

Adjusting to change: how communication in mediation is moving into digital environment in e-MEDIATION

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Mediation is an important tool of dispute resolution being brought into the new century with some important changes. Digital environment is introducing interesting challenges to mediators, mostly related to correct ways to translate their communication techniques into online space. The following article delves into this issue, discussing the evolution of mediation and communication, communication skills' adaptation and presents the reader with recommendations on the process of online mediation. The article is supported by research done by the team of the e-MEDIATION project.

Introduction

Mediation, as a dispute resolution tool, is picking up traction faster than ever in the business area as a means with which to protect both the business interests of companies and their fruitful relationships with important partners. With more and more of humanity's time being spent online, however, changes are imminent in all areas of life, including dispute resolution. Online mediation (also electronic mediation or just e-mediation) is not a new phenomenon, it has been practiced for more than 20 years in different parts around the world, and has opened the doors for many high-tech solutions, which save time and other resources by transferring the process of mediation to the online environment.

One effort to support the penetration of digital mediation in everyday live of business is the project e-MEDIATION: promoting ICT tools to cross-border disputes resolution, which has been financed by the JUSTICE program of the European Commission and is being implemented by three Bulgarian organizations: Law and Internet Foundation, the Bulgarian Chamber of Commerce and Industry, and Dextro Research. The goals of the project include building a platform for easy, affordable and efficient online mediation, as well as raising awareness for the opportunity of using mediation as a dispute resolution mechanism and improving mediation culture.

In the following text, some of the findings of the e-MEDIATION project will be discussed, namely how communications can and should be adapted for the online environment, as well as what additional steps mediators should undertake when taking on mediation cases online. The article includes suggestions and recommendations on communication techniques after a thorough analysis of the historical background and the implications, introduced by the digital environment.

Communication in mediation throughout history

The roots of mediation trace back to antiquity. Historians identify early cases of mediation in ancient India and Phoenicia. Disputes were solved with the support of a third independent person in ancient Greece and later in the Roman Empire (the Roman law has implemented mediation through the Corpus Juris Civilis).

In the last two decades, mediation has become a preferable dispute resolution method not only in the United States – it has paved its way into the European legal system.

In the twentieth century mediation became institutionalized in the secular arena. The Conciliation Act relating to the conduct of industrial relations was enacted in the United Kingdom as early as 1896. In the United States alternative dispute resolution (ADR) processes were being formalized as an alternative to litigation early on with the U.S. Department of Labor (established in 1913) appointing a panel called “the commissioners of conciliation” to deal with labor/management disputes. Later that entity became the Federal Mediation and Conciliation Service.

The adoption of mediation as a mechanism for dispute resolution in countries of the European Union dates back only a few decades ago. There are also countries that started

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implementing it some years ago, which can lead to the conclusion that mediation is still under development in some ways and will prove to be much more polished and improved in the years to come. Some EU countries have applied mediation earlier and faster – for example Great Britain and the Netherlands, while other countries with shorter mediation history have done extensive researches and have a good legal base – like Austria and Germany.

There is evolution in the legal framework in regard to mediation on EU level; a strong impetus was definitely given by the EU Directive on Mediation. A lot of countries have since regulated not only cross-border mediation but have developed the legal framework covering mediation on national level as well.

A key element in the mediation process is communication between the parties and the mediator. The most open definition of communicative action given by Habermas³ is that it is an action in which: „the actors seek to reach an understanding about the situation and their plans in order to coordinate their actions by way of agreement... A type of interaction that is coordinated through speech acts and does not coincide with them”. Although the theory of communicative action is abstract, dealing with the grounds of how people get along, it still demonstrates how people actually do seek to relate to each other. Mediators can take advantage of this to remain centered and proactive through the conflict resolution process. By weaving together this theory with mediation practice, both theory and practice are enriched and enlivened.

From ancient times and looking forward, mediation is a form of communication – a form of overcoming differences with the goal of aligning interests, supporting relationships and finding the best possible solutions. However, those communication processes have usually always existed in the face-to-face context; now, as mentioned before, with the fast penetration of technology into the world, communication in mediation should also adapt appropriately, as discussed further below.

Changes of digital environment

On the international level, mediation is used in a number of areas: family matters – pre-marriage agreements, financial misunderstanding, separation, divorce, child and elder people care, family business relationships, property disputes; in the working place – working conditions, discrimination, termination of labor contracts, compensations, peer disputes; in commerce – tenant/landlord relations, contractual relations, medical services, business partnerships; society matters – environment, disputes in education institutions, non-governmental organizations, victim/criminal relations, etc.

As the ICT is penetrating faster and faster in the everyday life influencing almost every person on the planet, logically the next step in the mediation process is to transform itself into an online process or simply – e-mediation.

Electronic mediation is a part of alternative dispute resolution methods and can be used in practice for all cases where mediation is applicable. Most often it is used to resolve consumer disputes, including online commerce, where both parties are distant from each other. As a result of the increasingly active use of information and communication technologies in trade, in fact, online dispute resolution (ODR) was initiated. Other factors that have influenced the emergence of ODR are: rapid development and penetration of digital technologies; new communication tools; mobility of citizens; globalization. It is important to notice that ODR includes more than online mediation.

The implementation of online dispute resolution includes the following stages: input of initial information, launch of the procedure/thanks to the initiative of at least one party and the work of technologies/, gathering of information, evidence, etc., hearing if needed, conducting online discussions – audio and video, developing an agreement.

A key element in ODR is the use of technology/computer, mobile device, telephone, etc./and software. In e-mediation, the mediator and the parties are supported in the following actions: organizing information, sending automatic messages, drafting a written communication, blocking rough language, video and audio conferencing, drafting agreements, etc. The software can monitor meetings – start, duration, clarification of interests and priorities, etc. activities, depending on the development parameters. To some extent, ICT can even reduce the role of the mediator.

With ICT development, online dispute resolution is also developing – efficiency increases due to more functionality and cost savings. The project e-MEDIATION was created with a goal to develop an online platform to facilitate all mentioned processes.

The platform is developed in two languages, to accommodate for transnational disputes, and it is focused exclusively on commercial issues. The user profiles are easy to make and are not publicly available in the platform, so as to keep the anonymity of users; registered mediators, on the other hand, can manage visibility of their profile and can be active or inactive, depending on their work availability. The e-MEDIATION platform gives the parties in a dispute the options to have online conversations, video conferences with the mediator, to have more than one mediator for a procedure, to safely and securely exchange documents between each other and between themselves and the mediator.

³ J. Habermas, *Theory of Communicative Action, Volume One: Reason and the Rationalization of Society (Book)*, Boston 1981.

All of these options show both the new environment in which all of us function, and the possibility to seamlessly move the process of mediation into the digital space. In the following sections, some suggestions, ideas and tips will be provided for a better adjustment of mediators to the new area of communication, in which we are gifted with some new options, while deprived of other innate abilities, such as reading body language in person.

Communication techniques for mediation in the digital environment and in the platform e-MEDIATION

A significant number of techniques, utilized by mediators, demand a type of personal contact, skills in managing the mood of a room, clearly reading intentions and body language, etc. One of the great challenges of translating the process of mediation into the online environment is the loss of many of those opportunities of finding solutions, potential interests, as well as a general feel of the tone and the direction of negotiations. This barrier is most easily overcome in platforms through transforming this apparent weakness into a strength for the mediator. This can be seen through the lens that online communication (in written form) usually means a slower response time, as well as a slower exchanging of information between different sessions. This gives the opportunity for a calmer pace of work for the mediator, as well as sufficient time for creating and adapting a strategy for dealing with the issues at hand. Moreover, experts notice a tendency for well-thought and calmer communication between the parties, when they can see their behavior „from the outside” – something rare in direct communication, when the parties are usually strongly affected⁴.

Deriving from this, it is important for mediators to take advantage of these tendencies by giving sufficient time for response for both parties, writing well-thought out responses to questions and feelings, as well as sometimes even intentionally slowing down communication in order to give parties „air” in the virtual space.

Something else crucial, when taking into account the change of environment to the digital, is that not all participants will be equally tech-savvy in most cases. This is why mediators, who have been put in this environment before, agree that there should be special attention paid to an introduction of the participants to the process of mediation, the functionalities of the platform used, as well as the options and rules that all participants should abide to. This thorough introduction (which can include a tour, written notes, screenshots of the environment, guidelines or a „practice” session for the participants, which they learn by doing) is key to a flawless and easy process of e-mediation afterwards⁵.

Another important note to hit on from the process of mediation and part of techniques, which should be adapted, is building trust with parties – an element of the process, which can decide the outcome of the whole mediation. A 2014 research⁶ discusses the use of video conferences as a tool for trust-building and notes that it can be used to overcome the barriers, connected to non-verbal communication and its interpretation, discussed above as a part of traditional mediation techniques. The authors also indicate that using video calls is pointed at by many experts as the solve-all tool for all problems, originating by text-based communication. However, video conference calls often create completely new challenges for trust-building between the mediator and the parties. There is a period of adjustment for all parties, as one article phrases it, to adapt from „face-to-face” to „screen-to-screen” communication⁷. It is recommended that trust-building should be established through the use of at least one video conference with all parties, which will introduce them to the mediator, give them a feeling of the mediator as a person, and put them at ease when considering what and when to say.

While not a panacea, it is still important to remember that a truly large part of the issues, connected to developing trust between the mediators and the parties, is indeed solved through the introduction of a video – and even more importantly, conference calls – which include all parties (and potentially their legal representatives) and the mediator at the same time.

On the topic of guaranteeing privacy in the online environment, a 2015 publication⁸ shows that as people grow closer to technologies, their trust in digital means of communication increases together with their desire to solve as many problems as possible through online and digital means. This does not exclude privacy in procedures, such as mediation, where the authors specifically note that it is enough to have in place processes of erasure and lack of collection of data for parties. This fact should also be clearly conveyed to parties in order to ensure their strong trust towards technology, the platform and the process of mediation.

⁴ P. Staff, Using E-Mediation and Online Mediation Techniques for Conflict Resolution, Harvard Law School Daily Blog 2018.

⁵ A. Hammond, How Do You Write ‘Yes’?: A Study on the Effectiveness of Online Dispute Resolution, Conflict Resolution Quarterly, Spring2003, Vol. 20, Issue 3, pp. 261–286.

⁶ N. Ebner, J. Thompson, @ Face Value? Nonverbal Communication & Trust Development in Online Video-Based Mediation, International Journal of Online Dispute Resolution 2014.

⁷ J. Hörnle, Online Dispute Resolution: The Emperor’s New Clothes?, International Review of Law, Computers & Technology, Mar2003, Vol. 17, Issue 1, pp. 27–36.

⁸ C. Rule and I. Sen, Online Dispute Resolution and Ombuds: Bringing Technology to the Table, Journal of the International Ombudsman Association 2015.

⁹ J. Rifkin, Online Dispute Resolution: Theory and Practice of the Fourth Party, Conflict Resolution Quarterly, Fall2001, Vol. 19, Issue 1, pp. 117–124.

Communication changes when put into the digital environment, without argument⁹. However, mediators as agile supporters of the process of reconciliation, mutual understanding and cooperation, should be encouraging when taking on this means for the process. This includes not only advocating for the parties to take advantage of the options and functionalities of platforms they use, but also demonstrating their usefulness by example, and embracing new developments. The enthusiasm of the mediator, more than anything, can prove to be the key in acceptance of new means of technology, a powerful trust-builder for the process, and a driver of effective inter-personal communication for mediation.

Some additional communication techniques are outlined below as recommendations for mediators and sides in disputes.

Recommendations and conclusions

In order to help facilitate the process of transition into the online environment, the e-MEDIATION project team has created a Mediator's Code of Conduct, which highlights some of the most important elements of mediation online – some of which may be overlooked by mediators, who are just making the transition.

Based on that research, it is important to highlight some recommendations for the mediators in the online space:

- 1) The mediator should communicate with the parties about convenient times and find out the most suitable time for the first common meeting before inviting them. A good idea might be to set up a short questionnaire with possible dates and times through a Meeting Scheduler tool, for example Calendly, Doodle or TimeBridge.
- 2) The mediator should ensure a good environment for the first common meeting and meetings that follow. This includes setting up online etiquette rules, explaining functionalities and options the platform offers, giving the parties time and opportunity to clear up their use of the platform. The

online etiquette could include rules such as when to mute a microphone, how and when to use emoticons, how to go about asking for a separate meeting, etc.

- 3) Other things to be noted when having a conference call between parties and mediator/s are:
 - Test hardware and Internet connection before the time of the meeting;
 - Make sure to be in a well-lit space; the camera should cover the face and hand movements of the mediator/s;
 - Demonstrate to the parties that the mediator/s are alone in their space;
 - Wear headphones to improve the quality of the call, as well as to improve security;
 - Foresee potential distractions such as phone ringing, arrival of people in the room, etc. and eliminate them as much as possible;
 - Encourage the parties to turn on their cameras at least during the first, but also following conference calls;
 - Make eye-contact with the camera, instead of the screen, in order to create trust with the parties;
- 4) Confidentiality should be underlined specifically in the online setting – the parties should be reassured in the mediator's opening statement that the environment does not change confidentiality of the procedure; on the other hand, the mediator should not attempt to record conference calls, save chats or documents and should destroy their notes as soon as the procedure is over.

Mediators are faced with a new challenge in times of digital progress and integration of new technologies in the everyday life of people – managing and mediating communication in a new way. However, this is something which should not be seen as a hurdle to overcome, but a process of development and growth, which includes those mediators.

Processes are made easier, faster and cheaper through the introduction of new technologies to the world, and it is important to take advantage of their benefits and evolve them with technology.

Key words: mediation, dispute resolution, communication, communication techniques, e-MEDIATION project.



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