

# The Impact of On-line Communication on Mediation Online Technologies – Why and When to Use Them?<sup>1</sup>

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## Abstract

Demographic trends will lead to a growing gap between the digital orientation of the mediator's population and the digital orientation of their client's population for the coming 10 years.

New technologies in Online Dispute Resolution (ODR) have already had an impact on some of the very core values of mediation, interpreted by some leading researchers in the field as threatening to the current definition of mediation.

Before a wider divide separates 'traditional' mediation from ODR led processes, the mediator's community, at wide, should integrate digital age communication systems in their practice.

The resulting digitally enhanced mediation processes would cater for the needs of their changing client base while securing their practice field.

Better information and training of all mediators to the integration of on-line media in their practice is therefore a key to mediation's development in the next decade.

## Introduction

Online Dispute Resolution is not news.

Software, platforms and other internet age products have been created and tested, they have grown and disappeared for at least as long as email has existed.

Internationally, the mediation community seems polarised between a growing minority of pro 'online' practitioners, ready to embrace all new technologies, and a majority of mediators attached to face to face dealings.

While mediators discuss the appropriateness of writing 'online' next to 'mediation', e-mediation was born and has developed mostly in providing asynchronous, text based platforms. Observers indicate that synchronous voice or video based systems have been left behind by the industry, for mostly technical reasons.

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1 First presented to the Arbitrators' and Mediators' Institute of New Zealand's Conference 2014 held in Queenstown, New Zealand between the 28th and the 30th of August 2014. The theme of the conference was 'Looking Forward'.

2 CPEng, MIPENZ, AAMINZ, Arnaud Deutsch is a freelance mediator practising in the engineering and technology industries. He is based in Auckland, New Zealand and has experience with companies from both side of the Tasman Sea.

Highlighting the risk for traditional mediators to be kept out of e-mediation in the future, this paper will question how traditional mediators can still relate to on-line mediation.

It will point at the obvious opportunity for traditional mediators to achieve the double goal of adding value to their current practice of mediation and improve the process of mediation as it will be known in 20 years.

## Current trends in e-mediation and consequences

### E-mediation

One of the many forms of ODR existing and to be created, e-mediation,<sup>3</sup> is defined as mediation using on-line technologies within its process. This open definition makes any mediation process using any on-line technology, at any stage and for any purpose within its process, e-mediation.

From that starting definition, available on-line technologies can be split in several categories. They are aimed at the administration and management of cases and/or directly at enabling the communication between parties and neutrals.

Within the on-line technologies aimed at communication enablement, a distinction is made between synchronous systems, like phone or video conference, and asynchronous systems like email and messaging systems.<sup>4</sup>

### An industry meeting a demand

For an excellent summary of the progress of e-mediation and its current trends, the reader is invited to refer to Noam Ebner's chapter of *Online Dispute Resolution: Theory and Practice, A Treatise on Technology and Dispute Resolution*.<sup>5</sup> Two years on, this remains a very up-to-date account of the industry.

Three very interesting elements of N Ebner's review must be highlighted.

The first is that e-mediation has developed and is believed to continue its developments through mostly text-based asynchronous modes rather than synchronous modes.

The second is that e-mediation services appear to be provided by large corporations rather than small mediation practices.

The third, given as a consequence of the two previous by the author, is a change in the way mediation is practiced on-line.

A possible explanation for this state of development can be found in the ability of large computer systems

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3 The term e-mediation doesn't seem to be fully accepted yet in the lexicon of ODR. Other denomination of the same are still largely used, like on-line mediation.

4 Note that synchronous messaging systems can be considered asynchronous as the real delivery time of each message is often hidden to the emitter. The distinction between synchronous and asynchronous is often irrelevant in these – growing – technologies.

5 Mohamed S Abdel Wahab, Ethan Katsh and Daniel Rainey (eds), *Online Dispute Resolution: Theory and Practice, A Treatise on Technology and Dispute Resolution* (Eleven International Publishing, The Hague, Netherlands, 2012).

to process large amount of data very quickly. The systems developed in the computing industry over the past decades are readily effective for the management of large amounts of cases insofar as the process used to resolve them is following a sequence of pre-identified steps. These same systems are still particularly bad at making sense of complexity and paradox.

On-line dispute resolution has therefore flourished where readily available computing technologies could easily be seen to add commercial value to large segments of their markets. In this on-line environment, the particular requirements of a synchronous mediation process have been removed to better fit the sequential nature of computerised processes. The result is currently an on-line, text based, asynchronous, and mostly evaluative mediation process. It is called e-mediation.

As a result of the adaptation of mediation to the on-line environment, as opposed to an adaptation of the on-line tools to mediation, e-mediation is reported to be increasingly different in nature from traditional meditation. Ethical issues are reported<sup>6</sup> to include lack of impartiality, lack of confidentiality, costs and system design issues.<sup>7</sup>

The current shape of e-mediation is clearly the result of commercial forces favouring large computing systems to the craftsmanship of professional mediators. This leaves the resolution of disputes requiring the skills of traditionally off-line mediators outside of e-mediation.

I will suggest here that we, traditional, mostly off-line, professional mediators, while we could rejoice that on-line systems cannot –yet – replace us, should look forward and think again.

It is not only Artificial Intelligence that should be our worry, but simply demography.

### **Digital natives and migrants**

Maturists, Baby boomers, Gen Xers, Gen Yers, Gen Zers and Millenials are now demographic categories familiar to all readers of managerial self-improvement literature.<sup>8</sup>

As their characteristic preferences are often exaggerated, it is hard to use these stereotypes for any practical purpose without facing the risk of irrelevance. There is however a significant element of everyone's background that is relevant to a generational divide in the context of mediation.

Some of us have learned communication through on-line systems, they are digital natives. Others have learned to use on-line communication to replace the traditional communication tools they have developed through. These are digital migrants.<sup>9</sup>

Regardless of the year of birth, it is the attitude towards technology of one's environment that is determining. If your birth was announced to your wider family through email, chances are that you are a digital native. You will be using on-line technologies with little restraint.

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6 Jo DeMars et al, 'Virtual Virtues, Ethical Considerations for an Online Dispute Resolution (ODR) Practice' (2010) *Dispute Resolution Magazine* 6.

7 Note that while these issues are reported to be increasingly visible in the field, they are not inherent to e-mediation and can be avoided.

8 As a good example of generation categorisation, see the Barclays report from 2013: Talking About My Generation.

9 A third category is voluntarily set aside: the population that is totally disengaged from any on-line technologies (voluntarily or not).

If relevant data on generational preferences in dispute resolution is not readily available,<sup>10</sup> the development of on-line dispute resolution is not a surprise. As years pass there will be more and more digital natives in the population and their natural use of on-line technologies will inevitably fertilise this field. There will be an increasing demand for ways to solve conflicts on-line in the future.

### Our future client base

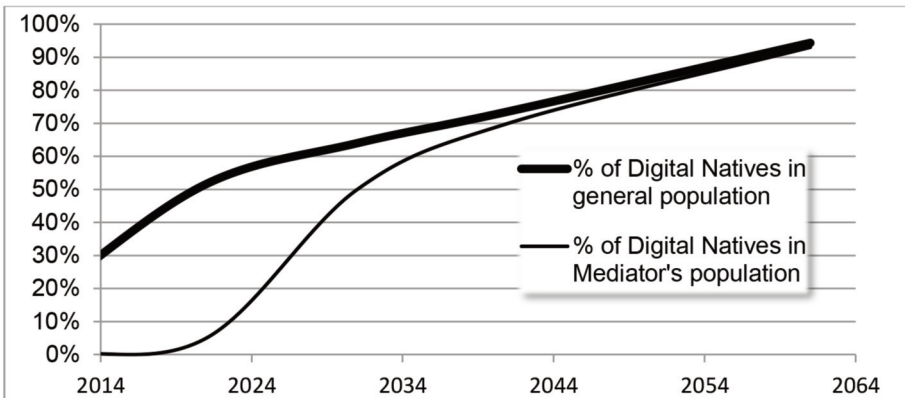
For the next 20 years, a large majority of Australia's and New Zealand's mediator's clients will be likely to be more technologically orientated than their mediator. The inclination of our customers to use on-line technologies is about to increase dramatically.

This difference in digital orientation is the direct result of two dynamics.

The first is the entrance of digital natives in the active population. They will be close to 60% of the population by 2024 and 80% by 2050.

The second comes from the delayed entrance of digital natives in the mediator's population. Estimated here at around 20% in 2024 and only matching the whole population's percentage of digital natives by 2044 .

Figure 1 – Entrance of Digital Natives in The Mediators' Population<sup>11</sup>



10 Or at least not available to the author.

11 Estimated penetration curves based on census data for New Zealand and Australia as available at time of writing from governmental websites. Mediator's penetration curve estimated on anecdotal evidence of current average age of mediators.

When digital natives' inclination toward on-line systems is taken into consideration, the amount of work channelled out of the traditional off-line dispute resolution systems into on-line system can be expected to be significant.

The social value proposition of mediation, as we understand it now, is therefore at risk because the mediation process is adapting to its on-line delivery mechanisms. Key skills of the mediator's population, like the ability to exploit synchronous communications to their benefit, will potentially be unrequired.

It is fair to wonder if the traditional practice of mediation will still exist as it is known in 40 years.

## A proposition

In the context described above, the industry is challenged to provide a Digital Friendly Online Mediation process, a process that attracts digital natives and safeguards the values of mediation as they are known, by enabling mediators to deliver a process worthy of their skills.

Two solutions to this demographic dynamics can be envisaged:

The first solution would be to reduce dramatically the average age of the mediator's population to include more digital natives earlier.

The second is to increase the technological orientation of mediators from the digital migrant's generations.

While younger mediators will inevitably be more inclined to use new technologies, older mediators have to become innovative, very quickly.

Yet there is another step to take to enable the development of a hybrid practice linking on-line technologies and traditional mediation: integrate on-line technologies to traditional mediation practice.

As it is currently taught, marketed and practiced, mediation often only considers the use of on-line technologies as solutions for issues preventing face to face sessions.<sup>12</sup> It is suggested here that on-line technologies can add value when integrated at system design stage rather than used as back-ups.

In agreement with N Ebner, '*mediators would serve themselves well by reviewing the knowledge gained to-date regarding online communication and process management. They could also conduct their practice with an eye to contributing knowledge to this growing field of practice by documenting their experiences, conducting experiments of their own and sharing these with the e-mediation community*'.<sup>13</sup>

The following part of this article will consider the integration of on-line technologies in mediation. It will provide an example, mostly as an invitation to other practitioners to be curious, creative and collaborative in facing the challenge ahead.

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12 Exceptions are very marginally reported. Giuseppe Leone, founder of the Virtual Mediation Lab is making a great contribution to the field. Other initiatives also provide training to mediators but the teaching of mediation worldwide seems to retain the face to face model as reference.

13 N Ebner, Online Dispute Resolution: Theory and Practice, 398.

## Integration of digital communication into traditional practice

One way to make a traditional mediation process attractive to digitally orientated parties surely involves the use of digital technologies.

The range of on-line communication tools that can be used for mediation is wide, expanding and very innovative.<sup>14</sup> It is difficult to discuss any given system without risking appearing out of date when its core features can change so swiftly.

Because of their diversity, on-line technologies offer solutions to many difficulties faced by mediators. Off-course, not one new technology will solve all the challenges of a given type of disputes, but the use of various technologies applied to the right steps in a process can make a significant difference. As Ebner notes on his review of Katsh and Rifkin,<sup>15</sup> *'by combining text, images and design, mediators can better provide resolution-oriented surroundings'*.

Furthermore, all communication systems, modern and traditional, can be evaluated against a similar set of key parameters. Doing so forces us to look into our expectations of any communication process rather than into the divide between off-line and on-line.

## The loss of face to face communications

*'Communication always fails to some extent...'*

Face to face conversations are used as the norm against which all the research trying to establish the effectiveness of any on-line communication methods is done. Naturally this is the result of face to face communication being seen as the more natural, the less obstructed communication channel by mostly digital migrant researchers.

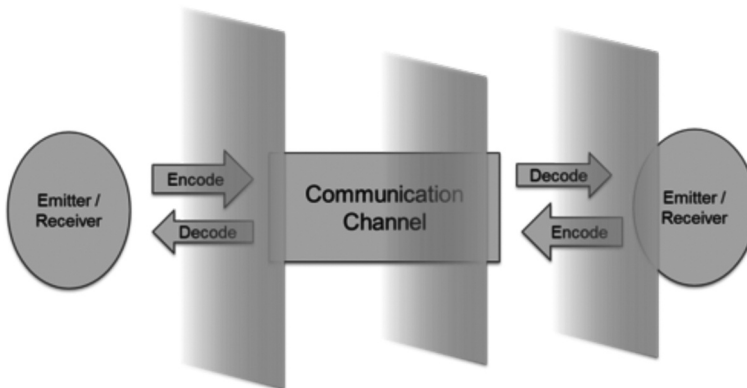


Figure 2 – Communication Model

14 For a good and local example of an innovative integration of on-line communication in mediation, refer to Dawn Duncan's paper delivered at the AMINZ 2014 conference.

15 E. Katsh and J. Rifkin, *Online Dispute Resolution* (San Francisco, Jossey-Bass, 2001).

Following a simple model of communication as appearing in Figure 2, the number of possible filters blurring the quality of the communication in a face to face conversation can be expected to be minimal. Yet filters between emitter and receiver are present in face to face communication.

All on-line technologies would be expected to multiply the number of filters by reducing the available amount and quality of information. For example, emails and instant messaging are known to reduce access to non-written clues with consequences to the parties' relationship to conflict.<sup>16</sup>

Even with the fast progress of technology making many of these filters disappearing, communicators trained in face to face communications will usually find on-line communications less efficient. The main reason put forward to explain this is the difficult task of building rapport without non-verbal communication.<sup>17</sup>

The obvious becomes more complex when other psychological filters are taken into account.

Interestingly, the value of body language has recently been questioned. Through his research, the psychologist Nicholas Epley demonstrates that it is not so efficient to understand other's minds.<sup>18</sup> Mediators might be mistaken to place so much confidence in the value they get from their analysis of non-verbal communication.

Other psychological filters potentially eroding the quality of face to face communication are linked to the generational preferences described in the first part of this paper.

Each party to the communication, with its particularities, will be more or less confident to use a given mode of communication at any given time. When a process forces a reluctant party to engage through an uncomfortable mode of communication, a new psychological filter appears to further blur the communication.

**Synchronous, video based:  
Video Conference**

**Video conference has been possible for decades. Recently its availability and quality has dramatically increased while its cost has dropped.**

**We are, for the first time in history, able to envisage the notion of telepresence as a reality.**

**Telepresence refers to a set of technologies which allow a person to feel as if they were present, to give the appearance of being present, or to have an effect, via telerobotics, at a place other than their true location. WIKIPEDIA**

16 As reported by N Ebner: 'Asynchronous, text-based communication (...) create(s) a somewhat uneven playing field, favouring individuals who tend towards analytical-rational expression, it leads the conversational dynamics into expression of positions, arguments and facts'. Online Dispute Resolution: Theory and Practice, 381.

17 Aimee L Drolet and Michael W Morris, 'Rapport in Conflict Resolution: Accounting for How Face-to-Face Contact Fosters Mutual Cooperation in Mixed-Motive Conflicts' (1999) 36 *Journal of Experimental Social Psychology* 26.

18 Nicholas Epley, *Mindwise, How We Understand How Others Think, Believe, Feel and Want* (Allen Lane, The Penguin Book, 2014).

If the Mediators' population is more inclined to face to face communication and the parties' population is more and more reluctant to face to face dealings, then face to face communications will become counterproductive and not serve the wider purpose of mediation.

It is not reasonable to imagine changing the preferences of digital natives therefore the only way forward is to improve the flexibility of mediators in their use of on-line communications.

**Synchronous text based:  
IM, Txt, Twitter...**

Teenagers are so comfortable in their use of Instant Messaging that forcing the release of their device is often a major issue.

Yet, these communication technologies offer the poorest access to peoples' minds.

*Modern technology enables everyone to express themselves (...) but when everyone is speaking, it is hard to tell that anyone is listening.*

Nicholas Epley

## Managing Synchronous communication is a strength

Synchronous communications are not amongst the strength of current developments in e-mediation. An interesting insight into the potential consequences of this situation comes from interviews with e-mediators conducted by Katsh and Rifkin<sup>19</sup> that surprisingly reported a preference for asynchronous methods. In synchronous methods, e-mediators 'were less able to control the flow of information between disputants', they found.

It is an interesting paradox that access to the flow of information between disputants is on one hand reported as a lack in on-line communications by some mediators and simultaneously reported a preference by e-mediators.

There again there might be an explanation to find in generation theory but a simple approach is to recognise that synchronous communications have always been in traditional mediators' practice. Indeed, many mediators see themselves as enablers of face to face conversations. For these, not accessing the flow of information between disputants is detrimental.

As a corollary, the ability of these same mediators to manage both synchronous and asynchronous communications systems would be a notable advantage on current developments in e-mediation.

This appears clearly if the mediation process is considered through a sequence of events composing it rather than in a whole.

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19 Katsh and Rifkin (2001).



Asynchronous text-based systems would, for example, be particularly adapted to the needs of the earlier parts of mediation, while synchronous video-based systems would better serve other parts of the process.

The professional that can master all of these communication techniques will be at an advantage on others.

## Added value through flexibility

The choice of the modes of communication to be used in a given mediation process comes from two directions.

Firstly it can be a consequence of the choice made earlier by the party to subject themselves to a dispute resolution process. This can come from earlier contracts but not always. It is however important to note that it is mostly an uneducated choice.

Secondly the choice of communication mode can be a decision of the third party neutral. This choice can be a one off decision made ahead of all proceedings, based on business models or personal preferences. It can also be a continuous decision based on the expertise of the professional as to what the needs of the parties and the process are.

It is the author's view that instead of a customer decision to use such or such on-line platform to try to resolve their dispute – a choice often made by accepting obscure Terms & Conditions – the choice of the communication mode should lay with the professional.

This latest approach is of particular interest as it enables the integration of any communication mode, at any time in the process. The resulting process will be referred to as a Digitally Enhanced Mediation as opposed to the process-rigid e-mediation.

## Digitally Enhanced Mediation: an example

Figure 3 illustrates the sequence of communication modes used in a recent mediation conducted by the author.<sup>20</sup> It represents the various communication events and the technology used through the process along a time line. The communication event occurred within the period between the signature of the agreement to mediate and the signature of the mediated agreement.

### Asynchronous text based: emails, forums, blogs,

*In asynchronous processes, the slowed-down pace can allow the mediator a more intentional application of the mediator's toolbox. This is enhanced by enhanced opportunities for nuance and subtlety. Mediators might find it easier to tweak and reframe messages. They can create opportunities for, light, behind the scenes contact with each party to a greater degree than face-to-face processes allow, as private communication reduces threats to perceived neutrality. Working with asynchronous methods, mediators can conduct simultaneous caucusing, saving process-time.*

Noam Ebner

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20 The dispute mediated was of commercial nature and related to the engineering field. Mediation occurred over 6 months in 2014. Only a simplified sequence is provided as example. The real sequence would include several dozens of emails and about 5 videoconferences.

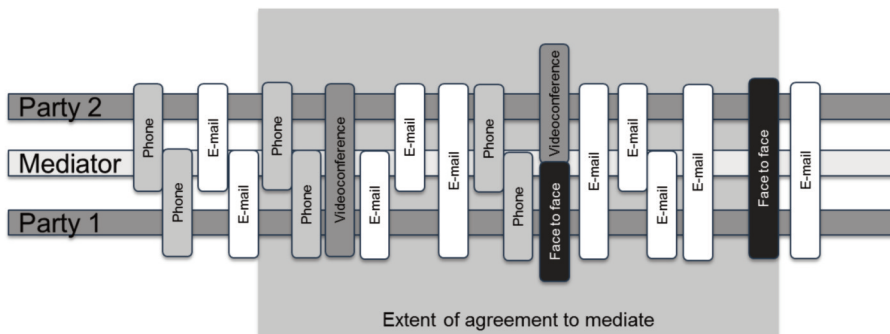


Figure 3 – Example of Multimodal Communication in Mediation

The great advantage of this sequence was its ability to provide for both synchronous sessions, either face to face or through video conference and shared digital desktops, and asynchronous period when the mediation was conducted through emails.

It is not suggested that such a sequence would be adapted or even useful to all types of disputes. Simply this particular type of dispute was greatly helped by it. It offers a great opportunity to observe a variety of communication techniques used in conjunction with each other.

From a process design point of view, it is interesting to note that a fixed sequence of events, while it could be defined at the outset, was not originally set in this mediation. Rather it is a constant reassessment of the parties' needs that led to the sequence above.

A set of rules applied to this mediation.

The first rule was that the mediator would decide about communication events, participants, format and timeframe. This is a commitment to get from the parties at the outset. Without it the role of the mediator is deeply challenged. Practically, it does provide the mediator control over the process.

The management and enforcement of this rule is also a challenge in itself. The on-line environment might seem more complex on this issue, but is not fundamentally different from similar situations in traditional settings where parties can also find ways of communications unbeknown to the mediator.

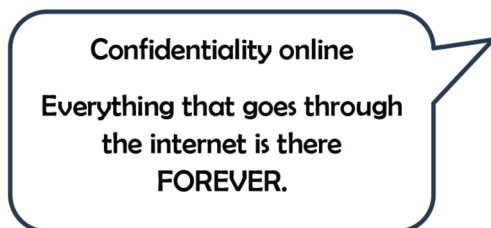
A second rule that relates to the parties ability to leave mediation is that parties must discuss their decision with the mediator before it can take any effect. It is obviously a very common clause of any agreement to mediate but it takes a particular importance at times when the sequence of asynchronous communication is complex and blurred.

It is the commitment of the parties to these rules that led to a successful mediation. This commitment was gained at the outset but, and more importantly perhaps, renewed at each session, when agreement about the next steps in the process was gained.

The question of confidentiality can be a large subject of preliminary discussions between parties and the mediator. It becomes even so in an environment where mainstream media focuses our fears towards privacy loss.

Beyond the common questions that can be answered by good legal advice, a new concern particular to the digital environment was present. The fear that the systems used would lead to involuntary breaches of confidentiality through technical faults or misunderstanding of operations. As the communication systems used in the mediation multiplies, so does the risk of breach.

The main aim of the digitally enhanced mediation should be to use all available technologies to create a resolution enabling digital environment. It uses the advantages of each type of communication, like screen sharing in videoconferences for example, to effectively create augmented conversations.



## Conclusion

We do not know what the field of mediation will look like in 20 years.

Computer based, sequentially driven processes have so far adapted e-mediation to their limited abilities, but the complexity of human relationships is the traditional mediator's daily bread.

The author's view is that traditional mediators could add value to traditional mediation and e-mediation by bringing their mediation skills, well developed in synchronous processes by traditional face to face practice, into the under-developed e-arena of video based mediation.

This paper does not suggest a drastic shift in practice but rather to develop the integration of adequate computer mediated communication, synchronous and asynchronous, at adequate moments of a traditional mediation process.

The idea of a Digitally Enhanced Mediation is simple and already used by many practitioners. Yet it has the potential, if more widely spread, to greatly enhance the productivity and efficiency of mediation for the growing community of digital natives.

