggests, then, that VCM would host evaluative mediation as well, or nearly as well, as in-person mediation. Consider, for example, the practice of disputants and their counsel meeting privately in separate rooms during breaks in the evaluative mediation process. These private meetings are opportunities for the participants to discuss and refine their arguments with counsel, thus returning to the evaluative mediator with better reasons for why the mediator should suggest a resolution in their favour. Videoconferencing technology has approximated private meetings through the "break out room" tool, which allows the mediator to put the disputants (and their counsel, if present) into separate virtual rooms.

VCM may also have an advantage over in-person evaluative mediation in its ability to reduce the animosity between the parties. Different mediators and lawyers have anecdotally observed that when disputants meet in-person, it "raises the temperature" in the room, whereas when they meet over videoconference, it slightly reduces the animosity. And when the animosity is diminished, it is easier for people to listen to each other and work together.[81]

2. *Transformative mediation*

As observed above, the theory of transformative mediation is entirely different from that of evaluative mediation. According to the transformative view, "conflict is primarily a crisis in human interaction" that affects the parties in two ways: feelings of weakness and self-absorption.[82] The transformative mediator seeks to reverse these effects by supporting the parties as they move "from weakness to strength and from self-absorption to responsiveness."[83] The movement "from weakness to strength is called *empowerment*," and the movement "from self-absorption to responsiveness

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80. Braeutigam, *supra* note 32 at 114.
81. Pizzo, supra note 23; King, *supra* note 11; Solarz, *supra* note 7.
82. Goodhart, Fisher & Moloney, *supra* note 70 at 318.
83. *Ibid.*

is called *recognition*."[84] To help the disputants become empowered, the mediator "support[s] the parties' own process of making clear and deliberate decisions" by allowing the parties to control the session's pace, content, and conclusion. [85] In doing so, transformative mediators "orient the parties to their *own* agency—that is, their own potential ability to exert power or achieve certain goals in the mediation session."[86] And to achieve mutual recognition, the mediator supports the parties as they face the choice "of how much consideration to give the perspective, views, or experiences of the other."[87]

Therefore, the transformative mediator's goal is *not* to lead the parties through a discussion nor to achieve a settlement. Whereas evaluative mediators tightly control the mediation in an attempt to reach a settlement, transformative mediators believe the parties are "capable of devising whatever format they need for discussing their concerns" and that the parties can set their own goals for the process, which may or may not include settlement.[88] Although transformative mediators do not ignore the importance of resolving disputes, they believe the parties will "find acceptable terms of resolution for themselves" if the mediators support them in achieving empowerment and recognition.[89]

a.   *Transformative mediation in text-based mediation*
TBM may be a functional platform for hosting the tools of transformative mediation. Although transformative mediation is about the parties guiding the discussion themselves, it is not as simple as the mediator holding themselves back from directing the parties on "what to do" in the mediation session. Instead, transformative mediators utilize specific tools to aid the disputants in achieving empowerment and recognition. These tools are called "supportive responses."[90]

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84.   *Ibid* at 319.
85.   Joseph P Folger & Robert A Baruch Bush, "Transformative mediation and third party intervention: Ten hallmarks of a transformative approach to practice" (1996) 13:4 Mediation Q 263 at 264, 268.
86.   Dorothy J Della Noce, James R Antes & Judith A Saul, "Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model" (2004) 19:3 Ohio St J Disp Resol 1005 at 1026.
87.   Folger & Baruch Bush, *supra* note 85 at 264.
88.   Donna Turner Hudson & James R Antes, "Transformative Mediation at Work: A Case Study from the REDRESS Program" (2001) 3:2 J of Alternative Dispute Resolution in Employment 41 at 45; Solarz, *supra* note 7.
89.   Robert A Baruch Bush & Sally Ganong Pope, "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation" (2002) 3:1 Pepperdine Dispute Resolution LJ 67 at 84.
90.   *Ibid* at 88.

TBM has limited capability to host one of the most essential supportive responses for transformative mediators: close listening, which involves the transformative mediator "being fully present to the person speaking," paying including paying attention to physical and verbal cues.[91] In TBM, however, the transformative mediator will have no access to the parties' body language. That said, the parties will not be attempting to communicate via body language as they know nobody can see them. The TBM format may advance the mediator's ability to "closely listen" (or, rather, closely read) for two reasons. First, the mediator can read and reread the parties' statements to fully understand their meaning. And second, as observed above, in TBM, the disputants often put more care into their written messages than into their spoken statements, so extracting the meaning from the messages should be easier.

The transformative mediator's second "supportive response" is called "reflection," which may be particularly well-suited to TBM.[92] Simply put, the mediator "reflects" what parties are saying, including the language used by the party.[93] By reflecting the participants' language back to them, the mediator invites the participants "to choose to expand on the […] statement, to explain it further, or to rethink it and amend it to reduce hostility or exaggeration."[94] In TBM, reflection may be easier for transformative mediators because, as noted above, the mediator has access to an archive of the parties' messages and thus can more accurately reflect the disputants' statements.

TBM is a uniquely useful format for another tool used by transformative mediators, "summarizing."[95] When transformative mediators summarize, they "provide the parties with a review of what they have been talking about and what each has been saying," thus "help[ing] the parties remember what they were discussing and make more informed choices about where they want to go."[96] This recap may serve to clarify the main points of disagreement between the parties.[97] Transformative mediators will summarize when "the parties come to a natural break" in the conversation, as it allows them to determine what still needs to be resolved (if a resolution is their goal) and figure out "where to go next."[98] In TBM, the mediator has access to a written record of the conversation. Therefore,

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91. *Ibid.*
92. *Ibid.*
93. *Ibid.*
94. *Ibid* at 89.
95. Goodhart, Fisher & Moloney, *supra* note 70 at 320.
96. *Ibid.*
97. Goodhart, Fisher & Moloney, *supra* note 70 at 320.
98. Baruch Bush & Pope, *supra* note 89 at 89.

she can more accurately summarize the parties' topics of discussion and respective positions, which may allow the parties to determine a way forward for their dispute more effectively.

The great weakness of TBM in hosting transformative mediation, however, is the emotional component. Providing parties with the space to express their emotions is considered "an integral part of the conflict process."[99] Emotional expression is vital in transformative mediation, especially if the relationship between the parties will continue. Consider, for example, Janice Fleischer's report on the pilot program she directed, in which transformative mediators worked with self-represented divorce litigants in Florida. Fleischer's preliminary findings suggest that in the majority of cases, transformative mediators were able to reach a full settlement[100] And consider the United States Postal Service's "Resolve Employment Disputes, Reach Equitable Solutions Swiftly" (REDRESS) program, which has had great success in resolving disputes between employees and supervisors.[101] In the divorce context, the relationship will continue in some form, especially if children are involved; and in the employment relationship, the parties will undoubtedly continue to interact. If the emotional issues were not addressed or resolved in these transformative mediations, they would likely flare up, putting the parties at odds again. Therefore, transformative mediators "expect and allow the parties to express emotions."[102] Such expression is difficult in TBM because the lack of spontaneity dilutes emotion.

The reduced emotionality of TBM is an obstacle to hosting transformative mediation, but not an insurmountable one. When asked about disputants' tendency to overly edit themselves in TBM, Basia Solarz, a transformative mediator in Halifax, did not find this self-editing problematic so long as the parties were saying what they honestly thought. Here, Solarz reframes the issue in an interesting way: the problem is not that participants are untruthful in TBM, but that they may leave out emotional content they want to include. The transformative mediator may counteract this problem, then, by advising the parties to talk about everything they wish to discuss and not to leave out issues simply because they are emotional.

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99.   Folger & Baruch Bush, *supra* note 85 at 271.

100. Janice M Fleischer, "Directing and Administrating a Mediation Program: The Transformative Approach" (1996) 13:4 Mediation Q 295 at 296-7, 303.

101. Turner Hudson & Antes, *supra* note 86 at 41, 46; Yuseok Moon & Lisa Bingham, "Transformative Mediation at Work: Employee and Supervisor Perceptions on USPS REDRESS Program" (2007) 11:2 Intl Rev of Pub Admin 43 at 48, 49.

102. Folger & Baruch Bush, *supra* note 85 at 271.

b.   *Transformative mediation in videoconferencing mediation*

VCM would serve as an effective host for transformative mediation. As previously stated, VCM seems to be as close an approximation of in-person mediation as we can currently achieve. Accordingly, it follows that VCM can effectively host the tools of transformative mediation. The transformative mediator on VCM may perform "close listening" more effectively than in TBM because they have access to the participants' verbal and body language, though somewhat limited. They can also "reflect" the party's statements "using words close to the party's own language"[103] as much as if they were in-person, provided the parties and mediators have internet connections that do not lead to stuttering and uncommunicated statements. And lastly, transformative mediators in VCM can "summarize" the parties' positions when appropriate, subject to the same internet restrictions just mentioned.[104]

VCM does not have the same issue as TBM of removing the emotion from transformative mediations. As noted above, VCM may somewhat reduce the parties' animosity, but there are no anecdotal reports of it removing emotion entirely. Indeed, by partially reducing the disputants' animosity, VCM may make it easier for the disputants in transformative mediation to engage in a productive discussion regarding their emotions. But there has not yet been research on this topic, so it is difficult to determine if that possibility ever materializes.

IV. *Conclusion—The way forward*

Once considered the future of dispute resolution, ODR has now become the primary method of dispute resolution thanks to the COVID-19 pandemic. Admittedly, ODR is subject to the sensory limits of its online platform: in TBM, the parties cannot see nor hear each other, and in VCM, the parties' ability to see and hear each other is somewhat limited. However, it appears that these limitations can be overcome and TBM and VCM are perfectly capable of building trust between the mediator and disputants. While TBM may initially appear to contain significant limitations in building trust due its lack of visual and verbal cues, TBM may engender trust in its own particular way by providing the time for carefully constructed messages and self reflection. At the very least, with the proper preparation and instruction, mediators can build trust in TBM. Likewise, despite that it does not equally replace in-person mediation, VCM can build trust

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103. Baruch Bush & Pope, *supra* note 89 at 88.
104. *Ibid* at 89.

between the participants by allowing participants to see one another and read body language.

Our analysis also suggests TBM and VCM are both capable of hosting evaluative and transformative mediation. Since TBM deemphasizes the emotional nature of conflicts, it may be the perfect host for evaluative mediation. And because VCM is a close approximation of in-person mediation and may reduce the parties' animosity, it also seems capable of hosting evaluative mediation. Both TBM and VCM are also capable of hosting the tools of transformative mediation. VCM seems perfectly capable of hosting discussions of the emotional issues sometimes found in transformative mediation. While TBM faces some challenges in hosting such discussions, a transformative mediator may overcome these challenges by advising the participants to discuss emotional issues if they so desire, rather than editing them out.

Though COVID-19 has thrust ODR into the dispute resolution spotlight, it is deserving of that position. ODR stands to benefit all individuals who participate in dispute resolution, from the participants and their lawyers to mediators and arbitrators. Furthermore, analysis suggests that ODR is perfectly capable of hosting different forms of dispute resolution, though dispute resolution professionals may have to make some adjustments to their procedures. Accordingly, when asked, lawyers and mediators alike have expressed their willingness to use ODR in the future, even beyond the COVID-19 pandemic.[105] ODR is not a passing solution to a passing problem. Instead, it is a new method all dispute resolution professionals should adopt into their practice.

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105. Solarz, *supra* note 7; Lewis, *supra* note 7; King, *supra* note 11; Pizzo, *supra* note 23; Compton, *supra* note 14.

Secondary Sources

Baruch Bush, Robert A & Sally Ganong Pope, "Changing the Quality of Conflict Interaction: The Principles and Practice of Transformative Mediation" (2002) 3:1 Pepperdine Dispute Resolution LJ 67.

Baker, Peter C, "We Can't Go Back to Normal: How will coronavirus change the world" (31 March 2020), online: *The Guardian* <https://www.theguardian.com/world/2020/mar/31/how-will-the-world-emerge-from-the-coronavirus-crisis> [https://perma.cc/FS7T-RFCC].

Braeutigam, Andrea M, "What I Hear You Writing Is…Issues in ODR: Building Trust and Rapport in the Text-Based Environment" (2006) 38:1 U Tol L Rev 101.

Chen, Denise & Jeannette Haviland-Jones, "Human Olfactory Communication of Emotion" (2001) 91:3 Perceptual and Motor Skills 771.

Compton, Erik, in discussion with author (November 9 2020). Mr. Compton is a lawyer at KMSC Law in Edmonton, AB.

Condlin, Robert J, "Online Dispute Resolution: Stinky, Repugnant, or Drab" (2017) 18:3 Cardozo J of Conflict Resolution 717.

Della Noce, Dorothy J, James R Antes & Judith A Saul, "Identifying Practice Competence in Transformative Mediators: An Interactive Rating Scale Assessment Model" (2004) 19:3 Ohio St J Disp Resol 1005.

Ebner, Noam, "Negotiation Is Changing" (2017) 2017:1 J Disp Resol 99.

———, "Trust-Building in E-Negotiation" (2007) in L Brennan & V Johnsons (eds), *Computer-Mediated Relationships and Trust: Managerial and Organizational Effects* (Hershey, PA: Information Science Publishing) 139.

Ebner, Noam & Jeff Thompson, "Face Value – Non-Verbal Communication and Trust Development in Online Video-Based Mediation" (2014) 1:2 Intl J of Online Dispute Resolution 103.

Etcheson, Steven C, "Transformative Mediation: A New Current in the Mainstream" (1999) 27:2 Policy Studies J 393.

Folger, Joseph P & Robert A Baruch Bush, "Transformative mediation and third party intervention: Ten hallmarks of a transformative approach to practice" (1996) 13:4 Mediation Q 263.

Fowlie, Frank, Colin Rule & David Bilinsky, "Online Dispute Resolution: The Future of ADR" (2013) 22:1 Can Arbitration & Mediation Journal 51.

Goodhart, Ian, Tom Fisher & Lawrie Moloney, "Transformative Mediation: Assumptions and Practice" (2005) 11:2 J of Family Studies 317.

Gramatikov, Martin & Laura Klaming, "Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation" (2012) 14:1 JL & Fam Stud 97.

Gilliéron, Philippe, "From Face-to-Face to Screen-to-Screen: Real Hope or True Fallacy" (2008) 23:2 Ohio St J Disp Resol 301.

Hammond, Anne-Marie G, "How Do You Write Yes: A Study on the Effectiveness of Online Dispute Resolution" (2003) 20:3 Conflict Resolution Q 261.

Katsh, Ethan & Colin Rule, "What We Know and Need to Know about Online Dispute Resolution" (2016) 67:2 SCL Rev 329.

Katsh, Ethan & Leah Wing, "Ten Years of Online Dispute Resolution (ODR): Looking at the Past and Constructing the Future" (2006) 38:1 U Tol L Rev 19.

King, Narnia, in discussion with author (9 November 2020). Ms. King is a lawyer at KMSC Law in Grande Prairie, AB.

Kovach, Kimberlee K & Lela P Love, "Evaluative' Mediation Is An Oxymoron" (1996) 14:3 CPR Institute for Dispute Resolution 31.

Lessig, Lawrence, "The Law of the Horse: What Cyberlaw Might Teach" (1999) 113:2 Harv L Rev 501.

Lewis, Owen, in discussion with author (9 November 2020). Mr. Lewis is a lawyer at KMSC Law in Grande Prairie, AB.

Love, Lela P, "The Top Ten Reasons Why Mediators Should Not Evaluate" (1997) 24:4 Fla St UL Rev 937.

Mania, Karolina, "Online Dispute Resolution: The Future of Justice" (2015) 1:1 Intl Comparative Jurisprudence 76.

McQuiston, Doug & Sharon Sturges, "Online Dispute Resolution: A Digital Door to Justice or Pandora's Box? Part 1" (2020) Colo Lawyer 30.

Moon, Yuseok & Lisa Bingham, "Transformative Mediation at Work: Employee and Supervisor Perceptions on USPS REDRESS Program" (2007) 11:2 Intl Rev of Pub Admin 43.

Nauss Exon, Susan, "Ethics and Online Dispute Resolution: From Evolution to Revolution" (2017) 32:4 Ohio St J Disp Resol 609.

———, "Maximizing Technology to Establish Trust in an Online, Non-Visual Mediation Setting" (2011) 33:1 U of La Verne L Rev 27.

Nauss Exon, Susan & Soomi Lee, "Building Trust Online: The Realities of Telepresence for Mediators Engaged in Online Dispute Resolution" (2019) 49:1 Stetson L Rev 109.

Pizzo, Ron, in discussion with author (9 November 2020). Mr. Pizzo is a lawyer and mediator at Pink Larkin in Halifax, NS.

Rashid, Zaheena, "Our lives after the coronavirus pandemic" (26 March 2020), online: *Al Jazeera* <https://www.aljazeera.com/news/2020/03/world-coronavirus-pandemic-200326055223989.html> [https://perma.cc/5F38-EMWZ].

Riskin, Leonard L, "Understanding Mediators' Orientations, Strategies, and Techniques: A Grid for the Perplexed" (1996) 1 Harv Negot L Rev 7.
Ross, Graham, "Building Trust Online: How to Adapt Mediation and Negotiation Techniques to The Virtual Environment" (2010) [unpublished, archived at < https://perma.cc/Z7UV-WKUA>] 79.

Roy, Arundhati, "The Pandemic is a Portal" (3 April 2020), online: Financial Times <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca> [https://perma.cc/Q33G-5L2E].

Rudolph Cole, Sara & Kristen M Blankley, "Online Mediation: Where We Have Been, Where We Are Now, and Where We Should Be" (2006) 38:1 U Tol L Rev 193.

Rule, Colin, "Is ODR ADR? A Response to Carrie Menkel-Meadow" (2016) 3:1 Intl J of Online Dispute Resolution 8.

———, "Technology and the Future of Dispute Resolution" (2015) 21:2 Dispute Resolution Magazine 4.

Schmitz, Amy, "ODR through the Lens of A2J: Who Benefits?" (23 October 2020) online (video): *Vimeo* <https://vimeo.com/472683866> [https://perma.cc/2K62-UJGD].

Shah, Aashit, "Using ADR to Resolve Online Disputes" (2004) 10:3 Rich JL & Tech 1.

Solarz, Basia, in discussion with author (12 November 2020). Ms. Solarz is a mediator at the Nova Scotia Health Authority.

Sorokowksa, Agnieszka Sorokowski, Piotr & Andrzej Szmajke, "Does Personality Smell? Accuracy of Personality Assessments Based on Body Odour" (2012) 26:5 Eur J Pers 496.

Turner Hudson, Donna & James R Antes, "Transformative Mediation at Work: A Case Study from the REDRESS Program" (2001) 3:2 J of Alternative Dispute Resolution in Employment 41.