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## ASK THE EXPERTS

### Family Mediation 2.0 – Integrating Online Capacities

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Dramatic changes are coming to family mediation programs and practices in the US. In the court context, The National Center for State Courts (NCSC) and the Pew Charitable Trusts (Pew) are now leading the way to expand online access to justice, including online dispute resolution (ODR). Countries including Canada, the UK, China, and the Netherlands now integrate online processes into their family justice systems. More than 1,000 participants are expected from around the world at the [ODR2019.org](http://ODR2019.org) conference hosted by the NCSC this October 28-30 in Williamsburg, Virginia. In family justice, the movement to online mediation in particular is profound.

It should not come as any surprise in that Internet sensibilities (notably including access and ease) are finally coming to the dispute resolution industry and courts. The Internet has already permeated nearly every economic sector. Consider how travel, financial services, real estate, and other industries have been revolutionized by the Internet over the past two decades. We are now at a point where end users (read: taxpayers) are frustrated that they are not able to conveniently and affordably process their legal business 24/7.

#### The Evolving Digitization of Family Mediation

Family mediation, particularly in the private sector, has been digitizing since the early 1980s. Basic word processing (WordPerfect, then Word) were and are at the core of the growth of mediation as a phenomenon. Ultimately, mediation's critical deliverable is a written agreement. The mediation industry was truly "liberated" (from white-out and retyping pages) by our ability to easily generate unlimited drafts and possibilities with word processing.

Further, there was, a few years later, a magic day when we were asked by tech-savvy participants to send them their draft agreements as email attachments. How cool was this for mediators? This saved 3-4 days each time we wanted to send a new draft agreement to participants compared to snail mail.

Email and attachments also supported participants, in an empowered way, to get more involved in the drafting and editing of their own agreement. Then we were also provided with track changes (in Word) as a technical answer to Fisher and Ury's long-suggested single text document. Bingo!

To summarize how far we have already come in terms of the digitization of family mediation over the past two decades, consider the following:

Back in the Day	Now
Shared family landlines	Personal smartphones in pocket or purse
Yellow Page ads	Search engines and directories (Google)
Brochures and storefronts	Professional websites
Send hard copy intro info (3-4 days)	Send email with educational links, including video (3-4 minutes)
Bring in hard copy forms	Fill out online forms
Snail mail drafts	Email drafts as attachments, with track changes
Meet every 2 weeks	Meet more often— weekly, online
Predictable structure	Choreography of variety of online and face-to-face (FTF) communications
Joint and Caucus meetings	Joint/Caucus; FTF/Online; Synchronous/Asynchronous
Mediation room as art form	Zoom and Skype online meetings
Attorney review and finalization	PDFs, DocuSign, and e-Filing

Note that these digitization opportunities over the past two decades have not taken place as part of any grand plan, but, rather, incrementally as each new digital opportunity earned its place in our expanding toolbox of effective online mediation approaches and resources.

## **ODR as Access to Justice and Resolution**

What is now taking place with the NCSC and Pew is, however, much grander than this incremental development of nifty digital widgets over time. In fact, the NCSC and Pew now see ODR, and particularly online mediation, as a key to providing access to both justice and resolution moving forward.

There are both challenges and opportunities for family mediation as we move forward online. For starters, it is unlikely that anyone (either participants or mediators) will be *forced* to participate online. It is likely that, at least for the next decade, brick-and-mortar options will continue to exist.

It should also be acknowledged that mediating online is simply not the same as mediating face-to-face (FTF). I warily suggest to students that online, they are a click away from disengagement. Better be on your best behavior! Further, we find that online participants seem to have somewhat less patience and stamina for extensive joint problem-solving. When the going gets tough online, it is commonly easier and more productive to schedule short respective online caucus meetings. The bottom line here is to expect a higher number of shorter meetings held online, and a likely increased shift to rely on online shuttle diplomacy.

Intriguingly, online mediation does offer great promise for being able to mediate in circumstances where one or both parties are not comfortable being in the same room together, e.g., when there is concern about abuse or violence, and for participants with physical disabilities. It has been noted that no one has ever gotten a bloody nose online. Mediating online is, of course, also greatly valuable when participants are at a distance.

It has also been said that when you're online, no one knows that you're a dog. Actually, with Zoom's and Skype's superior technology, participants *do* tend to recognize canine mediators as dogs. However, participants may still not detect that you, canine or human, are wearing pajama pants during an online mediation meeting.

## **Online Mediation Strategy**

Fundamental psychological and communicational issues like rapport development, trust, and credibility are just as important in the online environment as in the FTF environment. It is generally true that people are still people online. However, the way that participants get to know us these days has changed. Participants will likely have either found us online, or will have vetted us online (in response to a partner's or professional's suggested mediator selection), or, most likely, both. More and more, mediators are wisely including valuable informational videos on their websites to give participants both valuable information and, even more importantly, a real sense of what this mediator might be like to work with.

In addition to the myriad of digital communication options available to us, there are new options for mediation strategy. I have long thought that the primary determinant of how facilitative or directive a mediator is depends the total time available for mediation. For example, if we assume that we have only one hour to make mediation magic, we are likely to rather soon become more directive, if not evaluative, seeking an agreement result to the mediation.

On the other hand, if we assume ten or more hours to work with, we are likely to be more facilitative, for a longer period of time, before more pointedly suggesting what might work. It is thus intriguing to ask: What are our assumptions for the total time needed and available for quality online family mediation? What agreement-reaching strategies are most effective in this presumed resource context?

One huge opportunity that exists online is our ability to infinitely educate participants about relevant issues in a quality way without the taxi meter running, available 24/7 for participants. This education might include how to best communicate or negotiate, or the developmental needs of children, or child support guidelines, spousal support, property division, tax issues, or all of the above.

Given our unlimited ability to educate participants at essentially no cost, it seems incumbent upon mediation programs and practitioners to develop the most valuable family mediation educational resources possible.

## **Normative Solutions**

A great opportunity online is our ability to elegantly and timely share *normative solutions* (solutions that have worked for others in similar situations) with mediation participants. After having mediated nearly 2,000 family cases, I am fully convinced that most participants in family mediation do NOT need to win nor prevail. What is far more motivating for participants, I find, is participants' unwillingness to lose, and their unwillingness to be a fool.

People understandably want to be smart in their family decision-making, and they often psychologically need a face-saving rationale for compromising and agreeing. This is where solutions that have successfully worked for others in similar situations may be valuable. When people get the sense that their arrangements are relatively normal, they feel normal too, rather than abnormal or uncertain, or at least feel like they're not a foolish chump.

## A Choreography of Communications

In truth, nearly every family mediation case is now done online to some extent. In this respect, every family mediation case is now an online case, and it is proper and good that we ask ourselves how we can best integrate online and FTF communications to best get the job done.

In this sense, family mediation has become more a *choreography of communications* (both online and FTF) than a discrete physical event. We now need to ask ourselves how we can most effectively choreograph all of our communications to best assist each participant to be at their best and reach agreement.

## Functions to Accomplish

One way to think about our family mediation services becoming more digitized, and our new choreography of communications, is to identify the specific functions to be accomplished in family mediation. One can then ask which of these functions can effectively (or more effectively) be accomplished, in full or part, online. Among these functions are the following:

- Delivering professional education (e.g. this newsletter and article!)
- Engaging in organizational networking (like AFCC)
- Utilizing a professional website as both a storefront and an information resource center
- Marketing to a focused geographic area
- Offering an online newsletter
- Auto-responding to a contacting participant
- Responding thoughtfully to the other participant
- Conducting ongoing communications with both participants and other professionals
- Providing ongoing client education, available 24/7
- Confirming process understandings and Agreement to Mediate
- Scheduling meetings
- Developing rapport with both parties
- Developing rapport with each individual party
- Identifying full agenda and points of agreement
- Framing open issues as problems to be solved
- Providing timely and ongoing correspondence and drafting
- Describing new possibilities for consideration privately (and asynchronously)
- Distributing and reviewing the final agreement
- Signing the agreement
- Filing the agreement
- Offering satisfaction survey
- Contacting participants downstream to check in
- Mediating future modifications
- Offering annual or other periodic review

## What About Artificial Intelligence, Models, & Exemplars?

Intriguingly, it does not seem that anyone in the world of family justice is particularly interested in taking online mediation to the full extent of artificial intelligence (AI). In truth, this could likely be done! What a mediator does, more than anything, is ask questions. Essentially, a family mediation is a conversation in which a mediator asks between 50 and 500 questions, tailoring the specific sequence based upon ongoing respective participant responses.

It is very possible that a computer could be well trained to ask all these “right” questions and then, based upon participant responses, be trained to suggest most likely best solutions. A bit scary, I know! Especially the part about mediators being replaced.

Nonetheless, courts do not seem to favor AI, viewing it as diluting their authority and judicial discretion, and mediators are not particularly thrilled with full AI either. Not many professionals yearn to be replaced by a computer.

There may, however, be a sweet spot best answer here, which is the happy medium of asking a sufficient number of questions (perhaps 10-30) to be able to determine roughly what is relevant and likely worthy of participant consideration. The mediator may then ask participants to review, select, and edit from among relevant exemplars and to also add in their own additional provisions to create a unique agreement.

## **Case Flow and Participant Journey**

There is a tendency for both professional mediators and technologists to focus on rather mechanistic case flow concepts in thinking about online mediation services. However, in our seemingly endless pursuit of *better, faster, cheaper*, we should not ignore each participant’s very human journey experience through the family mediation process, be that process online or FTF or both.

Rather challenging is the fact that, in most divorces, participants are in rather different psychological positions entering the mediation process. One participant likely initiated the divorce and is often the protagonist in the mediation process and is likely, with a degree of certainty, to want to move things forward as quickly and affordably as possible. The other participant, who might not want to break up at all, often wants to go slower (if not engage in reconciliation strategies or wallow in despair and confusion). Whatever family mediation processes we design, be they online, FTF, or a hybrid mix, need to be flexible enough to address the true psychological states and needs of participants, even if they are in very different psychological places. Remember, people are still people online.

## **Are New Online Mediation Ethical Standards Helpful?**

Finally, the ubiquity of online communication, not only for mediators and participants, but also for their children, creates fascinating new ethical and practice issues for a mediator. For example, should a mediator be encouraged to explore each participant’s preferred modalities of communication? Should a mediator seek to define, along with participants, how they would like to best communicate online, both during the mediation and perhaps following the mediation? And what about the children? Should participants be encouraged to consider reaching agreement as to their respective ability to contact their child(ren) online (in one form or another) while the child(ren) are with the other parent? And if so, during what hours? And what about a child contacting a non-residential parent digitally? And how might these communicational understandings change over time, relative to their children’s age and maturity level?

Here are some sample new Ethical Standards for Online Mediation that may be added to existing AFCC, APFM, and other family mediation ethical standards:

## **Recommended New Standard – Online Communication During and After Mediation**

### **A. Discussing Mediation Communication Options**

As part of a mediation process (face-to-face, online, or a mixture of the two), mediators should discuss and seek the best means of communicating during the mediation with all participants.

In addition to meeting face-to-face, mediators and participants may communicate via online video, as part of online mediation platforms, via email (including the use of attachments), by text, on the phone, and through other means. Mediators and participants are encouraged to utilize a range of communication options in support of their mediation. It is understood that the confidentiality of mediation communications shall not be lessened nor determined by a selected modality of communication. To the extent that participants jointly prefer communicating in certain ways during a mediation, those preferences should generally be honored by the mediator. To the extent that participants have different preferences for how to communicate during a mediation, the mediator shall seek to best satisfy those interests in an overall balanced way.

### **B. Including Online Communication Understandings in Substantive Agreement**

As part of a mediation process (face-to-face, online, or a mixture of the two), mediators are encouraged to raise issues of how participants, particularly parents, can best communicate with others, including children, both during and following the mediation.

Understanding of these issues tend to evolve. Mediators are advised to assist parents in particular to discuss and set clear expectations for their children's online access and communications, both with a non-present parent and more generally. In the best interests of their children, parents are encouraged to consider adopting common online access standards for their children.

### **C. Reaching Understandings About Post-Mediation Communications**

As part of a mediation process (face-to-face, online, or a mixture of the two), mediators are encouraged to raise issues of whether and how participants can best communicate directly following the mediation process.

As determined by the participants, future communication agreements may or may not be included as part of a formal binding mediation agreement. Participants having clear expectations about future communications can assist with mediation agreement implementation and assist to pre-empt future conflict.

## **Conclusion**

Family mediation has steadily become more and more digitized since the early 1980s. These developments have been driven more by mediation participants wanting to take advantage of evolving, affordable, and convenient communicational technologies than due to any particular attraction to technology by most mediators. In fact, mediation and the courts have been playing "catch up" when it comes to providing mediation participants with the flexibility, convenience, and economy available through online services.

New, however, is the heightened interest in ODR from NCSC and Pew. It is now clear that the time for family mediators and family mediation programs to randomly dabble in online technology is over. It is time for the mediation profession and mediation programs to fully embrace online opportunities and to develop best possible online mediation systems for the full range of family mediation participants.

ODR and online mediation are about both access to justice and access to resolution. We need to come together to design most effective online journeys to assist participants to grow and fashion their most capable agreements, for both participants and their child(ren)'s benefit. The time for embracing the online environment and developing most capable online family mediation systems and services is now.

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