

University of Nevada, Reno

**Judges Speak Out:
Did the Need to Use Distance Technology to Mediate during COVID-19 Outweigh
the Potential Ethical Pitfalls Related to its Use?**

A dissertation submitted in partial fulfillment of the
Requirements for the degree of Doctor of Philosophy in
Judicial Studies

by

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THE GRADUATE SCHOOL

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prepared under our supervision by

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Abstract

Judges should not express their personal opinions about cases that appear before them. When legal precedent exists, judges should apply the law to the facts and rule. For cases of first statutory impression, judges look for legislative intent. This study gave judges an opportunity to share their personal views without looking to precedent or statutory intent for guidance. During the COVID-19 pandemic and lockdown, a time of constantly evolving business guidelines related to public safety, such an opportunity was provided to judges across the United States. Judges did not believe the need to use technology to mediate during the COVID-19 pandemic created more potential for ethical pitfalls to occur than mediations conducted face-to-face (FTF). Judges reported their computer skills improved during COVID-19, along with their confidence that technology can be used to conduct mediations. Many judges plan to continue to use technology to conduct mediations after COVID-19 is contained. Of course, not every judge is convinced that technology is a resource to be used for mediations or other court proceedings. Judges shared their own definitions of “ethical pitfalls” related to the use of distance technology during hearings mediations and hearings during COVID-19. The population studied included full and part-time judges across the U.S. The unit of analysis was sitting judges, whether or not they were legally trained or conducted mediations. Judges responded through two research methods: an online survey and participation in an online focus group. Judges (n= 532) responded to a survey and in August 2021, some of these judges (n = 41) also participated in one of seven focus groups.

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Chapter 1: Introduction

Problem Statement

Most disputed cases in the United States settle before a hearing or trial is held. It would be unrealistic and economically unsustainable for every legal dispute to only be resolved after a hearing. Ninety-eight percent of Missouri worker's compensation cases are resolved prior to a hearing, either through settlement, dismissal, or a request to close the case. A majority of case resolutions occur after at least one face-to face setting with an administrative law judge. Until 2020, the Missouri Division of Workers' Compensation only utilized a fraction of the technology available to manage settings, in favor of face-to face proceeding. In 2018, the topic of this study was: *Do judges believe potential ethical pitfalls exist with the use of distance technology during mediations?* The 2018 pilot survey of judges revealed judges in other jurisdictions shared similar opinions. In 2020, the novel coronavirus ("COVID-19"), arrived in the U.S. and expanded the scope of this study to: *Did the need to use distance technology to mediate cases during COVID-19 outweigh the potential ethical pitfalls related to its use?*

The Impact of COVID-19 on the Court System

The COVID-19 pandemic caused severe acute respiratory symptoms in humans and animals (Michener et al., 2020). A pandemic is defined as an epidemic of an infectious disease that spreads across a large region, such as multiple continents or worldwide, affecting a substantial number of individuals ("Pandemic," 2022). After the development of COVID-19, judges were forced to start using technology overnight in order to continue to conduct court business. Many judges had little or no formal training

or experience with Zoom calls, break out rooms and technical difficulties. In Missouri, the Director of the Missouri Division of Workers' Compensation cancelled all in-person settings, effective March 19, 2020. All dockets were changed to telephone settings. For hearings, parties could still request an in-person setting. In addition, a virtual platform was established through Lexitas, formerly known as Alaris, local business that provided online services to businesses. Judges conducted most settings by telephone or video conference until Governor Parson directed state workers back to the office in May 2021. However, Missouri workers' compensation offices have not returned to the large, in-person dockets that existed pre-COVID-19. Most judges conduct mediations, pre-hearings, and conference settings via telephone, Webex or Zoom. Hearings may be held in-person or virtually upon request of the parties. In St. Louis, state trial courts in St. Louis City and St. Louis County quickly moved to Zoom platforms to manage court proceedings. Jury trials were placed on hold for more than a year.

Virtual dispute resolution platforms have been around for a long time but were underutilized until COVID-19 appeared. Overnight, COVID-19 changed the way we conduct business and legal matters. In March and April 2020, most states declared "lockdowns" which forced the closure of businesses, schools, courthouses, doctor and dentist offices, restaurants, and car dealerships, to name a few as they moved from face-to-face ("FTF") services to virtual platforms, where possible, to conduct business. Courts scrambled to establish virtual platforms quickly. Traditional court proceedings were abruptly stopped. State courts transferred all proceedings online. State Supreme Courts were tasked with establishing unprecedented rules to keep visitors and staff safe while

administering justice, whether in-person or online. Zoom court meetings sprang up across the country to host arraignments, mediations, hearings, and other docket settings. Across the U.S., instant demand arose for the use of distance technology; Factiva Court Call, Microsoft Teams, Skype, and the reliable telephone (M. Reagan & B. Winger, personal communication, June 12, 2020).

Before COVID-19, texting became a way of life across all cultures, ages, genders, and economic backgrounds. After COVID-19, texting may play a bigger role in case resolution for injured workers. Over 81 percent of the population owns a smartphone, according to the Pew Research Center (V. Wenzel, personal communication, May 19, 2020). Roughly one in five adults uses a smartphone but lacks traditional broadband service at home, making texting the preferred communication over (V. Wenzel, personal communication, May 19, 2020). HomeCare Connect is a company that services injured workers through a program called TextConnect. Within an hour of receiving a referral, a care coordinator contacts the injured worker by text, introduces the company, assesses the worker's condition, and discusses expectations (V. Wenzel, personal communication, May 19, 2020).

After the COVID-19 pandemic "ended" in 2021, skepticism remained about the use of virtual platforms for mediation. However, the technology continued to evolve. Some experienced mediators predicted COVID-19 would "change the landscape" of alternative dispute resolution ("ADR") in the foreseeable future (M. Reagan Ret. & B. Winters, personal communication, June 12, 2020). As of March 7, 2020, over 170,000 Americans had died from COVID-19 (<https://www.cdc.gov>). At that time, a COVID-19

vaccine had not been developed. Two months after the lockdown of America, states began to reopen. As businesses, churches and governments opened their doors, politicians and medical leaders continued to recommend social distancing (staying six feet apart), wearing masks, and regular hand washing. Despite these efforts, by July 2020, many states had experienced a spike in the number of COVID-19 cases since reopening businesses and beaches and following nationwide protests to keep them open. Some experts opined this was not a second wave, but a continuation of the first wave, with more positive cases predicted in the fall of 2020. In Missouri workers' compensation offices, work from home orders were extended until November 1, 2020. Except for hearings, all docket settings continued to be held by telephone or video conference. Parties could request an in-person hearing. However, twenty-five-year-old computers were no match for the new virtual platforms. On a Zoom call with office staff during beginning of the pandemic, I had to write my comments in the chat box because I did not have audio access through my computer. As an alternative, I called my supervisor and joined the meeting through her cell phone on speaker.

COVID-19 required all courts to remain vigilant in promoting the health and safety of litigants, attorneys, court staff and the general public. Courts learned to manage COVID-19 until a vaccine and other defenses were established. Other defenses used by courts to stop the spread of COVID-19 included: A stay on jury trials, limiting the number of potential jurors in a room when hearings resumed, limiting the number of people in the court room and the courthouse, promoting attorney meetings away from the courthouse, encouraging attorneys to communicate with each other before seeking help

from the courts, and assisting parties via teleconference and video conference, including mediations and hearings.

Missouri Courts Responded to COVID-19

The Missouri Supreme Court (“Court”) supervises the administration of the state’s judicial system. As COVID-19 cases rose, the Court issued several orders to the courts in the judicial branch of government. On May 13, 2020, the Court suspended all in-person appellate and circuit court proceedings due to COVID-19 (Schallhorn, 2020). At the Missouri Division of Workers’ Compensation (“DWC”), in-person hearings finally resumed in June 2020, after a three-month delay. During the summer of 2020, the first hearing had to be continued because the injured worker had contracted COVID-19. The St. Louis DWC office was shut down completely for deep cleaning after a visitor reported exposure to someone who tested positive for COVID-19. Telework continued and business travel was discouraged. Physical workspaces were modified for social distancing and the number of in-office staff was greatly reduced. Until August 2020, the National Guard stood at the entrance of the Wainwright State Office Building and questioned everyone who entered the building about their exposure to COVID-19. Sick workers were asked to stay home.

Significance of the Problem

In 2018, face-to-face mediations had been the gold standard for decades. With a few exceptions, it worked well. Occasionally, an exception was made for a litigant to attend a mediation by telephone if in-person attendance caused a hardship. This study sought to discover if judges believe mediations conducted with the use of distance

technology to bring participants together from different locations, caused potential ethical problems, and regardless, would they be willing to try it. This original research question in 2018 was of interest to the researcher in order to bring to fellow judges another possible tool for their mediation toolkit. This study provided a platform for judges to express their concerns and make suggestions in order to improve the virtual process and remain in business when meeting in person was not an option.

Fast forward to March 2020 when the COVID-19 lockdown first began in the United States. Due to the uncertainty of various strains of COVID-19, guidelines provided by the Centers for Disease Control and Prevention (“CDC”) and the NIH (“National Institute of Health”), were also rapidly changing, sometime daily, and were in conflict with their previous guidelines about mask mandates and social distancing, and local policies, in these front-line defenses. Courts are typically reactionary. We make decisions based on things that have already happened. We rely on legal precedent to decide cases. However, there was no precedent for COVID-19 in the legal field. Many judges have learned to manage disputes while learning how to operate technology. These conflicts impacted court policies and docket management, because no vaccine had been created at that time. Courts fought to keep up with their own guidelines while trying to decipher the mixed guidelines from public health officials and politicians about how to conduct business while keeping everyone safe while trying to establish a “new normal.”

To keep staff and the public safe, innovative plans emerged overnight to resolve disputes with the use of technology, which has improved over the last two years. Judges have gained more knowledge about technology and confidence in their ability to use it.

Like face-to-face mediations, the need to use of technology to conduct mediations in a pandemic does not overshadow the importance for security and ethics to be maintained while using it. However, some of the safeguards are different for the two processes and this research reveals the differences between them. This study looked at issues that were important to maintain in both processes, e.g., confidentiality, mediator control of the process, and trust in the process. Whether the process used is Webex, Zoom, or some other platform, there is potential bias that may be entered into the process that was not present with FTF mediations.

The COVID-19 threat is not over, but courts are learning how to manage their mediations, hearings, and other proceedings, in spite of it. Many courts manage a large number of cases and people, often in crowded spaces, and with long wait times, and limited ventilation. These are often called “bulk dockets.” Mediations may not have as many people present, but the space and ventilation can be limited. Some courts convene in borrowed government buildings, with no control over the size of the room, windows, or doors. Therefore, it is important to know how COVID-19 affects the U.S. and other countries. This can help court managers prepare for a safe in-person meeting for all or convert to a virtual setting to be safe. COVID-19 has shown us that we are more closely connected than we thought.

As a result of these events, the scope of the study was expanded in 2020 to include the judicial opinion about the impact of COVID-19 and its place in the mediation. The COVID-19 fight has been a marathon, not a sprint. In 2020, it was unknown how long it would last. Now, nearly three years later, it looks like COVID-19 is here to stay.

Rationale for the Study

The purpose of this study is to examine judicial opinions about potential ethical pitfalls related to distance technology use during mediations. If potential ethical problems exist, does the need to use distance technology during a pandemic outweigh ethical problems that may arise during use? If so, which technologies are they? This study fills a void in the literature. Much information has been written about FTF mediations. In the U.S., courts have only used technology for proceedings on a consistent basis since the appearance of COVID-19 early in 2020. Judges, litigants, and attorneys had the unprecedented experience of converting to virtual proceedings overnight and continue to use them nearly three years later. Judicial opinion on this subject is still evolving. How much has COVID-19 shaped current judicial opinions on this topic?

Often a mediation judge will become the hearing judge on a different case, and it could be a virtual hearing. Judges were asked questions about hearings and distance technology. Although some concerns are different in a hearing than a mediation, many of the same challenges exist in both. Although this study was about mediations and technology, hearings and technology were also discussed to some extent.

Before the COVID-19 vaccine became available, the number of COVID-19 cases and related deaths increased in the U.S, and virtual mediations became the new normal. Virtual hearings increased as well. In some courts virtual mediation have remained. As judges it is our responsibility to ensure that virtual justice is administered with the same ethical standards as FTF mediations and other court proceedings.

Chapter 2: Literature Review

Overview

Over a short period of time, technology has evolved as a reliable way to resolve legal disputes. It is economical, efficient, and less stressful than driving to a meeting. COVID-19 quickened the acceptance of virtual mediations, and some hearings. Given COVID-19 predictions, and the fact that most cases are resolved before a hearing, technology may become the main vehicle used to resolve legal issues in the future, short of a hearing.

The topic of this study, judicial perspectives on ethical pitfalls related to the use of distance technology to facilitate mediation and the impact of COVID-19 on the opinion of judges, is timely. The topic was chosen before the appearance of COVID-19; however, the scope of the study has expanded since the arrival of the virus.

Traditionally, courts have favored face-to-face mediations over virtual settings for a variety of reasons. Facial expressions cannot be observed over the telephone. Parties may not be as committed to virtual mediation or take it as seriously as FTF mediations. There is no 'skin in the game,' meaning they do not have to get dressed (from the waist down) and travel to the court in order to participate. Video conferences offer limited exposure to body language. Before 2020, courts may have been reluctant to use technology to mediate due to: 1) a lack of commitment, 2) technical difficulties, 3) lack of technical knowledge and skills, 4) cost, and 5) FTF mediations were available and worked fine.

Every day people use negotiation and mediation skills to resolve disputes. A teenager negotiates with parents about chores. Negotiation takes place between two people in an effort to resolve a dispute. When attorneys negotiate, they represent competing client interests in the background. Mediation is a negotiation between two or more parties facilitated by an agreed-upon third party called a mediator (Program on Negotiation, 2022). A trained third-party neutral can lower the emotional temperature in the room, improve communication among the parties, and suggest ways to resolve the issue that parties may have overlooked (Program on Negotiation, 2022).

The Evolution of Distance Technology to Mediate Disputes

This section chronicles the development of distance technology to facilitate disputes from the early beginnings through August 2020. Before the widespread use of the internet, Phil Salin created the American Information Exchange (“AMIX”), an international network to buy and sell information, goods, services, ideas, and intellectual products (“American Information Exchange,” 2022). The 1980s were characterized as the Information Age. Actions emerged to support this conclusion. For example, Warren Buffett, known as one of the shrewdest investors of our time, invested in ABC/Capital Cities because he believed control of channels of information was capital. Intellectual property, a product of the human mind, began to replace physical property. The need to have access to accurate, timely information became a key factor in success.

AMIX has been described as the “first market for information.” Salin’s goal was to have immediate access to the exchange of expertise at a reduced cost that benefitted many people. Salin predicted information markets would reduce the need for redundant

employees in different organizations. Therefore, companies would become smaller, more efficient, and rely on each other as external sources. In 1988, Autodesk acquired a majority interest in AMIX and funded it until 1991. The computer industry became the source of early markets, i.e., a network for the exchange of libraries of object-oriented computer code. The company closed in 1992 after Salin died (“American Information Exchange,” 2022).

In the early 2000s, the biggest obstacle to the use of technology to access justice was called the digital divide (Schmitz & Rule, 2017). At that time technology and fast internet service disproportionately benefitted the wealthy. In 2013, a Pew Research Center (“PRC”) study revealed about 70 percent of adults had high speed broadband Internet connections, and three percent had home dial-up connections. Home broadband was greatest for white, non-Hispanic (74 percent), and lowest for Hispanic (53 percent) of consumers (Schmitz & Rule, 2017).

However, creation of relatively inexpensive mobile phones increased access to the internet for everyone. PRC findings revealed the smart phone closed the gap with respect to internet access for minority and low-income consumers. PRC found ten percent of Americans did not have home broadband internet service, but most owned a smart phone (Schmitz & Rule, 2017). Smartphones virtually eliminated the digital divide among races and ethnicities. Studies revealed 80 percent of white non-Hispanic, 79 percent of African American, and 75 percent Hispanics had internet access through home broadband or smartphones. Schmitz and Rule (2017) compare the mass delivery of technology to the evolution of the landline telephone. In the past, landline phones were considered a luxury,

only available to the wealthy. Over time, access to phones expanded to the point that public bodies were comfortable providing telephone services. Similarly, the authors believed policy makers and agencies realized the growing need for internet access for all. In 2022, internet access is a continuing challenge in rural areas in Missouri and across the country. However, with time, innovation may change during our lifetime.

Schmitz and Rule (2017) also recommended the establishment of clear guidelines for ODR systems, prior to the pandemic. A 2010 article by De Mars et al. identified the following ethical challenges for mediators and arbitrators when conducting business online: impartiality, cost, and confidentiality. Rainey (2014) as reported by De Mars et al. (2010) identified three primary challenges for mediators: confidentiality/privacy, access to the process, and competence. Rainey concluded: “Technology-assisted dispute resolution, be it mediation or some other form, is not just an analogue of a face-to-face process. There are changes in the nature of the interaction and the skills needed to manage communication and information exchange, all of which may have an impact on the parties with whom we work.”

An example of a change in the way virtual mediations were conducted compared to FTF mediations occurred early during the pandemic. Zoom experienced “Zoom bombing,” which permitted unwelcome people to enter a Zoom meeting and create havoc, which decreased consumer confidence in the platform. This problem was quickly corrected, which helped to re-establish user trust in the confidential nature of the platform.

Ms. Nancy Price Yeend, a national dispute management specialist, mediator, and mediation instructor at The National Judicial College, designed the mediation process used by AMIX to resolve customer disputes (N. Yeend telephone interview, October 29, 2018). AMIX developed software to initiate contracts between people. The contract was expressed in two parts, software and “free form text.” When parties disagreed over the terms of the contract, the claim would be arbitrated. Ms. Yeend used the software, but it had significant issues. Most work with AMIX occurred by telephone (N. Yeend, personal communication, October 29, 2018).

Examples of some drawbacks to FTF mediations include: geographic separation, bad weather, health issues, scheduling conflicts, and double victimization. What if the parties want to mediate but they are located in different geographic regions? Perhaps weather conditions make it impossible to meet in person at the courthouse, agency, or other designated location where mediations are commonly held. Health issues, scheduling conflicts and other life events may prevent parties from meeting FTF to resolve disputes. One party may feel threatened or intimidated by another party.

Now, parties face even more roadblocks to participation in FTF mediations. When that happens, what do you do? Do you reschedule the meeting for several months and hope circumstances are ripe to conduct a FTF mediation next time? The old adage, time is money, can make waiting a less desirable option. For the past two years, the major obstacle to FTF mediations has been COVID-19, which, made FTF mediations less desirable. Since March 2022, that trend has been changing. Businesses are open. Concerts and are back. Courts are open again and managing the backlog of cases. In the future,

FTF mediations may be drastically reduced or eliminated due to the impact of the virus on a global basis. The need for mediation remains an essential tool in our judicial toolbox to move cases toward resolution. But unlike the 1980s, we now have the Internet.

What is Distance Technology?

Fortunately, technology can take mediations to another level of case resolution. Today, there are a number of distance collaboration modalities (“DCMs”) that enable people to mediate cases despite life’s unexpected surprises and for the convenience of the parties (Skopp et al., 2015). DCMs include audio-conferencing (AC), video-conferencing (VTC), electronic meeting systems (EMSs), virtual environments, electronic mail (e-mail), instant messaging, and remote document sharing (Skopp et al., 2015). Telephone conferences should be included with DCMs too. Some state workers’ compensation agencies have traditionally employed video conferences in remote areas. Each year, the Social Security Administration conducts thousands of hearings across the country by video conference. Online mediation is an effective way to resolve disputes, according to Ebner (2012). It provides the flexibility for parties to participate. In addition, the slower pace of email discussions allows mediators to carefully draft responses and strategies, without reacting in the heat of the moment to emotionally charged statements. Online mediations may level the playing field between disputants who naturally dominate discussions and those who are more reserved.

Typically, mediators are chosen locally by word of mouth, therefore, parties may not trust a mediator arbitrarily chosen online. The advent of online mediations may change this way of selecting mediators. Companies like JAMS and Alaris, and

BeaconLive Webinars have sprung up and offer full-service packages to help customers resolve disputes with virtual services (Ebner, 2012).

Disadvantages to online mediation include the limited cues from body language, facial expressions, tone of voice and other in-person signals (Rainey et al., 2012). The risk for misunderstanding is increased, and it lacks the rapport and warmth developed through FTF meetings (Rainey et al., 2012). Parties may send hostile, insulting or threatening messages through Twitter and other social media outlets, which can broaden the divide between parties, and make it easier for frustration to sit in and halt participation (Ebner, 2012). Also, participants may not take the process seriously. Stephen Goldberg, a veteran mediator, and law professor at Northwestern University, believes mediator rapport with parties still outweighs the benefits of technology. Peter Adler, another mediator, and Goldberg's colleague, measures success by "breakdowns, breakthroughs, and the windows of opportunities lost or found." In contrast, participants in their program remember the mediator's role as "opening the door, making coffee, and getting everyone introduced" (Ebner, 2012). In summary, these experts support two requirements for negotiators and mediators: 1) building relationships and 2) the absence of manipulation.

Using Distance Technology to Resolve Business Disputes

In the 1990s, startup companies offered e-mediation or online mediation services to other companies and the public (Program on Negotiation, 2013). Mediators were trained to conduct online dispute resolution, mainly through email. Now, the service is

offered across the world by service providers and a growing number of individual professional mediators.

Traditionally, online mediation has been used to resolve conflicts that involve high volume, low value cases and long-distance challenges. The company, eBay, is an early pioneer in the use of online mediation practices to resolve customer complaints (Program on Negotiation, 2013). Since the 1990s the types of cases mediated online have expanded to include family conflicts and workplace injuries for people who live and work in the same and different areas.

Development of e-mediation can be traced to the following four early efforts in the 1990s: First, the Online Ombuds (“Ombuds”) project which was established in 1996 (Ebner, 2012). Second, the same year the Center for Law Practice Technology at the University of Maryland’s School of Law initiated a mediation project for family and health care disputes, called the Maryland Family Mediation project. The National Center for Automated Information Research (“NCAIR”) provided funding for the project. Unfortunately, the program was not successful. Third, the Cyber Tribunal project at the University of Montreal School of law, created e-Resolution, a commercial service provider of e-mediation and arbitration services for domain named disputes. Fourth, in 1999, the Ombuds project started a pilot program to mediate disputes for eBay (Ebner, 2012). This laid the groundwork for online negotiation and mediation skills currently used by eBay (Ebner, 2012).

Square Trade picked up the eBay mediation project when the Online Ombuds program ended (Ebner, 2012). Square Trade referred parties with disputes to eBay who

offered several options for resolution. First, parties contacted each other through automated negotiation, followed by assisted negotiation. If no agreement was reached a live mediator assisted them. During the 1990s and early 2000s, thousands of cases settled through the automated process. In 2008, eBay re-integrated the dispute resolution program into their company. Later, a hybrid system was used in automated negotiation. If no agreement was reached, an optional human mediator became available (Ebner, 2012). The emphasis shifted to offering e-mediation to the general public. Early online service providers included Internet Neutral, e-Resolution, and Online Resolution. The disputes included business, commercial, workplace, and insurance issues (Ebner, 2012).

Using Distance Technology to Address Medical Conditions

Today, online services have extended to other services as well. Telecommunication is transforming medical treatment for injured workers with the advent of alternatives to onsite medical care. Telemedicine is defined as tech-enabled modalities that enable consumers to receive medical care or advice remotely from clinicians (DiSilva et al., 2021). According to a survey by Rock Health, telemedicine is the most popular distance technology service with 59 percent of those surveyed. Of those surveyed 41 percent favored email and 29 percent favored text messages. Video based telemedicine experienced rapid growth from 7 percent in 2015 to 22 percent in 2016. In 2021, live video became the most used telemedicine modality used, among live video, live phone, text messaging, email, messaging via a health app or website, and picture or video messaging (DiSilva et al., 2021). This rapid increase in live video is attributed to more clinicians offering video telemedicine than ever before.

Telemediation 101 focused on in-person services provided online. Now the focus is on specific clinical issues, i.e., autoimmune disorders, reproductive health, consumer gaps. Patient care is expected to become more proactive and a part of everyday life, based on Millennials who are known as the “texting generation.” Companies have begun to embrace the asynchronous telemedicine model including K Health, BetterHelp, MindRight and Cerebral. These companies use in-app provider messaging to address needs, including primary care, mental health, and urgent care. Nurx uses photo sharing to remotely assess skin conditions (DiSilva et al., 2021).

Using Distance Technology to Solve a Variety of Problems

In the early phases of COVID-19, many injured worker’s appointments were rescheduled or managed through video or telephone conferences. In many states, that trend continues today. Mediators have expanded their practice to include e-services, such as email, phone, and videoconferencing (Ebner, 2012). In 2020 it was predicted that COVID-19 may last through the end of 2020 and possibly beyond. That prediction has come to pass. As a result, some predict distance technology will become a staple mediation resource. Smart watches may be the next addition to the expanding number of resources available to facilitate mediations through the use of distance technology. Currently, a smart watch may be used for a teleconference or to text or email a counteroffer or send test results to your physician.

Using Distance Technology to Address Disputes in Family Law Cases

In addition, technology has infiltrated the ranks of family law. CoParenter, an online program, was created in 2015 to help parents who are separated, divorced, or

never married avoid costly litigation. (www.coparenter.com/help-center). In 2017, coParenter developed an application (“app”) to help parents deal with managing their children’s schedules, visits, and everyday conflicts that often returned them to court to seek resolution (www.coparenter.com/help-center). For years, the Honorable Sherrill A. Ellsworth, a retired family court judge in California, saw families torn apart through the court system. During an interview I had with Judge Ellsworth, she said children should be raised at home not in court (S. Ellsworth, personal communication, November 1, 2018). Judge Ellsworth is co-founder of coParenter, along with Jonathan Verk, a divorced father. After what he called an expensive and “emotionally crippling” divorce, Jonathan and his family were devastated. He wanted other families to avoid litigation and “Keep their kids at the center, not in the middle” (coParenter: A Revolutionary New Approach to Coparenting is Here, 2017).

The app provides parents with tools to reach agreement about their children in ways traditionally managed by the courts, sometime poorly, according to Judge Ellsworth. One unique feature of the program is the ability to meet with local mediators in real time. Live “on-demand” co-parenting mediators and coaching professionals are available by telephone as needed. The mediator facilitates discussion and helps parties make decisions about their child’s day-to-day activities. The coParenter app offers a variety of professionals, in and out of the court system, to help parents communicate more effectively with each other. This trend is likely to continue in light of COVID-19, emotions, and finances involved with family conflicts.

In 2018, the Resolution Systems Institute (“RSI”) received a planning grant from the Family and Interpersonal Resilience and Safety Transformation Fund to explore the development of an online or digital tool to assist mediators in screening for intimate partner violence (“IPV”) prior to assessing whether each individual can exercise self-determination in the mediation (Slepek-Cherney & Yates, 2018).

Using Distance Technology to Resolve Issues in the Courtroom

The National Judicial College (“NJC”) conducted a survey in March 2020 about the use of distance technology in the courtroom. They received 302 responses from judges across the country. Forty-one percent of judges surveyed said they do feel adequately prepared and believe video conferences and telecommunications could easily become the new status quo (Firth, 2020). Some states are educating judges on potential problems with alternate platforms to face-to-face proceedings and provide legal precedent on quarantines and related issues. An insurance appeals judge responded, “... one of the largest challenges is preparing oneself psychologically to get out of our business-as-usual entrenchment to make wise decisions recognizing extraordinary circumstances. Denial can be as much a fault as panic or overreaction.” Another judge stated the “proper path forward” should be “discoverable” from “existing law and judicial principles,” given enough useful information about the nature and scope of the emergency. In this same survey conducted by NJC (Firth, 2020), six out of ten respondents did not feel adequately prepared to deal with the impact of COVID-19 on court proceedings. For example, how should judges weigh personal rights versus public safety? How do judges ensure ongoing court operations? Should evidentiary rules be relaxed to allow video testimony in order to

avoid infection? One judge expressed concern about the lack of “forward-focused leadership,” despite early confirmed cases of COVID-19 in their state and local courts. Other concerns expressed by judges included: 1) How to manage time sensitive hearings; 2) when to close public events or quarantine; 3) what to do if jails become infected and how to proceed with convictions, bond release, etc.; 4) how to manage vulnerable populations without access to health care and addressing disease-prevention hygiene for a large percentage of litigants who appear in court; 5) spread of the virus among jurors and court personnel who interact with the public; 6) staff training and COVID-19; and 7) evidence and mail decontamination.

In May 2020, NJC (Firth, 2020) conducted a follow-up survey to the survey conducted in March 2020. An additional 702 judges were surveyed about the online platform they have used the most since COVID-19 began. The main platforms used were Zoom (forty-eight percent) and WebEx (twenty-five percent). In Baldwin County, Alabama, courts use Zoom with existing software to set cases for hearing and create virtual dockets. It has worked so well the court may continue using it for motion dockets after social distancing restraints are lifted. One judge in Texas commented that drug court participants seemed more relaxed on Zoom than during in-person court appearances. Judges noted parties had greater access to the justice system online than during face-to-face proceedings.

In addition to Zoom and WebEx, judge-respondents ranked other virtual platforms in the following order: Other – 10.54% (Star Leaf, Vidyo, Whereby, Uberconference, Free Conference Call, Jabber, Call Bridge, Polycom, Virtual Meeting

Room, and Amazon Chime; Skype – 9.69%; Microsoft Teams – 9.12%; GoToMeeting – 6.13%; Google Hangouts – 3.85%; BlueJeans – 3.56%; CourtCall – 3.13%; Adobe Connect - .14%. Judges who responded to this survey also were concerned about security issues with “Zoom bombing” or video conference hijacking. Judges were pleased with Zoom’s password protection option, live security and sharing features. Since the initial rush to virtual settings, Zoom has improved their product by adding a meeting ID and a password to join a meeting (Firth, 2020).

The Impact of COVID-19 on Virtual Hearings

The topic of this study involves the ethical impact of COVID-19 on virtual mediations. However, during focus groups, judges were asked about the ethical impact of COVID-19 on hearings for several reasons. First, during the pilot study in 2018, judges referred to virtual hearings when they discussed virtual mediations. Second, the same judges were presiding over virtual mediations and hearings, often in the same location, using the same equipment. Judges had an opinion on the subject, and this was their opportunity to be heard. That discussion follows.

In June 2020, members of the executive board for the National Association of Hearings Officers, (“NAHO”), unveiled their remote work plan (NAHO, personal communication, June 2020). Department of Transportation board members in Minnesota converted to Microsoft Teams to conduct video hearings. For hearings, law enforcement officers used smartphones to participate in court proceedings using the video camera and a free app. The Philadelphia Environmental Hearing Board conducts in-person and telephone hearings. Challenges to virtual settings included adjustments for large numbers

of participants for in-person hearings and use of electronic exhibits while avoiding bias and to ensure due process to everyone. Until COVID-19, hearing notices by email were not considered to be “in the regular course of business.” If parties did not appear, you could not assume the notice was received. To avoid due process concerns, they rescheduled the hearing or dismissed the complaint without prejudice.

In Georgia public schools, discipline and behavioral hearings were on hold since the spring 2020 school shutdown (NAHO, personal communication, June 2020).

“Pending” student hearings resumed once schools reopened. Some students requested their hearings be transferred to online proceedings. The challenge for the administrative office was to give schools guidance on how to conduct investigations and to assure all parties have an opportunity to give statements, Title IX allegations were addressed, and due process was followed. Contract hearing officers in Orange County California conducted due process hearings before COVID-19 under the California Penal Code. Telephone hearings were conducted with a focus on explaining the remote process, how testimony will be received, how objections will be made and ruled upon, and how additional evidence will be submitted.

NJC presented an online seminar on how courts around the world managed settings early in the pandemic (NJC, personal communication, June 26, 2020). Judges from Korea, Spain, Italy, and United States shared changes made by their courts to ensure the safety of staff and the public. For court appearances in Spain, plexiglass was used to keep participants safe. Barriers were established for eight feet distance between people standing in lines. A chair was left empty between participants. Italy limited the number of

judges and staff in the courthouse, and restricted public access inside the Justice Palaces. Lawyers were asked to appear alone for hearings if assistants or parties were not strictly necessary. Meetings, conferences, and training were eliminated inside the Justice Palaces and bars and food were prohibited. No one was permitted to enter Palaces from the red zone.¹ At the height of the pandemic, New York only permitted in person hearings for issues involving the constitution, domestic violence, and juvenile matters. Each court room had its own WebEx number for the public to watch and listen to proceedings. Self-represented litigants had access to technology in a designated room (NJC, personal communication, June 26, 2020). In Texas, jury trials remained prohibited at the end of July 2020. Each county courthouse was assigned an Administrative District Judge who established local guidelines for business to be conducted in the courthouse. Use of disinfectants, masks, gloves, social distancing, etc. were used by the courts for in-person hearings based on the county's security level. For example, in a county with more than five active COVID-19 cases, temperature checks and masks were required. Visitors could not enter the building over a certain age or if they were "high risk," unless they signed a statement acknowledging the risks associated with the high-risk areas. Otherwise, entrants considered high risk and older adults were excluded.²

A survey of online seminar participants revealed forty-five percent of courts used Plexiglas or another types of separators for judges, attorneys, and witnesses, for safety

¹ In the seminar Justice Palaces were not defined. It is presumed they were part of the court system.

² It is not clear from the Webex what was considered "a certain age."

reasons (NJC, personal communication, June 26, 2020). This became a plausible option for FTF mediations in the U.S., although added to the cost of proceedings. Nevertheless, the cost was justified. The challenge courts had was to keep participants safe as they enter, leave, and take recess during the mediation. For courts that allowed in-person hearings, thirty-six percent only permitted litigants, counsel, and witnesses to enter the courthouse. Nine percent of courthouses permitted litigants, counsel, witnesses, and jurors to enter the courtroom. Another nine percent permitted litigants, counsel, witnesses, juries, and media to enter. Twenty-two percent of courthouses surveyed allowed everyone to enter. Forty-eight percent of courthouses were partially open. During the Webex meeting, judges did not directly discuss how mediations were conducted up to that point during the pandemic. However, circuit court protocols for in-person hearings provided guidance for FTF mediations as well. Based on circuit court procedures during COVID-19, a number of mediations were conducted online or by telephone at the height of the pandemic. This was consistent with mediation practices at the Missouri Division of Workers' Compensation and continues in large part in September 2022 (NJC, personal communication, June 26, 2020).

Since the start of the pandemic, many courts shifted to virtual or hybrid proceedings. Virtual proceedings can be convenient and cost effective. However, Laura Eschleman, a medical liability defense attorney in Atlanta, reported connecting with the jury was the greatest challenge with virtual and hybrid trials (Gallengos, 2022). In a medical malpractice case against a doctor, jury selection is an opportunity for physicians to connect with jurors. However, with 36 Zoom boxes of potential jurors, Ms. Eschleman

stated it is difficult to assess each potential juror. Some jurors do not take a video platform seriously or do not stay focused. During jury selection via Zoom, jurors lounged in bed, and spouses and children waltzed into the room as they pleased. One trial was delayed because a juror fell asleep during the recess. Another potential juror showed up drunk during virtual jury selection. Attorneys and defendant physicians also have trouble presenting their cases to Zoom jurors. Of course, technical difficulties can create a glitch in the proceedings. Tips to remember during virtual malpractice trials for defendants include: 1. Physicians should make eye contact with jurors, 2. Keep a poker face, 3. Have good lighting, 4. Keep paper copies of exhibits, and 5. Look professional. Virtual mediations and depositions are beneficial for doctors, reduces expenses and time away from work (Gallegos, 2022).

Judges Speak Out on the Ethics of Virtual Proceedings During a Pandemic

The number of COVID-19 related court cases is expected to continue to grow surrounding the constitutionality of witness testimony by video platform due to COVID-19. Discussed below are some of the early decisions at the federal level and in Missouri. On September 9, 2021, President Biden issued an executive order requiring vaccinations for all executive branch agency employees, except for medical and religious reasons. In response, the Fifth Circuit Court of Appeals upheld President's Biden's requirement that all federal employees be vaccinated against COVID-19, reversing an earlier lower court decision, and ordering a dismissal of the challenge. The Court found no area and challengers could have pursued administrative remedies under Civil Service law (The Associated Press, 2022).

The Honorable Terry A. Doughty, a U.S. District Court judge of Western District of Louisiana, blocked an emergency regulation issued November 4, 2021, by the Centers for Medicare and Medicaid Services (“CDC”), that required vaccines for nearly every full and part-time employee, volunteer, and contractor working at a variety of healthcare facilities that receive Medicaid or Medicaid funding (Brown, 2021). The lawsuit was brought by the attorney generals from 13 states and Louisiana. Plaintiffs asserted if the executive branch is allowed to go around Congress and issue a mandate, two of the three powers conferred by the Constitution would be in the same hands. This is a grave risk to civil liberties.

The Missouri Supreme Court Tackles the Constitutionality of Witness Appearance by Video at Hearings

On January 13, 2022, the Missouri Supreme Court handed down three cases and restricted the use of video testimony during trials, including via WebEx and Zoom. In all three decisions the Court held that permitting testimony by video over objections by the defendant violates the Sixth Amendment to the Constitution, which guarantees a defendant’s right to confront witnesses (Patrick, 2022). Lawyers believe the cases may end up in the U.S. Supreme Court. This came at a time when the use of Zoom, WebEx and other video platforms experience increased popularity. The first case involved Defendant Rodney A. Smith, accused of statutory rape in St. Louis, prior to the pandemic. At the hearing, Smith’s public defender objected to allowing DNA evidence being admitted without testimony from Erik Hall, the crime lab employee, who swabbed Smith’s cheek, did the analysis, and prepared a report. Hall was on paternity leave. The

judge allowed him to testify by video over the defense objection. Smith was found guilty and sentenced to probation. Judge Zel Fischer wrote, Hall's situation was not among the accepted reasons to allow video testimony; a child witness or ruling by the circuit judge that Hall would be unavailable to testify live which was needed to support the conclusions he reached from his analysis of the evidence (Patrick, 2022).

In the juvenile case involving Defendant J.A.T., the defendant was accused of shooting a man during a marijuana deal. The third case involved a twelve-year-old accused of sodomizing a 5-year-old. Jackson County Circuit Judge Jalilah Otto presided over both cases during COVID-19. Both defendants objected because they did not appear in person. Both juveniles will receive a new hearing. J.A.T. attended the hearing via video, everyone else was present in the courtroom. The Court held the defendant was entitled to be in the courtroom during his trial. Although the judge was trying to protect the juveniles from COVID-19, she did not make the required findings specific to each child to overturn that guarantee.

The younger child was in court with some family, lawyers, while witnesses and his mother attended on Webex. The Court held it was not clear if the pandemic met an exception to the requirement for in-person testimony in U.S. Supreme Court cases involving underage witnesses. But the Court found that even if pandemic precautions were met, the judge did not make specific findings needed for a remote appearance. Michael Wolff, a former Missouri Supreme Court Judge, believes this case is less complicated and may be ripe for the highest court. Prior to COVID-19, Judge Wolff believed there was confusion about the legal standard. At last update, the Missouri

Attorney's Office was deciding if the decision will be appealed. In a per curiam decision, the Missouri Supreme Court vacated and remanded all three cases on January 11, 2022 (Murdock, 2022).

Federal Response to COVID-19

On July 26, 2021, the Office of Civil Rights for the Department of Justice ("DOJ") published guidance to explain the application of federal disability laws to individuals suffering from long COVID-19. As a result, the federal government has established long COVID-19 as a disability under ADA and sections of the Rehabilitation Act (Berger, 2021). On November 5, 2021, the Occupational Safety and Health Administration ("OSHA") issued an Emergency Temporary Standard ("ETS") which applied to employers of 100 or more employees and required employers to adopt a "soft vaccine mandate," requiring employees to either get vaccinated or undergo regular COVID-19 testing and wear a face covering at work (Pryor et al., 2021). The measure was designed to protect unvaccinated employees of employers with 100 or more employees from contracting COVID-19 by strongly encouraging vaccination (Occupational Health and Safety Administration [OSHA], 2022). The emergency provision pre-empted all state and local testing/mask requirements, and required employers to develop, implement and enforce a mandatory COVID-19 vaccination policy, unless employers adopted a policy that required employees either be vaccinated or undergo regular COVID-19 testing and wear a face covering. The emergency provision served as a "proposed rule" for a "proceeding" to promulgate an occupational safety or health standard.

On January 26, 2022, OSHA withdrew the vaccination and testing requirement under OSHA-2020-0007 (<https://www.osha.gov/laws-regs/federalregister/2022-01-26>) based on the U.S. Supreme Court ruling that stayed the Vaccination and Testing ETS. The Court held that OSHA Act of 1970 does not provide a vaccine mandate because the statute only covers workplace safety not health initiatives. The Court concluded challengers were likely to prevail on their claims (SCOTUSblog, 2022). The Court concluded the OSHA vaccine mandate too invasive on individual rights. It was up to Congress to give OSHA the authority to mandate vaccines, which goes beyond the scope authorized by Congress.

State Response to COVID-19

On August 28, 2021, Missouri Governor Mike Parson signed into law SB51, which protects businesses and health care workers from personal injury lawsuits related to exposure to COVID-19, unless plaintiffs can show clear and convincing evidence of recklessness or willful misconduct (Lauck, 2021).

In 2014, Ms. Greenstein, Executive Director of the Alaska Commission on Judicial Conduct, wrote that many judges remain ignorant about the details of cloud computing and Twitter accounts (Greenstein, 2014). As Director Greenstein pointed out, technology is not just for lawyers. To remain competent, and safe, in today's society, judges have had to develop a working knowledge of technology as well. Little did Ms. Greenstein know her words would become a reality in a few short years.

In 2018, Zel M. Fischer, former Missouri Supreme Court Chief Justice, wrote; "We can no longer think of technology as a cool toy. It's how our citizens do business"

(Fischer, 2018). Justice Fischer's words also foreshadowed our current trend. With the arrival of COVID-19, this study explores how technology can provide an effective, secure, and ethical alternative to FTF mediations.

The American Bar Association ("ABA") concluded competency via technology equals professional responsibility (American Bar Association [ABA], 2020). Model Rule of Professional Conduct, 1.1, Comment 8, requires lawyers to have a basic understanding of the benefits and risks associated with relevant technology.

Overnight federal, state, and administrative courts were forced to develop a "new normal" to manage cases in a safe, impartial, and confidential manner. Courts continue to find ways to conduct fair and impartial proceedings while keeping staff and visitors safe from this invisible killer virus. As of October 2022, the total number of COVID-19 cases in the United States totaled 97,329,787, deaths totaled 1,066,351, and current hospital admissions totaled 11,873 (<https://covid.cdc.gov/covid-data-tracker/#datatracker-home>).

By October 2022 two COVID-19 vaccines and two boosters have been developed that will ease the challenges related to in person settings. In addition, Paxlovid and other drugs have been created to reduce the severity of COVID-19. However, statistics show some people who would benefit from the drugs are not receiving them (Leonhardt, 2022). Hundreds of deaths everyday can reportedly be prevented in the U.S. Two reasons are given for the underutilization of these drugs. First, the public discussion focuses on caveats and concerns, not the sound evidence that shows the drugs can reduce the risk of hospitalization and death. Second, is the opinion that many Americans, in particular Republicans, do not take COVID-19 seriously (Leonhardt, 2022). As a result, judges

should be aware that some of the public they serve may not have received vaccines and boosters, therefore, the number of in-person attendees should be monitored to avoid overcrowding and possible infection. Prior to COVID-19, the Missouri Division of Workers' Compensation scheduled several hundred cases at a time (called bulk dockets) in the St. Louis Office. The number of attorneys present required them to line up single file, back-to-back, in a crowded hallway, while other attorneys squeezed by, or sit in a crowded conference room. After COVID-19 began, bulk dockets were transferred to an email status update. That policy remains today because the location for these settings has not changed. This also protects visitors who may have compromised immune systems. It will be interesting to see how the government, scientists and academics respond to this situation during the winter of 2022 through 2023, and the impact it will have on how mediations and hearings are conducted across the country.

Over the past two years we have perfected our technological ability to conduct virtual mediations and other court proceedings. The question remains whether virtual options are accessible and secure enough to instill confidence in users as well as provide the service they need. This study will examine this question in detail. Judges from various courts share their perspective on possible ethical pitfalls associated with the use of distance technology to mediate cases and whether COVID-19 impacts their opinions.

Summary

As discussed above, the use of distance technology to resolve business disputes is not new. However, pre-COVID-19, the use of technology in the legal profession was an underutilized resource. During COVID-19, technology was employed to keep cases

moving as much as possible, while keeping participants safe. In 2022, some experts believe COVID-19 will not be eradicated. Instead, we must learn to live with it. The most recent tool added to our “toolkit” to fight COVID-19, is the issuance of a second booster shot by Pfizer in September 2022. Moderna is expected to follow soon. This study is designed to help judges continue to add to their “toolkit” of resources as we transition to the “new normal.” Courts must remain vigilant about their efforts to administer justice in a safe environment for all. The challenge remains, but the future is bright.

Chapter 3: Methodology

Overview

In March 2018, the Institutional Review Board (IRB), approved the pilot survey and focus group studies, and found no human subjects would be harmed. This was a multi-method approach. In 2018, a pilot study was conducted that consisted of a survey and a focus groups (Pilot Study 1: Survey and Focus Groups 2018). The goal of the pilot studies was to gain experience creating and administering surveys and moderating focus groups. The participants were judges from various courts across the United States. Non-legally trained judges were included in the survey and focus groups, if they were active on the bench. Judges were only excluded if they were retired. The pilot study provided a better understanding for what judges think about ethical pitfalls related to the use of distance technology during mediations. At that time, judges were not asked about the impact of COVID-19 on their opinions because it did not arrive until early 2020. The information obtained from judges in 2018 provided the basis for survey and focus group studies in 2021. In 2021 a survey was administered (Study 1: Survey 2021) a pilot focus group was also conducted (Pilot Study 2: Focus Group 2021) prior to the actual focus group data collection (Study 2: Focus Groups 2021). The Nevada Center for Surveys, Evaluation, and Statistics was contracted to analyze the data collected from Pilot Study 1 in 2018 and the surveys and focus groups from Pilot Study 2 and Study 2 in 2021.

Pilot Study 1 (Survey and Focus Groups 2018)

On October 1, 2018, volunteers were solicited from a group of judges attending a civil mediation class at the National Judicial College. Judges were asked to complete the

questionnaire and participate in one of two focus groups. Prior to the start of class, each judge was sent an invitation to participate in the training session and explained the nature of the study. Appendix 2 contains the request for volunteers. No set number of participants was established in advance of the survey.

At the start of class, judges were explained the project, and invited to participate. Participants were asked to return the completed surveys before their scheduled focus group session, which they did. Participants were competent to answer questions because they were sitting judges at the time of the survey. Two volunteers were excluded because they were not judges, and they participated in mediations as an attorney. One person was excluded because they did not complete the questionnaire.

Survey Methodology

A questionnaire was created for judges to complete that included the following information for judges to complete, which included: jurisdiction, venue, type of cases heard, population served, and length of time on the bench. Twelve judges participated in the pilot survey. These 12 participants were asked to define distance technology, list their experience with online and FTF mediations, list potential ethical pitfalls related to the use of distance technology to facilitate mediations, and list the type of cases they thought would benefit from using distance technology, to mediate, if any. At the start of this research in 2018, the author was curious to find out if mediations conducted with distance technology had the same potential for ethical pitfalls to occur as mediations conducted face-to-face. Some of the potential ethical pitfalls related to face-to-face mediations include breach of confidentiality, unequal bargaining power, and mediator bias. After

COVID-19, the topic expanded to an inquiry into whether similar ethical pitfalls found in face-to-face mediations might also be present when using distance technology to conduct mediations. However, for all of the studies, an explicit definition of “ethical pitfalls” was purposely not provided to the judges so that they could be afforded the opportunity to provide their own operational definition during the course of the research.

The questions asked were open ended and closed, short and to the point. Matrix questions were used to follow up on questions. Consideration was given to the order questions appeared in the questionnaire. Negative and biased statements were avoided. Survey questions consisted of a total of 31 questions. However, the actual number of questions answered by a respondent depended on whether they served as a judge or attorney and if they had experience using distance technology to conduct mediations.³ Initial survey questions identified personal information about the judge, whether they worked as a judge, non-attorney⁴ or attorney. If the respondent served as a judge, they were asked about their length of service on the bench, type of cases heard, and the population served. The survey was divided into three sections, 1) judges who had conducted online mediations, 2) judges who had not conducted online mediations, and 3) non-judges to express their opinions about online mediations in any capacity. Participants were asked to define distance technology, their experience with the use of distance

³ The questionnaire had a section for attorney mediators to complete. There was one person in this category.

⁴ The questionnaire was intended to identify non-attorney judges as judges but did not specifically indicate the distinction.

technology, their willingness to participate in distance technology to mediate cases, the type of cases that would benefit from using distance technology, and any potential ethical problems they saw with the use of distance technology to mediate. Appendix C contains the complete questionnaire used for the Pilot Study in 2018. Judges were not asked any questions about COVID-19 because it had not occurred.

Focus Group Methodology

Judges who signed up to take the survey, also signed up to participate in a focus group. On the questionnaire judges were assigned to a focus group. These same 12 judges participated in the focus groups in 2018. One was excluded as a non-attorney mediator. The last judge did not complete the questionnaire. On October 3, 2018, and October 4, 2018, focus group sessions were conducted. Historically, focus groups involved 12 to 15 people brought together in a room in a guided discussion of a topic (Babbie, 2008). Focus groups are qualitative in nature, meaning responses are descriptive, not numeric. They are used to supplement and support quantitative data. The sessions achieved three goals: 1) to gain experience conducting a focus group, 2) obtain data from the judges, and 3) develop questions for the later study. During the initial invitation at the start of class, judges were asked to sign up and participate in the survey and a focus group, which they did. Once they signed up, each judge was randomly assigned to one of two focus groups. Each group met for one day, for 60 minutes, during lunchtime from the civil mediation class. The first half of the session participants ate lunch. The second half of the session focus group discussions were held.

Setting and Apparatus. The Pilot 1 focus groups took place in a room approximately 9 feet by 12 feet, with participants sitting side by side on one side of a six-foot table, with a table tent in front of each judge. The moderator stood approximately three feet away from the table. Other researchers on the project sat nearby. A tape recorder was used to record participant responses. The researchers took notes. Access to a video was mentioned but not observed. Appendix D shows the Moderator's Guide to Focus Groups created for the two pilot focus groups conducted in 2018. The following resources, format, objectives, and questions were used to conduct the pilot focus groups:

Equipment and material. Equipment and materials included a digital voice recorder, microphones, video recorder, notepads, pens, and table tent cards to identify participants by assigned number.⁵ The judges' names were not used.

Research objectives. Judges were explained the research objective of the focus group; to gain a better understanding of judicial views about ethical pitfalls related to the use of distance technology to mediate cases.

Introduction to focus group. Judges were thanked for their time during the 30-minute session. I encouraged participants to share their experiences and opinions with the group. Participants were asked to be honest, even if their opinion was negative or different from the opinions of other judges. Participants were told no answer was right or wrong. Information remained confidential and there was no mention of judge's names on the audio and digital recordings. For identification purposes, each participant was

⁵ The record contains no copy of a video recording of the pilot focus groups.

assigned a number that was placed on the table tent in front of them. During the pilot focus group, judges were addressed by their assigned number. Judges were informed that no participant quotes and opinions would be attributed to a specific judge. Participants were told all data would be destroyed at the conclusion of the study.

Notes were taken by researchers during the pilot 1 focus groups in 2018. Later, key themes from the discussion were summarized by question.

At the start of each focus group the moderator's role was explained, which was to identify the topics and ask participants to discuss the topics among themselves, and not the moderator. The moderator was not a talking member of the group and did not express opinions on any topic. The moderator was there to move the conversation forward, record the discussion, take notes, and make sure everyone had an opportunity to participate. Before the recording began, judges were asked if they had a strong objection to being audiotaped or videotaped/or had any other concerns. No objections or concerns were expressed in either group. It was recommended that participants use the bathroom before taping started because the tape could not be stopped once it started. Before starting the tape, each participant introduced themselves, the court they represented, and the state where they sat on the bench. After introductions, participants were notified the recording would begin.

Focus group questions. Focus group participants were asked the following questions about online mediation. The pilot 1 moderator's guide and questionnaire are contained in Appendix D and Appendix E. Judges were asked questions about their

judicial experience with online mediations and the control, cost, and quality of mediations.

Study 1 (Survey 2021)

Survey Methodology

Information obtained from judges in the 2018 pilot survey was used to create questions for the survey 2021 study. This was a multi-method approach, where surveys, focus groups, and content analysis was used to collect data from judges from across the U.S. Late in 2020, a second survey was created. It contained 51 questions. The self-administered survey was mailed to approximately 1100 sitting judges, across the U.S., during an online survey period from May 6, 2021, until July 2, 2021. Surveys were expected to take 10 to 15 minutes to complete. Judges were asked if the need to use distance technology to mediate, in light of COVID-19, was outweighed by any ethical pitfalls that may occur from using it. Study 1 and study 2 in 2021 required approval by the IRB, which was granted on March 25, 2021, when they concluded there would be no harm to human subjects. The first research method studied was through surveys. Study 1 surveys were self-administered. Each participant was asked to complete a, privacy statement and agree to the collection of data. The data and participant's identity remained confidential. Judges were informed their participation was voluntary and they could stop at any point if they decided to do so without repercussions.

Sample. It was not possible to study every judge in the U.S., so a sample of judges was collected and studied to reflect the entire population of judges (Babbie, 2008). At the beginning of the survey, participants were asked to participate in study 2 – focus

groups 2021. They were also given the option to skip the survey and participate only in an online focus group. Therefore, the focus groups were not a subset of the survey and do not represent the population. No sitting judges were excluded from becoming a member of the sample. Before the survey began, it was estimated that 30 percent or 330 of the estimated 1100 surveys emailed would be returned in a useable form.⁶ The target sample size for the survey was 330 judges. This number was considered sufficient to represent a good cross section of judicial opinions. The actual number of usable surveys was higher:

532 – usable responses (20 to one hundred percent completed)

504 – over 50 percent completed

495 – over 80 percent completed

469 – 100 percent completed

Therefore, a total of 532 surveys were considered partially completed and used for data analysis.

Invitations were emailed to individual judges and organizations that judges belonged to. The invitations contained the link to the survey. The link sent to individual judges could not be forwarded to other people, but the tiny URL link sent to organizations could be forwarded. Email addresses of individual judges were found on government websites and can be accessed by the public. Sitting judges were asked about their judicial background, full or part-time employment on the bench, the type of cases they preside over, length of time on the bench, and the size of the population they served.

⁶ Thirty percent of 1,100 is 330 respondents.

After the development of COVID-19 in the U.S. in 2020, the scope of the study expanded to find out if COVID-19 changed judicial opinions about the use of distance technology to mediate cases. Judges were asked their opinion about ethical pitfalls during mediations when distance technology is used, and whether those pitfalls outweighed the need to use distance technology in light of COVID-19. Surveys were emailed to hundreds of judges across the country. The exact number of surveys emailed is unknown because judges were encouraged to share an anonymous survey link with other judges, created through Qualtrics (<https://tinyurl.com/judgessurvey2021>).

Survey Invitations to Individuals 2021. CSES was hired to program, test, administer, and monitor the survey, and assist with increasing the response rate through Qualtrics (www.qualtrics.com). Qualtrics is an online survey tool that builds surveys, distributes them, and analyzes responses in one location. The names and email addresses of hundreds of judges were compiled, and invitations were sent through Qualtrics. During the survey period, contact was made with various individuals to resolve technical and scheduling issues. At least three different sets of emails were sent to individual judges as additional contacts became available. Each email blast was repeated every two to three weeks. A list of individual judges was compiled and maintained during the survey.

Survey Invitation to Organizations 2021. The second method used to deliver surveys to judges by email in 2021 was through a list of known judicial organizations. This method provided a wider net to reach judges other than their courtrooms. A list was created to include the following information for organization: contact persons, telephone numbers, physical addresses, email addresses, and notes about contacts with the

organization's representatives. Notes included information about meetings with contacts and conversations that took place. An attempt was made to speak with a contact person from each organization, sometimes multiple times, if needed. One agency with the State of Missouri required submission of an extensive application for review before their hearing officers could be contacted. The application was submitted, but the request was denied. It is not possible to determine the number of surveys sent to members of organizations because the tiny URL link provided to organizations permitted the survey to be forwarded to other judges who may not be members of the organization. If a judge received a tiny URL link and returned the survey, there was no way to determine where the link originated or how many links were sent to judges. An email was sent to the president or executive director of each organization with a cover letter that explained the study, requested permission to contact members and invite them to participate, or in the alternative, request the survey link be passed to membership, which was attached to the email. The alternative became the most widely used format with organizations. Many organizations were reluctant to share membership contacts without the member's permission. Appendix F is an example of the invitation sent to the presidents and executive directors in 2021. This example was sent to The Honorable Bruce Moore, President of NAWCJ, 2020-2021. It was important to identify someone in the organization to contact to get a better response. A telephone call preceded most emails.

Organizations contacted to participate in the survey and focus groups included but are not limited to:

- 1) The National Association of Workers' Compensation Judiciary ("NAWCJ");

- 2) The National Judicial College, (“NJC”);
- 3) The College of Workers Compensation Lawyers “CWCL”);
- 4) The National Bar Association (“NBA”);
- 5) (“SAWCA”); and
- 6) The National Association of Hearing Officers (“NAHO”)

The following discussion summarizes the activities taken to encourage organizations to participate in addition to sending emails:

On August 10, 2020, the board of directors for the NAWCJ were presented with highlights of the study and a request for the email list of the membership. The points presented to the board are listed in Appendix G. The NAWCJ Board, approved the survey to be sent to the 195 members by the organization. The administrator emailed the survey to all 195 members. An article was written for the Lex and Verum, an online newsletter sponsored by the NAWCJ to invite membership to participate in the study and the tiny URL link to the survey. The notice ran in the Lex and Verum during the survey period. On September 28, 2020, The Honorable Toni Boone, president of NAHO, agreed to send the letter and the survey to the 40 members of NAHO, with a note to contact me with questions. Attorney Katheryn Yetter, with NJC, agreed to post the survey on their Facebook page. The survey was posted In Chambers, a closed NJC Facebook group established for judges to communicate with each other about current events. Circuit Court Administrators were contacted and asked to email the survey to members. Judges were invited to participate through the Judicial Studies Program (“JSP”) of UNR and the National Council of Juvenile and Family Court Judges (“NCJFCJ”). The tiny URL

survey was sent to an unknown number of academic contacts through Twitter. Surveys sent to organizations were repeated twice during the survey period to remind organizations about the June 30, 2021, deadline. The goal was to communicate with members in a way that the organization approved while maintaining the confidentiality of its members.

Survey research was economical and compiled a lot of data about the large population of judges. The questions collected background data about the judges. Surveys allowed many questions on a topic, which provided flexibility in the analysis. On the other hand, survey research may be superficial and inflexible because it is weak on validity but strong on reliability (Babbie, 2008). Appendix H contains the survey completed by judges online from individuals and organizations. Respondents were asked to complete a consent form to participate. The form included personal information, which was handled in a confidential manner (see Appendix I Privacy Statement and Agreement to Participate). Personal information was not shared with third parties. The judge's identity remained anonymous. Judges were told participation was voluntary and they were free to stop at any time. All participants agreed to participate in writing. The survey asked judges to provide information about their professional background, i.e., the court where they served, type of cases heard, population served, and length of time on the bench, etc. The survey asked about their experience with face-to-face mediations versus mediations conducted with the use of distance technology, the type of cases they feel should be mediated using distance technology, ethical pitfalls associated with the use of distance technology to mediate, and if the need to use distance technology during the

pandemic outweighed potential ethical pitfalls related to its use. Data were collected through open ended questions, where respondents self-reported their own answers, and closed-ended questions, where respondents selected from a list of provided answers. A significant number of qualitative responses were received when respondents were asked if there was anything they wanted to add that had not been discussed. Questions were clear and concise, unambiguous, and relevant to respondents. Negative terms were avoided to prevent bias and confusion. Judges were competent to answer questions, even if they did not mediate cases, because they were aware of ethical pitfalls in general that can impact court proceedings and judicial obligations to avoid them.

Content Analysis. Survey research was conducted in this study. Content analysis was used to study the written survey responses from judges. Content analysis is the study of recorded human communications, in written form. Our unit of analysis, judges, was a sample of judges obtained from the total population of judges. To conduct content analysis, a sample of each judge's opinion was selected and coded into broad themes (see Appendix K and L). Coding is the process of transforming raw data, judicial responses, into a standardized form for machine processing and analysis (Babbie, 2008). Judges were asked to identify the types of cases that would not benefit most from mediations using distance technology. Their responses included criminal cases, complex cases, and complex parties. Each category was assigned a number which represents a code. For example, criminal cases were coded 01, complex or cases were coded 02, and complex parties was coded 03. An excel codebook was created which contained every survey question and the code assigned to each response. Each category of responses was totaled.

Pilot Study 2 (Focus Groups 2021)

In August 2021, two pilot focus groups (n = 11) were conducted via Zoom using essentially the same methodology as in Pilot Study 1 (see Appendix J), except for the fact that they were conducted virtually rather than in-person. Zoom was used to record the video and audio transcripts of the focus groups for Pilot Study 2. By then, COVID-19 was in full swing. At that time, the Delta variant had arrived in the U. S. Some courts reversed their decision to re-open or continued their decision to remain virtual. Either way, the traditional in-person focus groups were not an option. At the beginning of the study online focus groups were considered an interesting concept. However, with the appearance of COVID-19, virtual focus groups were the only option. On August 2, 2021, six volunteers participated in pilot 2 2021. On August 6, 2021, five volunteers participated in the second focus group. This experience provided an opportunity to refresh moderator skills. The same questions were asked that were later asked in the study 2 focus group in 2021. The goal was to refresh moderator skills for the study 2 focus groups in 2021.

Study 2 (Focus Groups 2021)

Focus groups were the second research method used in this study (see Appendix J). The goal was to gain a better understanding of the answers provided by judges in the survey. Judge participants (n = 41) met by Zoom during seven sessions, over 9 days at pre-arranged times selected by the judges. Four to nine judges participated in each group. Each session was recorded. Judges were asked qualitative and quantitative questions,

which they verbally answered, unless computer limitations required them to put their responses in the chat box.

Study 2 focus groups in 2021, took place between August 9, 2021, and August 17, 2021, via Zoom. Forty-one judges participated. The goal was to have 60 to 80 participants (10 to 15 percent of the number of completed surveys). A total of 79 judges volunteered to participate in a focus group, but only 41 actually participated. A graduate assistant admitted judges into the Zoom meeting, changed screen names, responded to comments in the chat, and announced when the recording started and when judges had questions. Many of the same questions were used in pilot 2 focus groups 2021 study 2 focus groups 2021. Judges were asked the following topics: 1) Their experience using distance technology to mediate, 2) Ethical considerations and mediations, 3) Ethical considerations and hearings, 4) Mediations and technology, and 5) COVID-19 and mediations. One difference between the two-focus group questionnaires is pilot 1 focus groups 2018 did not ask judges about COVID-19. That question was addressed in study 2 focus Groups 2021. Also, pilot 2 focus groups 2021 contained questions about hearings and technology. The rationale was to find out if judges had the same opinions about using distance technology for hearings as they had for using technology to conduct mediations. It was believed that many of the judges conducted mediations and presided over hearings, but if they did not, their opinions were still important because they were judges sitting on the bench during the pandemic.

Unit of Analysis

For this study, the unit of analysis was sitting judges, whether or not they mediated cases. A cross section of judges were surveyed from various tribunals at the state, federal, and local levels across the U.S., including but not limited to the following jurisdictions: workers' compensation, Commission on Human Rights, Missouri Public Service Commission, administrative hearing officers, Social Security administrative law judges, and state court judges at the circuit and appellate levels. It was believed that sitting judges were in the best position to share their opinions about the way technology was used to conduct mediations pre and post COVID-19.

Population

A population for study is defined as the group that conclusions will be drawn about (Babbie, 2008). Here, the population was the total number of active judges across the U. S., in full and part-time positions. Attorney mediators and non-attorney mediators were excluded from the population because they are not adjudicators. It was important to define judicial participation in the study because of the unique position of judges in the legal process. Some judges, called commissioners, may not be attorneys but they preside over mediations, pre-trial matters, and hearings, and make rulings on the admission of evidence, both substantive, and procedural. Therefore, for the purpose of this study they were considered judges. As stated, participants represented judges who took the survey and participated in a focus group, not the entire population of judges.

Target Sample

An estimated 40 to 60 respondents were the target sample for the focus groups. The estimate assumed a ten to twelve percent participation in the focus groups from the original estimated number of 330 usable surveys. The actual usable surveys were 532, as mentioned above.

Forty-one judges participated in one of the focus groups, which was lower than expected at 8.7 percent of the total completed responses. One-hundred and thirty-nine more surveys were completed than expected, which is good. Based on 469 totally completed surveys, the estimated number of focus group participants should have been between 46 and 56. However, it was an adequate representation of the number of focus group participants, not the entire population of judges who conduct remote hearings. From available options, they selected the date and time to participate that met their schedule. Seventy-four judges expressed an interest in participating in a focus group. Interested judges were sent a schedule and asked to select the day and time from the available options that they could meet for 45 minutes for a Zoom focus group meeting. Judges were assigned to one of seven focus groups, scheduled between August 9, 2021, and August 17, 2021, including one Saturday. Each focus group was assigned four to ten judges, based on preset dates and times. Based on survey responses, a set of focus group questions were created to learn more about respondent answers to the survey. At that time, given the surge in COVID-19 cases due to the Delta variant, all focus groups were conducted online via Zoom.

Participants were asked if they had access to the following equipment during the focus group: a computer with a microphone and video camera, the type of operating system to be used, whether they had internet service, and the amount of available bandwidth. For the meeting, a laptop or tablet was recommended over a phone, and participants were informed the session would be recorded. Participants were asked if they had major concerns about being recorded. Each focus group lasted forty-five minutes. The email sent to focus group participants contained details about the date and time of the focus group, and asked recipients to either accept or decline the invitation.

Once a participant accepted the invitation, they received a meeting number and password for added security, and they were asked not to forward meeting details to non-participants. When participants clicked on the link to join the meeting, they were announced and placed in a virtual waiting room. Once the participant's identity was confirmed, they were admitted to the focus group by either the moderator or a graduate student assigned to the group for that day. Once the focus group began, the graduate student admitted late arrivals, changed screen names, monitored questions from the judges, and kept attendance. At the beginning of each focus group, participants were welcomed and explained the process. During the focus group, participants were encouraged to interact with each other in response to moderator questions. It was explained that the moderator was not a speaking member of the group. The moderator's role was to get the participants to talk among themselves. The goal of their discussions was for researchers to gain a better understanding of the judge's views on the topics discussed. During the focus group judges were identified by their assigned number, not

their name or any other identifying information. This allowed judges to freely speak their opinions. Judges were asked to keep their cameras off during the focus group as an added measure of confidentiality.

During the seven focus groups, no participants objected to being recorded or ended the session early, although a few came in late. After the focus group ended, judges turned on their cameras and were invited to identify themselves and their court, which some did, others did not. A few missed their appointment altogether. The majority of judges appeared for the session, stayed, and contributed to the discussion.

After the survey closed and focus groups ended, the responses from each method were collected, analyzed, and summarized by category, including but not limited to; type of court, cases heard, experience with the use of distance technology to mediate, FTF mediations, and perceived ethical pitfalls, and the impact of COVID-19, if any. Judges were competent to answer questions, even if they did not mediate cases, because they were aware of the ethical safeguards needed to protect the integrity of court proceedings.

Operationalization

Operationalization is the measurement of the variables in a study (Babbie, 2008). The meaning of variables is determined in part by how they are measured (Babbie, 2008). To test the hypotheses in this study, a survey was created. In the survey judges were asked if they believe the benefits of using distance technology to mediate during a pandemic outweighed the potential risk for ethical pitfalls to occur, in light of COVID-19. At the beginning of the study variables were conceptualized. The survey and focus groups were used to operationalize each variable. In other words, the variables and their

attributes were operationalized through surveys and focus groups. An attribute is a characteristic of a variable (Babbie, 2008). Every variable must be exhaustive and mutually exclusive (Babbie, 2008). Exhaustive means every attribute that defines a variable must be classified. For example, in the survey, judges were asked if they believe potential ethical pitfalls exist with the use of distance technology to conduct mediations. The possible attributes are yes, or no. Responses were classified in one category or the other. To account for all possible answers, a third category was created, “other.” Mutually exclusive means every observation must be classified with only one attribute (Babbie, 2008). In other words, no observation can fit two categories. For example, judges were asked if they believe mediations conducted using distance technology had more, less, or the same potential for ethical pitfalls to occur, compared to FTF mediations. It was not possible for judges to give an answer to more than one category. To be exhaustive, the “other” category was included.

Content Analysis

Content analysis was also used to analyze the data from the focus groups. Each focus group was transcribed, themes were identified, and each judge’s response was highlighted on the transcript. For example, responses to the first question, *what does distance technology mean to you?* Included the following answers: Zoom, Go to Meeting and Webex. A code was assigned to each response. For example, Zoom was coded 01, Go to Meeting was coded 02, Webex was coded 03, and so on.

Qualitative questions included the following: Identify the types of cases that would benefit most from mediations using distance technology. Their responses included

cost/time/efficiency concerns, complex or long cases, and geographic issues. Each category was assigned a number which represented a code. For example, cost/time/efficiency concerns were coded 01, complex or long cases were coded 02, and geographic issues were coded 03. A codebook was created which include each focus group question, judicial responses and the code assigned to each response. Additional codes assigned to each question included the following codes: 97- other, 98- Do not know, 99- Not ascertained, and 01 – INAP. Each category of responses was totaled (see Appendix K and L).

Chapter 4: Results

Overview

In this study, qualitative research, surveys and focus groups, was used to collect data. Descriptive statistics were used to summarize and describe data from the research, and provide simple summaries and comments made about the sample. Graphs were used to easily display and understand data.

Section I – Socio-Demographics and Current Court Practices

Full-time vs. part-time judges:

A total of 532 judges responded to the survey. Not every judge answered every question, therefore, the number of respondents (n) or responses (n; multiple mentions for

some questions) for every question varies. A total of 489 judges reported they serve as full-time judges, 40 reported they are part-time judges (n = 529; see Table 1).

Table 1

Judges' employment status

Full Time vs. Part Time	Frequency (n = 529)
Full Time	489
Part Time	40

Type of Judge

Most judges (n = 200) reported that they were state administrative judge (SAJ) or state administrative law judge (SALJ). A large number (n = 114) of judges reported they were State Circuit Court Judges. Another large group of judge-respondents to the survey were Associate State Court Judges (n = 50). A variety of other types of judges also responded to the survey. Some of the titles are names for the same type of judge in different jurisdictions. The titles cannot be collapsed because the job descriptions are not clearly known (see Table 2).

Table 2

Type of Judge

Type of Judge	n
Muni Court Judge	30
Hearing Ofc	28
SAJ/SALJ	200

State Commish	15
State Circuit Court Judge	114
Associate State Court Judge	50
Court of Appeals (State)	15
State SC Judge	3
FAJ/FALJ	15
Federal Admin Commish	0
Federal Mag Judge	7
Federal District Court	12
Fed App Court	0
Other	34

Type of Cases Heard

The majority of the types of cases heard by judges (see Table 3) included workers compensation (n = 148), Administrative law (n = 48), criminal law (n = 22), public utility (n = 11), family law (n = 8), civil (n = 7), and social security (n = 6). A number of case types contained only one or two judges because the software only grouped matching answers if they were typed exactly the same. Therefore, some case types may be combined.

Table 3

Type of Cases

Type of Judge	n
Work Comp	148
Family Law	8
Civil Law	7
Criminal Law	22
Soc Sec	6
Pub Utility	11
Admin Law	48
Other	90

Time Served as a Judge

Judges (n = 522) who served on the bench from 0 to 40 years with mean years totaling 11.7 years. Service time for judges with less than one year of service on the bench ranged from zero months to 11 months, with a mean average of 4.59 months (see Table 4).

Table 4

Length of time served as a judge

Length of time	n	Mean	sd	min	max
Years	522	11.7	8.76	0	40
Months	522	4.59	3.45	0	11

Type of Training

Not all judges were legally trained; however, most judges who responded to this survey (n = 513) were legal trained and only a very small number (n = 9) were not (see Table 5).

Table 5

Legally trained vs. non-legally trained

Training	n
Legally trained	513
Non-legally trained	9

Population

The populations served by judges including the following ranges: 0 to 49,999 (n = 65), 50,000 – 99,999 (n = 32), 100,000 - 249,000 (n = 45), 250,000 – 499,999 (n = 69), 500,000- 999,999 (n = 58), and one million plus (n = 200; see Table 6).

Table 6

Population size served

Population Size	n
0-49,999	65
50k-99,999	32
100k-249,999	45
250k-499,999	69
500k-999,999	58
1 million+	200

Face-to-Face (FTF) Mediations

At the time of the survey, 442 judges reported they were not conducting FTF mediations. However, 78 judges reported they were conducting FTF mediations. At the time of the survey, 442 judges were not conducting FTF mediations, but 78 were conducting FTF mediations (n = 520; see Table 7).

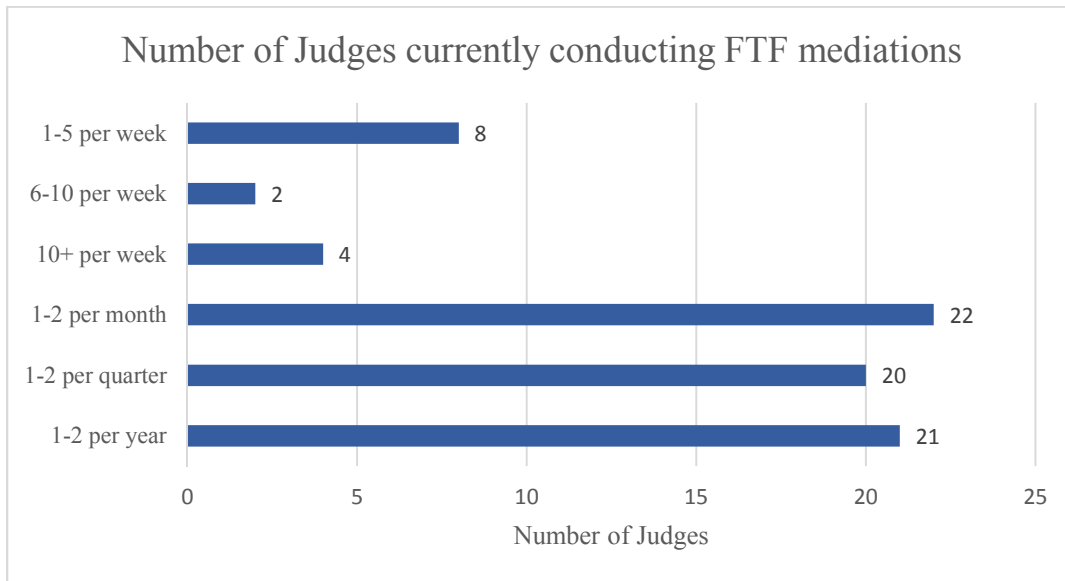
Table 7*Whether judges are conducting face-to-face mediations*

Conducting face-to-face mediations	n
Yes	78
No	442

Number of FTF mediations currently conducted

Judges who reported that they were *currently* conducting FTF mediations also reported their frequency conducting mediations (see Figure 1). At the time of the survey, judges conducted the following number of FTF mediations: 10+ per week (n = 4), 6-10 per week (n = 2), 1-5 (n = 8), 1-2 per month (n = 22), 1-2 per quarter (n = 20), and 1-2 per yer (n = 21).

Figure 1*Number of Judges currently conducting FTF mediations*

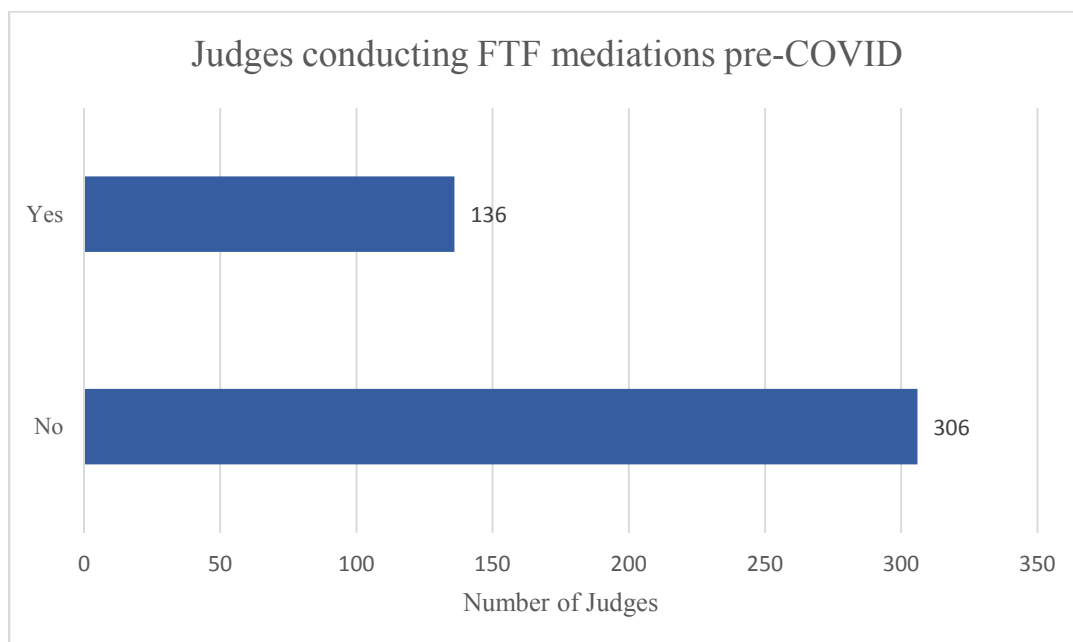


FTF mediations prior to COVID-19

Prior to COVID-19, 306 judges did not conduct FTF mediations, however, 136 judges did conduct FTF mediations (see Figure 2).

Figure 2

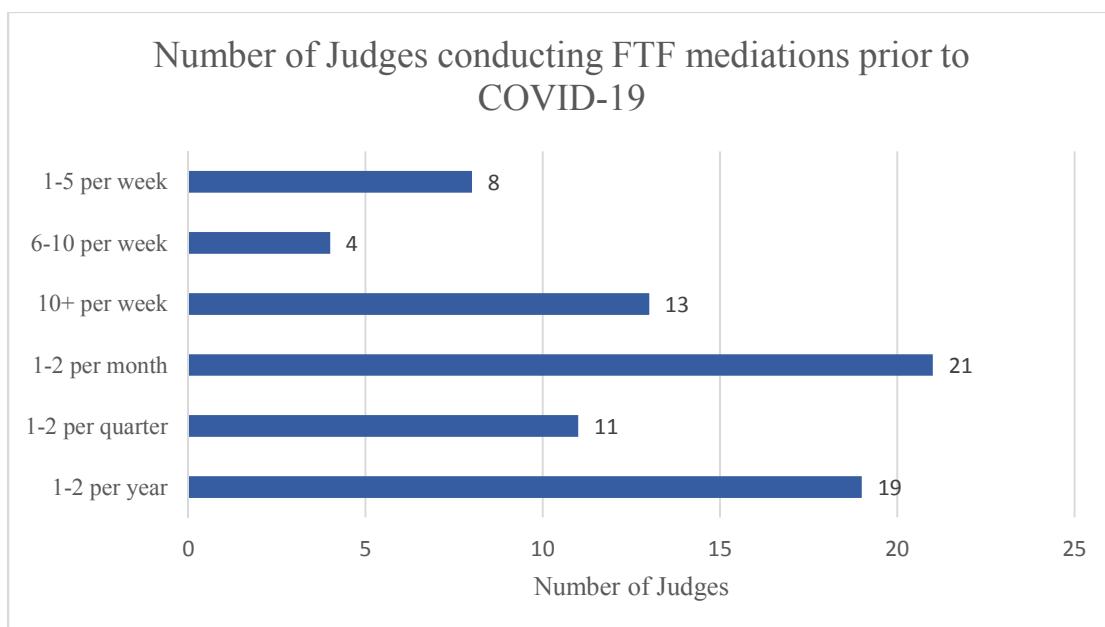
Whether judges were conducting face-to-face mediations prior to COVID-19 pandemic



Judges reported they conducted the following number of FTF mediations *prior* to COVID-19: 1-5 per week (n =8); 6-10 per week (n = 4); 10 or more per week (n =13); 1-2 per month, (n = 21); 1-2 per quarter (n = 11); and 1-2 per year (n = 19; see Figure 3).

Figure 3

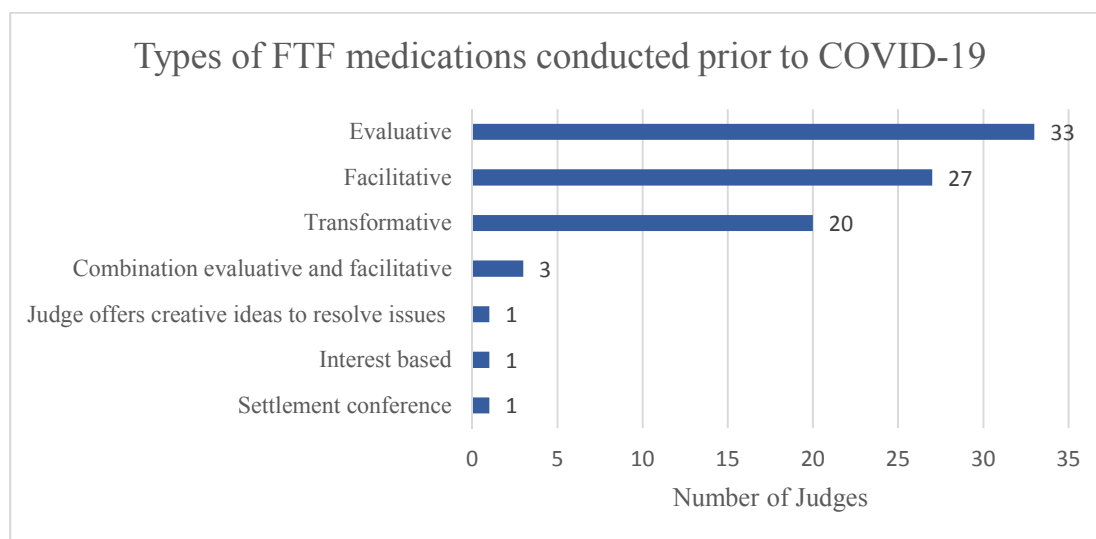
Number of Judges conducting FTF mediations prior to COVID-19



When asked about the type of FTF mediations conducted prior to COVID-19, judges gave the following responses: evaluative (n = 33); facilitative (n = 27), transformative (n = 20), along with a few other less common responses (n = 86; see Figure 4).

Figure 4

Types of FTF medications conducted prior to COVID-19



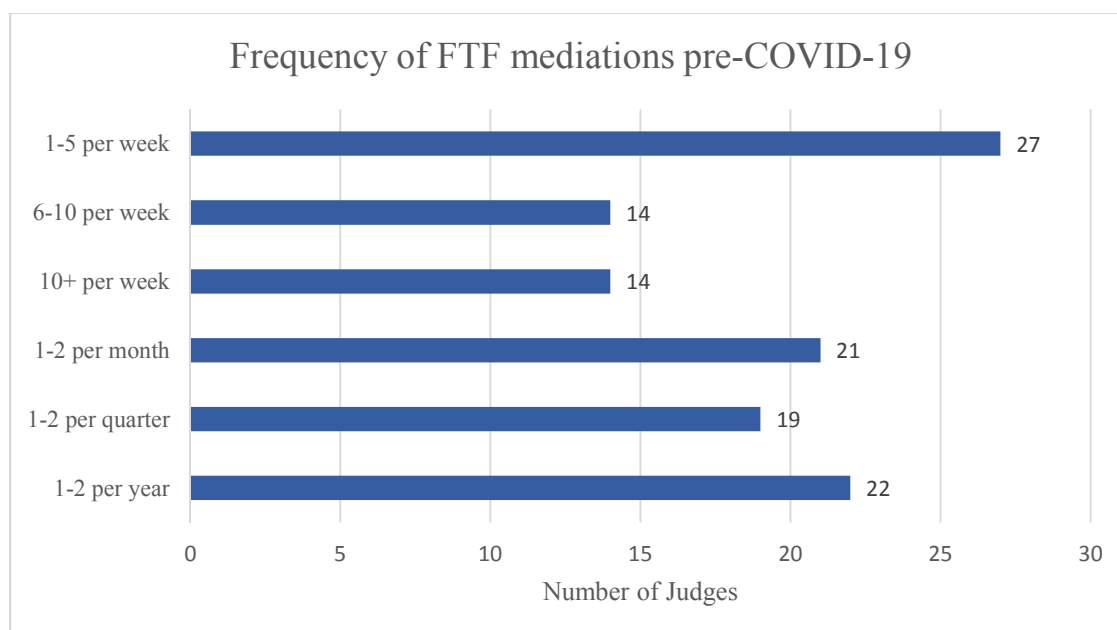
When asked if they plan to continue to conduct FTF mediations after COVID-19 is contained, 442 responded no, and 78 responded they plan to continue FTF mediations after COVID-19 is contained.

Judges were asked if they stopped conducting FTF mediations because of COVID-19, and 118 responded yes, they stopped because of COVID-19. However, 13 judges reported they did not stop conducting FTF mediations because of COVID-19.

For judges who stopped conducting FTF mediations due to COVID-19, they reported the following number of mediations pre-COVID-19: 1-5 per week (n = 27), 6-10 per week (n = 14), 10 or more per week (n = 14), 1-2 per month (n = 21), 1-2 per quarter (n = 19), and 1-2 per year (n = 22; see Figure 5):

Figure 5

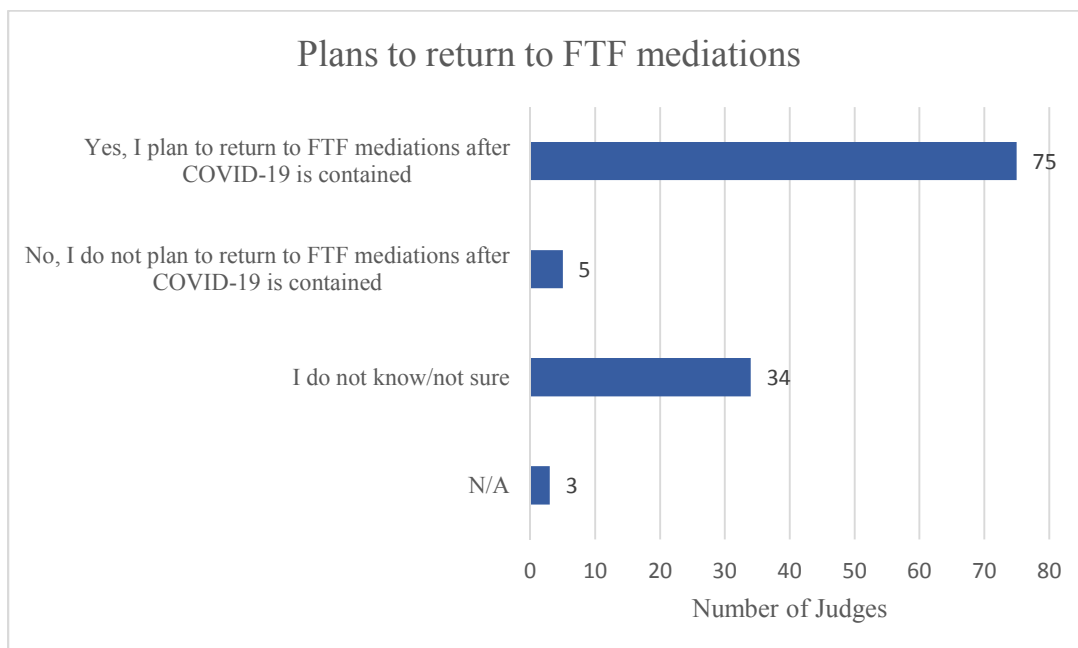
Frequency of FTF mediations pre-COVID-19 for judges who stopped conducting FTF mediations due to COVID-19



Judges that stopped FTF mediations due to COVID-19 gave the following responses when asked if they plan to return to FTF mediations after COVID-19 is contained: Most of the judges that responded to this question stated that yes, they do plan to return to FTF mediations after COVID-19 is contained (n = 75; see Figure 6).

Figure 6:

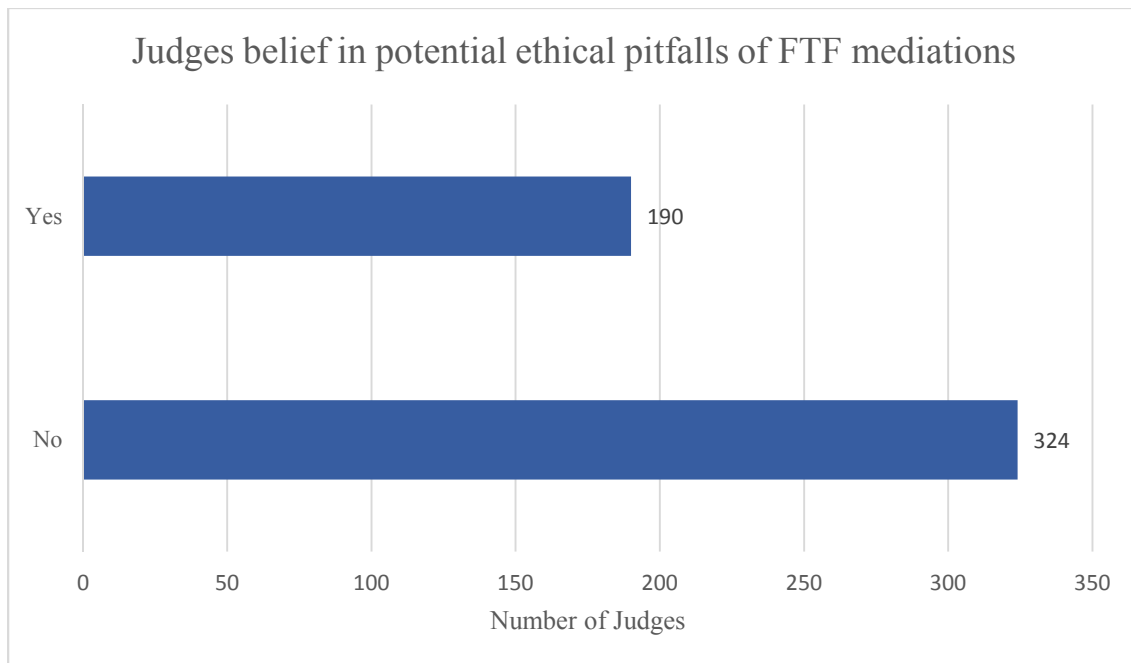
Plans to return to FTF mediations after COVID-19 is contained



Most judges (n = 324) said that they *do not* believe ethical pitfalls existed with the use of FTF mediations, whereas 190 judges said yes, they *do* believe that ethical pitfalls exist with the use of FTF mediations (see Figure 7):

Figure 7

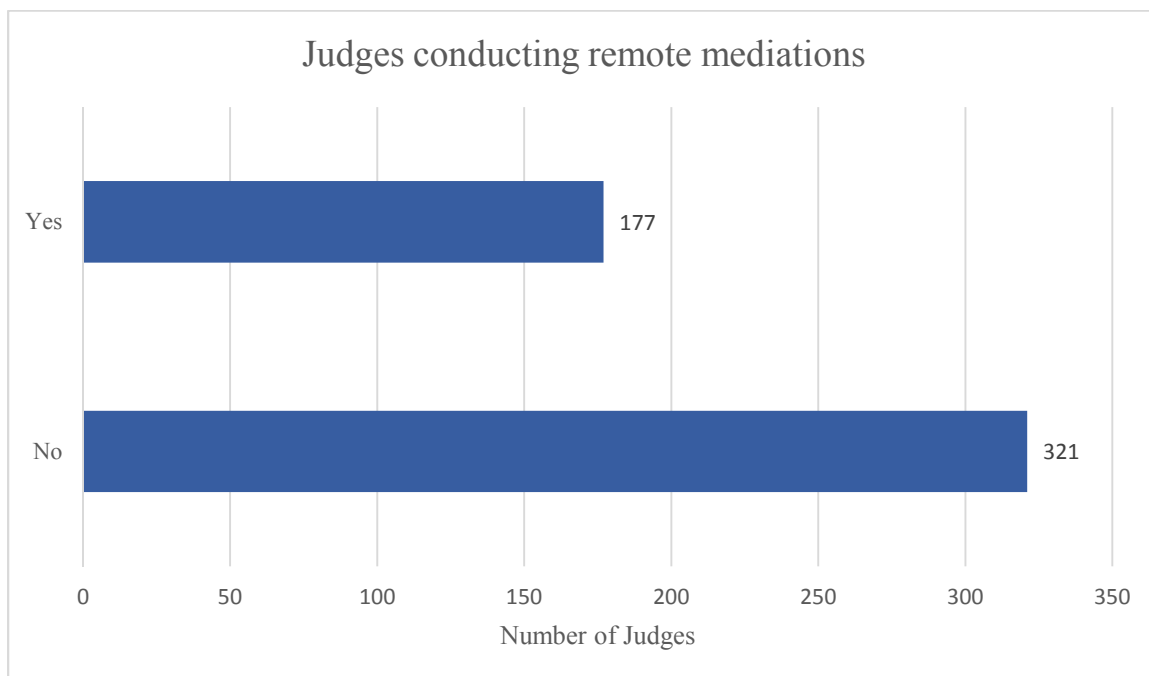
Whether judges believe potential ethical pitfalls exist with the use of FTF mediations



When the survey was administered, 177 judges currently conducted remote mediations using distance technology (Telephone, Internet, iPad, videoconferencing, etc.) whereas 321 judges did not (see Figure 8).

Figure 8

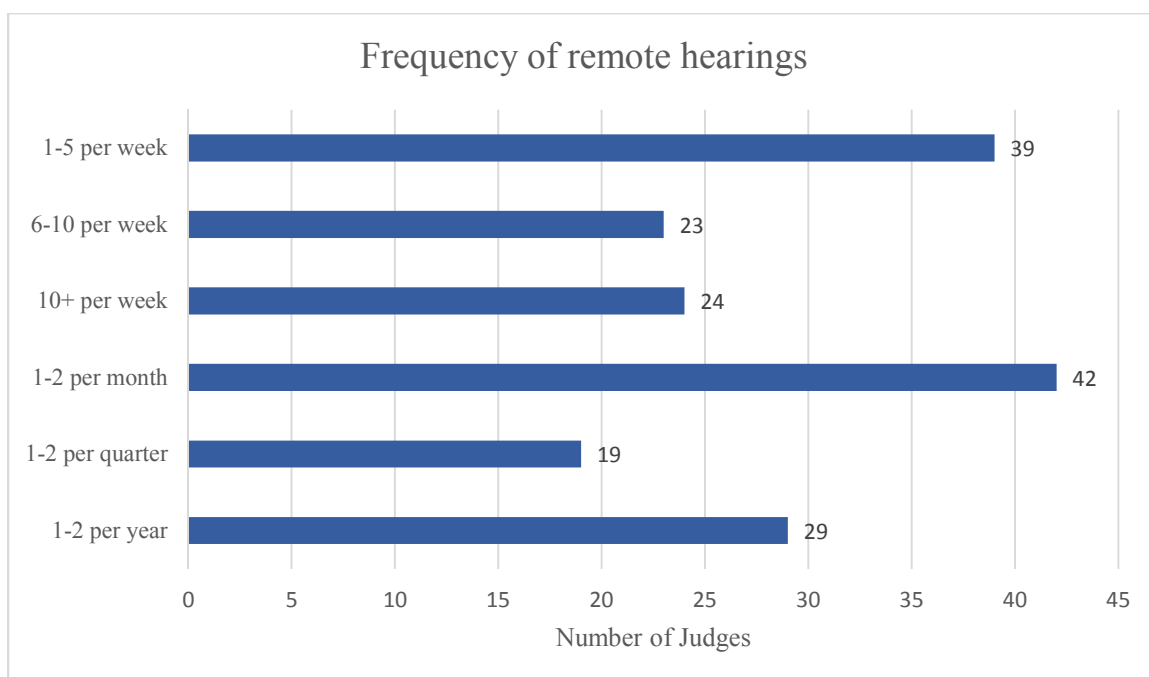
Number of judges currently conducting remote mediations using distance technology (Telephone, Internet, iPad, videoconferencing, etc.)



Judges reported the following frequency for conducting remote mediations using distance technology at the time of the survey: 1-5 per week (n = 39), 6-10 per week (n = 23), 10 or more per week (n = 24), 1-2 per month (n = 42), 1-2 per quarter (n = 19), 1-2 per quarter (n =29; see Figure 9):

Figure 9

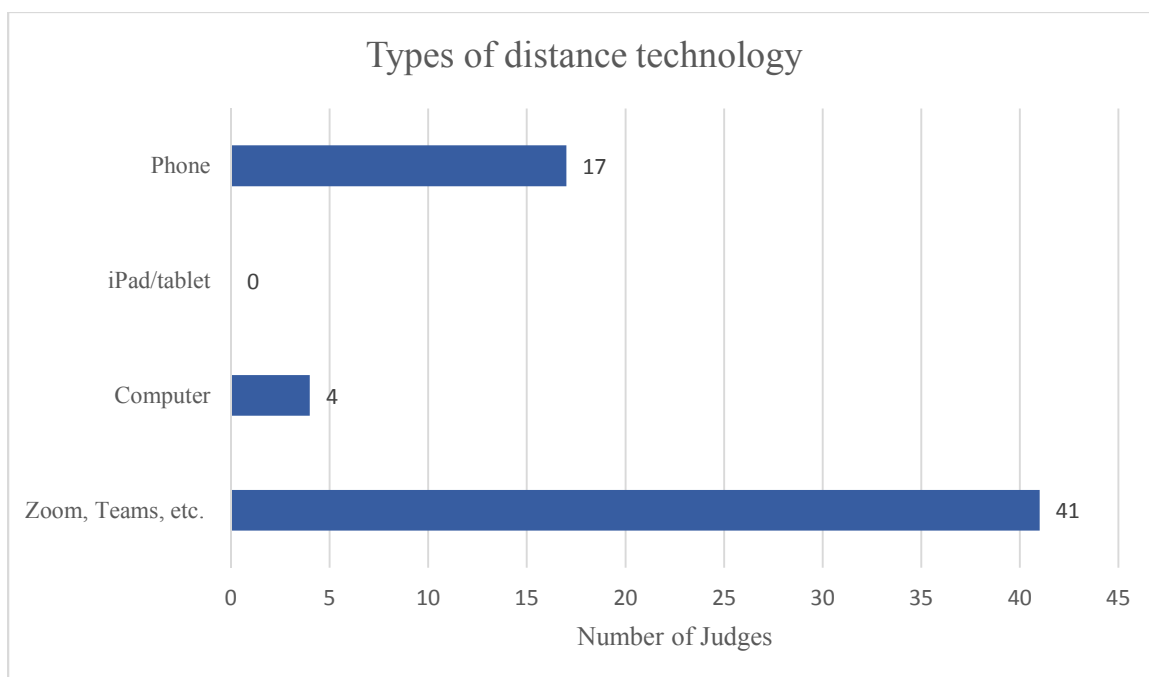
Frequency of remote mediations using distance technology at the time of the survey



Judges who used distance technology at the time of the survey listed the following types of equipment used: phone (n = 17), computer (n = 4), Zoom, Teams, etc. (n = 41; see Figure 10):

Figure 10

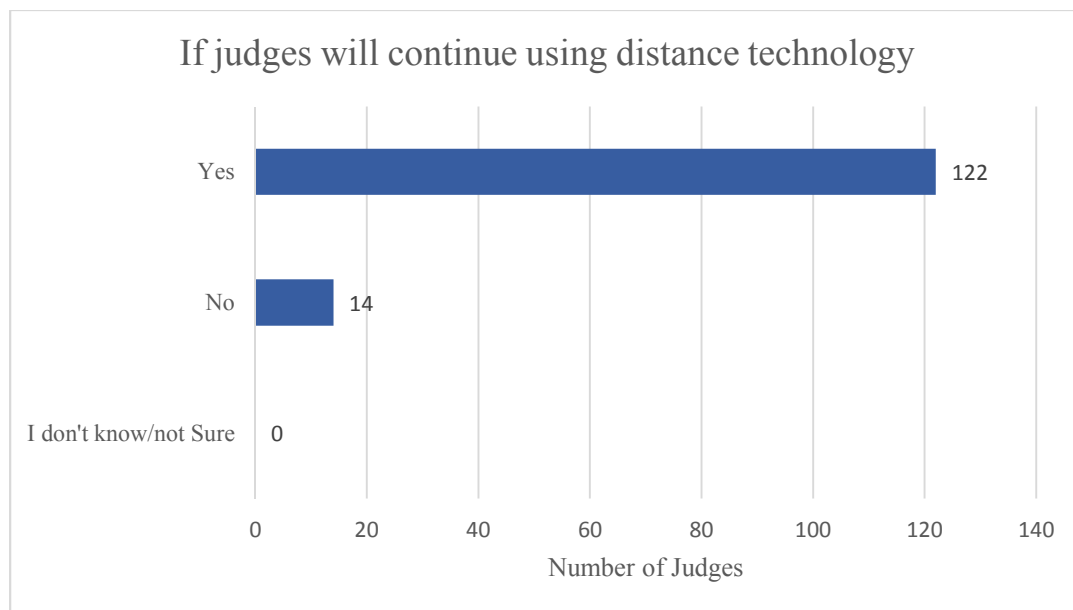
Types of distance technology equipment used at the time of the survey



A number of judges (n = 122) indicated that they do plan to use distance technology to conduct mediations once COVID-19 is contained (see Figure 11).

Figure 11

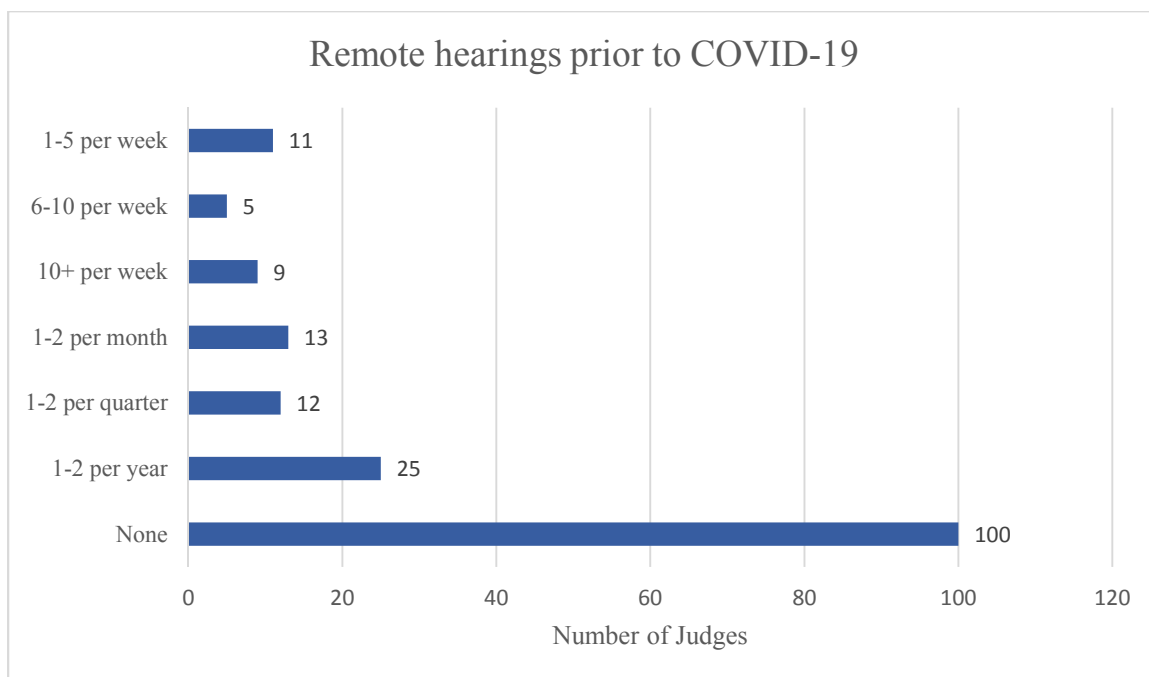
Whether judges plan to use distance technology to conduct mediations once COVID-19 is contained



When asked how many remote mediations were conducted prior to COVID-19 judges gave the following responses: 1-5 per week (n = 11), 6-10 per week (n = 5), 10 or more per week (n = 9), 1-2 per month (n = 13), 1-2 per quarter (n = 12), 1-2 per year (n = 25), and “none” (n = 100; see Figure 12).

Figure 12

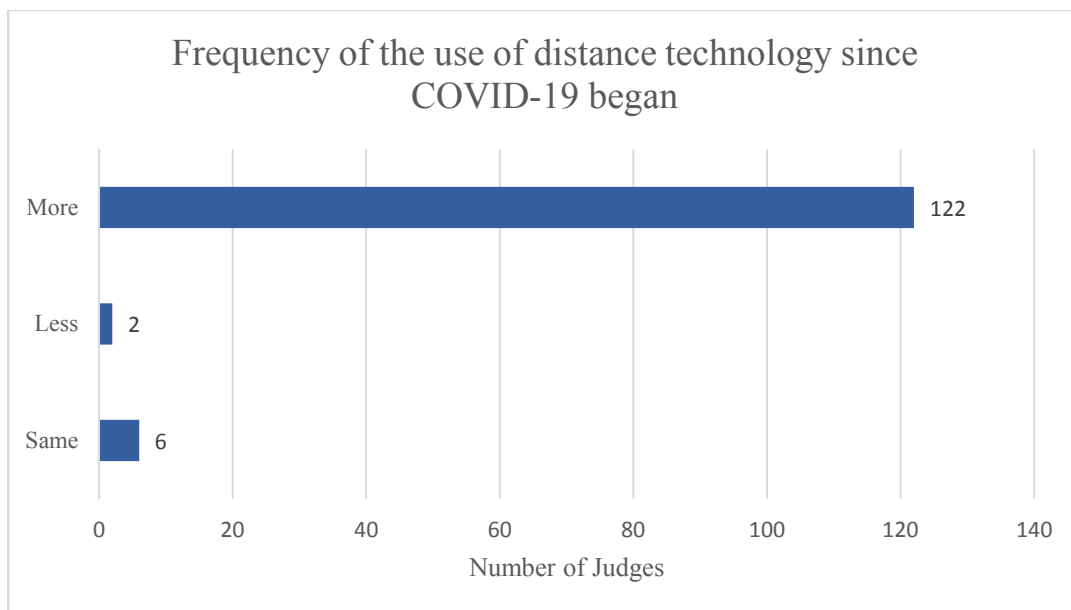
When asked how many remote mediations were conducted prior to COVID-19 judges gave the following responses



Judges gave the following responses when asked if they used distance technology more or less frequently since COVID-19 began: more (n = 122), less (n = 2), same (n = 6; see Figure 13):

Figure 13

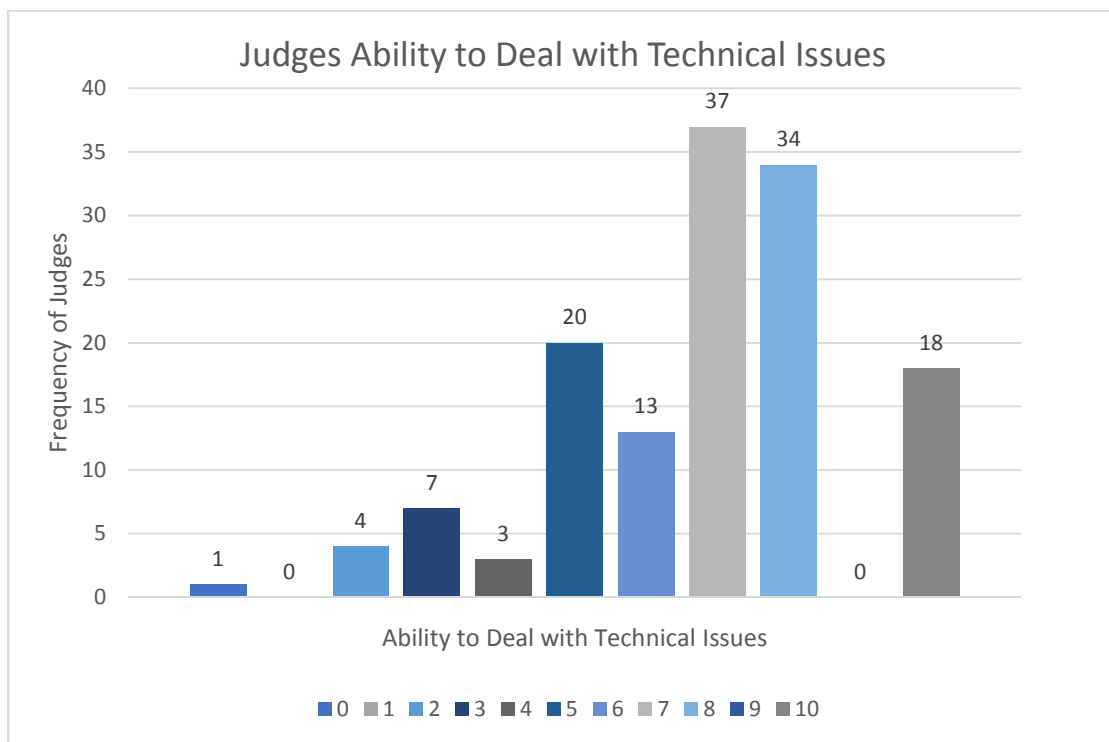
Whether judges use distance technology more or less frequently since COVID-19 began



Judges ranked their ability to deal with technical issues, from 0 – No ability to 10 – Handle most or all issues (see Figure 14).

Figure 14

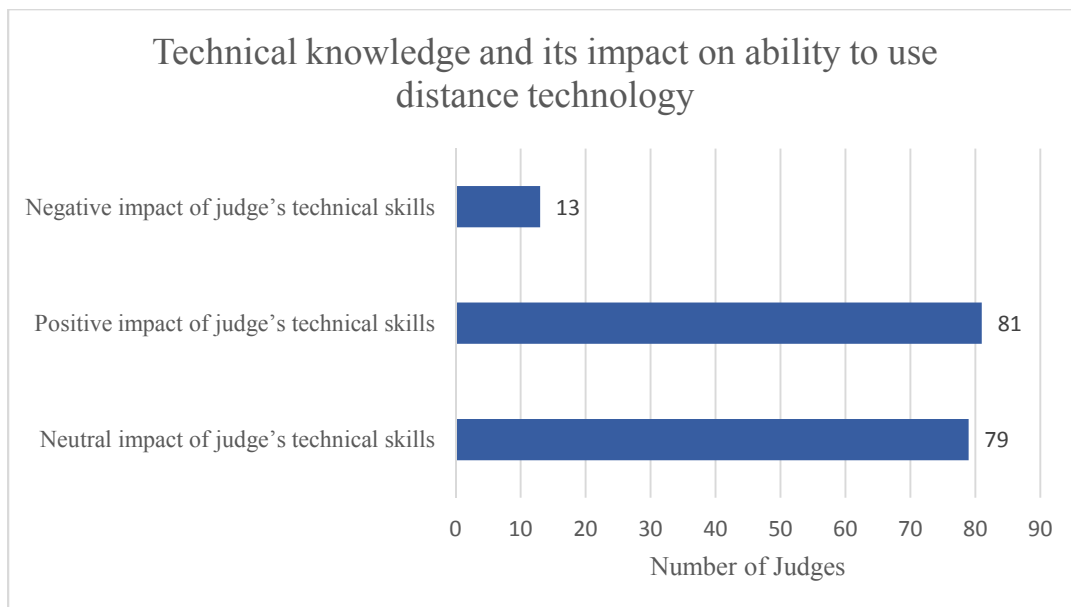
Judges ranked their ability to deal with technical issues, from 0 – No ability to 10 – Handle most or all issues



The majority of judges believed their level of technical knowledge positively impacted their ability to use distance technology (n = 81). But a nearly equal number of judges were neutral about the impact of their technical skills on their ability to conduct mediations using distance technology (n = 79; see Figure 15).

Figure 15

Judges' belief in level of technical knowledge and its impact on ability to use distance technology



An overwhelming majority of judges (n =167) reported they have access to technical assistance. Two judges reported they do not have access but need it. Six judges reported they do not need access to technical assistance. Judges reported the following access to technical assistance (see Table 8):

Table 8

Judges access to technical assistance

Type of Technical Assistance	Number of Judges
Court	137
Personal	1
Another judge	1
Coworkers/Chief Judge	1
Attorneys	1
Google, Zoom self-help	1
IT Personnel	1
Non-IT staff	1
Office Staff	1
YouTube Video	1

Section II - Hypotheses

Apriori criteria was set before analysis such that an approval of two-thirds of judges was required for any hypothesis in order to find support for that hypothesis.

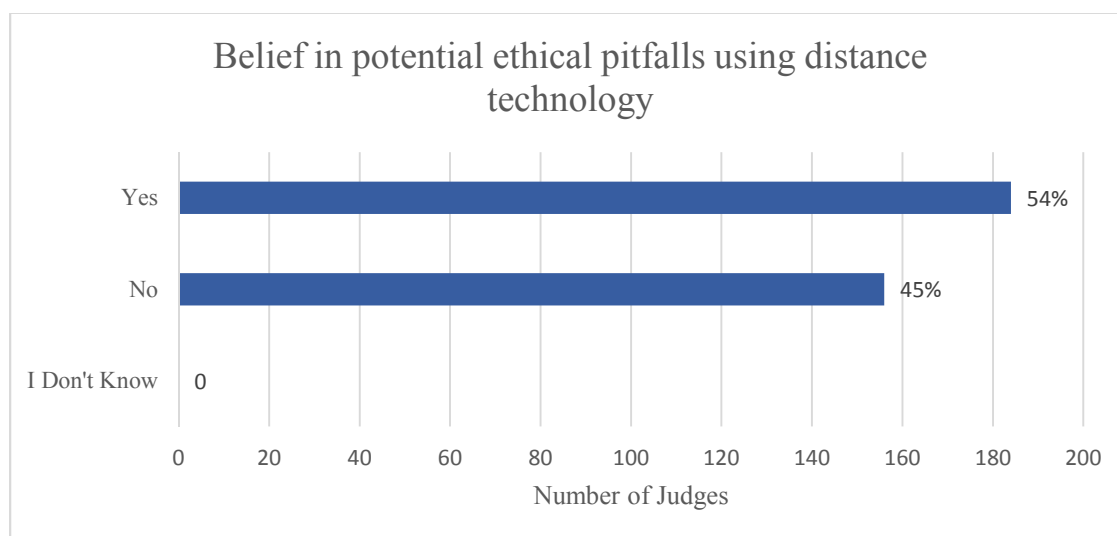
Hypothesis 1a (H1a): Judges believe potential ethical pitfalls exist when mediations are conducted using distance technology.

On the survey, judges were asked, “Do you believe potential ethical pitfalls exist with the use of distance technology to mediate cases?” (see Figure 16).

- 184 of 340 judge-respondents to the survey answered yes (54%), they believe potential ethical pitfalls exist when mediations are conducted using distance technology.
- 156 of 340 judge-respondents to the survey answered no (45%), they do not believe potential ethical pitfalls exist when mediations are conducted using distance technology.

Figure 16

Number of Judges that believe potential ethical pitfalls exist when mediations are conducted using distance technology



Conclusion. The percentage of respondents that agreed with the hypothesis is less than two-thirds of the total judges that responded ($n = 340$), therefore, the hypothesis is not supported.

Hypothesis 1b (H1b): Judges will identify potential ethical pitfalls associated with the use of distance technology to facilitate mediations.

As predicted, of the judges ($n = 184$) who answered “yes,” they do believe there are ethical issues related to the use of distance technology in the previous question, 166 of these 184 judges (90%) also identified 219 potential ethical pitfalls associated with the use of distance technology to facilitate mediations. Judges could give multiple responses in the survey, therefore, 166 judges offered 219 potential ethical pitfalls they associated

with the use of distance technology to facilitate mediations. These 219 mentions were coded into broader themes. The results are discussed below in the order of concern for judges. The top five themes that emerged from the data were as follows: 1) Judges found no difference between the potential for ethical pitfalls to occur when mediations are conducted remotely or FTF, 2) judges could not identify everyone present in the virtual room, 3) breach of confidentiality including secret recordings, 4) technical issues, and 5) the possibility of witness coaching.

Of the 219 responses provided by the judges, 45 of the responses or 21%, mentioned no difference between remote and FTF mediations. These judges who provided this response believed there was no difference between the potential for ethical pitfalls to occur when mediations are conducted using distance technology versus FTF mediations because the ethical pitfalls *were the same* as in-person. Some of the comments included: “The same ethics apply whether in person or remotely,” “Those mediations are no different than in person mediations, other than we use a telephone to do the mediation,” and, “The issues remain the same. Nothing changes, but the location of the parties” (Table 9).

Table 9

Themes: Potential for ethical pitfalls to occur when mediations are conducted using distance technology versus FTF mediations

Theme	Frequency (n = 219)	Example Quote
No Different than FTF	45	<p>“The existence of ethical pitfalls is not dependent on the use of distance technology. Ethical issues can arise whether technology is used, or meetings are face-to-face.”</p> <p>“One of the biggest issues I see is having people participating that the mediator does not know are participating. The mediator does not control the environments as with face-to-face mediations. It may also be more difficult to perceive any imbalances of</p>
Judges Could Not Identify Parties in the Virtual Room	41	

		power or coercion that may be taking place.”
Breach of Confidentiality	34	“Confidentiality could not be guaranteed because other people may be hearing confidential information without being seen or heard. Privacy is not assured.”
Technical Issues	23	“Technical difficulties tend to frustrate the process and the participants.”
Witness Coaching	18	“The parties may be subject to undue influences which you, as the mediator are unaware since you only see or hear what is shown on the screen/phone.”
Other	58	“To a pro se litigant, the Court may appear biased.”

The inability to verify everyone in the virtual room, especially if they were off camera, was the second largest theme identified by judges (n = 41 or 18.7%). Judges believed it is impossible for them to control off camera influences. Judges could not verify if there were people off camera that should not be there, who were listening or participating in the mediation. Judges concluded confidentiality could not be guaranteed if they could not verify those in attendance in the virtual room. Another judge expressed concern because they were unable to know if a witness relied on resources during virtual mediations that were unknown to the mediator. For example, the witness may be reading from a script or other material not known to the judge or the other parties. One judge commented, “mediations conducted with distance technology increase the chances that someone could participate that should not be there.” Other examples include: “You cannot tell who is present off camera” and “You cannot control who is with the parties and influencing them during the process.”

The third largest theme identified by judges (n = 34 or 16%) as an ethical pitfall is a breach of confidentiality. This theme also included discussions of secret recordings. Judges were concerned the information may be leaked, which could affect participant opinions about the fairness of the process. Confidential leaks can have a chilling effect on participant willingness to engage in the open communication needed for a successful mediation. Another judge reported “confidentiality could not be guaranteed because other people may be hearing confidential information without being seen or heard. Privacy is not assured.” Again, judges reported an imbalance of power but did not explain their response in more detail. Secret recordings were also identified by judges as a concern.

Judges noted that portions of the mediation could be published. In addition, it is easy for parties to record, even when warned not to. It is difficult for judges to tell when recordings are made. “Mediations are confidential but could be recorded, which would be unethical.” “It is difficult to determine if... parties are attempting to record the mediation.”

Judges identified technical issues as the fourth largest theme for concern for potential ethical pitfalls to occur when distance technology was used to mediate (n = 23 or 10.5%). Technical issues not only include the hardware and software used during remote mediations, but also include user skill level with technology. Some of the concerns mentioned by judges were: 1) difficulty hearing the parties online, 2) parties may be overhead when they think they are muted, 3) parties may have unequal access to technology, 4) parties may not be comfortable with their technical skill or knowledge, 5) disparity among races and socio-economic groups in their access to internet services, 6) one party may feel disadvantaged and not heard by the judge, 7) there is not the same level of participation when the telephone is used instead of video, and 8) counsel may lack the technical skills or ability to share documents. Another concern raised by judges was the inability to view all parties and their surroundings adequately through multiple computer screens [and] ensure [the] integrity [of the] judicial system. Other comments about technical issues include: “Technology is fickle, and glitches hurt the process,” and “Some people do not have the necessary technical skill or equipment to fully participate in ‘distance technology’ mediations.”

Judges (n = 18 or 8.2%) listed witness coaching as a fifth area of concern for potential ethical pitfalls to occur when distance technology is used to mediate. Judges did not know who may be feeding responses to a witness off camera, including an attorney. Remote judges felt they lacked the authority to control witness tampering. “A lawyer may be directing a client/witness during the mediation.”

The remaining themes were identified as “other” and include body language and non-verbal cues which are difficult to read when distance technology is used during mediation, according to some judges (n = 8 or 3.7%), *ex parte* communications (n = 6 or 2.7%), participant understanding of the process and technical skills, bias, and a warning not to mistakenly include opposing counsel during a breakout meeting with the other side (n = 4 or 1.8%), a greater potential for “slip-ups,” so the mediator judge must remember how to effectively go between break out rooms without accidentally including other parties, and it is harder to impeach witnesses and that parties may be distracted by family and others (n = 2 or 1%), for the rush to resolve cases, amplified communication problems using distance technology, security, and the appearance of fairness (n = 3 or 1.4%). Judges further identified “other” potential ethical pitfalls that may occur during mediations when technology is used: 1) in-person is a better way to view scars than on video, 2) potential ethical pitfalls may occur if the mediation judge is assigned to preside over the hearing, 3) it is harder to use interpreters online, 4) distance technology is less formal than in-person mediation, 5) impartiality can be a factor, 6) securing signatures may be more difficult, 7) it is harder to establish rapport with the parties, and 8) coercive behavior may be a factor online.

Conclusion. Hypothesis H1b is supported. A total of 340 judges ($n = 340$), responded to the previous question: *Do you believe ethical pitfalls exist with the use of distance technology to facilitate mediations.* Of the 340 judges who responded, 184 said yes potential ethical pitfalls exist. From the 184 judges who said ethical pitfalls exist, 166 judges (90%) identified potential ethical pitfalls. Judges were allowed to give more than one response and these 166 judges identified a total of 219 potential ethical pitfalls. Of these 219 mentions by these 166 judges, there were some interesting findings. First, a surprising survey result showed that one-fifth of judges ($n = 45$ judges or 20.5%) held the position that there was no ethical difference between mediations conducted in-person and mediations conducted with the use of distance technology because the ethical pitfalls were the same as in-person. Second, an almost equal number of judges ($n = 41$, 18.7%), were concerned that they could not verify who was in the room when distance technology was used, despite the majority finding that they also believed there were no ethical differences in the processes used. Third, 34 judges were concerned about a breach of confidentiality. However, the most important result related to hypothesis 1b is that 174 judges identified a number of themes that *were* considered ethical pitfalls using distance technology, including: judges could not identify parties in the virtual room ($n = 41$); breach of confidentiality ($n = 34$), technical issues ($n = 23$); witness coaching ($n = 18$); and other ($n = 58$).

Hypothesis 2 (H2) Judges believe mediations conducted using distance technology have more potential for ethical pitfalls to occur than mediations conducted face-to-face.

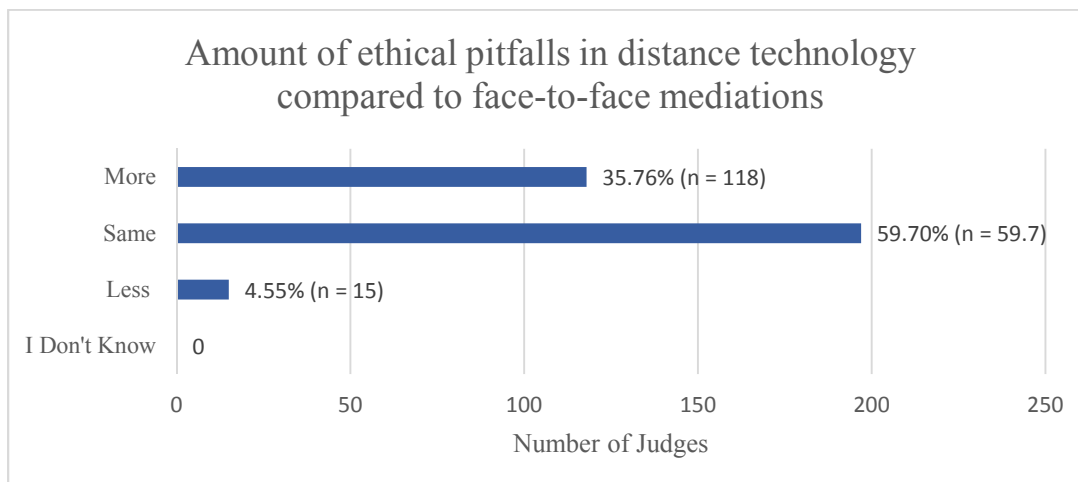
Judges were asked, “Do you believe remote mediations using distance technology have more or less potential for ethical pitfalls, compared to face-to-face mediations?”

See Figure 17.

- 197 judges (59.70%) believed mediations conducted using distance technology will have the *same* potential for ethical pitfalls to occur as mediations conducted FTF.
- 118 judges (35.7%) believed mediations conducted using distance technology will have *more* potential for ethical pitfalls to occur as mediations conducted FTF.
- 15 judges (4.55%) believed mediations conducted using distance technology will have *less* potential for ethical pitfalls to occur as than mediations conducted FTF.

Figure 17

Whether judges believe that remote mediations using distance technology have more or less potential for ethical pitfalls than face-to-face mediations.

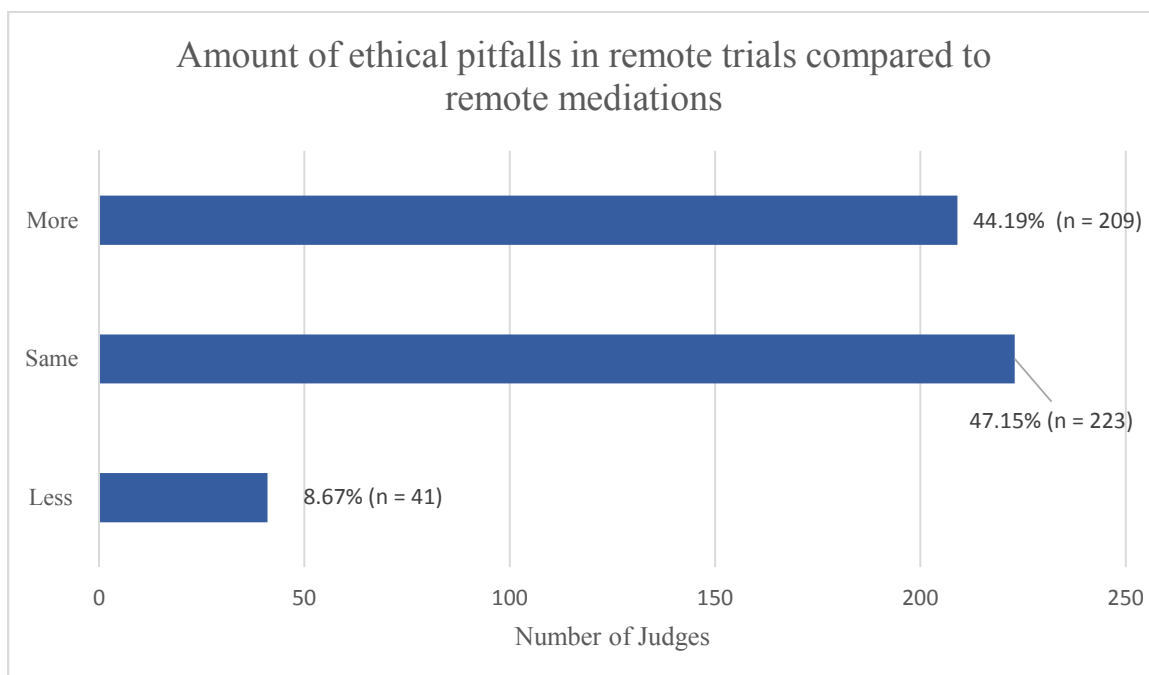


Conclusion. Judges surveyed did not agree with Hypothesis 2 by at least two-thirds of the total responses, (n = 330), therefore the hypothesis is not supported by the data collected.

In contrast, 473 judges were asked; “Do you believe there is more, less or the same potential for ethical pitfalls to occur with the use of distance technology during remote hearings compared to the use of distance technology in remote mediations?” This was not a hypothesis in this study, but the majority of judges believe the potential for ethical pitfalls to occur is the *same* when distance technology is used during hearings, compared to mediations (n = 223 or 47%; see Figure 18).

Figure 18

Whether judges believe that remote trials using distance technology have more or less potential for ethical pitfalls than remote mediations.



Judges explained their reasons for believing the hearings and mediations have the *same* potential for potential ethical pitfalls to occur with remote hearings and remote mediations:

“Witnesses could be coached by technology unbeknownst to tribunal or opposing parties.”

“With multiple people on the screen, it is easy to focus on one person and not another and completely miss cues. This not only makes the job more difficult, but it makes it easier to create a bias based on partial information. Moreover, if a student is in their dorm, for example, I am seeing things related to them that I would not see in a hearing room. Should I consider those impressions? Is there true privacy/confidentiality?”

“While the ethical pitfalls may be of a different nature, both approaches create their own potentials for real or imagined ethical problems.”

Another 209 judges or 44 percent of judges surveyed, believe there is *more* potential for ethical pitfalls to occur with the use of distance technology during hearings than during mediations. This is consistent with repeat comments made by judges who held hearings to a higher ethical standard than mediations. Judges explained:

“While we have conducted bench trials remotely during the pandemic, even with bench trials, not having witnesses face-to-face, and not knowing what is occurring outside of the camera’s view, can lead to issues regarding the testimony of the witnesses, the conduct of the attorneys, the conduct of the court, etc.”

“When an attorney and his or her client are in the same space during the client’s testimony, if the attorney is not able to be on camera at the same time as the client, the attorney could be giving the client signals (shaking head no/nodding yes, mouthing words, etc.).”

“Also, the litigant could be receiving messages on electronic devices. We don’t know what appeals issues will be raised from remote trials. It’s inconceivable that issues such as coaching witnesses via other remote methods such as texting the witness during testimony won’t arise. It’s naive to think that just because circuit and state supreme courts have authorized remote trials that they won’t address 6th amendment issues that arise due to this technology. We still have a constitution regardless of Zoom.”

“Trials have several ethical pitfalls because of the nature of taking evidence. Witnesses may have paperwork in front of them and no one knows, witnesses’ testimony could be livestreamed to another witness, etc.”

“The judge may be more tempted to not pay attention if they aren’t in the room and face-to-face with the parties.”

“There is more finality to trials than to mediation; therefore, more risk of issues to arise.”

“There is a potential for remote participants to engage in research, communications, or activities that are out of the control or knowledge of the Court and/or the trier-of-fact. This could result in some unfairness to one party or another.”

“There are no defined rules for conducting hearings remotely. It is impossible to regulate whether a witness is listening in to testimony since witnesses are often at attorney offices. There is greater potential for attorneys to tamper with witnesses b/c the Court cannot see everything that is happening at the remote location. There is potential for witnesses and attorneys to communicate during testimony w/o the courts knowledge.”

Only 41 judges or 8 percent, believe there is *less* potential for ethical pitfalls to occur during hearings when distance technology is used compared to mediations. Judges explained their positions:

“When conducting mediations remotely we often caucus. During those times when I am caucusing with one party, I have no idea what is going on with the other party or who else they may be talking with. During a remote hearing, I typically have sight of

the participants at all times, or they are in a virtual lobby where they cannot talk with one another. Also, since mediation is voluntary, I feel I have more authority and control in hearings than in mediations.”

“Trials or hearings are recorded and transcribed through the services of a court reporter. This makes the proceeding more formal than mediation and also places inherent courtesies and professionalism associated with trials and hearings.”

“Trials and hearings are adversarial in nature and therefore, I believe the ethical pitfalls for the judge are decreased as compared to mediations, which are not as adversarial. The mediator has the possibility or potential to establish some sort of relationship with the parties which may impact the mediation. Establishment of relationships with parties in trials is unlikely for the judge.”

“The structure of a hearing lends itself to equalizing the parties’ ability to interact with the judge. I can’t see the parties, so their respective appearance does not add bias; they have to take turns and I have plenty of opportunity to explain process; and the basic structure of a “trial” is understood by most litigants.”

Hypothesis 3 (H3) COVID-19 did not impact judicial opinion about potential ethical pitfalls related to the use of distance technology to facilitate mediation.

Hypothesis 3 was not supported because an insufficient a number of focus group findings were made. However, two judges reported that post COVID-19, their opinions did change about the potential for ethical pitfalls to occur when distance technology is used to mediate. One of the judges explained: “I want to clarify that pre-Covid, the only distance technology we had was the telephone. And I think that's a really important

distinction, at least for me, yeah, because I wasn't going to do settlement conferences by telephone. And its light years away from what we have now I'm really comfortable with what we have now." The other judge said: "I have to say that it did change for me. Pre-COVID-19 we rarely mediated cases by phone. So, our judges, including me, thought (using the phone) would bring a lot of ethical issues, a lot of issues during the mediation. But Post COVID-19, I think it brought more pluses than minuses. It has changed my mind, and I wonder why we never used it before."

Hypothesis 4a (H4a): Judges do not believe potential ethical pitfalls outweigh the benefits derived from use of distance technology to mediate disputes in light of COVID-19.

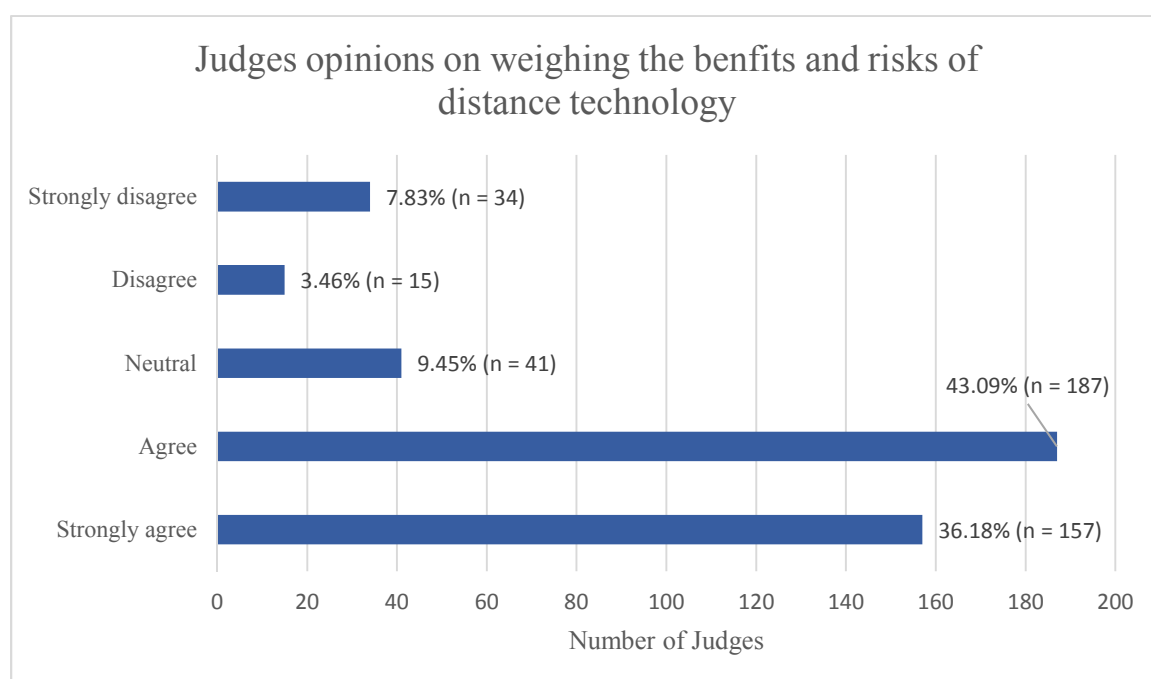
Judges were asked the following question on the survey, "Whether or not you conduct any mediations (remote or face-to-face), do you disagree or agree with the following statement: The benefits of using distance technology to mediate cases during a pandemic outweighs the risks" and at least one judge comment in the focus groups, "Absolutely, because we are in the midst of a pandemic, which can cause grave illness to everybody involved." See Figure 19.

- Thirty-four judges (7 percent), strongly disagree that the benefits of using distance technology to mediate cases override the benefits derived from use of distance to mediate disputes in light of COVID-19.
- Fifteen judges (3.46 percent), disagree that the benefits of using distance technology to mediate cases during a pandemic outweighs the risks.

- Forty-one judges (9.4 percent) were neutral about the benefits of using distance technology to mediate in light of COVID-19.
- One-hundred eighty-seven judges (43.09%) agreed the benefits of using distance technology to mediate cases during a pandemic outweighs the risks.
- One-hundred fifty-seven judges (36.18%), strongly agree that the benefits of using distance technology to mediate cases during a pandemic outweighs the risks.

Figure 19

Judges' opinion on whether the benefits of using distance technology outweigh the risks



Conclusion. Three-hundred forty-four judges agreed the benefits of using distance technology to mediate cases during a pandemic outweighs the risks. Therefore, 79.27 percent of the judges who responded (344 judges) out of 434 judges surveyed do not

believe potential ethical pitfalls outweigh the benefits of using distance technology to mediate in light of COVID-19. Hypothesis 4a is supported by the survey data.

Hypothesis 4b (H4b) Pre-Covid, judges believed potential ethical pitfalls outweighed the benefits derived from the use of distance technology to mediate disputes.

Hypothesis 4b was not supported because an insufficient number of focus group findings were made. However, one judge from the focus group did comment that parties should not be forced to use distance technology, and offered the following example: “If you have a party that doesn’t want to engage in distance technology, then they shouldn’t be forced to do that.”

In fact, a few judges from the focus group stated the exact opposite sentiment: “No, I’m sorry, I do not [believe the potential ethical pitfalls outweighed the benefits derived from the use of distance technology to mediate disputes, pre-COVID]”. Another judge from the focus groups commented that pre-Covid, the benefits of using distance technology to mediate disputes outweighed the ethical pitfalls related to its use and added: “Yes, using distance technology outweighs any pitfalls just because ...of ... the convenience, the ability to schedule cases more easily, the ability to get cases resolved when people physically can't get together like we can't in the in the pandemic, without risking people's lives. It definitely is worth it, to choose to do it distance.” Other examples from the surveys included judges that never really considered the issue: “Pre-COVID, we never used remote communication for mediation, so it did not cross my mind regarding ethical considerations.” Pre-COVID-19, one judge did not think about potential

ethical pitfalls during mediations: “pre-COVID-19, we did not promote mediations. I would conduct settlement conferences by telephone.”

By comparison, judges in the focus groups shared similar opinions about *hearings*. One judge in the focus groups did offer that they prior to Covid-19, they also didn't think distance technology should be forced upon any party during a hearing and stated, “If you've got a person with a hearing disability or, in some cases visual disabilities, or something that prevents them from using the equipment appropriately that can cause problems with the hearing, pre-Covid”

Also similar to mediations, some judges pre-Covid never even considered the possible ethical issues related to using distance technology during hearings. One judge stated that “I never even thought about it one way or the other. I never thought we would need that.” Or that “In the federal system, [pre-COVID-19], there were specific federal rules on the side which require most of the proceedings to be in person.” Other examples from the survey included: “I believe that the potential for them existed (ethical pitfalls). Our state didn't have virtual technology used in hearings pre Covid-19, not for the central panel administrative judges that I work with. So, if it were employed those ethical pitfalls would be available but we just didn't have the technology or didn't employ it pre-Covid-19.” This judge responded; “Pre Covid-19, there was a concern that, at least with the procedures that were available to us, that we were not able to protect the integrity of the process, by ensuring that people, like we've been saying, are not getting help from someone else, are not seeing documents they shouldn't be seeing, are not referring to documents they shouldn't be referring to without at least the knowledge of the Court.”

One judge expressed no opinion: “I would say I didn't have an opinion, one way or the other, because we did not use any distance technology for hearings or mediations.

Everything was live.”

Judges believed potential ethical pitfalls outweighed the use of distance technology during *hearings*, pre-COVID-19. Post COVID-19, judges believed the need to use distance technology for *hearings* was not outweighed by potential ethical pitfalls that may occur during its use. Judicial opinions are split on this issue. Some judges believe the use of distance technology for hearings should be decided on a case-by-case basis: “We do workers comp and it's a case-by-case basis we've just started up.” Others believe the need to use technology outweighs potential ethical pitfalls that may occur with its use (n=6).

Hypothesis 4c (H4c) Judges believe some distance technology options have less ethical pitfalls than others when mediating cases.

H4c is not supported because there was an insufficient number of findings to support the prediction. However, two judges agreed that some distance technology options have less ethical pitfalls than others during mediations. One judge preferred a video mediation with complex cases, and attorneys on both sides, and preferred telephone mediations for pro se parties. The second judge preferred to use Zoom and MS Teams for mediations. When asked why they chose those options to conduct mediations, one judge replied: “I think Teams has a slight advantage when you will have to share documents amongst one another, but I understand that Zoom is refining that feature.” The other judge explained: “Where you have a self-represented party, frequently they just

don't have the capability of dealing with the proper computers, or don't know how to deal with the software and, I prefer that everybody use the same medium, so a number of our mediations are done by telephone.” One judge cautioned: “I think there are two really key issues with the distance technology. As a threshold issue I don't think you can lump in telephone technology and Zoom technology.”

Other Findings

When asked how mediations could be improved, judges responded: “I would like to suggest that we used to do them by phone pre Covid-19 and continue to do them by phone. The difficulty I have is when people are talking over one another. I had this very thing today. And I think that with video conferencing, sometimes just the body language helps with that and makes the conversation go smoother. So just in response to how would you make a mediation better, I would suggest by video conference, rather than just phone and with that now available it's more of an option.” Another judge said: “I agree that video is preferable to telephone so that we can see body language and reactions.”

On a different note, judges were asked to define what distance technology meant to them (n = 43; see Table 10). Judges identified the top three definitions of distance technology: 1) twenty-two judges defined distance technology as online video conferencing, 2) fourteen judges identified the telephone, and 3) seven judges identified break out rooms. “Other” findings for distance technology (n = 2) included emails. One judge explained: “When we have confidential information, we use two methods, one is encrypted email, and the second is a secure cloud drop box, where I send private links to

the parties and they're able to drop directly into that on the state's secure cloud, so only that participant and myself get access the folder”

Table 10

Judges define the phrase “distance technology”

Theme	Frequency (n = 45)	Quote
Online video conferencing	22	<p>“For me, it means a Zoom and others related platforms, Microsoft teams, and even to some extent teleconferencing which we do in my jurisdiction, and we do mediations via teleconference as well, so. We have a sort of a broad range of options that we use for virtual distance communications”</p>
Telephones	14	<p>“...[We] have used telephones and we are now exploring Zoom. Because we have various mediations taking place at the same time with one mediator, sometimes two sometimes three mediations at one time, the mediators have found it better to use</p>

the phone system than Zoom, but we are now actively investigating Zoom for mediations.”

Breakout rooms	7	<p>“For mediations we use Go To Meeting and although it has worked well it has not allowed for caucus because we do not have the breakout rooms”</p>
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In another finding, judges (n = 36) identified the top three technologies they used during mediations: 1) Zoom, 2) Webex, and 3) Microsoft teams (see Table 11). Judges reported: “We have used the platforms Teams and Zoom to do remote proceedings.” and ... “[W]e use Webex events to do public statement hearings, (and for) public comment hearings, we use Webex meetings to do mediations and hearings.” Judges unanimously agreed (n = 13) that mediations should not be recorded (see Table 12). “Mediation is confidential, and it would stifle the parties if they thought/knew they were being recorded.” Also, “Well, the concern of parties recording the session is always the biggest concern. Things you wouldn't allow them to do if they were present is the first one that comes to mind.”

Table 11*Types of technology used by judges during mediations*

Technology used by judges	Frequency (n = 36)	Quote
Zoom	16	“For informal conferences among the judges, will usually use Zoom or sometimes we use Microsoft Teams.”
Webex	12	“For our mediations and hearings, we use Webex”
Microsoft Teams	8	“We're currently using Teams as a way to mediate the cases”

The number one reason judges gave for not recording mediations is confidentiality (n = 8), followed by recording is prohibited by law and violates the principle definition of mediation, ‘if you can’t record in person, you can’t (record) online, (n = 4), by law, notes must be destroyed after a divorce mediation by everyone (n = 3), and recording (mediations) discourages parties from mediating instead of litigating (n = 3). Judges overwhelmingly (n = 12) agreed that post-COVID-19, the need to use distance technology to mediate outweighed the potential for ethical pitfalls to occur during use (see Table 13). For example, “Yes, I think that the benefits outweigh the pitfalls, simply because with many cases if we weren't mediating and or having hearings post COVID,

virtually, we would not have them at all.” However, one judge reported they did not “run into any serious ethical problems.”

Table 12

Do judges believe mediations should be recorded?

Judge’s Opinion	n
Yes	13
No	0

Table 13

Post COVID-19, did the need to use distance technology to mediate outweigh the potential for ethical pitfalls to occur during use?

Distance Technology	Frequency (n = 13)	Example Quote
Yes	12	“Yes, because there have been many times when our State did not allow in person contact that would have enabled us to mediate, so it was either use distance technology or just not do them. And the same thing with hearings at some points”

No	1	“I’ve never run into any serious ethical problems”
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Other findings include a list of case types that judges believe will benefit from mediations conducted with the use of distance technology during COVID-19 (see Table 14): One judge summarized it this way: “During a pandemic, all cases can benefit from using distance technology, when we can't mediate in person. It's been helpful and a public service to have distance technology available as an alternative.”

Table 14

Cases that can benefit from mediations with distance technology

Cases can benefit from mediations with technology	Frequency (n =16)	Example Quote
All cases	2	“I found mediation useful in all of the case types” “Longer and more complicated cases we very much encourage mediation and, in many cases its almost routine”
Long/complicated cases	1	“I think in family and in some of the higher emotional cases, really,

Geographic distance	3	using distance technology has been a real advantage” “When cost prohibitive to get everybody together in the same room” “Participants request it, because of the time savings in addition to the cost savings”
Save time and money	2	“Traffic congestion is just terrible” “Works best with telephone mediations”
Avoid traffic	2	“A lot of the cases that are best suited are attorney fee lien disputes”
Represented parties	1	“Cases where people aren't physically able to leave their homes, to actually come to the court”
Fee disputes	1	
Disable litigants	1	

Workers compensation	1	“We do mediations in the workers comp, and that seems to work just fine”
Pleas	1	“We do virtual pleas all the time”

In additional findings, judges identified a number of cases that do not work well when mediations are conducted with technology, including multiple parties and multiple attorneys. For example, one judge said: “Well, it's possible (to use technology to mediate) when you have multiple parties and multiple attorneys in complex commercial litigation or workers compensation cases, but it's very difficult.”

Chapter 5: Discussion

Hypothesis 1a was not supported. For the most part, judges in this study do not believe potential ethical pitfalls exist when distance technology is used to conduct mediations. In the survey, judges were asked this question because it was believed that judges would be aware of the need to maintain ethical standards during mediations, whether or not they actually conducted them. Also, the vast majority of cases are resolved prior to a hearing, in some form of mediation across the country. It would not be feasible to take every legal dispute to a hearing to resolve disputes. Given the large number of cases resolved through mediation, it was decided to speak with judges about mediations.

The survey was conducted in May and June 2021. By then, most of the judges surveyed had used the telephone, email, or videoconferencing for over a year due to the COVID-19 pandemic lockdown and social distancing restrictions. With the exception of a few new judges, most were on the bench an average of 10 years before the courts reduced services due to COVID-19. That means they had experience on the bench using the resources available before the pandemic, mainly in-person settings and telephones, and they continued to gain experience on the bench after the courts switched to the use of distance technology after COVID-19 arrived. This group was in the best position to compare the mediation process pre and post pandemic. Moreover, they had some familiarity with using distance technology to conduct mediations by the time the survey was administered. In addition, they may have encountered ethical problems while using distance technology.

This study showed that just over fifty percent of the judge-respondents believed potential ethical pitfalls existed when distance technology was used to mediate. However, this was less than the required two-thirds of judges predicted to believe ethical pitfalls existed with the use of distance technology to mediate. This finding may be due to lack of viable options available for judges to conduct court business at the height of the pandemic. Courts relied heavily on technology to manage dockets, except in urgent situations, such as hardship hearings for medical treatment and protective orders.

A little less than half of judges found no potential pitfalls with the use of distance technology to mediate cases. The reasons for their opinions varied. One reason given was that mediations using distance technology were the same as FTF mediations, just conducted in a different place. This type of thinking was common when virtual mediations began pre-COVID-19. However, it quickly became apparent that there were major differences in the processes, i.e., time and convenience. Instead of parties traveling across town or across country to mediate, now they click on a link and join the mediation from the comfort of their home or during a lunch break at work. This allowed parties to have less disruption in their day. Attorneys had more time to prepare for and attend multiple settings per day. As a mediation judge, attorneys have appeared on my docket virtually from parking lots, at home while caring for sick children, and while babysitting grandchildren. Clearly, these activities would not have taken place in our office. Yet, we were able to move cases along through our virtual discussions. This finding supports the prediction that judges realize ethical pitfalls exist with the use of technology to conduct mediations, however, they seem willing to accept some ethical pitfalls associated with

using technology in order to keep cases moving. This is a significant change from 2018 when judges considered the handshake to be the “gold standard” for mediations. Now, agreements reached through the use of distance technology are accepted via a virtual handshake.

Another important survey finding was the distinction judges made between their acceptance of ethical pitfalls that occur when technology is used during mediations that involve procedural issues, versus ethical pitfalls that occur when technology is used during mediations that involve substantive issues. However, this was an important distinction for some judges. Future researchers may choose to explore why judges make this distinction, and whether this opinion is held by certain types of judges, i.e., criminal versus civil judges.

The findings suggest judges were more willing to accept ethical pitfalls when technology was used during mediations than they were willing to accept ethical pitfalls when technology was used during hearings. No hypothesis was formulated about hearings, but judges were asked their opinion about hearings as a point of comparison. A number of judges conduct both mediations and hearings, so it was interesting to hear their opinions. The main concern judges expressed with remote hearings was the inability of the accused to confront witnesses. Future researchers may want to study if this reluctance to use distance technology during hearings is more prevalent with trial judges than commissioners or administrative hearing officers. Also, future researchers may want to study whether judicial opinions are impacted by the court where the judge sits, i.e., criminal court vs. administrative court, or by the type of court dispositions reached

by the court. In other words, is a defendant's freedom at stake, or does the use of technology violate a defendant's Sixth Amendment right to confront witnesses? Does the decision affect a benefit award? It is speculated that judges outside of criminal court may not have the same confrontation clause concerns. In addition, the denial of benefits will not lead to incarceration.

Hypothesis 1b predicted judges would identify potential ethical pitfalls associated with the use of distance technology to facilitate mediations. Hypothesis 1b is supported. Although the most common response provided by judges found no difference between ethical pitfalls that exist during in-person mediations versus distance technology, they commented that the ethical pitfalls *were the same* as face-to-face. There were also 174 judges that responded to this question that did provide other potential ethical issues with using distance technology, such as not knowing who is in the room, breach of confidentiality, technical issues, witness coaching, and other.

Hypothesis 2 was not supported. Judges did not believe mediations conducted using distance technology had more potential for ethical pitfalls to occur than mediations conducted FTF. The research question asked: "Do you believe remote mediations conducted face-to-face have the same potential for ethical pitfalls to occur as mediations conducted with the use of distance technology?" As discussed above, a key survey finding is that judges believed mediations have the same potential for ethical pitfalls to occur whether they are conducted remotely or FTF. Perhaps judges justified this opinion based on the need to keep the court doors open during the pandemic. Future research

may want to study if judicial opinions differ post pandemic, when the need to use technology is not the only realistic option.

The survey did not include pre and post opinions about COVID-19, but this is discussed in some detail in the 2021 focus group section. Future researchers can explore pre and post opinions in more detail in future surveys. Findings indicate judges were willing to make an allowance for ethical pitfalls to occur during mediations when technology is used during a pandemic. One judge said, “I think it is a good tool to use (technology), and can be used effectively in certain situations, but not widely.” In the pandemic, judges consistently found less or the same potential for ethical pitfalls whether mediations were conducted using distance technology or conducted in-person. It would be interesting to find out if judges would see the same potential for ethical pitfalls to occur in both systems if the pandemic had not occurred, or when the pandemic is over. Judges may see more potential for ethical pitfalls when distance technology is used if there is no pandemic, and FTF mediations were an option. As one judge said in 2018, “The handshake is the gold standard.” Findings from this study can be useful to assist future courts manage health emergencies like COVID-19, should they arise in the future.

COVID-19 did not impact judicial opinions about potential ethical pitfalls when distance technology was used to conduct mediations. Research question number three asked: Did COVID-19 impact judicial opinions about potential ethical pitfalls when distance technology is used to mediate cases? Was the prediction supported? Although pre-COVID-19 studies were not performed except for the limited Pilot 1 survey and focus group, in Study 1, judges commented on the impact of COVID-19 on their opinion

about potential ethical pitfalls when remote technology is used during mediations.

Absent COVID-19, judges may not have embraced the “virtual handshake” as quickly as they did. It may have taken decades to achieve the level of technical skills judges have achieved in just two years. Our swift transition was due to a collective effort by courts, business, government, and health officials to promote social distancing, wear masks, encourage frequent hand washing, quarantine, and vaccines to “stop the spread” of COVID-19. Money was allocated from the federal, state, and local levels to advertise safe behavior, provide personal protective equipment, upgrade computers, purchase video conferencing platforms, and authorize employees to work from home. Some of these measures remain in effect today, which is good since COVID-19 may be here to stay. Future researchers may explore judicial opinions about the effectiveness of these measures and discuss other ways to keep everyone safe, in hindsight. The findings suggest that initially, judges lacked trust in distance technology to mediate, and they lacked the skills needed to operate it. Pre-Covid-19, judges did not need to use distance technology to mediate. FTF mediations worked well. People sacrificed time and money to attend FTF mediations. Mediations were continued if parties could not attend mediations in person. So, judges were against what they did not understand or need, pre-pandemic. Pre-COVID-19, distance technology was not widely used to mediate, and most parties did not have the resources to conduct them, including judges. When COVID-19 arrived, through trial and error, training, or both, judges developed confidence in their knowledge of technology and their ability to use it. As their ability to use technology increased, so did their trust in the usefulness of distance technology to

mediate. Now, they have a better understanding of distance technology, and how to use it, and they see a need to use it. It took a pandemic which devastated our society for judges to realize the value of technology as a judicial skill in the judge's toolbox. As the old saying goes: "necessity is the mother of invention." It is possible judges see the use of distance technology as the lesser of two evils during a pandemic, as evidenced by one judge's response that "we had no choice but to use it."

However, not all judges have embraced the use of technology to mediate. Once the endemic phase arrives, future studies should measure the variable judicial resistance to technology, to find out if their resistance decreased, increased, or stayed the same overtime. In summary, judicial opinions about ethical pitfalls related to the use of distance technology during mediations may have been impacted by COVID-19 because viable alternatives were limited.

Findings support the Hypothesis 4a prediction that judges do not believe potential ethical pitfalls outweigh the benefits derived from the use of distance technology to mediate, in light of COVID-19. Research question 4 asked: Do potential ethical pitfalls related to the use of distance technology outweigh the benefits of using it, in light of COVID-19? The majority of judges agreed or strongly agreed that the benefits of using distance technology to mediate outweigh the risks associated with using it. What was not asked if their opinions would differ if there had been no pandemic.

During the survey, the qualitative responses from judges consistently reported that using distance technology during the pandemic was a necessity to keep courts operating. That may explain the significant number of judges who did not believe that in a

pandemic, there was a difference between mediations conducted in person or with technology. Judicial responses suggest they were less concerned about ethical problems in a pandemic, as they were the continuation of court proceedings. They may have seen remote mediations as a necessary evil to keep cases moving. This may have accounted for another significant statistic, judges who were neutral on the subject. One judge said, “The isolated nature of this court dictated the use of distance technology.” These findings are consistent with a majority of judicial opinions where judges believed the potential for ethical pitfalls to occur is the same for mediations conducted in-person or using distance technology.

Some judges warned not to compromise justice for efficiency. A minority of judges believed the risk that ethical pitfalls would occur when technology was used to mediate outweighed the benefits. Future researcher may want to find out why some judges felt that way and compare their opinions to their ability to use technology. Not everyone has received training, and some judges may not know how to operate the technology. After more than two years using technology, the judges who cannot operate it may be embarrassed to admit it or seek training.

The pandemic provided a first impression for judges, attorneys, and injured workers on how to conduct court business during a health crisis. Therefore, no literature existed on how to management court dockets and people during a pandemic. The pandemic produced unprecedented needs that required insight and knowledge on many levels. Overnight many judges were not prepared to execute emergency plans to meet technical needs of staff and the public. But courts responded to mandates from superior

courts, local and federal agencies, and health care professionals, and developed and implemented safe practices for all, in real time, while continuing to administer justice. Judges had no idea how long these measures would be needed. In addition, courts had to adjust to constantly changing and conflicting mandates. For example, in Missouri, decisions were made by local authorities. Some counties required masks, others did not. Some workers' compensation offices opened to the public. Other offices scheduled in-person settings by request. Attorneys who practiced in multiple jurisdictions had to be aware of the different mandates in each county, and act accordingly. The contrary findings may help future researchers develop literature. The findings may help confirm judicial opinions about remote technology and mediations that judges may not hear because judges do not routinely express their personal opinion about the court processes used. Another question for future researchers is whether the benefits from using distance technology are the same regardless of the technology used. In summary, the recurring theme from this study suggest that during a pandemic judges agree or strongly agree that the benefits of using distance technology to mediate outweigh the risks.

Hypothesis H4b predicted that pre-COVID-19, judges believed potential ethical pitfalls outweighed the benefits from using distance technology to mediate disputes. This is a retrospective look at judicial opinions. Pre and post COVID attitudes were not measured during the study. However, in 2018, judges provided a glimpse of what the judges surveyed believed at that time. While most judges recognized advantages to mediations conducted online, they also recognized the mediations may be subject to ethical problems. However, judges were not asked if potential ethical pitfalls outweighed

the benefits of using distance technology to mediate. Of course, these responses do not represent the population of judges. Future research would benefit from a pre/post inquiry about whether benefits outweigh the risks of using distance technology during mediations. Researchers may also inquire about the benefit versus the risk of individual remote technologies during mediations. Was the prediction supported by the findings? The opinions expressed by judges represent the judges surveyed, not the entire population of judges. Here, the findings are groundbreaking, establishing a foundation for more research. What is important about this study is that it occurred during the pandemic, so judicial memories were fresh about pre and post COVID-19 activities by the courts. Future researchers will have access to retrospective judicial opinions about the benefits and risks of using technology to mediate. Pre-COVID-19, a number of disadvantages were cited for the use of technology during mediations, including misunderstanding, limited cues from body language, facial expression, lack of a serious attitude by participants, and a lack of rapport and warmth (Rainey, et al., 2012). Stephen Goldberg, a veteran mediator, believes the mediator's rapport outweighs the benefits of technology (Ebner, 2012).

Hypothesis H4c predicted that judges believed some distance technology options have less ethical pitfalls than others when used to mediate. Many of the video conferencing platforms used early in the pandemic continue to be used today, including Zoom, Webex, Microsoft Teams, and Skype. What has changed is the smooth operation of the platforms and security upgrades. These changes were critical to the success of these platforms because users would not continue to use a platform that was not secure

and free from unwanted intrusions. During this study, one judge found Zoom had less potential for ethical pitfalls to occur than telephone mediations. The judge did not elaborate on the types of problems that occur during telephone mediations. Future researchers may want to explore this in more detail in an effort to continue to improve the quality of remote services offered while increasing the level of public trust in the process. This has been discussed throughout this section.

Although most judges identified ethical pitfalls in general, a few believe video conferencing incur fewer ethical issues. Future researchers could inquire about ethical differences between various *types* of remote technology and why judges might hold differing opinions about ethical issues to consider depending on each type. In this example, it would be helpful to know why the judge believed mediations conducted by Zoom had less potential for ethical pitfalls to occur than mediations conducted by telephone. This type of research will help judges identify and use the most effective remote systems for their jurisdiction based on peer review. In summary, the prediction was not supported by the findings, but it provides a body of information that can be used by court officials and judges to improve the quality of mediations for all participants when distance technology is used.

Based on the responses provided by judges who participated in this study, a best practice guide about the use of technology to conduct mediations and preside over hearings while maintaining high ethical standards was created. Judges teaching judges how to use distance technology to manage their caseloads, improve efficiency, and instill public trust in the process. A list of commonly used technical terms were included for

review in Appendix M. Judges with little technical knowledge or judges who would like to enhance their skills can benefit. Virtual tools are expected to be a part of our “judicial toolbox” for years to come. Court settings can be stressful, especially virtual settings. When judges successfully manage virtual dockets, their confidence increases and impacts the court experience for staff, parties, attorneys, the general public, and increases case resolution rates.

Limitations of the Study

Design of the investigation

One of the biggest limitations of this study was the failure to define “potential ethical pitfalls” to judges. This left it to each judge to define the phrase. As a result, some judges did not identify potential ethical pitfalls, i.e., the inability to place parties in breakout rooms and keep the other side from eavesdropping, and a lack of a strong internet connection among all parties. An unstable internet connection may lead to poor communications, which is another potential ethical pitfall that some judges did not recognize. Communication is key to the success of mediations, no matter which process is used. It is especially important to have a good communication system when distance technology is used. Some parties may have to join the mediation by phone while others join with audio and video, which can establish a perceived imbalance of power. In addition, if a pro se claimant is the party on the phone they may feel like the outsider, and the other side is friends with the judge.

In addition, there was no pre-COVID -19 measure in either the survey or the focus groups about potential ethical pitfalls related to the use of distance technology to

facilitate mediations, however, judges offered opinions about how their opinions changed out of necessity.

External Validity

The target sample size for the surveys was 1,100 judges. This number was originally considered sufficient sample size to represent a good cross section of judicial opinions across the U.S. if a random sample for this study was possible. However, a snowball sampling method was eventually used to garner survey participation from judges, and the total population of judges who received the survey was ultimately unknown. Therefore, it was not possible to track how many emails were sent out by the individual organizations because the researcher did not have control of the participating organizations' mailing lists.

The actual number of judges that participated in the survey over a six-week period included the following:

- 621 judges clicked the link and began the survey.
- 532 usable responses were received (20-100 percent completion).
- 504 were over 50 percent completed responses.
- 495 were over 80 percent completed responses.
- 469 were 100 percent completed responses.

The 532 usable responses in the dataset represent 157 participants received from the survey through Qualtrics individual emails, and 375 received through the anonymous tiny url link used to recruit members of organizations.

Participants were removed from the list if they did not make it past the first two questions post-consent: *Are you a sitting judge?* And *What is your judicial status?* After removing these participants only 42.6 percent of the total number of judges sought actually participated in the survey. There are literally thousands of judges in the U.S., and they could not all be interviewed. However, it was important to obtain an adequate sample in order to generalize about the entire population of judges. Given that less than half the projected number of judges responded, this may not be a sufficient number of responses reflect the opinions of the general population of judges. However, the judges that responded represent a cross-section of the types of judges in the population, as described above, i.e., state, and federal court judges, commissioners, administrative law judges, hearing officers, and municipal judges to name a few. From that perspective, we have good representation from the bench.

Conclusion

Schmitz and Rule (2017) discussed the need for clear ethical standards when technology was used pre- COVID-19. Much has been written about ethical standards during FTF mediations. The misconception is that the same standards apply to technology driven mediations. That is true to a degree, but other factors come into play when technology is used. The concept of ODR system bias, and associated ethical challenges was raised. For example, Webex has a recording feature that automatically starts when meeting begin. Initially, my mediations were recorded because I did not know or understand what was taking place. If confidential information is recorded, it could be misused and create distrust in the system by users. A close look at the system

design is encouraged to assure no inherent bias is present in the system (Schmitz & Rule, 2017)

Judicial opinions continue to evolve about the role of technology in mediations and other court proceedings. After start of the pandemic in 2020, The National Judicial College conducted a survey and found six out of ten judges who responded did not feel prepared to handle the impact of COVID-19 on court proceedings (Firth, 2020). Judges expressed a number of concerns including how to weigh personal rights versus public safety, how to ensure ongoing court operations, and should evidentiary rules be relaxed to allow video testimony in order to avoid infection? By the time this study was conducted in 2021, a significant number of judges felt good about their ability to handle technical issues during remote settings. This shift in skills and confidence levels occurred because of experience with the remote process, adequate tools, general acceptance by judges, and limited options to conduct court business. If there had been no pandemic, and judges had the option to use technology or in-person mediations, they would most likely have continued to use in-person mediations. As early as 2014, Director Greenstein warned that judges must have a working knowledge of technology, a sentiment codified in the Model Rules of Professional Conduct established by the American Bar Association, and reiterated, in 2018 by then Chief Justice Zel Fischer of the Missouri Supreme Court. He cautioned that technology can no longer be considered a fun toy. The public expects it to be used (Fischer, 2018)

The Missouri Supreme Court addressed the concern about testimony by video and found witness testimony by video over the objection of the defendant violates the Sixth

Amendment right to confront witnesses (Patrick, 2022). Some legal experts believe the issue is ripe to be heard by the United States Supreme Court. The ruling may not apply to mediations and motions as it is not sworn testimony and the parties still have the right to a hearing if they choose. As we near the end of 2022, judicial opinions continue to evolve about technology and mediations, which makes it fertile ground for more research overtime.

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Appendix A: IRB Information Sheet

We are conducting a survey and focus groups to learn about perceptions of distance technology, ethics, and mediation. If you volunteer to be in this study, you will be asked to fill out a series of questionnaires. Your participation should take 15 minutes. At the end of the survey, you are invited to participate in an online focus group on a different date to discuss your survey answers in more detail. The focus group will last 45 minutes.

This study is considered to be minimal risk of harm. This means the risks of your participation in the research are similar in type or intensity to what you encounter during your daily activities.

We hope the findings from this project will garner a better understanding of the implications of technology use in mediation contexts.

Your identity and responses will remain anonymous. Your participation is voluntary, and you may stop at any time. You may skip any questions you do not want to answer. Your decisions will have no impact on your relationship with the researchers, University of Nevada, Reno, or National Judicial College. Your survey responses will be kept confidential, and your name will never be included in any reports. At the conclusion of the study, all collected data will be destroyed or deleted.

If you have questions about the study or would like to know more before you participate, you can click [here](#) to access a PDF of the *Frequently Asked Questions* (FAQs). For questions about the survey that are not addressed in the FAQs, please contact Suzette Carlisle Flowers at the phone number or email address listed at the end of

this letter. If you have technical problems, please call the Nevada Center for Surveys, Evaluations, and Statistics at 1-800-929-9079 (Mon-Fri 9am-9pm; Sat/Sun/holidays 9am-5pm). If you have questions, concerns, or complaints about this research, you may report them (anonymously if you so choose) by calling the University of Nevada, Reno Research Integrity Office at 775-327-2368.

Thank you for taking time from your judicial duties to improve the administration of justice across our country. Please show your consent to participate in the study by clicking “Yes, I consent” below.

Do you consent to participate in this research study?

- Yes, I consent.
- No, I do not consent.

Appendix B: Volunteer Request Pilot 1 Survey and Focus Groups 2018

Hello, my name is Suzette Carlisle, and I am one of three faculty assistants for your civil mediation class next week. I look forward to working with you.

I am also in the judicial studies program at UNR, working on a Ph.D. in Judicial Studies.

As a part of the Judicial Studies program, I need 12 volunteers to participate in a focus group from noon to 1:00 on Wednesday and Thursday next week.

You will be asked your perspective on: “The potential for ethical pitfalls related to the use of distance technology to facilitate mediation” (Online mediation, for example)

Six volunteers are needed each day for a 30-minute discussion. (Volunteers are asked to participate for only one of the two days).

If you have questions or would like to volunteer, please contact me at: suzettecarlisle1@gmail.com or text me at 314-691-0052. Or see me next week during break times.

Will you join me for a discussion during the lunch hour?

I hope so!

I look forward to seeing you next week.

Appendix C: Pilot 1 Survey Questions 2018

The first question is to be completed by all volunteers

1. What type of work do you do? (Check one that applies the most)

a) Judge _____

b) Attorney _____

c) Non-attorney _____ (**If you are not a judge, please skip to number 23**)

The following questions are for all judges:

2. What bench do you serve on? (Administrative law, circuit, etc.)

3. What type of cases do you hear? _____

4. How long have you served in each capacity as a judge?

5. What size population do you serve?

a) Under 250,000 in population

b) 251,000 – 350,000

c) 351,000-450,000

d) More than 451,000

6. How do you define distance technology in the use of online mediation?

A. This section is for judicial volunteers who have conducted distance technology/online mediations (If not please skip to Number 15)

7. Have you ever used distance technology to mediate cases online?

a) Yes ____ If yes,

i. Approximately how many cases have you mediated online? _____

ii. What technology did you use? i.e., email, skype, etc. _____

iii. Is there a difference in the quality of mediations performed in person versus online?

a) Yes ____

b) No ____ **(If no, skip to Number 15)**

iv. If yes, what difference do you see in the two processes?

v. What types of cases did you mediate online?

vi. How would you rate the effectiveness of distance technology/online mediation in the resolution of disputes?

1. Excellent ____

2. Good ____

3. Fair ____

4. Poor ____

5. I don't know ____

8. Would participate in distance technology/online mediation again?
- a) Yes ____
 - b) No ____
 - c) Why or why not? _____
9. What worked well with the online mediation? _____
10. What would you do different next time? _____
11. Have you seen abuses with the use of distance technology/online mediation?
- a) Yes ____
 - b) No ____
 - c) If yes, what abuses have you seen?

12. What type of cases do you think would benefit from distance technology/online mediation? Please list:
- a) _____
 - b) _____
13. From a judicial perspective, do you see any potential ethical problems with the use of distance technology/online mediations?
- a) Yes ____
 - b) No ____
 - c) If yes, what potential ethical problems do you see? Please list:
 - i. _____
 - ii. _____

iii. _____

14. Do you conduct traditional mediations?

a) Yes _____ If yes,

i. What type of cases do you mediate? _____

ii. What mediation process do you use? (i.e., evaluative, facilitative, etc.)

b) No _____

B. This section is for judicial volunteers who have not used distance technology/online mediation

15. How do you define distance technology in the use of online mediation?

16. As a judge have you ever had an opportunity to participate in online mediation?

a) Yes _____

b) No _____

c) If yes, why did you not participate? _____

17. If given an opportunity, would you try it?

a) Yes _____

b) No _____

c) Why or why not? _____

18. Do you think online mediation will be used to resolve cases in the future?

a) Yes _____

- b) No _____
- c) Why or why not? _____
- d) I don't know
19. What type of cases do you think would benefit from distance technology/online mediation? Please list:
- a) _____
- b) _____
- c) _____
20. Do you see any advantages to online mediation over face-to-face mediations?
- a) Yes ____
- b) No ____
- c) If yes, what advantages do you see? _____
21. From a judicial perspective, do you see any potential ethical problems with the use of distance technology/online mediations?
- a) Yes ____
- b) No ____
- c) If yes, what potential ethical problems do you see?

22. Do you see any potential abuses of the use of distance technology/online mediations?
- a) Yes ____
- b) No ____

c) If yes, what potential abuses problems do you see?

23. Have you ever conducted traditional mediations?

a) Yes _____

No _____

b) If yes, what mediation process did you/do you use? i.e. (Evaluative, facilitative, etc.) _____

c) Approximately how traditional mediations have you conducted?

a) 0 _____

b) 1-50 _____

c) 51-100 _____

d) 100-150 _____

e) Over 151 _____

f) In what capacity? (Attorney, mediator, party) _____

C. This section is for non-judicial volunteers about distance learning/online mediation

24. How do you define distance technology in the use of online mediation?

25. Have you ever had an opportunity to participate in online mediation?

a) Yes _____

b) No _____

- c) If yes, why did you not participate?
 - d) If given an opportunity, would you try it?
 - e) Yes ____
 - f) No ____
 - g) Why or why not?
26. Do you think online mediation will be used to resolve cases in the future?
- a) Yes _____
 - b) No _____
 - c) Why or why not?
 - d) I don't know
27. What type of cases do you think would benefit from distance technology/online mediation? Please list:
- a) _____
 - b) _____
 - c) _____
28. Do you see any advantages to online mediation over face-to-face mediations?
- a) Yes ____
 - b) No ____
 - c) If yes, what advantages do you see? _____

29. Do you see any potential ethical problems with the use of distance technology/online mediations?

a) Yes ____

b) No ____

c) If yes, what potential ethical problems do you see?

30. Have you ever conducted traditional mediations?

a) Yes ____

b) No ____

c) If yes, what mediation process did you/do you use? i.e. (Evaluative, facilitative, etc.) _____

31. Approximately how traditional mediations have you conducted?

a) 0 ____

b) 1-50 ____

c) 51-100 ____

d) 100-150 ____

e) Over 151 ____

f) In what capacity? (Attorney, mediator, party) _____

Thank you for sharing your time and participating in this survey. Your thoughts and opinions are very important to this project!

Appendix D: Moderator's Guide to Focus Groups 2018

ONLINE MEDIATION FOCUS GROUP

(Prompts and probing questions)

FOCUS GROUP EQUIPMENT AND MATERIALS

Digital voice recorder

Note pads

Pens

Tent cards

12:15

“Welcome to the focus group and thank you for being here today. My name is Suzette Carlisle and Dr. Veronica B. Dahir is Director of the Grant Sawyer Center for Justice Studies. I have the pleasure of having her as the Chair of my committee. Assisting Dr. Dahir is a graduate student. I am here as a student in the judicial studies doctoral program at the University of Nevada, Reno”

RESEARCH OBJECTIVES

[Information for participants]

The objective of this focus group is to gain a better understanding of your views and opinions on distance technology and using online mediation to mediate cases.

RESPONDENT PROFILE

[Information for participants—also appears on participant information sheet]

You have been chosen and asked to participate in this project because you are currently a sitting judge and may or may not have had any experience with online mediation, and we believe that judges like you would be best equipped to provide valuable feedback about online mediation. You have the right to decline participation in the focus group at any time, and you will not be penalized for doing so. If you choose to participate, we'd like you to maintain an open dialogue, take turns to allow all of your fellow colleagues to give their opinions as well, and most importantly, we'd like you share your experiences and your honest points of view.

INTRODUCTION

[Information for participants, script to be read during focus group]

We really appreciate your time, and we know that you have busy schedules. Because your time is important, we are going to do our very best to limit this entire session to 30 minutes. We'd like to talk with you about your experiences with online mediation, so that we gain fundamental information about your perceptions of the process and its impact on the litigants and process in such cases.

Please know that our sole purpose is to collect data. We are not here to promote any views or opinions. In order for the data to be valid, however, it is important for everyone to be as honest and forthright as possible when sharing their experiences, and perceptions of others' experiences. Please feel free to share your point of view even if it

differs from what others have said. Keep in mind that we're just as interested in negative comments as positive comments, and at times the negative comments are the most helpful. I want to remind you that all information will remain completely confidential and there are no right or wrong answers.

We are using a digital voice recorder and a video camera to capture our discussion. The reason for using this equipment is to be sure that we do not miss any information that is shared. We will also be taking notes throughout the focus groups in order to accurately capture your opinions. Later, we will review the notes and recordings and analyze transcriptions for key themes pertaining to our discussion.

Once this process is complete, we will delete or destroy all recordings. Please note that, although all of you know one another, we will remove all personally identifying information during the transcription process, thus ensuring individuals' confidentiality. This is why we have notecards with numbers in front of you. No personally identifiable information will be shared with anyone. If we decide to use any quotes from our discussion today in a report, no names will be attached to those quotes.

We also ask that you respect each other's privacy and do not disclose what we talk about here today to other people who might participate in tomorrow's focus group.

I'm going to serve as the moderator for this session, which means that I am only here to get the conversations started, to ask you the questions I'd like you to talk about with each other, not me. I'm not going to give my opinion on any matter, and I will not be a talking member of this group. We are here to move the discussion along, record what you say, take notes, and be sure that everyone is participating and being offered the

opportunity to give his or her opinion.

Does anyone have a strong objection to being audiotaped or videotaped and/or any other concerns at all? Also, please use the bathroom before taping begins as we cannot stop the tape once we start.

Before we begin again, is there anyone that chooses not to participate?

[Begin after providing all pertinent information to participants...]

“Thank you all again for choosing to participate in this focus group! Let’s get started. In a moment, we will begin recording our discussion using the digital voice recorder and video camera.”

“... but first, let’s do a quick round of introductions off of the camera and tape. Can each of you tell the group your name, type of court you sit in, and what states where are you from?” [NO VIDEO OR AUDIO RECORDING YET]

[After everyone is done with introductions, notify group that you are turning on the recorded, and start taking notes (assistant)]

Appendix E: Pilot 1 Focus Group Questions 2018

Topic: Experience with and Opinions about Online Mediation

We would like to hear about your opinion regarding the use of online mediation.

1. To begin, tell me, what does online mediation means to you?
2. Show of hands, how many people have actually used online mediation to mediate a case? Don't ask them what type of case yet. Just want to know how many people have used it.
3. Even if you have never used online mediation (e.g., skype, video, Zoom, etc.), what types of cases do you think would benefit the most from using distance technology to facilitate online mediations and why?
4. What types of cases do you think would not work well using distance technology to facilitate online mediations and why?
5. What advantages do you see to online mediation vs. face-to face mediation?
6. What disadvantages do you see to online mediation vs. face-to-face mediation?
7. Ok, this is a somewhat related question, can you think of any potential ethical problems that might arise with the use of distance technology in online mediations? If so, what might those be?
8. For those of you that have used online mediation, what types of cases did you mediate?

TOPIC 2: Control Over Mediations

Now I would like to talk about your specific knowledge and experience regarding the impact of online mediations on the litigants and the court.

9. For those of you who do have experience with online mediation, do you feel that there is a difference between offers made in person versus online, and if so, could you give an example? Probe: Do you feel that parties reach a consensus online the same way that they do in person? If not, why not?
10. Can you think of any skills or techniques you might use to prevent the deterioration of mediations when using the online process?
11. How much notice should be given for mediations when using distance technology for online mediations?
12. Should there be a tape or transcript from the online mediations? Why or why not? Do parties consent to this?
13. Does the lack of a mediation table online impact the ability to settle disputes?
14. In the future do you believe younger litigants will utilize online mediations more often than they are used now?
15. As the number of online mediations increase, do you believe face-to-face mediations should cost more than online mediations? Why or why not?
16. Do you think there is a difference in the quality of face-to-face mediations compared to online mediations? Why or why not?

CLOSING REMARKS

17. Is there anything about online mediation that I did not ask you that you wish that I would have asked you.

“Thank you for your time and willingness to participate in this project! We greatly appreciate your insight into this important topic.”

**Appendix F: NAWCJ - Invitation to participate in Study 1 Survey and Study 2
Focus Groups 2021**

From: Carlisle, Suzette

Sent: Tuesday, July 14, 2020, 5:33 PM

To: 'Bruce Moore [KDOL]' <Bruce.Moore@ks.gov>

Subject: RE: [bypass security] Final meeting of the 2019-2020 NAWCJ Board/Passing of the Torch

Hello Judge,

I seek permission to send a survey to our membership about potential ethical pitfalls related to the use of distance technology to facilitate mediations. That is the topic of my dissertation at the University of Nevada – Reno.

Participants will be emailed a survey and asked their background; where they sit, cases heard, time on bench and if they see any potential ethical pitfalls with using phones, video conferencing, text, and email to mediate cases. I will also ask whether COVID-19 impacts their opinion.

Participants who complete the survey will be asked to participate in a focus group session that should last about 45 minutes online. The idea is to explore their survey answers in

more detail. I will tabulate the answers, summarize findings, and draw conclusions based on the data.

Each participant and their responses will remain anonymous.

I spoke to Kathy, and she suggested I speak with you.

I am close to finishing my dissertation, provided I can complete one more class and this dissertation.

Thanks for your time and consideration.

**Appendix G: Presentation to NAWCJ Board of Directors To Participate in Study 1
Survey and Study 2 Focus Groups 2021**

1. Hello. I am Suzette Carlisle Flowers. I am from Missouri and I have served on the board since 2018.
2. I am a Ph.D. student at the University of Nevada-Reno majoring in judicial studies a program in conjunction with the National Judicial College.
3. My dissertation involves the use of a survey and focus groups.
4. In an online survey, judges will be asked their opinion about ethical pitfalls related to the use of distance technology to mediate disputes. Phones, video, and audio conferences. Whether COVID-19 has impacted their opinions.
5. Survey participants will be assigned to online focus groups for one hour to discuss their opinions in more detail.
6. Based on the responses, I plan to develop a best practices checklist for judges to use to avoid ethical pitfalls when using technology to mediate. The focus is administrative and family law judges because mediation is a staple in the services they provide.
7. The topic has not been approved but I plan to submit it this month. I should have a response by October 2020.

8. I request a copy of the NAWCJ membership email list. The standard protocol is for survey research is to establish a list of potential volunteers and monitor their responses.
9. In the alternative, I request the survey and a cover letter run in Lex and Verum for several issues this fall, if approved. Interested may contact me directly.
10. Either way is fine.
11. Questions?

Thank you for your time and consideration!

Appendix H: Study 1 Survey Questions 2021

Start of Block: Consent

infosheet

Information Sheet

We are conducting a research study to understand sitting judges' opinions about hearings and mediations, both in-person and remote. Your knowledge and opinions are crucial for the success of this project, so you do not need to conduct mediations or hearings to complete the survey.

The brief online survey takes approximately 10-15 minutes to complete. Your responses will remain completely confidential and reported in group form only, no responses will be tied back to you individually. If you receive a copy of this invitation from another source, please take the survey only once. At the end of the survey, you will also be invited to participate in an online focus group on a different date. Both the survey and focus group are completely voluntary, and participating in one does not require your participation in the other. Your survey and focus group responses will be used to create a quick, easy to follow checklist for judges who conduct any court proceedings using distance technology. We will send a copy of this checklist to you as a thank you for your participation in this study.

This survey is considered to be minimal risk of harm. This means the risks of your participation in the research are similar in type or intensity to what you encounter during your daily activities. Your identity and responses to this survey will remain confidential, and your name will not be included in any reports. Your participation is voluntary, and you may stop at any time. You may skip any questions you do not want to answer. Your decisions will have no impact on your relationship with the researchers or the University of Nevada, Reno.

If you have questions about the study or would like to know more before you participate, [you can click here to access a PDF of the Frequently Asked Questions \(FAQs\)](#). For questions about the survey that are not addressed in the FAQs, or to request a copy of the checklist, please contact Suzette Carlisle Flowers at the phone number or email address listed in your email or newsletter invitation. If you have technical problems, please call the Nevada Center for Surveys, Evaluations, and Statistics at 1-800-929-9079 (Mon-Fri 9am-9pm; Sat & Sun 9am-5pm). If you have questions, concerns, or complaints about this research, you may report them (anonymously if you so choose) by calling the

Thank you for taking time from your judicial duties to improve the administration of justice across our country. Please show your consent to participate in the study by clicking “Yes, I consent” below.

consent Do you consent to participate in this research study?

1. Yes, I consent. (1)
2. No, I do not consent. (2)

Display This Question:

If consent = 2

Q51 You can participate in a focus group without completing this survey, if you so choose. If you wish to skip the survey and go directly to the focus group, you can select that option below. Otherwise, choose "Exit research study."

3. Skip survey and go directly to focus group enrollment. (1)
4. Exit research study. (2)

End of Block: Consent

Start of Block: Prior Participation

Q51 Have you taken this survey before?

5. Yes, I have already taken this survey. (1)
 6. No, I have not taken this survey before. (2)
-

Display This Question:

If Q51 = 1

Q53

Even though you have taken the survey, have you signed up for a focus group?

You can participate in a focus group whether or not you completed this survey, if you so choose. If you would like to sign up for a focus group, you can select that option below.

Otherwise, choose "Exit research study."

7. Sign up for a focus group. (1)
8. Exit research study. (2)

Instructions

Please follow the instructions stated for each question below. Select the answer that best represents your opinion. We expect this survey to take 10-15 minutes to complete. Please use the buttons at the bottom of the survey page to navigate through the survey (pictured below).

DO NOT use the browser buttons at the top of the page to navigate, or you may be exited from the survey.

Please make sure to finish the survey. You will receive a message once the survey is complete informing you that you are done. This message will have a link to a separate survey where you can enter your contact information for a follow-up focus group, if you so choose. We collect contact information in a separate survey form to ensure that your answers on this survey are not connected to your name or mailing address at all.

To report survey errors or technical problems, please call the Nevada Center for Surveys, Evaluation, and Statistics at 1-800-929-9079 (Mon-Fri 9 am-9 pm; Sat & Sun 9 am-5 pm).

End of Block: Instructions

Start of Block: Section I Qualifier

Q50 For the purposes of this study, we are talking about using distance technology to conduct remote mediations. Distance technology is considered the following devices: landline and cell phones, telephone conference, internet, tablet or iPad, computer and email, and video conference platforms like Zoom, WebEx, Microsoft Teams, and Skype for example.

Section I. Judicial Background Information

In this first section, we will ask you some information about your experience as a judge.

For the purposes of this study, we are interested in your opinions as a sitting judge who adjudicates legal disputes. This includes administrative law judges, hearing officers, commissioners, federal and state court judges, and federal administrative judges.

Are you currently a sitting judge?

9. Yes (1)

10. No (2)

End of Block: Section I Qualifier

Start of Block: Section I. Judicial Background Info

Q5 What is your judicial status?

11. Part-time judge (1)

12. Full time judge (2)



Q6 On what bench do you currently serve? (Select all that apply)

- A. Municipal Court Judge (1)
- B. Hearing Officer (2)
- C. State Administrative Judge or State Administrative Law Judge (3)
- D. State Commissioners (4)
- E. State Circuit Court Judge (5)
- F. Associate State Court Judge (6)
- G. Court of Appeals - State Court (7)
- H. State Supreme Court Judge (8)
- I. Federal Administrative Judge or Federal Administrative Law Judge (9)
- J. Federal Administrative Commissioner (10)
- K. Federal Magistrate Judge (11)
- L. Federal District Court Judge (12)
- M. Federal Appellate Court (13)
- N. Other (Please specify): (14)

Q7 What type(s) of cases do you hear? (Select all that apply)

- O. Workers' compensation (1)
 - P. Family law (2)
 - Q. Civil law (3)
 - R. Criminal law (4)
 - S. Social Security (5)
 - T. Public utility cases (6)
 - U. Administrative law (7)
 - V. Other (Please specify): (8)
-

Q8 How long have you served as a judge?

(Please list the total number of years for all positions held. If either years or months does not apply, please enter "0")

13. Total number of years (1)

14. Number of months (2)

Q9 Choose the type of training you received.

- 15. Legally trained judge (e.g., completed law school, legal apprenticeship, or Bar admission) (1)
 - 16. Non-legally trained judge (e.g., CLE courses, experience on the bench; Bar admission not required) (2)
-

Q10 What size of population do you currently serve?

- 17. 0 to 49,999 people (1)
- 18. 50,000 to 99,999 people (2)
- 19. 100,000 to 249,999 people (3)
- 20. 250,000 to 499,999 people (6)
- 21. 500,000 to 999,999 people (11)
- 22. 1,000,000 or more people (12)
- 23. I don't know (13)

End of Block: Section I. Judicial Background Info

Start of Block: Section II. Face-to-Face Mediations

Q11 SECTION II. FACE-TO-FACE MEDIATIONS

In this section, we would like to know your opinions about face-to-face mediations.

Are you currently conducting face-to-face mediations?

24. Yes (1)

25. No (2)

Display This Question:

If Q11 = 1

X→

Q12 Approximately how many face-to-face mediations do you currently conduct?

26. Only 1-2 mediations per year (1)

27. Only 1-2 mediations per quarter (2)

28. Only 1-2 mediations per month (3)

29. 1-5 mediations per week (4)

30. 6-10 mediations per week (5)

31. More than 10 mediations per week (6)

Display This Question:

If Q11 = 1

X→

Q14 Approximately how many face-to-face mediations did you conduct prior to the start of COVID-19?

- 32. Only 1-2 mediations per year (1)
 - 33. Only 1-2 mediations per quarter (2)
 - 34. Only 1-2 mediations per month (3)
 - 35. 1-5 mediations per week (4)
 - 36. 6-10 mediations per week (5)
 - 37. More than 10 mediations per week (6)
-

Display This Question:

If Q11 = 1

Q13 Do you plan to continue face-to-face mediations after COVID-19 is contained?

38. Yes (1)

39. No (2)

40. I don't know or I'm not sure (3)

41. Not applicable (4)

Display This Question:

If Q13 = 2

Q16 Why won't you continue face-to-face mediations?

Display This Question:

If Q11 = 2

Q17 Did you conduct face-to-face mediations prior to the COVID-19 pandemic?

42. Yes (1)

43. No (2)

Display This Question:

If Q17 = 1

Q18 Did you stop conducting face-to-face mediations because of COVID-19?

44. Yes (1)

45. No (2)

46. Other (Please specify): (3)

Display This Question:

If Q18 = 1

Use Reusable Choices

Q19 Approximately how many face-to-face mediations did you conduct prior to the start of COVID-19?

- 47. Only 1-2 mediations per year (x1)
- 48. Only 1-2 mediations per quarter (x2)
- 49. Only 1-2 mediations per month (x3)
- 50. 1-5 mediations per week (x4)
- 51. 6-10 mediations per week (x5)
- 52. More than 10 mediations per week (x6)

Display This Question:

If Q17 = 1

Q20 If you conducted face-to-face mediations prior to COVID-19, which mediation style(s) did you use? (Select all that apply)

W. Evaluative - The mediator makes non-binding recommendations. (1)

X. Facilitative - The mediator asks questions but does not make recommendations.

(2)

Y. Transformative - The mediator encourages empowerment of the parties to structure their own mediation process and outcome, which the mediator follows. (3)

Z. Other (Please specify): (4)

Display This Question:

If Q18 = 1

Q21 Do you plan to return to face-to-face mediations after COVID-19 is contained?

53. Yes (1)

54. No (2)

55. I don't know or I'm not sure (3)

56. Not applicable (4)

Display This Question:

If Q21 = 2

Q23 Why won't you return to face-to-face mediations?

Q24 Do you believe potential ethical pitfalls exist with the use of face-to-face mediations?

57. Yes (1)

58. No (2)

Display This Question:

If Q24 = 1

Q25 Please discuss any potential ethical pitfalls you believe exist with the use of face-to-face mediations.

Display This Question:

If Q24 = 2

Q26 Please explain why you believe no ethical pitfalls exist during face-to-face mediations.

End of Block: Section II. Face-to-Face Mediations

Start of Block: Section III. Distance Tech and Mediations

Q27 Section III. Distance Technology and Mediations

Now we would like to know your opinion about remote mediations using distance technology. Remote mediation is defined as "mediations held when all the parties are not in the same room."

Do you currently conduct remote mediations using distance technology? (For instance, telephone, internet, iPad, videoconferencing, etc.)

59. Yes (1)

60. No (2)

Display This Question:

If $Q27 = 1$

Use Reusable Choices

Q30 Approximately how many remote mediations using distance technology do you currently conduct?

- 61. Only 1-2 mediations per year (x1)
- 62. Only 1-2 mediations per quarter (x2)
- 63. Only 1-2 mediations per month (x3)
- 64. 1-5 mediations per week (x4)
- 65. 6-10 mediations per week (x5)
- 66. More than 10 mediations per week (x6)

Display This Question:

If Q27 = 1

Q31 You indicated that you are currently using distance technology. Please list the types of distance technology equipment you use to conduct remote mediations. (Select all that apply)

- AA. Phone (landline or cell phone) (1)
 - BB. iPad or tablet (2)
 - CC. Laptop or desktop computer (3)
 - DD. Zoom, Microsoft Teams, WebEx, Skype, or some other videoconferencing platform (5)
 - EE. Other (Please specify): (6)
-

Display This Question:

If Q27 = 1

Q33 Is your use of distance technology during mediations voluntary?

- 67. Yes (1)
 - 68. No (2)
-

Display This Question:

If Q27 = 1

Q35 Do you plan to continue using distance technology to conduct remote mediations after COVID-19 is contained?

69. Yes (1)

70. No (2)

71. I don't know (3)

Display This Question:

If Q35 = 1

Q50 Why will you continue remote mediations?

Display This Question:

If Q35 = 2

Q52 Why won't you continue remote mediations?

Display This Question:

If Q27 = 1

Use Reusable Choices

X→

Q36 Approximately how many remote mediations using distance technology did you conduct prior to the start of COVID-19?

72. Only 1-2 mediations per year (x1)

73. Only 1-2 mediations per quarter (x2)

74. Only 1-2 mediations per month (x3)

75. 1-5 mediations per week (x4)

76. 6-10 mediations per week (x5)

77. More than 10 mediations per week (x6)

78. None. I did not use distance technology before the COVID-19 pandemic. (0)

Display This Question:

If Q27 = 1

Q37 Have you used distance technology more or less frequently since the pandemic began?

79. More frequently (1)

80. About the same (2)

81. Less frequently (3)

Display This Question:

If Q27 = 1

Q38 Since the development of COVID-19, have you become more experienced with the use of distance technology in general?

82. Yes (1)

83. No (2)

If Q27 = 1

Q39 Please rate your ability to deal with technical issues from 0-10, with zero being no ability to deal with technical issues and ten being the ability to deal with most or all technical issues.

84. 0 (No ability to deal with technical issues) (1)

85. 1 (2)

86. 2 (3)

87. 3 (4)

88. 4 (5)

89. 5 (6)

90. 6 (7)

91. 7 (8)

92. 8 (9)

93. 9 (10)

94. 10 (Ability to deal with most or all technical issues) (11)

Display This Question:

If Q27 = 1

Q 40 Do you believe your level of technical knowledge negatively or positively impacts your ability to use distance technology to mediate disputes?

- 95. Negatively impacts my ability to mediate disputes (1)
- 96. Neutrally impacts my ability to mediate disputes (2)
- 97. Positively impact my ability to mediate disputes (3)

Display This Question:

If Q27 = 1

Q42 Do you have access to technical assistance?

- 98. Yes (1)
- 99. No, and I need technical assistance (2)
- 100. No, and I do not need technical assistance (3)

Display This Question:

If Q42 = 1

Q43 How is technical assistance provided to you? (Select all that apply)

FF. Provided by the court (work) - Like IT staff or an administrative clerk (1)

GG. Personal - Like someone at home or a friend (2)

HH. Other (Please specify): (3)

Q44 Do you believe potential ethical pitfalls exist with the use of distance technology to mediate cases?

101. Yes (1)

102. No (2)

103. I don't know (3)

Display This Question:

If Q44 = 1

Q45 Please list any potential ethical pitfalls you see with the use of distance technology to mediate cases.

Display This Question:

If Q44 = 2

Q46 Please explain why you do not believe ethical pitfalls exist with the use of distance technology to mediate cases.

Appendix I: Privacy statement and agreement to participate

The data collected during this study will be retained by me and used to answer questions related to this study. Some personal data is obtained but secure from third party access and may not be sold. Your responses will be anonymous and remain confidential before, during and after the study. At the completion of the study, the data will be destroyed or deleted.

The purpose of this study is to collect accurate data to produce best practices for mediations to be safe, ethical, and efficient, while increasing judicial trust in the mediation process.

I voluntarily agree to participate in this study. I understand I am free to stop my participation at any time.

Signature:

Date:

Appendix J: Study 2 Focus Group Moderator Guide 2021

Zoom meeting

Meeting ID

Meeting Password

Digital voice recording on Zoom Notepads, pens, digital devices

12:15

“Welcome to the focus group and thank you for being here today. My name is Suzette Carlisle Flowers. Present is Dr. Veronica B. Dahir, Director of the Grant Sawyer Center for Justice Studies and chair of my committee. Assisting today is Dr. Dahir’s associate. I am a doctoral candidate in the judicial studies program at the University of Nevada, Reno”

[Information for participants]

The objective of this focus group is to gain a better understanding of your views and opinions on the use of distance technology to mediate cases.

RESPONDENT PROFILE

[Information for participants—also appears on participant information sheet]

You have been chosen and asked to participate in this focus group because you are currently a sitting judge and may have had experience using distance technology to mediate. Even if you have not used distance technology to mediate, we believe that judges like you are best equipped to provide valuable feedback about any ethical pitfalls related to the use of distance technology to mediate. You have the right to decline to participate in the focus group at any time, and you will not be penalized for doing so. If you choose to participate, we'd like you to maintain an open dialogue, take turns to allow all your fellow colleagues to give their opinions as well, and most importantly, we'd like you share your experiences and give your honest points of view.

INTRODUCTION

[Information for participants, script to be read during focus group]

We really appreciate your time, and we know that you have busy schedules. Because your time is important, we are going to limit this entire session to 60 minutes. We'd like to talk with you about your experience using distance technology to mediate and gain fundamental information about your perceptions of the process, its impact on litigants and ethical concerns with its use, if any.

Please know that our sole purpose is to collect data. We are not here to promote any views or opinions. In order for the data to be valid, however, it is important for everyone to be as honest and forthright as possible when sharing their experiences, and

perceptions of others' experiences. Please feel free to share your point of view even if it differs from what others have said. Keep in mind that we're just as interested in negative comments as positive comments, and at times the negative comments are the most helpful. I want to remind you that all information will remain completely confidential and there are no right or wrong answers.

The Zoom platform is equipped with a digital voice recorder and a video camera to capture our discussion. This equipment is used to ensure we do not miss any information that is shared. Also, we will take notes throughout the focus groups to accurately capture your opinions. Later, we will review the notes and recordings and analyze the transcriptions for key themes pertaining to our discussion.

Once this process is complete, we will delete or destroy all recordings. We will remove all personally-identifying information during the transcription process, thus ensuring each individuals' confidentiality. This is why we have numbers assigned to each of you. No personally-identifiable information will be shared with anyone. If we decide to use any quotes from our discussion today in a report, no names will be attached to those quotes. Please do not disclose the identity of any focus group participant to people outside the focus group.

We also ask that you respect each other's privacy and do not disclose what we talk about here today to other people who might participate in different focus group.

I'm going to serve as the moderator for this session, which means that I am only here to get the conversations started, to ask you the questions I'd like you to talk about with each other, not me. I'm not going to give my opinion on any matter, and I will not

be a talking member of this group. I am here to move the discussion along, record what you say, take notes, and ensure everyone is participates and has an opportunity to give their opinion.

Does anyone have a strong objection to being audiotaped or videotaped and/or any other concerns at all? Also, please use the bathroom before taping begins as we cannot stop the tape once we start.

Before we begin again, is there anyone that chooses not to participate?

[Begin after providing all pertinent information to participants...]

“Thank you all again for choosing to participate in this focus group! Let’s get started. In a moment, we will begin recording our discussion using the digital voice recorder and video camera.”

“... but first, let’s do a quick round of introductions off of the camera and tape. Can each of you tell the group your name, type of court where you sit, and what state you are from?” [NO VIDEO OR AUDIO RECORDING YET]

[After everyone is done with introductions, notify the group that you are turning on the recorder, and start taking notes (assistant)]

Topic 1: Experience with and Opinions about Distance Technology to Mediate

We would like to hear your experience with and opinion about the use of distance technology to mediate.

1.1. To begin, tell me, what does it mean to you when you hear the phrase “Using

distance technology to mediate”?

- 1.2. Show of hands, how many people have used distance technology to mediate?
- 1.3. Even if you have never mediated a case using distance technology (e.g. Skype, Zoom, telephone, etc.), what type of cases do you think would benefit most from mediations using distance technology and why?
- 1.4. What type of cases do you think would not work well using distance technology to mediate and why?
- 1.5. What advantages do you see to using distance technology to mediate over face-to-face mediations?
- 1.6. For those of you that have used distance technology to mediate, what types of cases did you mediate?
 - a) What role did you play in the mediation? (Mediator, attorney, etc.)
- 1.7. For those who have experience using distance technology to mediate, do you feel there is a difference between negotiations that take place in person vs. negotiations that take place using distance technology? If so, what is different?
- 1.8. Should there be a recording or transcript from a mediation where distance technology is used? Why or why not?

Topic 2: Technology

We would like to know your knowledge, experience and opinion about using distance technology to mediate.

- 2.1. Before a mediation starts do you think participants should receive instructions about the technology to be used during the upcoming mediation? Why or why not?
- 2.2. If your answer is yes, what information do you think participants need to know about the technology used before the mediation?
- 2.3. What steps can we take to make mediations better when distance technology is used?
- 2.4. Which distance technologies have you used, if any?
- 2.5. During mediations, do you prefer some technologies over others? If so, which ones do you prefer and why?
- 2.6. During mediations, who should control the technology and why?

Topic 3: Ethical Considerations

We would like to know if you think there are potential ethical problems related to the use of technology during mediations

- 3.1. Can you think of any potential ethical problems that might arise with the use of distance technology to mediate? If so, what might those be?
- 3.2. After a mediation using distance technology, do you see a potential for a breach of confidential information? If so, what? How do we avoid this result?

- 3.3. When distance technology is used, can you suggest ways to protect confidential information exchanged before, during and after the mediation?
- 3.4. Do you believe face-to-face mediations have more, less or the same potential for ethical pitfalls as mediations using distance technology? Why or why not?

Topic 4: COVID-19

We would like to know if COVID-19 impacted your opinion about using distance technology

- 4.1. Pre-COVID-19, did you believe there were potential ethical pitfalls associated with the use of distance technology during mediations? If so, what were they?
- 4.2. Pre-COVID-19, did you believe the potential for ethical pitfalls to occur during mediation with distance technology outweighed the need to use it? Why or why not?
- 4.3. Post- COVID-19 did your opinion change about the potential for ethical pitfalls to occur when distance technology is used to mediate?
 - a) Post- COVID-19 do you believe the need to use distance technology during mediation outweighs the potential for ethical pitfalls to occur during its use? Why or why not?
- 4.4. Show of hands, how many people used distance technology to mediate for the first time after COVID-19?

- 4.5. In light of COVID-19, do you believe the need to use distance technology to mediate outweighs the potential for ethical pitfalls that may occur during its use?
Why or why not?
- 4.6. Once COVID-19 is contained should distance technology continue to be used during mediations? Why or why not?
- 4.7. After COVID-19 is contained do you plan to use distance technology?
- 4.8. After COVID-19 is contained do you plan to return to face-to-face mediations?

Appendix K: Study 2 Focus Group Code Book (Excerpt)

Q1a- What does it mean to you as a judge when you hear the phrase, "using distance technology to mediate?"

- 01- Telephone
- 02- Online Video Conferencing (see Q1b)
- 03- Email
- 04- More than one tool (general)
- 05- Break-Out Rooms
- 06- Ability to participate in mediation from various locations
- 97- Other (please specify)
- 98- Don't Know / Not Sure
- 99- Not ascertained
- 00- INAP

Q1b- If code "02" is present in 1a, what type of technology did you use?

- 01- Zoom
- 02- Go To Meeting
- 03- WebEx/Cisco Products
- 04- Skype
- 05- MS Teams
- 06- Blue Jeans
- 07- Court Call
- 97- Other (please specify)

98- Don't Know / Not Sure

99- Not ascertained

00- INAP

Q2a- Even if you've never mediated a case using distance technology such as Skype, Zoom, or telephone, what type of cases do you think would benefit most from mediation using distance technology?

01- Cost/Time/Efficiency Concerns

02- Complex or long cases

03- When parties are represented

04- Specific case-types (see Q2b)

05- Geographic issues, transportation issues, traffic congestion

06- All cases; All cases except criminal; Pandemic issues; All cases during pandemic

07- When parties agree/consent

08- Emotional cases, alleged victims become more empowered and involved

09- When parties cannot physically attend due to physical, mental, or cognitive disability; Elderly who have help at home for technology

10- On a case-by-case basis

11- When all parties have a laptop and camera so they can participate live and people outside the courtroom can see them

12- Cameras are controlled by voice to control technical problems and make transcripts

13- Ability to manage hybrid hearings

97- Other (please specify)

98- Don't Know / Not Sure

99- Not ascertained

00- INAP

Q2b- If code "04" is present in 2a, what case-type?

01- Domestic violence

02- Attorney liens/fees and their disputes

03- Workers Comp

04- Civil

05- Probate

06- Child custody; visitation

97- Other (please specify)

98- Don't Know / Not Sure

99- Not ascertained

00- INAP

Q3a- What types of cases do you think would not work well using distance technology to mediate?

01- Criminal Cases

02- Complex Cases (e.g., difficult subject matter)

03- Workers Comp

04- Refusal and/or inability to participate remotely by parties and/or attorneys

05- Multiple Parties

06- Multiple Attorneys

97- Other (please specify)

98- Don't Know / Not Sure

99- Not ascertained

00- INAP

Q3b- Why those cases (referencing Q3a)?

01- No such thing as criminal mediator

02- In-person is much better

03- Difficult to mediate if the parties are not willing to use technology

97- Other (please specify)

98- Don't Know / Not Sure

99- Not ascertained

Appendix L: Excel Workbook Study 2 Focus Group Code Sheet Q21a- 2021

Q21a) Post-COVID-19 (After COVID-19 is over), do you believe the need to use distance technology during mediations outweighs the potential for ethical pitfalls to occur during its use?

	01	02	03	04				97	98	99	00
A101											
A102											
A103	01										
A104											
A105											
A106											
A107											
A108											
A109											
A110											
B201		01									
B202											
B203											
B204											
B205											
B206	01										
B207											
B208											
B209											
B210											
C301											
C302											
C303											
C304											
C305	01										
C306											
C307											
C308											
C309											
C310											
D401											
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E504											
E505											
E506	1										
E507											
E508											
E509											
E510											
F601											
F602	1										
F603											
F604	1										
F605	1										
F606	1										
F607											
F608											
F609	1										
F610	1										
G701											
G702											
G703											
G704											
G705											
G706	1										
G707	1										
G708	1										
G709											
G710											
TOTAL	13	01	00	00	00	00		00	00	00	00

Appendix M: Definitions Related to Technology, Mediation and Court Related Proceedings

In discussing distance technology and mediation it is helpful to be familiar with the following basic terms:

1. **Agreement** – The act of coming to a mutual arrangement. Parties accept the terms of a transaction (Dictionary.com).
2. **Application** – A program (i.e., word processor or spreadsheet) that performs a particular task or set of tasks (<https://www.merriam-webster.com/dictionary/application>).
3. **Bandwidth** – The maximum amount of information that can be sent over an internet connection in a measured amount of time (Verizon.com).
4. **Blog** – a regularly updated website or web page, typically run by an individual or small group, which is written in an informal or conversational style (<https://merriam-webster.com/dictionary/blog>).
5. **Breakout rooms** – Session that split off from the main meeting into small groups. They are isolated from audio and video in the main session. Used for collaboration and discussion related to the main meeting (Support.Zoom.us).
6. **Caucus** – A private meeting between the mediator and one party or parties on one side of the dispute, held out of hearing range of the other party. In some mediations there are no caucuses. In other mediations the mediator may caucus with each side one time, or many times based on the circumstances (Niemanmediation.com).

7. **Chat feature** – Allows participants during an online meeting to text a question to other participants and send it to the host, everyone, or a specific person. Other participants may respond immediately and create a conversation (Definitions.net).
8. **Computer** – A machine that accepts data as input, processes that data using programs, and outputs the processed data as information. Computers may be connected together to form networks and allow connected computers to communicate with each other (<https://simple.m.wikipedia.org>)
9. **Desk top computer** – A computer that uses a desktop or tower case compared to a portable computer (Laptop). Designed to sit on top of the desk (PC Magazine Digital Edition).
10. **Device** – The name used to describe cell phones, tablets, laptops, and desktop computers.
11. **Distance collaboration modalities** – Includes audio-conferencing (AC), video-conferencing (VTC), electronic meeting systems (EMS), virtual environments, electronic mail (e-mail), instant messaging, and remote document sharing products. Skopp et al. [Analysis of Distance Collaboration Modalities](#)
12. **Download** – Occurs when the computer receives data from the internet (Support.bell.ca/internet/usage).
13. **Email** – A system for transmitting messages electronically between computers on a network to mobile phones, tablets, and other devices (Merriam-Webster).
14. **Filter** – A softening effect to minimize visible imperfections on a Zoom call (<https://styl-inc.com>).

15. **Gallery view** – Enables participants to see thumbnail images of other participants in a grid pattern during video conferences, which expands and contracts as people join and leave a conference meeting ([support.Zoom.us](https://support.zoom.us)).
16. **Guests** – Participants invited to attend a web conference by the host. Before the meeting, guests are provided with meeting details, including dial-in-numbers, meeting identification numbers and passwords (expressvirtualmeetings.com).
17. **HIPAA**– The Health Insurance Portability and Accountability Act of 1996 (“HIPAA”) is a federal law that required the creation of national standards to protect sensitive patient health information from being disclosed without the patient’s consent or knowledge (<https://www.cdc.gov>).
18. **Host** – The person who organizes a web conference meeting, sets up the web conference format (webinar, webcast, or meeting), and sends out the invitations (expressvirtualmeetings.com).
19. **HTML** – Stands for hypertext Markup Language. It is the language used to create webpages ([Techterms.com](https://techterms.com)).
20. **Internet** – A vast computer network linking smaller computer networks worldwide. The internet includes commercial, educational, governmental, and other networks, all of which use the same set of communications protocols ([Dictionary.com](https://dictionary.com)).
21. **Invitation** - An invitation is a written request, usually sent by email. to request participation in a video conference. The email includes a link to the mediation, password, and meeting ID or a telephone number to call to join the video conference (<https://www.merriam-webster.com/dictionary/invitation>).

22. **Laptop** – A small, portable personal computer. A notebook is similar to a laptop but bigger and heavier. As of 2014, there are no differences between a laptop and a notebook (Wikipedia.org).
23. **Link** – Short for hyperlink, this is an HTML object that allows you to jump to a new location when you click or tap it. Provides a simple way to navigate between pages on the web (Techterms.com).
24. **Lock the video conference** – The ability of the host of an online meeting to prevent people from joining unless/until admitted by the host. The “virtual room” may be locked at any time during the conference by the host (Webex.com).
25. **Mediation** - The disputing parties work with a neutral third party, the mediator, to resolve their disputes. The mediator facilitates the resolution of the parties' disputes by supervising the exchange of information and the bargaining process (www.findlaw.com).
26. **Meeting ID** – A unique number assigned to a scheduled online video conference (<https://usqassist.custhelp.com>).
27. **Mobile device** - A general term used for any handheld computer or smartphone. The term is interchangeable with “handheld,” “handheld device,” and “handheld computer.” Mobile devices include smartphones, tablets, e-readers, PDAs, and portable music players with smart capabilities (Lifewire.com).
28. **Network** – A system of computers and peripherals that are able to communicate with each other (Merriam-Webster).

29. **Neutral** – A mediator is called a neutral because they are unbiased, not a party to the case and not engaged on either side of a dispute (Merriam-Webster Dictionary).
30. **Party** -A person or group taking one side of a dispute. Merriam-Webster. Parties have a vested interest in the outcome of a case. At the mediation, they may participate or be represented by an attorney or designated non-attorney.
31. **Password** - A string of characters used to verify the identity of a user during the authentication process. Used with a username and designed to be known only to the user to gain access to a device, application, or website (<https://searchsecurity.techtarget.com>).
32. **Platform** – A standard for the hardware of a computer system that determines the kind of software it can run. Includes conference calls or video conferencing platforms such as Zoom, Endispute, and Court Call. Parties may dial into the mediation by phone or join with audio and video at the click of a link (Wikipedia and lexico.com).
33. **Presenters** – Do not have to be the host. Presenters deliver the content or substance of the meeting (expressvirtualmeetings.com).
34. **Screen sharing** – The ability to view another computer’s desktop on your computer. You can open folders, move files, and run programs on the remote computer (Techterms.com).
35. **Tablet** – A small portable computer that uses a touch screen as its primary input device. Most tablets are slightly smaller and weigh less than the average laptop (Techterms.com).

36. **Teleconferencing** – A meeting of people in different locations using telecommunications, which may include audio, video and data sharing using telephone, videoconferences, and web meetings (Techterms.com).
37. **Telephone** – A system used to transmit speech or computerized information over distances, usually by converting sounds into electric impulses that are sent through a network of wires and cables, sometime by radio waves. Any device that has a transmitter, receiver, and a dialing mechanism, used in a telephone system (Your dictionary).
38. **Texting** - the act of composing and sending electronic messages including alphabets, numbers, and images, between two or more mobile devices, desktops/laptops, or tablets (Wikipedia).
39. **Upload** – Data sent from your computer to the internet, i.e., sending emails, posting photos on social media, using a webcam, and clicking on a webpage sends a data upload (Support.bell.ca/internet/usage/).
40. **Virtual background** – The background on the computer can be changed to reflect different backgrounds while hiding the actual background from view.
41. **Virtual check-in** – A security check that requires participants to be admitted to a virtual meeting by the host to enforce security.
42. **Virtual waiting room** – Allows the host to control when a participant joins the virtual meeting. A host may admit attendees one at a time or all together. The host may refuse admittance (Support.Zoom.us/).

43. **Video conferencing** – Allows users to meet face-to-face and collaborate via computer, mobile and video devices. May be set up through an internet connection or dedicated servers and infrastructure. Data may be shared, including screens and slideshows (expressvirtualmeetings.com).
44. **Virtual mediations** – A process where parties can settle their disputes online without the need for in-person appearances. Meetings are conducted by video or telephone conference, and any form of document submission is facilitated through an encrypted, cloud-based platform accessible through the internet (ArbResolutions.com). Video conferences include Zoom, Webex, and Court Call to name a few.
45. **Virtual mediation security** – Steps taken to protect and secure virtual meetings which include unique meeting IDs, “waiting rooms,” moderators assigned to each meeting to troubleshoot technical issues, control entry to the meeting, use breakout rooms as needed, lock the meeting, and remove people from the meeting, if needed (Jamsadr.com).
46. **VoIP** – Web conferencing program that permits access to audio through the internet on your computer (expressvirtualmeetings.com).
47. **Web conference** – A visual meeting between two or more participants in different locations using online conferencing technology. Webinars and webcasts are types of web conferences (expressvirtualmeetings.com).

48. **Webcam** (video streaming) – Used to show a participant’s face in the web conference. If the presenter has a webcam, other meeting participants can see them (expressvirtualmeetings.com).
49. **Webcast** – Non-interactive presentation, broadcast over the internet to many viewers at the same time. A webcast may be distributed live or on demand (Recorded). Transmission is one-way, does not allow interaction between the presenter and the audience (expressvirtualmeetings.com).
50. **Webinar** – is a presentation online. Useful for a lecture or information session (expressvirtualmeetings.com).
51. **Upload** – To transfer data or files from a computer or other digital device to the memory of another device, i.e., a larger or remote computer (<https://www.merriam-webster.com/dictionary/upload>).

Appendix N: Tips for a Successful Virtual Mediation or Court Proceeding

Based on findings from this survey, the following checklist for virtual proceedings was created and may be applied to mediations, motions, and hearings.

Tips for a Successful Virtual Mediation or Court Proceeding

Before the Remote Meeting

1. Create a “What to Expect” sheet, for all parties, including pro se litigants and share with all participants:
 - a) The purpose of the proceeding.
 - b) The order of presentations.
 - c) When they can expect to be called.
 - d) What they are expected to do.
 - e) Physical appearance.
 - f) Decorum (conduct during the proceeding) Take turns and be courteous.
 - g) No inappropriate filters and background distractions.
 - h) No food. Water or coffee is acceptable.
 - i) Lighting should be good, avoid strong background light.
 - j) No smoking during the proceeding.
 - k) Identify the type of setting, mediation, motion, hearing.
 - l) Identify the type of distance technology to be used by the Court,
 - i. cell phone,
 - ii. landline or

- iii. video conferencing
- iv. email, including the email address
- m) Parties agree they will not be coached by any person, document, or other device during the proceeding. During hearings, parties take an oath to comply.
- n) When testifying, parties and witnesses swear or affirm not to be coached or rely on any information or device, and to use their own personal knowledge during testimony in a hearing or when making statements during mediation.
- o) Impose consequences for failure to comply, i.e., termination of mediation, continuation of the proceeding, removal of parties or witnesses. Communicate expectations and consequences to parties in advance.

Internet Stability Questions

2. If the Court will use video conferencing, list the platform to be used, i.e., Zoom, etc. (Laptop or desktop computer are preferred, if available). Questions to ask participants:
 - i. Do the parties have stable internet connection?
 - ii. What is their bandwidth?
 - iii. Is the telephone connection stable?
 - iv. Headsets are recommended to reduce noise level, if available.
3. Provide parties and witnesses with information about how to join the meeting, i.e., telephone numbers, meeting links, meeting ID numbers, and passwords.
 - i. Provide a telephone number or email address that everyone can call to alert the judge and others if they have problems joining the meeting.

4. Include a digital box account or encrypted email for parties to upload confidential documents or arrange for parties to send documents to the judge who can share them with everyone.
5. Provide or direct parties to technical assistance if needed.
6. Offer parties a test run, or encourage them to do their own, if needed.

At the start of the virtual meeting

7. Identify who is present. Certify one person per room, per device, per camera, if used.
No sharing of devices.
8. Only the parties/witness are allowed to join, view, or participate in the proceeding.
Do not share the link to join the meeting.
9. Review basic computer functions, chat, raise hand, share a document, etc. with participants and solicit questions.
10. Remind parties that mediation discussions are confidential and cannot be used in any other proceeding. Protective orders may be issued, if needed.

During the Virtual Meeting

11. No recording of the proceeding, except for court sanctioned proceedings.
12. Cameras are to remain on at all times, and subject to a pan of the room, if requested by the Court at any time.
13. Cell phones, iPads and computers not used for the proceeding are to remain off.
14. Witnesses and parties are to remain visible at all times from the chest up during the proceeding, until they are excused by the Court.
15. Volume is to remain up throughout the proceedings.

16. Only parties and attorney are in the proceeding unless a witness is testifying.
17. Have the parties agree to each term, either verbally or in writing, and make a notation of their responses.
18. As needed, place parties in breakout rooms separately.
19. The judge is to remain observant about what parties are doing the proceeding, i.e., looking down, to the right or left.
20. Judges should solicit attorney support with observation of clients and witnesses to ensure all in attendance follow the Court's expectations.
21. If it is not possible to meet virtually due to an unforeseen event, have a backup plan and ability to contact all parties involved.

After the Mediation

22. A judge should continue to improve their technological skills.