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Article abstract

One of the greatest advantages of the “digital turn” in mediation, touted by many, is the increased access it can provide to users of mediation. That access could include a person with a disability who need not travel to places that are inconvenient or inaccessible or a busy single parent who can now mediate from their homes. There is no question that digital mediation can allow more people to participate. A disclaimer: this paper does not discuss the many users who might not have access to consistent or high-quality internet access or a device that allows them to access the internet. Even where users have such access, there are some negative side effects to the “digital turn” in mediation and of this increased access; a main one is an associated decrease in formality—at least in non-commercial settings. Decreased formality can lead to decreased engagement in the process, an increase in inflammatory language, an increase in in-group vs. out-group conflicts within the session, acceptance of less fair outcomes by the side with less power, and a greater likelihood that parties will end the process with little or no notice. Professor Delgado was one of the first writers to note that mediation provides a less formal, and therefore potentially less fair process, particularly in divorce mediation and arbitration. Taking mediation online has increased those dangers, some, including Professor Ebner, have written on the potential dangers of the digital mediation process.

This paper will explore those dangers and some possible means to attenuate them in the digital world. Some of those means include ways to increase trust, build rapport, and minimize misunderstandings and dishonesty, to ensure that increased access does not become a decrease in the quality of mediation or lead to less fair outcomes for users of mediation in the digital turn.



INCREASED ACCESS MEANS DECREASED FORMALITY IN MEDIATION

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RÉSUMÉ

L'un des plus grands avantages du « tournant numérique » en matière de médiation, vanté par beaucoup, est l'accès accru qu'il peut offrir aux utilisateurs de la médiation. Cet accès pourrait inclure une personne handicapée qui n'a pas besoin de se déplacer dans des endroits peu pratiques ou inaccessibles ou un parent seul occupé qui peut désormais faire de la médiation depuis son domicile. Il ne fait aucun doute que la médiation numérique peut permettre à davantage de personnes de participer. Avertissement : ce document ne traite pas des nombreux utilisateurs qui pourraient ne pas avoir accès à un accès Internet cohérent ou de haute qualité ou à un appareil leur permettant d'accéder à Internet. Même lorsque les utilisateurs disposent d'un tel accès, le « tournant numérique » de la médiation et cet accès accru entraînent certains effets secondaires négatifs ; l'une des principales est une diminution associée de la formalité – du moins dans les contextes non commerciaux. Une diminution du formalisme peut conduire à une diminution de l'engagement dans le processus, à une augmentation du langage incendiaire, à une augmentation des conflits au sein du groupe et hors groupe au cours de la session, à l'acceptation de résultats moins équitables par le côté avec moins de pouvoir et à une plus grande probabilité que les parties mettront fin au processus avec peu ou pas de préavis. Le professeur Delgado a été l'un des premiers auteurs à souligner que la médiation offre un processus moins formel, et donc potentiellement moins équitable, en particulier dans le cas de la médiation et de l'arbitrage en matière de divorce. La médiation en ligne a accru ces dangers. Certains, dont le professeur Ebner, ont écrit sur les dangers potentiels du processus de médiation numérique.

Cet article explorera ces dangers et certains moyens possibles pour les atténuer dans le monde numérique. Certains de ces moyens incluent des moyens d'accroître la confiance, d'établir des relations et de minimiser les malentendus et la malhonnêteté, afin de garantir qu'un accès accru ne se traduise pas par une diminution de la qualité de la médiation ou ne conduise pas à des résultats moins équitables pour les utilisateurs de la médiation dans le virage numérique.

MOTS-CLÉS

Médiation, Virage numérique, Race/Origine ethnique, Formalité, En ligne

ABSTRACT

One of the greatest advantages of the “digital turn” in mediation, touted by many, is the increased access it can provide to users of mediation. That access could include a person with a disability who need not travel to places that are inconvenient or inaccessible or a busy single parent who can now mediate from their homes. There is no question that digital mediation can allow more people to participate. A disclaimer: this paper does not discuss the many users who might not have access to consistent or high-quality internet access or a device that allows them to access the internet. Even where users have such access, there are some negative side effects to the “digital turn” in mediation and of this increased access; a main one is an associated decrease in formality—at least in non-commercial settings. Decreased formality can lead to

decreased engagement in the process, an increase in inflammatory language, an increase in in-group vs. out-group conflicts within the session, acceptance of less fair outcomes by the side with less power, and a greater likelihood that parties will end the process with little or no notice. Professor Delgado was one of the first writers to note that mediation provides a less formal, and therefore potentially less fair process, particularly in divorce mediation and arbitration. Taking mediation online has increased those dangers, some, including Professor Ebner, have written on the potential dangers of the digital mediation process.

This paper will explore those dangers and some possible means to attenuate them in the digital world. Some of those means include ways to increase trust, build rapport, and minimize misunderstandings and dishonesty, to ensure that increased access does not become a decrease in the quality of mediation or lead to less fair outcomes for users of mediation in the digital turn.

KEYWORDS

Mediation, Digital Turn, Race/Ethnicity, Formality, Online

1. INTRODUCTION. ADVANTAGES OF THE DIGITAL TURN IN MEDIATION

[236] One of the most significant advantages of the “digital turn” in mediation, is the increased access it provides to mediation users. A person with a disability need not travel to places that are inaccessible or difficult to reach in order to mediate a dispute. A busy single parent need not find childcare or use limited funds to pay for it. A worker with an inflexible schedule or alternative hours need not try to find time off work. People do not need to be in the same room or on the same continent in order to reach an agreement or have that important conversation.

1.1 POSSIBLE DANGERS OF MEDIATION, DIMINISHED FORMALITY AND WHERE IT CAN LEAD

[237] The authors of this work, each of whom works in the community mediation setting and runs mediation programs, have seen the positive impacts of this increased access across all types of cases, in disputes between community members, lower-level court cases with unrepresented parties, and even higher-level court cases with sophisticated parties and representation. However, there are potential negative consequences that lead to this increased access. One of these negative consequences is the decreased formality of the remote mediation space, whether synchronous using a video platform, or asynchronous via email, text, or chat platform.

[238] Mediation is already a more informal process than a court setting, which is part of the appeal and part of the use value of mediation. However, informality can lead to decreased engagement, decreased trust, decreased buy-in to the process, an increase of in-group versus out-group conflict, an increase in the use of inflammatory language, and potentially the acceptance of less fair outcomes by parties with less power. Professor Noam Ebner and others have written on these topics, always using the model of facilitative interest-based mediation as a lens through which they see these topics.

1.2 PROFESSOR DELGADO’S WARNINGS – INFORMALITY, DIMINISHED SAFEGUARDS, NO OVERSIGHT, AND LACK OF SHARED NORMS LEAD TO UNFAIR OUTCOMES

[239] Professor Richard Delgado has been writing about the potential dangers of the informal process in dispute resolution since 1985, particularly regarding civil rights cases. However, his concerns did not stop there and included concerns around many other types of mediation cases, for example, divorce and matrimonial cases. His fear was that the lack of formal processes and safeguards might help perpetuate racial or class prejudices; those who are already at a disadvantage due to structural racism and limited access to legal representation will be further disadvantaged and face diminished bargaining power in the informal mediation process. (DELGADO, 1985, p. 1360, 1361)

Beyond that, Delgado argued one of the main pillars of and advantages of ADR is that it is confidential, and yet that confidentiality could also help perpetuate unjust outcomes against those groups of people since no one can review the process for fairness after the fact. Finally, Professor Delgado was concerned that private dispute resolution could lead to the erosion of public rights because the enforcement mechanisms and remedies

are not the same as those that can be provided by the courts. (DELGADO, 1985, pp. 1361 et seq.)

[240] Professor Delgado firmly believed that the formal procedures and safeguards enshrined in the court systems in the United States also helped to blunt racist or supremacist viewpoints that litigants who were not members of marginalized groups might hold. Many Americans, he argued, suffer from a moral dilemma where their personal beliefs butt up against publicly held beliefs of what “equality” and “justice for all” is. He argued that in informal mediation, Americans might revert to their personally held beliefs instead of publicly held beliefs of “equality”. In the court system, this moral dilemma is resolved differently in different situations, which he called “situation specific factors”. For example, some of those factors like the rigorous rules and requirements of appellate courts might exacerbate unequal treatment in the justice system, while taking an oath or the systematic way in which evidence must be presented and rebutted before a judge might lead to more equal treatment and to greater deterrence against prejudice and bias. (DELGADO, 1985, pp. 1369-1385; MAMO 2020, p. 4)

[241] Mediation, missing many of the balancing “situation specific factors”, created potential peril and required that the parties have shared norms in order to have equality in the process. (DELGADO, 1985, p. 1388) However, for the parties to have shared norms, they must have shared experiences, shared values, and similar viewpoints. In a system where structural inequality has limited the ability of marginalized and non-marginalized groups to interact, how could they have these shared norms? Professor Delgado feared that whether or not they could, they did not. For all these reasons, he was hesitant and feared the privatization of the justice system through ADR. (DELGADO, 1985, pp. 1403-04)

[242] Professor Andrew MAMO has also written on the dangers or tensions of ADR, especially when attempting to use ADR to address racial and class disparity, within the courts or without. Professor MAMO argues that using the traditional, facilitative, interest-based approach to mediation, especially in redressing social injustice, is a bad fit (MAMO, 2020, p. 26). Applying this model could often confuse or incorrectly equate the rights of minorities and the interests of the majority, sometimes subordinating rights to interests (MAMO 2020, pp. 35-37). He makes an implicit suggestion for a potentially different approach to these types of disputes that we will address later in the paper (MAMO, 2020, pp. 44-49).

1.3 PROFESSOR DELGADO’S FEARS ARE PARTLY REALIZED

[243] To some extent, Professor Delgado’s fears may have come to pass. Other writers have worried about outcomes for women in divorce mediation, especially in the context of mandatory divorce mediation, and some studies suggest that women might do objectively worse in mediation (in terms of total dollars) than in the court system—despite the fact that women are much happier with mediated outcomes. Additionally, studies in small claims courts in both New Mexico and Maine suggest that female and “minority” (defined in the studies as non-white) litigants did not do as well in small claims mediation as their counterparts who continued through the small claims process. (LaFREE & RACK 1994, 767-98; McEWAN & MAIMAN, 1981, pp. 237 et seq.) There are some shortcomings to these studies. These studies use money as the determining

factor of what was a “fair” or “unfair” outcome. Some could argue that using money to determine the fairness of an outcome is itself a default to the majority or a situation-specific factor that advantages white people.

[244] Non-monetary agreements can have other meaningful impacts that are worth more than money, rebuilding relationships or obtaining respect for instance. Take for example a case where a black plaintiff sues a white contractor for failure to perform work on his home. The white contractor may not want to reimburse the black man in money—this could be for money reasons or race reasons. However, that white contractor may agree to complete or redo the work to the plaintiff’s satisfaction. If the black plaintiff had a case, he may have won money, but it’s also possible that the black plaintiff takes the agreement to complete or redo the work as a sign of respect when he had previously believed the contractor had disrespected him. The studies fail to incorporate the worth of those agreements.

[245] However, if Professor Delgado’s beliefs are supported, has taking mediation online made those dangers even more likely or pervasive? If so, does the apparent similarity to in-person mediation hide those dangers from mediators and others? Or, in other words, are there situation specific factors that we are missing? If so, what do we do about it? A final question worth thinking about: does increased access lead to decreased formality? Or, is there some other variable potentially at play?

2. DOES ONLINE MEDIATION EXACERBATE PROFESSOR DELGADO’S CONCERNS? FURTHER DIMINISHED TRUST, REDUCED SOCIAL NORMS, INCREASED POLARIZATION

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[246] Often called the “love hormone,” Oxytocin is a key component in social bonding. Neurological studies have shown that people communicating through a computer, even when on video, produce less oxytocin than when communicating in person. Follow-up studies have shown that people are slower to trust when they have only met or worked together via phone, chat, email, and even video. That trust is also more fragile, and easier to break no matter how long those people work together. (XU, CENFETELLI & AQUINO 2012, pp. 340-350)

[247] Additionally, studies have shown that the more removed people are from communicating face-to-face, the more likely they are to deceive others for their own gain. If using face-to-face communication as the control group, people selling stocks via video were more likely to lie about the performance of a stock, those selling via phone were even more willing to deceive, and those selling via text or chat were most willing of all to deceive. When confronted with deceit, people who were deceived were just as upset as those who were deceived in person. (GRONDIN & LOMANOWSKA 2019)

[248] Moreover, in a study conducted about effective bargaining strategies on Craigslist, “nice” words were much less effective, as was using “win-win” strategies, than was the use of hard bargaining or aggressive tactics. (JEONG & MINSON ET AL., 2019)

[249] When combining the lowered social bonding ability, the fragility or lack of trust, the greater likelihood of deception and the increased need for hard bargaining tactics, in situations where people are very unlikely to trust each other to begin with, such as in a mediation, it leads to significant challenges. Parties may be more likely to make more rigid demands, use inflammatory language, be less willing to make concessions and be more willing to abruptly end sessions. In addition to these potential challenges, the possibility that members of marginalized groups will accept less fair outcomes is present.

3. WHAT OUR EXPERIENCE HAS SHOWN US ABOUT THE DIGITAL TURN IN MEDIATION; THE DANGERS CAN BE REAL

[250] Since the pandemic, the turn toward remote and digital mediation has been in superdrive. The organizations that the co-authors work for have been performing solely remote mediation for nearly three years via video platforms, texting platforms, and telephone calls. Between the two of us, we have administered, debriefed, mediated, and coordinated, hundreds of cases in those three years. Here is some of what we have seen in that time:

- Parties logging on from the car while driving,
- a party logging on from their job as a toll booth operator while working their shift,
- a party doing grocery shopping or washing their dishes,
- a party logging on while not wearing a shirt, in a sheer nightgown, or while lying in bed.

[251] We have seen a decrease in the parties' willingness to hear each other or accept the other party's reality. We have seen parties end the session without warning, click off their video, hang up without notice, and refuse to respond to emails or chats. We have seen a small increase in anchored positions and anchored offers as "take or leave it" or "take it or drop dead" as expressed by one participant.

[252] What we have seen has not yet impacted settlement rates among parties in New York State. This may be a reflection of additional work and preparation pre-mediation we have done, work that did not need to be done before the acceleration of the digital turn in mediation, but it could also be a reflection of Professor Delgado's fear: that people are accepting outcomes that are less fair.

[253] Without more research, it is impossible to know if the differences we see are causing different outcomes than in-person mediation, but it is a worry that is worthy of further consideration. An additional caveat, any further research would have to take into consideration cultural differences and the extent to which those are acknowledged in the mediation setting or exploited to support the dominant ideology.

[254] Also, whether remote mediation is the sole variable leading to these developments needs to be further researched, as the pandemic mixed with the rush to move mediation online, has created other variables that could be causing these developments, including shared and individual trauma from the pandemic that has had a lasting impact on people, and that our governments have failed to help process, treat or alleviate.

4. WHAT CAN MEDIATORS DO TO MINIMIZE OR PREVENT THESE DAMAGES? SOME RECOMMENDATIONS FOR FUTURE PRACTICE

[255] From Delgado's work, it seems that some of the best ways to prevent added prejudice would be to only mediate cases among members of the same groups, or where that isn't possible, to ensure that the mediator is a member of the "out-group". In one of the studies cited above, when the mediator was a member of a minority, the disparity between mediated agreements and court decisions disappeared. (LaFREE & RACK 1994, 778) Given that the disparities disappear it would make sense to put such rules in place, but making such rules work is onerous, and raises potential equity and fairness concerns. To some extent implementing these rules stands against the spirit of mediation.

[260] However, we do have some practical suggestions for mediators working online:

- If mediating via text, the mediator should incorporate a phone or video call early into their pre-mediation process to help build rapport and trust between the participants.
- The mediator should work with parties before the session to encourage being timely, appearing in a private distraction-free space, and installing and using blurred backgrounds (false backgrounds seem to have a distracting and flat effect, an effect that blurred backgrounds are less likely to create). This change can help the parties stay engaged, which means a greater ability to use reason, and prevent the other participant or the mediator from making judgments—predisposed or otherwise about the other participant.
- The mediator should become an expert in whatever platform they use, in order to assist in troubleshooting, but also to be willing and able to use the platform as a scapegoat. Being able to proactively problem-solve technology with a participant can prevent or blunt any judgments from the more technology-savvy participant.
- As mediators, we must become aware of our own biases and prejudices. This will make us less blind to the bias and prejudices of others and more able to determine if the mediation, or our actions in the mediation, are adding to an imbalance of power or unfair outcomes.
- Finally, we should uphold empathy, and focus on the encounter, with less focus on resolution. Focusing on the dialogue and the encounter, and approaching both parties with empathy, can do more to help diminish the possibility of unfair outcomes than any other thing we can do as mediators. Or, in other words, we should be

more transformational in our approach to online mediating (the solution that Professor MAMO recommends).

[261] More recently, Professor Delgado has written that given the erosion of trust and protections in the legal system, at least in the United States, ADR might be less dangerous than it once was. This is not an endorsement of the field, in his view, but rather a denouncement of the legal field as it currently stands in the U.S. (DELGADO 2017 635–636).

[262] Our intent is not to propose that mediation or remote mediation are not useful tools for the resolution of disputes or the holding of space for dialogue. Rather, our intention is to point out pre-existing weaknesses in the structure of mediation that can be exacerbated by the digital turn and to begin a conversation about what needs to happen next.

[263] As we look towards a more extreme digital future where there is potential for a mediation to be hosted by an AI mediator, even more questions are raised. If we cannot adequately protect against these dangers now, how can a machine, programmed with all the data available to it—much of it from or supporting the dominant ideology—ever hope to help protect against these dangers? Do we want to move towards a more digital-heavy mediation future or away from it? What would a more hybrid approach look like?

[264] Our final recommendation comes from Hannah Arendt's famous work, *The Human Condition*, and that is "to think what we do." As this field, like so many others, enters a new digital age, there is room to evolve in a positive way to meet the needs of all people, but we must be thoughtful mediators and give careful consideration to our process at each next phase of the mediation digital era.

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