Kluwer Mediation Blog

Doing it online: Are you digitally ready?

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Are you doing it online?

A lot? Regularly? Just sometimes?

Do you talk to others about it or keep it mostly to yourself? And, if you do talk about it, do you just flippantly mention it as a throw-away line that everyone should hear or do you really engage in deep conversations about what it means?

Well, I'd like to start a meaningful conversation about it. I mean, do we really expect that by emulating what we successfully do offline and physically that we will have the same results doing it online and virtually? It's a rhetorical question of course. I'm certainly not the first one to pose it — yet it's a conversation that we need to keep having, especially as more and more of our mediating day involves technology and increasingly AI.

When no one complains about a mediation done online, we will most likely keep on doing the same thing in our time-poor professional world. Yet expertise comes from lots of practice combined with structured reflection.

In this post, I want to offer a structure for reflecting on our online mediation practice using the lens of *digital readiness*.

But first let me address a preliminary question: Why focus on online mediation and not ODR generally — in particular when many platforms offer negotiation, mediation and arbitration DR mechanisms? Readers of this blog know all too well that mediation as a process is fundamentally different from arbitration and litigation. Striking in this regard are features such as mediation's inherent informality, procedural flexibility and lack of rules of evidence.

As a result, there is greater scope for technology to challenge the fundamental nature of mediation compared to more evidence-based, formal and legalistic processes like arbitration and litigation. Put simply, technology has the potential to influence fundamental aspects of how the process is conducted (*procedural*), how parties communicate with one another and the mediator (*relational and cultural*) and how the substance of the dispute is perceived (*substantive*).

If physical mediation is considered procedurally flexible, then online mediation increases that flexibility multiple times over. Consider these choices and their potential impact on the dynamics

of a mediation:

1. Synchronous or asynchronous — or a combination of these.
2. Text, audio or audio-visual — or a combination of these.
3. Automated system elements (e.g. bind bidding or decision-tree analysis) or not.
4. Case management system or not.
5. Ability to use on a smart phone or not.

I don't have the space to go into here but there is an enormous amount of useful information and research available on these factors. Consider also what happens when participants in mediation start using multiple modes of communication technology in a way that is less than transparent. For example, a mediator moving into private session with one party but then corresponding (e.g. texting) with the other party at the same time. Or, during the open joint session of mediation where all participants are present, private communications concurrently taking place between parties, lawyers or even experts to the mediator.

My impression is that this is not uncommon particularly where an online mediation protocol has not been agreed upon ahead of time. Of course, if everyone agrees to such a concurrent multimode communication approach, then maybe there's less of an issue. But often people have not thought through how these shifts in communication mode affect power dynamics and the requirement of fair process in mediation.

Enter the concept of *digital readiness*. As a general term, digital readiness refers to our capacity to use technology actively, expertly, responsibly and confidently. In the specific context of online mediation, it requires the ability to shift from physical to online mediation practice in a manner that upholds the integrity of the mediation process as a client-centred process that maximises opportunities for parties to make informed decisions. Digital readiness is relevant for both individual mediators as well as institutional mediation providers.

There are three touchstones of digital readiness in mediation that are consistent with the empirical evidence on what's important for users, as well as standards such as the International Council for Online Dispute Resolution (ICODR) Standards for online mediation. They are **usability**, **reliability** and **accessibility**.

Usability

Mediation is characterized by its ability to maximize user (*party*) autonomy. Aspects of mediation service provision that contribute towards user-orientation fall into this category, including impartiality, confidentiality, efficiency and procedural flexibility. Shifting to online mediation, **usability** focuses on the extent to which the online mediation service is user friendly, intuitive and customizable. In terms of procedural flexibility and the ability to customize, consider the extent to which:

*   users are able to co-design the mediation process;
*   rules can be crafted about confidentiality to meet user needs and expectations;
*   users maintain the right to legal representation during mediation, subject to their agreement to dispense with it;
*   users can move back and forth between different stages in the mediation processes;
*   users can work through the mediation at their preferred pace;
*   users can shift between synchronous/asynchronous and text-based/verbal communication

technologies; and

- users can shift in and out of caucus.

Reliability

Users rely on the integrity of the mediation process. Here notions of quality, competency, ethics and regulatory robustness are relevant. Shifting to online mediation, consider the extent to which:

- online mediations are conducted by experienced, ethical, qualified, impartial dispute resolution professionals;
- online mediations are supported by a robust legal framework that supports confidentiality and enforcement of mediated settlement agreements;
- mediators in online settings are accountable to the institutions, legal frameworks and communities that they serve;
- mediators operate online mediations take place within tried and tested procedural protocols; and
- mediation service providers are responsive to user feedback in terms of client communications and ongoing improvements.

In online environments, reliability additionally measures the extent to which the e-space is secure and private for mediation communications, for storage of documents including confidential mediated settlement agreements, and the extent to which it facilitates e-signing. Reliability also means having protocols in place to address authenticity issues as well as providing users with the assurance of troubleshooting assistance.

Accessibility

Accessibility can mean different things for users, depending on their needs. It can refer to users' ability to access mediation services in terms of geography, infrastructure, venue facilities, cost, language and (digital) literacy. Accessibility to mediation as a dispute resolution mechanism is vital for mediation to remain relevant within its broader narrative of access to justice. Shifting to online mediation, consider the extent to which online mediation offers:

- a choice of users' preferred devices — personal computers, tablets or smartphones — depending upon what is available to them and suitable for their digital infrastructure;
- access to mediation during suitable timezones e.g. asynchronous components, or agreed timing and time frames to account for different time zones'; and
- training or capacity building to increase familiarity with online platform and digital literacy.

In terms of geography, online mediation can be helpful for many kinds of disputes. For example, online mediation may provide a cost-effective and practical way to handle cross-border disputes, in terms of costs and time. But even in local disputes, the new geography of online mediation can offer accessibility benefits that conventional mediation cannot, such as where parties wish to take advantage of expertise not available locally. Here, online mediation may enable mediators, advisers and other specialist professionals in different geographical locations to take part in the process.

Conclusion

So there you have it — the three touchstones of digital readiness for online mediation. As mediation providers move increasingly into online service, it is imperative to think through and ask

questions about the extent to which the chosen platform, the institutional protocols and the selected mediators can respond to these three touchstones. Many mediators seem content with social communication platforms such as Zoom. I wonder though, when something one day goes wrong, if they will still be as satisfied with a social communication platform rather than a dedicated ODR platform.

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