**RETHINKING THE LIMITATIONS OF ONLINE MEDIATION**

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*“I'm concerned about the internal struggles that are developing within the mediation community about what mediation is and what it is not… We need to be more open and eclectic and recognize that there are many different kinds of mediation that are appropriate in different settings.”*

- Frank E.A. Sander[[1]](#footnote-1)

# Introduction

To date, online mediation has been widely adopted in resolving a variety type of disputes, in particular, monetary disputes. For example, e-commerce websites like TaoBao (the Chinese counterpart of eBay) offers an online platform for consumers to resolve their disputes with suppliers in relation to online purchases. The mobile phone platform, called Public Adjudication, accepts disputes between consumers and suppliers and allows other users to vote for either side based on the parties’ arguments and evidence. Other websites from the United States like Cybersettle, SettlementOnline, and ClickNsettle[[2]](#footnote-2) allow dispute parties to exchange settlement offers, which the software will compare and let the parties know if there is a ZOPA (i.e., zone of potential agreement). Ebay, Paypal, and Square Trade are also considered leaders in the area of online dispute resolution.[[3]](#footnote-3)

Despite its obvious advantages like convenience, scholars and practitioners have argued that the impersonal and asynchronous natures of online mediation have restricted its use to resolving only limited types of disputes, such as commercial disputes. It seems to be commonly accepted that a great deal of information (e.g., psychological and emotional signals) will be lost in online mediation,[[4]](#footnote-4) thereby limiting online mediation’s capability to resolve non-commercial disputes.[[5]](#footnote-5) In particular, it has been argued that “[e]lectronic communication is no substitute for the ability of face-to-face conversations to foster important process values of mediation”[[6]](#footnote-6) because “cyberspace is not a ‘mirror image’ of the physical world.”[[7]](#footnote-7) As a result, certain mediation techniques like venting and expressions reading, which are are considered indispensable or critical for mediation, seem difficult to implement in an impersonal setting.[[8]](#footnote-8)

Typical responses from online mediation proponents focus on the point that the limitations can be eliminated to a certain extent by the development of technology (e.g., video conferencing),[[9]](#footnote-9) without digging much into the unique features of the online mediation,[[10]](#footnote-10) e.g., text-based and asynchrony, and analyzing how they may further the goals of mediation.[[11]](#footnote-11) This article encourages a rethinking of the unique features and limitations of online mediation: Can online mediation only be able to efficiently resolve people’s non-monetary disputes when cyberspace is a “mirror image” of the physical world?[[12]](#footnote-12) Specifically, does mediation have to be conducted in a personal and synchronous environment so that techniques like venting or expressions reading can work? Compared with prior discussions that simply list pros and cons for online mediation,[[13]](#footnote-13) this article approaches these issues by conducting a more structured and updated analysis. The article digs into the fundamental goals of mediation, and takes into account recent studies on human communications, psychology, and technological developments such as artificial intelligence (“AI”), data analytics, and emotion recognition.

Part II reviews the fundamental goals and principles of mediation. Part III explores the unique features of online mediation and discusses how they may further the goals of mediation without violating the principles. Part IV summarizes the article with emphasis on its position and purpose.

In sum, this article maintains that online mediation, by its unique features, may result in at least the same level of the efficiency with conventional offline mediation. Specifically, the text-based and asynchronous natures of online mediation, together with its easy access to technology, help mediation participants better process information, handle emotions, manage processes, and generate settlement options.

# Overview of the Goals and Principles of Mediation

## Goals of Mediation

To discuss the functions and limitations of online mediation, we must understand what online mediation is expected to achieve. The goals of mediation have been considered to include the followings:

* Encourage the exchange of information,
* Provide new information,
* Help the parties to understand each other’s views,
* Let them know that their concerns are understood,
* Promote a productive level of emotional expression,
* Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client),
* Help negotiators realistically assess alternatives to settlement,
* Encourage flexibility,
* Shift the focus from the past to the future,
* Stimulate the parties to suggest creative settlements,
* Learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other, and
* Invent solutions that meet the fundamental interests of all parties.[[14]](#footnote-14)

The list is hardly an exclusive one. Indeed, the goals of a mediation depend on the dispute settings, the parties’ interests, resources, objectives, as well as mediators’ understandings, preferences, skills, and styles (e.g., evaluative,[[15]](#footnote-15) facilitative,[[16]](#footnote-16) transformative,[[17]](#footnote-17) and narrative[[18]](#footnote-18)). For the purpose of a structured analysis, this article categorizes the above-mentioned goals as follows:

|  |  |
| --- | --- |
| **Information** | * Encourage the exchange of information * Provide new information * Help the parties to understand each other’s views * Learn (often in separate sessions with each party) about those interests the parties are reluctant to disclose to each other |
| **Emotion** | * Promote a productive level of emotional expression |
| **Process** | * Encourage flexibility |
| **Settlement** | * Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client) * Help negotiators realistically assess alternatives to settlement * Stimulate the parties to suggest creative settlements * Invent solutions that meet the fundamental interests of all parties * Shift the focus from the past to the future |

The matrix categorizes the goals of mediation into four dimensions: information, emotion, process, and settlement.[[19]](#footnote-19) Under this framework, the article will examine whether the features of online mediation and the goals match each other in the corresponding dimensions. It appears that the alleged limitations of online mediation mainly concern the information and emotion dimensions. Therefore, the discussions in Part III will begin with these two goals. Considering that the four dimensions are intricately interwoven and interrelated (e.g., emotion can also be regarded as a kind of information), the article will also discuss the other two dimensions (i.e., process and settlement) for the purpose of a comprehensive analysis.

## Principles of Mediation Ethics

The principles for mediation help us examine if a mediation approach, e.g., online mediation, is appropriate and advisable. It is believed that there are ten commonly accepted principles:

* Avoidance of conflict of interest;
* Knowledge of competence/professional role boundaries;
* Impartiality;
* Voluntariness;
* Confidentiality;
* Do no harm;
* Self-determination;
* Informed consent;
* Duties to third parties; and
* Honesty.[[20]](#footnote-20)

In addition, requirements such as safety (i.e., conducting the mediation in physically safe environment where parties can “can freely talk and can trust the integrity of the mediator and the process”[[21]](#footnote-21)), quality (i.e., avoiding judgments and assumptions that negatively affect the mediation process), being future-oriented[[22]](#footnote-22) are also regarded as the principles of mediation. With these principles in mind, this article will examine the extent to which online mediation may further the goals of mediation without violating its principles.

# Cyberspace and Online Mediation

## The Cyberspace Era and the Origin of Online Dispute Resolution

To understand the unique features of online mediation and how it may advance the purposes of mediation, we need to know where it came from. The occurrence and growth of the use of online dispute resolution (“ODR”), including online mediation, partly responded to the “the rapid growth of Internet-based markets for goods and services”[[23]](#footnote-23) and the trend for people to move from the reality to the “virtual reality”[[24]](#footnote-24) – i.e., the cyberspace. As people are spending more and more time living in the cyberspace,[[25]](#footnote-25) it should be safe to predict that ODR will be applied to areas other than e-commerce in the future.[[26]](#footnote-26) The efficiency of online mediation is to a large extent determined by how well it responds to the needs in the cyberspace era, under the four-dimension framework mentioned above.

## The Magic of Online Mediation in a Cyberspace Setting

As discussed in Section II, the goals of mediation can be divided into four categories: information, process, emotion, and settlement. To summarize, the article concludes that:

* Online mediation, with its unique features, furthers all those goals.
* Although levering technologies may not be an inherent feature of online mediation, mediating in an online setting does provide better access to relevant technologies.[[27]](#footnote-27)
* Risks and ethical concerns associated with online mediation are anticipated but not dispositive.

### Information

Dispute resolution “revolves around the communication, processing and management of information.” [[28]](#footnote-28) In particular, parties and the mediator in a mediation seek information about the parties’ perspectives and interests, their interactions, dealings, and transactions, related context, rules, and criteria. The cyberspace is “a place where powerful tools were being developed for communicating, storing, and processing information.” [[29]](#footnote-29) Most interactions and communications are automatically recorded and can be used in further fact-finding. Information is the core for both mediation and cyberspace. Therefore, it should be apparent that online mediation, conducted in a cyberspace setting, is naturally suitable for resolving disputes arising from that setting, which could mean most, if not all, settings in a cyberspace era.

Colin Rule in his article *Technology and the Future of Dispute Resolution* contends that the text-based and asynchronous natures of online dispute resolution help disputants better access information and correct misunderstandings:

ODR can support text-based, asynchronous conversations that help parties be more reflective in their communications while enabling them to access information relevant to their dispute in real time. It can enable participation from individuals anywhere in the world or support real-time joint single-text negotiation with collaborative editing. ODR can offer “wizards,” software tools to help parties explore their options or to provide early resolution for issues, sometimes before the complainant even has informed the respondent about his or her concerns. It can quickly address simple misunderstandings before they escalate or offer a library of creative possibilities to help parties craft their ideal solution. It can even use software algorithms to keep communication focused on key issues that need to be addressed while structuring negotiations to keep them moving toward resolution. [[30]](#footnote-30)

Rule also, in his article *New Mediator Capabilities in Online Dispute Resolution*, argues that the online and asynchronous natures of online mediation offer the mediator more options to reframe the parties’ statements so that they can better communicate with each other:

Online, a mediator has a variety of options. If one party posts a comment that is very accusatory in tone, or violates ground rules about slinging insults, a mediator can discuss the sentiments expressed with the poster and help them to re-frame the posting before the other side has seen it. A mediator can even take the comment off of the live site and discuss it in caucus with the author before jointly posting a re-framed version. In the extreme case, a mediator can even set the system to require mediator approval of each posting between parties, allowing the mediator to re-frame each communication in a system along the lines of shuttle diplomacy.

These options allow the mediator to re-frame communications transparent to the intended recipient, so that the initial unproductive outburst and the resistance to re-framing can be dealt with behind the scenes and only the re-framed comment actually makes it to the listener.[[31]](#footnote-31)

Not only the parties but also the mediator seek information. For example, the mediator needs to understand the parties’ interests and motivations in order to help the parties generate options. Rule, in the same article, maintains that in an online mediation, the mediator can better do this by conducting “concurrent caucusing”:

Caucusing can be a crude tool in face-to-face mediation sessions, however. The mediator usually has to call the joint discussion to a stop, and then has to decide which of the parties should caucus first. The other party is then sent into the hallway to wait while the mediator caucuses… Hopefully the delay hasn’t derailed the progress that was being made before the caucus; often, mediators only call caucuses when the discussions hit a stalemate because they don’t want to disrupt productive discussions.

Online, caucusing can be much more flexible. In Online Resolution’s “Resolution Room” environment, mediators can caucus with parties at the same time the joint discussion is going on. In the joint discussion, postings reach all participants, but in caucus discussions the mediator interacts with one side or the other. This allows the mediator to caucus through the entire mediation, even when the discussion is progressing well. It also prevents the other side from having to wait during caucusing, or to wonder what secrets are being passed while they are out of the room.[[32]](#footnote-32)

Other scholars and practitioners hold similar views.[[33]](#footnote-33) In short, as to information, the arguments supporting online mediation seem to be based on a “more is more” logic – the goal of information seeking is advanced by online mediation because it offers *more* access to information, *more* time for the parties to reflect and craft statements, *more* options for mediator to caucus, and *more* technological assistance. These arguments, while emphasizing the advantages associated with asynchrony, have not adequately responded to an unavoidable allegation related to the text-based nature of mediation – i.e., text can only carry *limited* information. Proponents of online mediation may still have to show, sometimes for communications, *less is more*.

To do this, we need to distinguish two concepts that could easily confuse with each other: *information* and *message*. Message (e.g., thought and idea) is what people want to convey; while information (e.g., text, body language, pictures, and video) is what carries the message. By seeking *more* information, people are actually asking for *clearer* messages. For example, by asking whether someone leaves his fingerprint on the weapon, people want to know if he is the killer; by observing a witness’ expressions and body language, people want to know if he is telling the truth. What really matters is whether the message is clear, not how much information is provided. More information could lead to confusion and distraction. We are living a world of “information dump”: people are providing and receiving more and more information, with the same brains and the 24 hours. Excessive information would not only consume our energies but also prevents us from seeing the message. Therefore, Twitter only allows people to tweet 140 characters one time and most courts have page limit for briefs. As often said by lawyers, “If I had more time, I would have written a shorter brief.”[[34]](#footnote-34)

In an offline mediation, it could easily be the case where one person is too talkative,[[35]](#footnote-35) the parties are interrupting each other, the parties are “dumping” too much information via their words, tones, expressions, gestures, with no one really catching the messages behind. In contrast, in an online mediation, the technologies-embedded platform can better enforce rules on the time, order, and length of communications. Interruption is hardly possible. The text-based approach controlled by a system not only allows people to better absorb and process information but also force them to be concise – e.g., the text-based approach forces people to communicate what is behind face, gesture, voice, and tone clearly in the text.[[36]](#footnote-36) For example, SquareTrade provides forms with yes-or-no questions to the parties and limits the length of the text. So users “had to be very concise about what you were doing… Once that happened, these disputes were fairly easy to resolve.”[[37]](#footnote-37) If a message cannot be translated into text, there is usually a risk that the message, while being conveyed by body language, is too subtle or ambiguous and could easily be open to endless interpretation or guessing.[[38]](#footnote-38) Under such circumstance, the party should probably try to restructure her message rather than dumping more information.[[39]](#footnote-39) Opponents may argue that a text-based mediation creates an imbalance between those who are well-educated and those who are not. There are three responses. First, some people are good at writing while the others are good at speaking, and education affects both writing and speaking skills; second, there have already been many writing programs that help people improve their writings in various aspects – e.g., Grammarly (grammar),[[40]](#footnote-40) Heiminway Editor (readability),[[41]](#footnote-41) Stylewriter (readability),[[42]](#footnote-42) and Judicata (persuasiveness).[[43]](#footnote-43) Many of the functions are free and can help disputants improve their written statements in online mediation. Similar programs can also be incorporated into the mediation platform given its good access to technology; third, there are plenty of well-developed speech-to-text transcription programs[[44]](#footnote-44) which have been widely used in litigations and arbitrations and can empower those who are not good at writing with the capability to prepare written statements.

In short, online mediation not only allows the parties and the mediator to have better access to information, more options to communicate but also “force” them to better convey messages by controlling the communication process and setting limitations on information output. The text-based “disadvantage” of online mediation is actually a significant advantage in another sense, as less could sometimes be more for communications. People may argue that the benefits from controlled communications should be attributed to the technologies used to manage communications, not online mediation. However, it should be apparent that incorporating the technologies is easier in online mediation as the parties are already using an online platform, where applications and programs can be easily embedded, and the communication rules can thereby be easily enforced.

### Emotion

The feeling that accompanies our cognitive activities “is what gives life its color, and shapes what we know.”[[45]](#footnote-45) Oftentimes our perceptions of only make sense when reading with emotions. Psychologists also discovered that emotion is a crucial part of the decision-making process and a people without the ability to feel would have difficulties making decisions.[[46]](#footnote-46) Therefore, reading and handing emotions have long been recognized indispensable for an effective mediation as emotions help us understand the parties’, interests, motivations, and decisions.[[47]](#footnote-47)

Rule in his article *New Mediator Capabilities in Online Dispute Resolution* contends that the asynchronous nature of online mediation allows the parties to better handle their emotions and mediators to better deal with their own biases:

As some online dispute resolution writers have observed, this ability to interact asynchronously can help parties to “be at their best” in a mediation. Instead of reacting emotionally to a new development or escalating a discussion out of surprise, parties can consider an issue and communicate in a considered way. They can still react emotionally, but they have the option of stepping back and reflecting before they respond.

This asynchronous communication can also be a valuable tool for mediators and facilitators. Just as disputants can react emotionally to new developments, neutrals can get caught up in the immediacy of a face-to-face session. Third parties can benefit from the cooling distance provided by asynchronous interaction, allowing them to pay greater attention to their own biases and perhaps enabling them to become more reflective practitioners.[[48]](#footnote-48)

In short, Rule maintains that the asynchronous nature can improve the efficiency of mediation by claiming down the parities and freeing the mediator from unnecessary interferences.[[49]](#footnote-49) This is often the case considering the odds that “the parties have already been negotiating with each other for a very long time and they’ve probably reached impasse and they’re very frustrated with each other”[[50]](#footnote-50) when they decide to turn to a third-party mediator.[[51]](#footnote-51) This “cool off” argument is widely held by the proponents of online mediation,[[52]](#footnote-52) including those who contend that online mediation is specifically suitable for divorce disputes[[53]](#footnote-53) or other disputes where there is an imbalance of powers.[[54]](#footnote-54) The logic behind the “cool off” argument, however, still seems to be that online mediation helps to better handle emotions by *avoiding* them, not *addressing* them. A question that naturally follows is could online mediation help to address the emotions, although in a text-based and asynchronous setting where a great deal of information (e.g., facial expressions) have probably been missing? This article maintains that the answer is yes: first, people are not necessarily getting *less* information as to emotions in an online setting; second, *less* information does not necessarily make emotional communication less efficient – the “less is more” logic also works in this regard.

First, we are not necessarily getting less information about emotions in an online setting. In an era of cyberspace, people are spending more and more time communicating online via emails and chat applications and have developed a vast amount of symbols (e.g., emoticons), phases, and norms in communicating emotions.[[55]](#footnote-55) Empirical studies show there is no indication that communication of emotions is more difficult in computer-mediated communication than in face-to-face communication.[[56]](#footnote-56) Research even “show[s] more frequent and explicit emotion communication in CMC [computer-mediated communication] than in F2F [face-to-face communication].”[[57]](#footnote-57) Therefore, the instinct that there is less information *output* in an online mediation does not seem to be true. How about *input*? Are we able to adequately receive and process the emotional information online? The above-mentioned discovery indicates yes otherwise people would not have been that willing to express emotional information online. In addition, research further shows that computers, with assistance from technologies such as big data analytics and artificial intelligence, may help (or even outperform) humans in reading emotions.[[58]](#footnote-58) In the marketing industry, “[a] handful of companies are developing algorithms that can read the human emotions behind nuanced and fleeting facial expressions to maximize advertising and market research campaigns. Major corporations including Procter & Gamble, PepsiCo, Unilever, Nokia and eBay have already used the services.”[[59]](#footnote-59) Emotion-detecting technologies like these are expected to be incorporated into the online mediation platform and help secure the input of emotional information.

Second, less information does not necessarily make emotional communication less efficient. As discussed above, for information, what really matters is the message behind. Same as emotions. When we are *addressing* emotions, we need to take a step back and understand what we are really dealing with. Law professor Roger Fisher[[60]](#footnote-60) and psychologist Daniel Shapiro in their book *Beyond Reason: Using Emotions as You Negotiate* encourage us to switch our attention from emotions to the underlying *concerns* that generate them:

Rather than getting caught up in every emotion you and others are feeling, turn your attention to what generates these emotions.

*Core concerns* are human wants that are important to almost everyone in virtually every negotiation…

Core concerns offer you a power framework to deal with emotions without getting overwhelmed by them…

Those core concerns are *appreciation*, *affiliation*, *autonomy*, *status*, and *role*.[[61]](#footnote-61)

In particular, Fisher and Shapiro explain how those concerns may be ignored or met[[62]](#footnote-62) and the corresponding risks and powers that result.[[63]](#footnote-63) Regardless of whether we accept Fisher and Shapiro’s classification or not, their studies shed valuable lights on dealing with emotions - *addressing* emotions means *identifying* and *meeting* the underlying concerns. So the next question is what is stopping people from identifying the concerns (much less meeting them)? Research shows that “venting of intense emotions by one party often produces an equal and opposite reaction by the other parties” and “[n]euroscience tells us that when someone is angry with us, this emotion may make rational discourse difficult.”[[64]](#footnote-64) To avoid this, mediators sometimes “use separate ‘caucus’ sessions to create a safe place for venting, thereby avoiding a situation in which the other parties’ reactions to the venting escalate the conflict.”[[65]](#footnote-65) As mentioned above, caucusing is easier to manage in an online mediation as it allows a mediator to conduct concurrent caucusing without creating much disruption. Leading mediation practitioner and law lecturer David A. Hoffman in his article *Mediation, Multiple Minds, and the Negotiation Within* mentions an Internal Family Systems approach to conducting “reflective practice” with a party (including the mediator) to explore her emotions and motivations.[[66]](#footnote-66) As mentioned above, the text-based and asynchronous natures of online mediation allow (or force) the mediation participants to be more reflective.

After we have overcome the emotional barriers and identify the concerns, the next question is how to meet them. Research indicates that acknowledgment is the key. Negotiation lecturers and consultants Douglas Stone, Bruce Patton, and Sheila Heen in their book *Difficult Conversations: How to Discuss What Matters Most* contend that the reason why the parties are stuck in emotions and not meeting the underlying concerns (which then generates more emotions) is that oftentimes people are “not saying to each other” what they are feelings.[[67]](#footnote-67) In fact, they are *venting* it, not *expressing* it.[[68]](#footnote-68) To overcome this, they provide the following guidelines for describing or expressing feelings:

* Frame feelings back into the problem[[69]](#footnote-69)
* Express the full spectrum of your feelings (e.g., not just anger, but also potential appreciation, and reassurance)[[70]](#footnote-70)
* Don’t evaluate – share without judging, attributing, or blaming[[71]](#footnote-71)

In particular, the authors highlight the importance of acknowledgment of feelings – i.e., “letting the other person know that what they have said has made an impression on you, that their feelings matter to you, and that you are working to understand them.”[[72]](#footnote-72) Fisher and Shapiro’s studies break down the acknowledgment of feelings into 1) for *appreciation*: acknowledging the merit of feelings, 2) for *affiliation*: treating the a party as a colleague, 3) for *autonomy*: respecting the freedom to decide important matters, 4) for *status*: recognizing the a party deserves her standing, and 5) for *role*: let a party feel that her current role and activities are personally-fulfilling.[[73]](#footnote-73)

In short, as to *addressing* emotions, scholars and practitioners have already provided valuable guidelines on *identifying* and *meeting* the concerns underlying the emotions. While a text-based and asynchronous online mediation cannot prevent people from not following these guidelines, it could still provide guidance next to each text box (e.g., describe all your feelings without blaming the other party) assisting users in making statements. Moreover, the online platform can require the parties to fill out a preparation form or checklist in order to better explore their emotions in a structured way (see Appendix I for example). Future technology may allow the online platform to store and analyze data from the cases and help to recognize patterns of emotions and concerns and provide relevant advice. Notice that this could raise ethical issues on confidentiality and data privacy as data misuse has always been a concern in the world of cyberspace. For example, it was recently discovered that “the personal data of up to 87 million Facebook users was improperly harvested by the consulting firm Cambridge Analytica.”[[74]](#footnote-74) Similar risks also exist in online mediation, where users may have no idea of whether and how their data might be used:

ODR providers may store sensitive communications and records, such as personally identifying information; opinions and communications made to other disputants or neutrals with the expectation that they would not be shared; and records relating to health, education, and employment. This privacy interest is two-pronged: (1) disputants may want protection against unauthorized *access* of data, in the form of technical and physical security, and (2) disputants may want protection against unauthorized and unexpected (or otherwise unconsented to) *use* of data.[[75]](#footnote-75)

The concern, however, is associated with offline mediation as well. Information has to be kept somewhere, either at the mediator’s notebook, personal computer, or a cloud drive. There is always a risk that information is leaked, no matter where it is stored. The advantage of storing information an online platform is that the custodians would be cybersecurity specialists, who, compared with mediators, seem to be better equipped to secure data privacy. This is like saving money in a bank could be safer than putting it under the bed. In any event, there seems to always be a trade-off between benefits and privacy in the foreseeable future. In an online mediation, we could at least guarantee that the users are making the trade-off themselves by providing fair warnings and full disclosure of the potential use of data.

### Process

To recap, as to process for mediation, Sander emphasizes the goal of encouraging flexibility.[[76]](#footnote-76) It should be apparent that online mediation, with good access to technology, is naturally suitable for furthering this goal. In an asynchronous online mediation, the participants do not need to stay with each other full days and can choose to respond to each other at their convenience. Moreover, with assistance from video conference technology (and probably mature virtual reality technology in the future), none of them need to travel to attend the mediation in person. As mentioned above, a mediator can also conduct concurrent caucusing without significantly disrupting or delaying the process.

Recognized ODR pioneer Ethan Katsh in his book *Digital Justice: Technology and the Internet of Disputes* also contends that a technology-assisted mediation could provide a facilitator with significant assistance in process management:

By substituting so ware for a human, and breaking down the mediation process into small components, technology-assisted negotiation could perform many of the tasks previously performed by a human facilitator and could easily scale to an extraordinarily large numbers of cases. These component tasks included: identifying dispute types; exposing parties’ interests; asking questions about positions; reframing demands; suggesting options for solutions; allowing some venting; establishing a time frame; keeping parties informed; disaggregating issues; matching solutions to problems; and drafting agreements.[[77]](#footnote-77)

Online working platforms like Yammer allow users to freely create and manage workflows. It is expected that similar technology will at some pointed be incorporated into online mediation and allows participants to do the same[[78]](#footnote-78) – e.g., turning the above-mentioned steps[[79]](#footnote-79) into an easily managed workflow. Such technology also allows the participants to be creative in designing tailor-made processes such as “anonymous brainstorming”[[80]](#footnote-80) and “yes-or-no proposal.”[[81]](#footnote-81) The idea behind this is “decomposition of work,” which legal technology and “futurist” Richard Susskind discussed in his book *Tomorrow’s Lawyers: An Introduction to Your Future*:

… namely, that for any deal or dispute, no matter how small or large, it is possible to break it down, to ‘decompose’ the work, into a set of constituent tasks.

… we can decompose (others would say ‘disaggregate’ or ‘unbundle’) work into various tasks and should undertake each, I propose, in as efficient a manner as possible.[[82]](#footnote-82)

Decomposing work not only allows participants to conduct better project management[[83]](#footnote-83) but also creates the possibility of legal process outsourcing (“LPO”) – i.e., outsourcing a particular task from the whole process to an outside vendor who can better handle it.[[84]](#footnote-84) For example, in an online mediation where a party needs psychological therapy, a specialist can easily get engaged by logging on the online platform; fact-findings would also be much more convenient as potential witnesses or stakeholders can participate in the process without incurring significant traveling expense.

As discussed above, the asynchronous nature of online mediation helps the participants better process information. Another way to put it, in the discussion about process, is that the distinction between synchronous and asynchronous is a false dichotomy – every mediation is asynchronous. There can only be one person speaking each time, and there are always time lags between statements from different persons (if the communication is synchronous the parties must be interrupting each other). In other words, every efficient communication should always be asynchronous, which can only be achieved when the participants strictly follow a procedure. A technology-assisted (or technology-controlled) mediation platform can provide significant assistance in making sure that all participants comply with a given process. Managing the process of offline mediation, by contrast, could be a challenge as a participant can easily make disruptions.[[85]](#footnote-85)

In short, online mediation, with its easy access to technology, is suitable for achieving the goal of process by enhancing flexibility and securing compliance with rules and procedures.

### Settlement

As mentioned above, the goal of settlement consists of:

* Deal with differences in perceptions and interests between negotiators and constituents (including lawyer and client)
* Help negotiators realistically assess alternatives to settlement
* Stimulate the parties to suggest creative settlements
* Invent solutions that meet the fundamental interests of all parties
* Shift the focus from the past to the future[[86]](#footnote-86)

In general, the goal of settlement concerns generating settlement options, including spotting issues and differences, discovering and mapping interests, and designing proposals that maximize the interests. It should be apparent that this would be advanced by the above-mentioned advantages that further the goals of information, emotion, and process: seeing the *messages* behind the *information* from each other allows the participants to make more thoughtful decisions; understanding the *concerns* underlying *emotions* helps the parties better create options meeting their interests; a process that is not only flexible be able to secure the parties’ compliance with procedures increases the odds of getting from dispute to settlement smoothly and efficiently.

Spotting issues, mapping interests, and designing options require solid analytical capability, which is an area where computers have begin manifesting significant advantages, as shown by IBM Watson[[87]](#footnote-87) and AlphaGo.[[88]](#footnote-88) Similar technologies are expected to be utilized in online mediation. Katsh claims that technology functions as a “Fourth Party”[[89]](#footnote-89) in an online mediation, assisting the participants in handling a variety type of tasks:

The Fourth Party may, in less complex disputes (such as many eCommerce disputes), replace the human third party by helping the parties identify common interests and mutually acceptable outcomes. Templates and structured forms can be employed that allow users to choose from various options and, by comparing the choices made by the parties, can highlight potential areas of agreement. More commonly, the Fourth Party assists, enhances, or complements the mediator or arbitrator. For example, consider the specific informational tasks performed by third party neutrals. These might include brainstorming, evaluating, explaining, discussing, identifying, defining, organizing, clarifying, listing, caucusing, collecting, aggregating, assigning meaning, simulating, measuring, calculating, linking, proposing, arranging, creating, publishing, circulating and exchanging, charting, reminding, scheduling, monitoring, etc. Some of these are simple or clerical but some involve making decisions at appropriate times and in appropriate ways. Technology can assist with all of these efforts.[[90]](#footnote-90)

Katsh in *Digital Justice: Technology and the Internet of Disputes* also contends that the collection of data through ODR may further the development of dispute resolution algorithms:

The collection of data through ODR also provides the means for developing and refining algorithms that can identify patterns on the sources of disputes (for example, sellers’ ambiguous shipping policies) or effectiveness of various strategies for the resolution of disputes (for example, the stage in which dispute resolution is offered), which can then be employed to prevent disputes and improve dispute resolution processes.[[91]](#footnote-91)

In short, although it remains to be seen to what extent online mediation may leverage the power of technology to enhance its effectiveness, considering that a certain part of the work in mediation could be standardized and that online mediation naturally has good access to technology, it should be safe to predict that relevant technologies (or the “Fourth Party”) will be utilized in online mediation to equip humans with better analytical capability in designing and reaching settlements. For example, research showed that machine learning could improve judges’ decision-making in deciding whether to jail a defendant.[[92]](#footnote-92)

In addition to analytical capability, a critical issue that may affect the effectiveness of settlement is trust building – the parties need to have faith in the settlement, believing that it is impartial and serves their interests. The conventional approach to addressing this concern is engaging an independent third party (i.e., a mediator) to facilitate the resolution.[[93]](#footnote-93) A mediator with a good reputation and no conflict of interest helps establish trust. Online mediation offers a commentary (not alternative) approach to addressing the issue - engaging a “Fourth Party”. Unlike human beings, the Fourth Party is more neutral[[94]](#footnote-94) and is less likely to accept bribes, form bias over a party from past dealings, or make self-serving recommendations (e.g., pushing a settlement in order to maintain a high settlement rate). Compared with mediators, the Fourth Party is more of a repeat player – it helps mediate all the cases on one platform. Therefore, it is putting its reputation on the line, which provides strong incentives to the engineers behind to ensure the quality of the Fourth Party. In addition, research has also found that the mediator’s ability to manage process also affect trust-building.[[95]](#footnote-95) As disused in the prior section, a mediator can better manage the process (i.e., securing both flexibility and compliance) in online mediation with its easy access to technology. Therefore, online mediation has its unique advantages in building the parties’ trust.

Concerns may come from two respects: 1) the “Fourth Party” could also be biased, and 2) it could be difficult for the “Fourth Party” to make an understandable self-explanation of its reasoning. Data/algorithmic bias has long been recognized as a critical barrier to improving data analytics technology. Some experts have warned that algorithms with hidden bias are “everywhere”[[96]](#footnote-96) and “already routinely used to make vital financial and legal decisions.”[[97]](#footnote-97) “Examples of algorithmic bias that have come to light lately, they say, include flawed and misrepresentative systems used to rank teachers, and gender-biased models for natural language processing.”[[98]](#footnote-98) ProPublica, a Pulitzer Prize–winning nonprofit news organization, discovered that COMPAS, a risk assessment software used to predict future criminals, was biased against blacks.[[99]](#footnote-99) A related issue, which is also a barrier to overcome data/algorithmic bias, is the so-called “Black Box Problem.” “The black box is an abstraction representing a class of concrete open system which can be viewed solely in terms of its stimuli inputs and output reactions.”[[100]](#footnote-100) The problem, in the setting concerning algorithms, means that “[n]o one really knows how the most advanced algorithms do what they do.”[[101]](#footnote-101) Take a self-driving car for example, due to the complexity of the car’s decision-making algorithm, even the engineers how made the car could not fully understand how it made decisions.[[102]](#footnote-102) Even worse, unlike a human decision-maker, a car would not be able to explain itself or testify. If, in an online mediation, the Fourth Party makes a recommendation which it cannot explain the reasoning behind, how can the parties trust such a recommendation? Similar problems have already occurred in the real life. For example, a Wisconsin convict has challenged a COMPAS-assisted judge decision which determined that his right to due process be violated “because the workings of the system were opaque to the defendant.”[[103]](#footnote-103) Scholars have also argued that “a system of public dispute resolution must be based on substantive standards and procedural rules that are transparent and known equally to all. The conception of fair outcome underlying public dispute resolution cannot be private.”[[104]](#footnote-104)

Moreover, data/algorithmic bias and the “block box” problem raise ethical issues concerning the principle of self-determination, according to which a facilitator should support and encourage “the parties in a mediation to make their own decisions (both individually and collectively) about the resolution of the dispute, rather than imposing the ideas of the mediator or others.”[[105]](#footnote-105) If the Fourth Party’s analytical capability becomes too strong so that the parties would heavily rely on it, and unexplainable so that the parties do not understand its recommendations, it could have the effects of imposing ideas on parties.

The above are all legitimate concerns over engaging a Fourth Party in an online mediation. There are four potential responses. First, apart from a smart AI Fourth Party, online mediation still has relatively easy access to other types of technologies, such as process management software whose benefits are undeniable; we can hold on incorporating complicated algorithmic technologies until they become understandable; second, algorithmic technologies are developing rapidly and progresses have been made on letting algorithms explain themselves;[[106]](#footnote-106) third, human brains are also like black boxes, the way how they work have not yet been fully deciphered yet; mediators, like any human decision makers, could also have unconscious biases[[107]](#footnote-107) and as a result, their decision-makings would not be fully explainable or predictable, and fourth, having the Fourth Party and the mediator work together (with the mediator still leading the process) may help them overcome each other’s shortcomings.

In sum, the unique features of online mediation can help parties better make decisions and generate settlement options. Online mediation also helps build the parties’ trust in the settlement by engaging a technology-assisted Fourth Party to assist in the decision-making process. Data/algorithmic bias and the “block box” problem do raise concerns over the trustworthiness of the Fourth Party and ethical issues concerning the parties’ self-determination. The issues, however, are hardly dispositive and expected to be overcome by appropriate procedural design and further technology developments.

# Conclusion

This article addresses the common concerns over online mediation and encourages a rethinking of its limitations. By looking into the fundamental goals of mediation and the unique features of online mediation, this article maintains that the power of online mediation may be stronger than people normally thought it was – i.e., online mediation, with its unique advantages on information, emotions, process, and settlement, is not only suitable for handling commercial disputes but also capable of resolving a lot more types of disputes where money is not the main issue.

This article does not hold a “one-size-fits-all” position, claiming that online mediation is better than offline mediation for every dispute. Indeed, it would be difficult to imagine that a divorce dispute, where the wife complains that the husband is not spending enough time with her and the kids, is to be resolved purely online, without the stakeholders meeting with each other at all. As Sander had said, “there are many different kinds of mediation that are appropriate in different settings.”[[108]](#footnote-108) In a world of “process pluralism,”[[109]](#footnote-109) it is most likely to be the case that an online-offline hybrid approach will be adopted for many disputes. What this article does propose is we can (and should) expect more from online mediation. We need to consider not only *what it is* and but also *what it could be* in a cyberspace era where technologies are reshaping people’s behaviors and at the same time exploring the potentials of the inherent features (e.g., text-based, asynchronous, and easy access to technologies) of online mediation. What critiques of online mediation do is not preventing us from using and exploring online mediation. Instead, it reminds us to carefully study the stakeholders’ interests in every dispute and design the most appropriate resolution system for them, keeping in mind the goals and principles of mediation, and utilizing all the tools that we have to meet the goals and maximize the stakeholders’ interests.

**Appendix I – Difficult Conversation Checklist[[110]](#footnote-110)**

1. **The Feelings Conversation** 
   1. My feelings
      1. How do I feel about this situation?
      2. Which feelings make sense to share?
   2. Their feelings
      1. What might they be feeling?
2. **The Identity Conversation** 
   1. My self-image
      1. What do I fear this situation says to me?
      2. What’s true about this?
      3. What’s not?
   2. Their self-image
      1. What might be the situation say about them that would be upsetting to them?
3. **What Happen Conversation** 
   1. My story
      1. What is the problem from my point of view?
      2. Data?
   2. Their story
      1. What is the problem from their point of view?
      2. Data?
   3. Contributions
      1. Their contributions
         1. How have they contributed to the current situation?
      2. My contributions
         1. How have I contributed to the current situation?
   4. Impact and Intent
      1. Impact on me
         1. What impact has his situation had on me?
      2. My intentions
         1. What were my intentions?
      3. Their intentions
         1. What might their intentions have been?
      4. Impact on them
         1. What impact might this situation have had on them?
4. **Choosing My Purpose** 
   1. What do I hope to accomplish in this conversation?
   2. What might their purposes be?

1. Frank E. A. Sander, *Future of ADR - The Earl F. Nelson Memorial Lecture*, 2000 J. Disp. Resol. 3, 7 (2000). [↑](#footnote-ref-1)
2. A recent online search shows that these three websites are no longer active. [↑](#footnote-ref-2)
3. *See* David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals 1-10 (2013). [↑](#footnote-ref-3)
4. *See*, *e.g.*, Douglas Stone, Bruce Patton & Sheila Heen, Difficult Conversations: How to Discuss What Matters Most 243 (2010) (“Email doesn't convey tone of voice, facial expressions, or body language – all of which help us make sense of the sender’s intensions.”); *see also* *Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, Program on Negotiation, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ (“Disputants who engage in talks primarily via e-mail will miss out on the cues they would receive from body language, facial expressions, and other in-person signals.”); *see also* Janice Nadler, *Rapport in Legal Negotiation: How Small Talk can Facilitate E-Mail Dealmaking*, 9 Harv. Negot. L. Rev. 223, 239-45 (2004). [↑](#footnote-ref-4)
5. *See* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) Lex Electronica, *available at* http://www.lex-electronica.org/files/sites/103/7-2\_katsh.pdf (“Text is often inefficient compared to the spoken word and text can be inefficient compared to various forms of visual communication… Phase one began with great concern that ODR would not succeed because the richness of offline communication would be missing… We will, during phase two, undoubtedly find additional contexts in which fairly simple online interventions or interactions will of considerable value.”); *see also* Colin Rule, *Technology and the Future of Dispute Resolution*, Dispute Resolution Magazine (2015), *available at* http://law.scu.edu/wp-content/uploads/Rule-Technology-and-the-Future-of-Dispute-Resolution-copy.pdf (“Many mediators initially resisted the encroachment of technology into dispute resolution, concerned that technology-based communication was not rich or robust enough to enable the kind of open, honest interaction that most mediators feel is essential to achieving effective resolutions.”); scholars claim that even some of the disputes that arise online would be better resolved offline. *see* Ethan Katsh, Digital Justice: Technology and the Internet of Disputes 115 (2017) (“Many cases of cyberbullying involving students and schools, for example, are as much physical-world bullying as online bullying and would be best resolved through a serious face-to-face intervention.”). [↑](#footnote-ref-5)
6. Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1308 (1998). [↑](#footnote-ref-6)
7. *See* Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber- Mediation Websites*, Duke. Rev., *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr. [↑](#footnote-ref-7)
8. *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1308 (1998) (“Given the profession's current orientation to listening and processing oral information, mediators would find it largely impossible to translate their skills to the online setting.”); *see also* Colin Rule, Online Dispute Resolution for Business: B2B, E-commerce, Consumer, Employment, Insurance, and other Commercial Conflicts 2-29 (2002). Notable exceptions include Andrea M. Braeutigam’s article on online mediation, which argues that “cyberspace is superior to face-to- face mediation for parties of unequal negotiating power, for family disputes, and for employment disputes.” Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 Appalachian J.L. 275, 276 (2006). [↑](#footnote-ref-8)
9. *See*, *e.g.,* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) Lex Electronica, *available at* http://www.lex-electronica.org/files/sites/103/7-2\_katsh.pdf (“Many inefficiencies caused by the parties being apart might be labeled “tolerated inefficiencies”. We are accustomed to them and have accepted many of them as inevitable. The network, however, changes significantly our ability to overcome these “tolerated inefficiencies”… we have new tools for communicating with parties in between face to face sessions…the new tools we are acquiring that allow us to change how long interactions with parties might take and where they might take place.”); *see* *also* Deborah Hope Wayne, *Mediation in the Digital Age*, Family Law Matters Blog, October 10, 2013, https://www.familylawmatters-blog.com/2013/10/mediation-in-the-digital-age.html. [↑](#footnote-ref-9)
10. Notable exceptions include Colin’s article on online mediation, which maintains that online mediation can help eliminate bias based on race, age, gender or disability. *See* Colin Rule, *Online Mediation: The Next Frontier for Dispute Resolution*, 23 SPIDR News 10 (1999); *see also* Colin Rule, *Technology and the Future of Dispute Resolution*, Disp. Resol. Mag. 4, 6 (2014-2015) (“ODR can support text-based, asynchronous conversations that help parties be more reflective in their communications while enabling them to access information relevant to their dispute in real time.”); Colin Rule in his article *Online Dispute Resolution and Ombuds: Bringing Technology to the Table* maintains that the asynchronous nature of ODR allows the mediation participants to conduct “concurrent caucusing”, where the mediator conducts caucusing with the two parties simultaneously. *See* Colin Rule, *Online Dispute Resolution and Ombuds: Bringing Technology to the Table*, Journal of the International Ombudsman Association (Jan. 1, 2015), *available at* https://www.ombudsassociation.org/IOA\_Main/media/SiteFiles/docs/JIOA-15-V8-1-Rule\_Sen.pdf. [↑](#footnote-ref-10)
11. People may argue that offline mediation can also be text-based and asynchronous so these features should not be unique features of online mediation. This is true, but it should be less disputed that online mediation, given its special setting, is more likely to be text-based and asynchronous. *See* Karolina Mania, *Online dispute resolution: The future of justic*e, International Comparative Jurisprudence (Nov. 2015), *available at* https://ac.els-cdn.com/S2351667415000074/1-s2.0-S2351667415000074-main.pdf?\_tid=1dc2840f-c494-4033-a573-6c7d1e7e7904&acdnat=1522983132\_d83753a8fb133ebfbd7c22dfb7dd2d83 (“ODR systems may be divided according to the forms of synchronous and asynchronous communication used… Research by Suquet, Poblet, Noriega and Gabarró has shown that the second form constitutes the most frequently used solution (42%)… In accordance with quoted research, asynchronous online mediation is the most popular form, allowing greater flexibility because of 24-h access to the platform.”); *see also* *Using E-Mediation and Online Mediation Techniques for Conflict Resolution*, Program on Negotiation, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ (“The ‘platform’ that mediators and service providers use varies, but the process is generally conducted via e-mail and telephone, while videoconferencing and real-time chats are less commonly used.”); *see also* Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?*, Kluwer Arbitration Blog, March 29, 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ (“Asynchronous online mediation has been shown to be the most popular form of online mediation as it allows parties flexibility and faster resolution of the matter compared to offline mediation.”). [↑](#footnote-ref-11)
12. Scholars hold and experience shows negative in this regard. *See* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329, 330 (2016) (“Approximately twenty years of experience has taught us 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…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.”). [↑](#footnote-ref-12)
13. *See*, *e.g.*, Sarah 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, 202-210 (2006-2007); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 Appalachian J.L. 275 (2006); *See also* Joseph W. Goodman, *The Pros and Cons of Online Dispute Resolution: An Assessment of Cyber- Mediation Websites*, Duke. Rev., *available at* http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1073&context=dltr; *see also* Negeen Rivani, *Online Mediation: If the Shoe Fits*, Mediate.com, May 2013, https://www.mediate.com/articles/RivaniN1.cfm. [↑](#footnote-ref-13)
14. Frank Sander, Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes 198-199 (2012). [↑](#footnote-ref-14)
15. *See* Leonard L. Riskin, *Understanding Mediators’ Orientations, Strategies, and Techniques: A Grid for the Perplexed*, 1 Harv. Negot. L. Rev. 7, 24-32, 34-38 (1996). [↑](#footnote-ref-15)
16. *Id*. [↑](#footnote-ref-16)
17. *See* David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals 1-15 (2013). [↑](#footnote-ref-17)
18. *See* *Narrative Mediation: A New Approach to Conflict Resolution*, Conflict Resolution Research Consortium, https://www.colorado.edu/conflict/peace/example/narrativemediation.htm (last visited May 2, 2018). [↑](#footnote-ref-18)
19. The “settlement” here refers to the need to reach a conclusion on something, i.e., bridging the differences, solving problems, and satisfying interest. Realizing that no agreement can be reached is also a settlement. *See* David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals 7-22 (2013) (“getting to ‘yes,’ or getting to ‘no,’ are equally acceptable results, so long as the mediation has helped the parties achieve clarity about their goals and the options available for achieving them.”). [↑](#footnote-ref-19)
20. *See* David Hoffman, *Ten Principles of Mediation Ethics*, 18 Alternatives 147 (September 2000), reprinted in Mediation: Approaches and Insights (Juris Publishing 2003) (a summary of basic principles), *available at* https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf. [↑](#footnote-ref-20)
21. Claudia Maffettone, *110 Years of Mediation: Principles, Opportunities, and Challenges*, Mediate.com, May 2016, https://www.mediate.com/articles/MaffetoneC1.cfm. [↑](#footnote-ref-21)
22. Senyo M. Adjabeng, *Mediation and The Principle Of Neutrality*, Mediate.com, April 2016, https://www.mediate.com/articles/adjabengS1.cfm?nl=101. [↑](#footnote-ref-22)
23. David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals 1-10 (2013); *see* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016) (“ODR originally emerged in the mid-1990s as a response to disputes arising from the expansion of eCommerce.”). [↑](#footnote-ref-23)
24. This is hardly a new phenomenon. Human beings are, after all, “virtual” animals. We were born in a given virtual reality where there were fictional entities like nations, religions, money, and law, and we have been constructing our own virtual realities ever since then. Therefore, another way to describe the trend towards cyberspace is that people are concretizing the pre-existing virtual realities. [↑](#footnote-ref-24)
25. *See* Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) Lex Electronica, *available at* http://www.lex-electronica.org/files/sites/103/7-2\_katsh.pdf (“Much of phase two will concern “what happens when the digital world merges with the physical world”) *cf*. Neil Gershenfeld, When Things Start to Think(1999). [↑](#footnote-ref-25)
26. *See* Ethan Katsh & Orna Rabinovich-Eny, Digital Justice: Technology and the Internet of Disputes xiv (2017) (“the second highlights five areas that are argued to be in particular need of ODR - e-commerce, healthcare, social media, employment, and the courts”); *see also* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329 (2016) (“Now, some twenty years later, ODR is the fastest growing area of dispute resolution, and it is increasingly being applied to other areas, including offline and higher value disputes.”). [↑](#footnote-ref-26)
27. *See* Sarah 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, 205 (2006-2007) (“Although increased technology may potentially advance the field of mediation, these advances will not be available to those who do not have access to a computer and the Internet. This may be especially true for online resolution of disputes occurring in the physical-rather than the virtual-world.”). [↑](#footnote-ref-27)
28. Ethan Katsh, *Technology and the Future of Dispute Systems Design*, 17 Harv. Negot. L. Rev. 151, 153 (2012). [↑](#footnote-ref-28)
29. Ethan Katsh, *Online Dispute Resolution: The Next Phase* (2002) Lex Electronica, *available at* http://www.lex-electronica.org/files/sites/103/7-2\_katsh.pdf. [↑](#footnote-ref-29)
30. Colin Rule, *Technology and the Future of Dispute Resolution*, Disp. Resol. Mag. 4, 6 (2014-2015). [↑](#footnote-ref-30)
31. Colin Rule, *New Mediator Capabilities in Online Dispute Resolution*, Mediate.com, December 20, https://www.mediate.com/articles/rule.cfm [↑](#footnote-ref-31)
32. *Id*. (“Some mediators are against caucusing and argue that parties can better communicate and work with each other in joint session.”); *see*, *e.g.*, David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 Negot. J. 263 (2011). [↑](#footnote-ref-32)
33. *See* Using E-Mediation and Online Mediation Techniques for Conflict Resolution, Program on Negotiation, January 8, 2018, https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/ (“Early studies of online mediation have found it to be an effective means of resolving disputes, Ebner writes. It offers convenience, allowing parties to participate when they have the time. The slower pace of e-mail talks (relative to real-time conversations) allows mediators to carefully craft their responses and strategy rather than needing to react in the moment to disputants’ statements.”); *see also* Jim Melamed, *The Internet and Divorce Mediation*, Mediate.com, January 2002, http://www.mediate.com/articles/melamed9.cfm (“Experienced mediators are well aware of the benefits of asynchrony. This is a big part of the reason that many mediators ‘caucus’ (meet separately) with participants. Mediators want to slow the process down and assist participants to craft more capable contributions. This concept of slowing the process down and allowing participants to safely craft their contributions is at the heart of caucusing. Surely, the Internet works capably as an extension of individual party caucus and is remarkably convenient and affordable. Internet communications take less time to read and clients do not hear a professional fee meter clicking. When the Internet is utilized for caucus, the ‘non-caucusing participant’ does not need to sit in the waiting room or library reading Time magazine or growing resentful at being ignored.”); *see also* Derric Yeoh, *Is Online Dispute Resolution The Future of Alternative Dispute Resolution?*, Kluwer Arbitration Blog, March 29, 2018, http://arbitrationblog.kluwerarbitration.com/2018/03/29/online-dispute-resolution-future-alternative-dispute-resolution/ (“It would also allow parties time to fashion their response, as one’s immediate response at a mediation is not always one’s best response.”). [↑](#footnote-ref-33)
34. This was originally from the quote “If I Had More Time, I Would Have Written a Shorter Letter” given by French mathematician and philosopher Blaise Pascal. [↑](#footnote-ref-34)
35. *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 Negot. J. 263, 282 (2011). [↑](#footnote-ref-35)
36. Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 Cardozo J. Conflict Resol. 717, 740 (2016-2017) (“these and other such anonymizing features of text-based communication can increase the chances that disputes will be resolved on the basis of what is said, rather than how it is said, or who says it.”). [↑](#footnote-ref-36)
37. Ethan Katsh, *The Evolution of ODR Mediator*, Courts and Tribunals Judiciary, February 16, 2015, https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ethan\_katsh\_int2\_evo\_of\_odr.pdf. [↑](#footnote-ref-37)
38. *See* Negeen Rivani, *Online Mediation: If the Shoe Fits*, Mediate.com, May 2013, https://www.mediate.com/articles/RivaniN1.cfm (“Body language and nonverbal cues may be misconstrued and unintentionally result in impasse during the live mediation.  Simple cues, such as crossed arms or rolling of the eyes can turn a successful settlement into a game of revenge and impasse.  Additionally, because tone is not naturally conveyed through textual communication, antagonistic or aggressive conduct, including shouting or negative gestures, will not be communicated without the party thinking about it beforehand.  When nonverbal communication is removed from the dialogue, the parties are forced to focus on the content of the message, rather than the potentially distracting gestures that may replace the substantive issues.”); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 Appalachian J.L. 275, 293 (2006) (“Body language can be misinterpreted, or worse, can be negative. If, for example, a person has crossed arms, they may be perceived as angry, closed off, or simply cold. When a party perceives negative behavior, whether or not it is a misinterpretation, they tend to focus on negative content and will react to it, increasing the likelihood of retaliatory behavior and impasse.”). [↑](#footnote-ref-38)
39. See *Id*. In fact, people could be overconfident in their ability to detect clues from expressions. *See* Bella DePaulo, *If You Watch ‘Lie to Me,’ Will You Become More Successful at Detecting Lies?*, Psychology Tody, Jun 13, 2011, https://www.psychologytoday.com/us/blog/living-single/201106/if-you-watch-lie-me-will-you-become-more-successful-detecting-lies (“In our review of hundreds of studies of skill at detecting deception, we found an average accuracy rate of only 54% (when a chance level would have been 50%). One of the papers in that collection is a study in which my colleagues and I compared the lie-detection judgments of experienced law enforcement officers to those of college students. The law enforcement officers were no more accurate - they only thought they were.”); *see also* Tom Jacobs, *In Truth, ‘Lie to Me’ Breeds Misconceptions*, Pacific Standard, July 8, 2010, https://psmag.com/social-justice/in-truth-lie-to-me-breeds-misconceptions-18677 (“the most recent research casts doubt on the accuracy and effectiveness of lie-detection methods presented on the series as unfailingly successful.”). [↑](#footnote-ref-39)
40. Grammarly, https://app.grammarly.com (last visited May 2, 2018). [↑](#footnote-ref-40)
41. Hemingway Editor, http://www.hemingwayapp.com (last visited May 2, 2018). [↑](#footnote-ref-41)
42. Style Writer, http://www.editorsoftware.com/StyleWriter.html (last visited May 2, 2018). [↑](#footnote-ref-42)
43. Judicata, https://www.judicata.com (last visited May 2, 2018). [↑](#footnote-ref-43)
44. *See* Nicole Black, *Speech-To-Text Dictation For Lawyers: What You Need To Know*, Above The Law, January 16, 2017, https://abovethelaw.com/2017/01/speech-to-text-dictation-for-lawyers-what-you-need-to-know; *see also Speech Recognition and Dictation Solutions for Today’s Lawyer*, Legal Talk Network, March 10, 2015, https://legaltalknetwork.com/podcasts/digital-edge/2015/03/speech-recognition-dictation-solutions-todays-lawyer/ (“These speech solutions… can greatly help lawyers with disabilities, those who type slowly, and can even help younger lawyers improve oral argument abilities.”). [↑](#footnote-ref-44)
45. David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals 7-8 (2013). [↑](#footnote-ref-45)
46. *Id*. [↑](#footnote-ref-46)
47. *See* Joel B. Eisen, *Are We Ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1323-1325 (1998). [↑](#footnote-ref-47)
48. Colin, *supra* note 31. [↑](#footnote-ref-48)
49. This has been supported by empirical studies and experiments. *See* Anne-Marie B. Hammond, *How Do You Write “Yes”?: A Study on the Effectiveness of Online Dispute Resolution*, 20 Conflict Resol. Q. 261, 277 (2003); *see also* Elaine M. Landry, *Scrolling Around the New Organization: The Potential for Conflict in the On-Line Environment*, 16 Negot. J. 133, 139 (2000). [↑](#footnote-ref-49)
50. Colin Rule, Modria - The Operating System for ODR, Courts and Tribunals Judiciary, February 16, 2015, https://www.judiciary.gov.uk/wp-content/uploads/2015/02/colin\_rule\_modria\_os\_for\_odr.pdf. [↑](#footnote-ref-50)
51. *See* Harry T Edwards, *Alternative Dispute Resolution: Panacea or Anathema*, 99 Harv. L. Rev. 668, 678 (1985-1986) (mentions a widely accepted “broken-telephone” theory, which suggests that “disputes are simply ‘failures to communicate’ and will therefore yield to ‘repair service by the expert ‘facilitator.’’”). [↑](#footnote-ref-51)
52. *See*, *e.g.*, Ethan Katsh, *The Evolution of ODR Mediator*, Courts and Tribunals Judiciary, February 16, 2015 https://www.judiciary.gov.uk/wp-content/uploads/2015/02/ethan\_katsh\_int2\_evo\_of\_odr.pdf (“Well, the system has to be programmed, obviously, in a certain way. The goal is to encourage the parties to communicate with each other seriously or without yelling at each other.”); *see also* Negeen Rivani, *Online Mediation: If the Shoe Fits*, Mediate.com, May 2013, https://www.mediate.com/articles/RivaniN1.cfm (“During highly emotional moments of mediation, a participant may make a regretful statement in the heat of the moment, disrupting the entire mediation process.  On the other hand, online mediation allows each party to cool off before responding.  The participants may use the time period to reflect on the state of affairs and on how to appropriately respond.  Subsequently, each response can be more carefully constructed and rid of unnecessary emotional attachments… The mediator may also benefit from blocks of time between each response because she is dealing with focused statements from the disputants and is given the opportunity to reflect on the statements on her own time as well.”); *see also* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 Appalachian J.L. 275, 295-296 (2006). [↑](#footnote-ref-52)
53. *See*, *e.g.*, Martin Gramatikov & Laura Klaming, *Getting Divorced Online: Procedural and Outcome Justice in Online Divorce Mediation*, 14 J.L. & Fam. Stud. 97 (2012) (A study of the experiences of 126 individuals who participated in online divorce suggests that “online divorce mediation is a viable alternative to both offline mediation and other more traditional modes of dispute resolution in divorce”); *see also* Rebecca Brennan, *Mismatch.com:* *Online Dispute Resolution and Divorce*, 13 Cardozo J. Conflict Resol. 197 (2011-2012); *see also* Rebecca Brennan, *Match or Mismatch.com - Online Dispute Resolution and Divorce*, 21 Disp. Resol. Mag. 15 (2014-2015); *see also* Susan L. Brooks, *Online Dispute Resolution and Divorce: A Commentary*, 21 Disp. Resol. Mag. 18 (2014-2015). [↑](#footnote-ref-53)
54. *See*, *e.g.*, Sarah Rogers, *Online Dispute Resolution: An Option for Mediation in the Midst of Gendered Violence*, 24 Ohio St. J. on Disp. Resol. 349, 351 (2008-2009) (“Furthermore, the unique psychological characteristics of the victim-offender relationship may make a face-to-face, intimate meeting between the two parties more damaging than healing.”) *cf*. Kathleen Daly & Julie Stubbs, *Feminist Engagement with Restorative Justice*, 10 Theoretical Criminology 9, 17 (2006). [↑](#footnote-ref-54)
55. *See* Andrea M. Braeutigam, *Fusses That Fit Online: Online Mediation in Non-Commercial Contexts*, 5 Appalachian J.L. 275, 291 (2006) (“Emoticons, such as ‘Smileys’ (☺), have become a useful way of communicating emotion online. Simple typing techniques operate similarly. For example, ‘SHOUTING’ or an ‘angry email’ is accomplished by using ALL CAPS. Abbreviations have also become a common way for online communicators to convey tone and emotion in their messages. The abbreviations IMHO (in my humble opinion) and LOL (laugh out loud) are descriptors used to temper a direct statement, and to underscore humorous statements. Additionally, online communicators will often mark a statement with the desired tone and meaning. To illustrate: ‘Today is a beautiful day! I'm so lucky to be inside working!’”). [↑](#footnote-ref-55)
56. *See* Daantje Derks, Agneta H. Fischer & Arjan E.R. Bos, *The Role of Emotion in Computer-Mediated Communication: A review* (May 2008) Computers in Human Behavior, *available at* https://ac.els-cdn.com/S0747563207000866/1-s2.0-S0747563207000866-main.pdf?\_tid=8fe6982a-7af2-4121-902e-a2f0babd83ca&acdnat=1523666096\_eb64b0ccc677b4a1d4387ba1c86a00d7. [↑](#footnote-ref-56)
57. *Id*. [↑](#footnote-ref-57)
58. *See* Melia Robinson, *Two Students from MIT and Stanford Created an Algorithm that Detects Human Emotion*, Business Insider, Jun 6, 2016, http://www.businessinsider.com/simple-emotion-stanford-mit-students-2016-6 (“The Simple Emotion algorithm works by monitoring acoustic features in speech — such as voice frequency, volume, and changes in tone over time — and comparing them to a library of sounds and tones. It identifies an emotion by finding the closest match in the catalog… Today, it understands between 30 and 40 emotions…”); *see also* Adam Conner-Simons & Rachel Gordon, *Detecting Emotions with Wireless Signals Measuring Your Heartbeat and Breath: Device Can Tell If You’re Excited, Happy, Angry, or Sad*, MIT News, September 20, 2016, http://news.mit.edu/2016/detecting-emotions-with-wireless-signals-0920 (“By measuring subtle changes in breathing and heart rhythms, EQ-Radio is 87 percent accurate at detecting if a person is excited, happy, angry or sad — and can do so without on-body sensors.”). [↑](#footnote-ref-58)
59. Cameron Scott, *With Emotion Recognition Algorithms, Computers Know What You’re Thinking*, Singularity Hub, January 19, 2014, https://singularityhub.com/2014/01/19/with-emotion-recognition-algorithms-computers-know-what-youre-thinking/#sm.00001n2mntsmbdfmktdvt87nngnm3. [↑](#footnote-ref-59)
60. Prof. Fisher is also the the co-author (with William Ury) of the book *Getting to Yes*. [↑](#footnote-ref-60)
61. Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate 15 (2006). [↑](#footnote-ref-61)
62. *Id*. at 17. [↑](#footnote-ref-62)
63. *Id*. at 19. [↑](#footnote-ref-63)
64. David A. Hoffman, *Mediation, Multiple Minds, and the Negotiation Within*, 16 Harv. Negot. L. Rev. 297, 303 (2011). [↑](#footnote-ref-64)
65. *Id*. at 304-305. [↑](#footnote-ref-65)
66. *Id.* at 322, 326. [↑](#footnote-ref-66)
67. Douglas Stone, Bruce Patton & Sheila Heen, Difficult Conversations: How to Discuss What Matters Most 22 (2010); *see also* *Id*., at 24 (“In fact, the gap between what you’re really thinking and what you’re saying is part of what makes a conversation difficult. You’re distracted by all that’s going on inside. You’re uncertain about what’s Okay to share, and what’s better left unsaid. And you know that just saying what you’re thinking would probably *not* make the conversation any easier.”). [↑](#footnote-ref-67)
68. *Id.* at 101 (“Too often we confuse being emotional with expressing emotions clearly. They are different. You can express emotion well without being emotional, and you can be extremely emotional without expressing much of anything at all. Sharing feelings well and clearly requires thoughtfulness.”). [↑](#footnote-ref-68)
69. *Id*. at 102. [↑](#footnote-ref-69)
70. *Id*. [↑](#footnote-ref-70)
71. *Id*. [↑](#footnote-ref-71)
72. *Id*. at 105. [↑](#footnote-ref-72)
73. *See* Roger Fisher & Daniel Shapiro, Beyond Reason: Using Emotions as You Negotiate 17 (2006). [↑](#footnote-ref-73)
74. Nellie Bowles, *After Cambridge Analytica, Privacy Experts Get to Say ‘I Told You So’*, The New York Times, April 12, 2018, https://www.nytimes.com/2018/04/12/technology/privacy-researchers-facebook.html. [↑](#footnote-ref-74)
75. Suzanne Van Arsdale, *User Protection in Online Dispute Resolution*, 21 Harv. Negot. L. Rev. 107, 130 (2015-2016). [↑](#footnote-ref-75)
76. *See* Frank Sander, Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes 198-199 (2012). [↑](#footnote-ref-76)
77. Ethan Katsh & Orna Rabinovich-Eny, Digital Justice: Technology and the Internet of Disputes 34 (2017). [↑](#footnote-ref-77)
78. Indeed, there are already platforms in this regard in China. *See*, *e.g.*, Yuandian (元典), https://www.legalmind.cn (last visited May 2, 2018). [↑](#footnote-ref-78)
79. See more detailed description of mediation stages in David Hoffman, Mediation: A Practice Guide for Mediators, Lawyers, and Other Professionals Ch. 4 (2013). [↑](#footnote-ref-79)
80. *See* Ethan Katsh & Orna Rabinovich-Eny, Digital Justice: Technology and the Internet of Disputes 64 (2017) (“The online brainstorming tool not only added real efficiency in terms of time, costs, and the administration of the process from the mediators’ viewpoint, it also improved the process by empowering parties (especially on the employee side) to voice their opinions—anonymously if they chose. Anonymous input can help to level the playing field among speakers by preventing ‘group think’ dynamics; however, it also comes at a cost to the other functions performed by mediators while brainstorming face to face, namely, the ability to gauge participation levels and address group dynamics and power imbalances within and among groups of stakeholders. Anonymous channel also undercut efforts to present a unified front (problematic in particular for labor unions) by allowing for fragmentation and individual preferences to be voiced.”). [↑](#footnote-ref-80)
81. *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 Negot. J. 263, 285 (2011) (“The conventional ground rules for such a mediator’s proposal are simple: the mediator makes the same proposal to each party, and each responds confidentially only to the mediator with either a ‘yes’ or a ‘no.’ The mediator then reports to the parties either a settlement (because each side said ‘yes’) or no settlement (because one or more parties said ‘no’). Using this mediator’s proposal process, each side can take the risk of saying ‘yes’ without the other party or parties knowing, unless they too said ‘yes.’”). [↑](#footnote-ref-81)
82. Richard Susskind, Tomorrow’s Lawyers: An Introduction to Your Future 37 (2017). [↑](#footnote-ref-82)
83. *See Id*. at 39. [↑](#footnote-ref-83)
84. *See* *Legal Outsourcing*, Wikipedia, https://en.wikipedia.org/wiki/Legal\_outsourcing (last visited May 2, 2018); *see also* Richard Susskind, Tomorrow’s Lawyers: An Introduction to Your Future 41-44 (2017). [↑](#footnote-ref-84)
85. *See* David Hoffman, *Mediation and the Art of Shuttle Diplomacy*, 27 Negot. J. 263, 282-284 (2011) (“Fortunately, very few lawyers or clients are as unmanageable as Jane. But where such problem personalities are found, managing the mediation properly may require not only separating the parties but also creating a time structure to manage talkative parties so that each side has equal, or approximately equal, time with the mediator.”). [↑](#footnote-ref-85)
86. *See* Frank Sander, Dispute Resolution: Negotiation, Mediation, Arbitration and Other Processes 198-199 (2012). [↑](#footnote-ref-86)
87. *See* *Watson*, Wikipedia, https://en.wikipedia.org/wiki/Watson\_(computer) (last visited May 2, 2018) (“Watson is a question-answering computer system capable of answering questions posed in natural language… On July 29, 2016, IBM and Manipal Hospitals (a leading hospital chain in India), announced launch of IBM Watson for Oncology, for cancer patients. This product provides information and insights to physicians and cancer patients to help them identify personalized, evidence-based cancer care options.”). [↑](#footnote-ref-87)
88. *See* *AlphaGo*, Wikipedia, https://en.wikipedia.org/wiki/AlphaGo (last visited May 2, 2018) (“AlphaGo is a computer program that plays the board game Go… At the 2017 Future of Go Summit, AlphaGo beat Ke Jie, the world No.1 ranked player at the time, in a three-game match.”). [↑](#footnote-ref-88)
89. *See* Ethan Katsh & Janet Rifkin, Online Dispute Resolution: Resolving Conflicts in Cyberspace 93 (2001). [↑](#footnote-ref-89)
90. *See* Ethan Katsh & Colin Rule, *What We Know and Need to Know About Online Dispute Resolution*, 67 S.C. L. Rev. 329, 330 (2016). [↑](#footnote-ref-90)
91. Ethan Katsh & Orna Rabinovich-Eny, Digital Justice: Technology and the Internet of Disputes 64 (2017); *see also* Ethan Katsh, *ODR: A Look at History*, Mediate.com, https://www.mediate.com/pdf/katsh.pdf (last visited May 2, 2018) (“[w]hen a negotiation problem is modeled, a computer can act as an intelligent agent using optimization algorithms that seek the best solution...Optimization algorithms utilize detailed and highly accurate information from all parties, information that they would never provide each other and in some cases not entrust to a human mediator. With anything other than the very simplest of cases, this optimization is beyond the capabilities of any unassisted human.”). [↑](#footnote-ref-91)
92. *See* Jon Kleinberg, Himabindu Lakkaraju, Jure Leskovec, Jens Ludwig, Sendhil Mullainathan, *Human Decisions and Machine Predictions*, NBER Working Paper (February 2017), *available at* http://www.nber.org/papers/w23180.pdf; *see* *also* Tom Simonite, *How to Upgrade Judges with Machine Learning*, MIT Technology Review, March 6, 2017, https://www.technologyreview.com/s/603763/how-to-upgrade-judges-with-machine-learning/ (“In a new study from the National Bureau of Economic Research, economists and computer scientists trained an algorithm to predict whether defendants were a flight risk from their rap sheet and court records using data from hundreds of thousands of cases in New York City. When tested on over a hundred thousand more cases that it hadn’t seen before, the algorithm proved better at predicting what defendants will do after release than judges.”). [↑](#footnote-ref-92)
93. *See* Jean Poitras, *What Makes Parties Trust Mediators?*, Negot. J. 307, 308 (2009) (“According to Morton Deutsch (1958), individuals are more likely to trust someone if they believe that person has nothing to gain from untrustworthy behavior. It is therefore important for the mediator to show the parties that he or she has no interest in favoring one party over another.”). [↑](#footnote-ref-93)
94. *See* Sarah 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, 204 (2006-2007) (“The Internet is also a neutral platform for negotiation because, unlike an attorney's office or other setting, neither party controls it.”). [↑](#footnote-ref-94)
95. *See* Jean Poitras, *What Makes Parties Trust Mediators?*, Negot. J. 307, 309 (2009) (“Parties develop trust in the mediator when they trust his or her ability to manage the process.”). [↑](#footnote-ref-95)
96. Will Knight, *Biased Algorithms Are Everywhere, and No One Seems to Care*, MIT Technology Review, July 12, 2017, https://www.technologyreview.com/s/608248/biased-algorithms-are-everywhere-and-no-one-seems-to-care. [↑](#footnote-ref-96)
97. *Id*. [↑](#footnote-ref-97)
98. *Id*. f뿷邍ꝛǺꑠ昂 ﷽﷽﷽﷽﷽﷽﷽﷽(e.g., the esictions, National Bureu of Economic Research, r make self-serving recommendations (e.g., the es [↑](#footnote-ref-98)
99. *See* Matthias Spielkamp, *Inspecting Algorithms for Bias*, MIT Technology Review, June 12, 2017, https://www.technologyreview.com/s/607955/inspecting-algorithms-for-bias/ (“Specifically, ‘blacks are almost twice as likely as whites to be labeled a higher risk but not actually re-offend.’ And COMPAS tended to make the opposite mistake with whites: ‘They are much more likely than blacks to be labeled lower risk but go on to commit other crimes.’”). [↑](#footnote-ref-99)
100. *Block box*, Wikipedia, https://en.wikipedia.org/wiki/Black\_box (last visited May 2, 2018). [↑](#footnote-ref-100)
101. Will Knight, *The Dark Secret at the Heart of AI*, MIT Technology Review, April 11, 2017, https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai. [↑](#footnote-ref-101)
102. *See* *Id*.; *see also* Finale Doshi-Velez fdcond,chology s aed mediation participants to and Mason Kortz, *How do we hold AI accountable?*, Royal Gazette, March 21, 2018, http://www.royalgazette.com/opinion/article/20180321/how-do-we-hold-ai-accountable (“Unlike a human, though, AI isn’t necessarily able to explain its internal processes to an outsider — unless we build in the capacity to do so. Entrusting important decisions to a system that can’t explain itself presents obvious dangers.”). [↑](#footnote-ref-102)
103. Matthias Spielkamp, *Inspecting Algorithms for Bias*, MIT Technology Review, June 12, 2017, https://www.technologyreview.com/s/607955/inspecting-algorithms-for-bias. [↑](#footnote-ref-103)
104. Robert J. Condlin, *Online Dispute Resolution: Stinky, Repugnant, or Drab*, 18 Cardozo J. Conflict Resol. 717, 745 (2016-2017). [↑](#footnote-ref-104)
105. *See* David Hoffman, *Ten Principles of Mediation Ethics*, 18 Alternatives 147 (September 2000), reprinted in Mediation: Approaches and Insights (Juris Publishing 2003) (a summary of basic principles), *available at* https://blc.law/wp-content/uploads/2016/12/2005-07-mediation-ethics-branchmainlanguagedefault.pdf. [↑](#footnote-ref-105)
106. *See* Will Knight, *The Dark Secret at the Heart of AI*, MIT Technology Review, April 11, 2017, https://www.technologyreview.com/s/604087/the-dark-secret-at-the-heart-of-ai/ (“Regina Barzilay, an MIT professor… and her students are also developing a deep-learning algorithm capable of finding early signs of breast cancer in mammogram images, and they aim to give this system some ability to explain its reasoning, too.”); *see also* Dong Huk Park, Lisa Anne Hendricks, Zeynep Akata, Anna Rohrbach, Bernt Schiele, Trevor Darrell1 & Marcus Rohrbach, *Multimodal Explanations: Justifying Decisions and Pointing to the Evidence*, arXiv.org (Feb. 15, 2018), *available at* https://arxiv.org/pdf/1802.08129.pdf (“We propose a multimodal approach to explanation, and argue that the two modalities provide complementary explanatory strengths… We quantitatively show that training with the textual explanations not only yields better textual justification models, but also better localizes the evidence that supports the decision.”). [↑](#footnote-ref-106)
107. *See* Carol Izumi, *Implicit Bias and the Illusion of Mediator Neutrality*, 34 Wash. U. J. L. & Pol’y 71 (2010); *see also* Christopher Honeyman, *Patterns of Bias in Mediation*, 1985 J. Disp. Resol. (1985). [↑](#footnote-ref-107)
108. *Supra* note 1. [↑](#footnote-ref-108)
109. 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*, 14 Harv. Negot. L. Rev. 195, 213 (2009). [↑](#footnote-ref-109)
110. This checklist was re-created from the Difficult Conversation Preparation Worksheet used in the Harvard Negotiation Workshop. Copyright © 2017 by the President and Fellows of Harvard College. All rights reserved. [↑](#footnote-ref-110)