Adapting to mediation online: the Irish experience

by Dr Treasa Kenny

Abstract

This article contrasts the use of online mediation in Ireland from February 2019, prior to the Covid-19 pandemic in March 2020, and from then until March 2021. It considers the context for online mediation in Ireland, the challenges to the mediation process, the experience of online mediation from the perspectives of mediators and participants in mediation. Sharing these experiences informs future decisions as to how technology might best be integrated into mediation practice in the longer term.

The experience of 13 mediators indicates that there are challenges due to familiarity with technology for mediators and participants, and challenges to power balancing and confidentiality. In Ireland, although platforms such as Zoom played a major role, use of the telephone in the mediation process also increased. An online mediation competence framework for mediators is proposed.

Keywords

Online mediation, computer technology, telephone, mediation, mediators

Introduction

A good deal has been written about online dispute resolution (ODR) prior to the restrictions imposed to control Covid-19 infection in March 2020, and even more since

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that time. ODR is described as technology-assisted dispute resolution that makes technology a 'fourth party' in dispute resolution processes (Wahab et al, 2021:480:15). There has also been significant sharing of resources since March 2020 (Ebner, 2021a).   This article contrasts the influence this 'fourth party' has had on the provision of mediation in Ireland, prior to and during the Covid-19 pandemic. Understanding how mediators have conducted sessions during the pandemic lockdown is essential to support the profession in making informed decisions about whether to continue meeting online, return to in-person meetings or create some hybrid.

This article shares findings from a small-scale research project undertaken with two dispute resolvers whose interest in technology played a part in Ireland from 2015, and with 13 mediators in practice prior to and during the period from February 2019 to March 2021. It considers feedback from participants in mediations.

Research methodology
My research role is linked to my role as a practitioner and, because of the inexplicable link between theory and practice, I identify myself as a scholar practitioner or a less used term, "pracademic" (Brannick & Coughlan, 2007; Susskind, 2013:225).

Back in May 2020, I had connected with some mediators in Ireland to check what was happening in relation to mediation in their areas of practice. Mediator reflections (by email or phone interviews) began in May 2020. It was the intention of this research to understand the experience of mediation rather than generalise from the experience of some to the experience of the many. The research design is set out below.

Context to online mediation in Ireland: On 8 May 2020, I introduced a mediator based in the US to a mediator here in Ireland because they had both been involved in encouraging the use of technology in mediation prior to March 2020. As part of the MA in Mediation and Conflict Intervention in Maynooth University, Simon Boheme, a student on a George Mitchell Scholarship from Cornell University, USA undertook a research project examining on-line dispute resolution (Boheme, 2015). Paul Pierse, an Irish mediator, was teaching on an online Law degree from 2014. He had explored various technology platforms and had identified Zoom as the easiest option to use. The meeting took place using the Zoom platform and, with their agreement, I made notes in relation to the history of online mediation and technology use for mediation in Ireland.

Research Sample: Nineteen mediators were identified, as a convenience sample, of the 644 members (June 2021) of the Mediators' Institute of Ireland (MII). Thirteen mediators, based in various locations around the island of Ireland, chose to participate in the research. Three mediators, of the original 19 invited, who did not participate in the research explained that they had not done any mediations between March 2020 and March 2021. Their reasons for not mediating during this time are noted under the section on Challenges and Solutions later in this article. Figure 1 gives some background to the mediators who participated while Figure 2 identifies their areas of mediation practice.

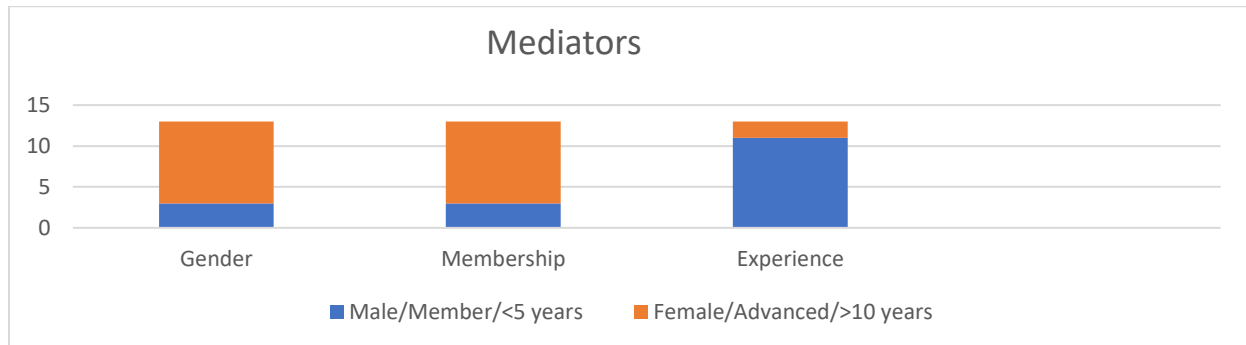**Figure 1: Mediator participants: gender, professional membership and experience**
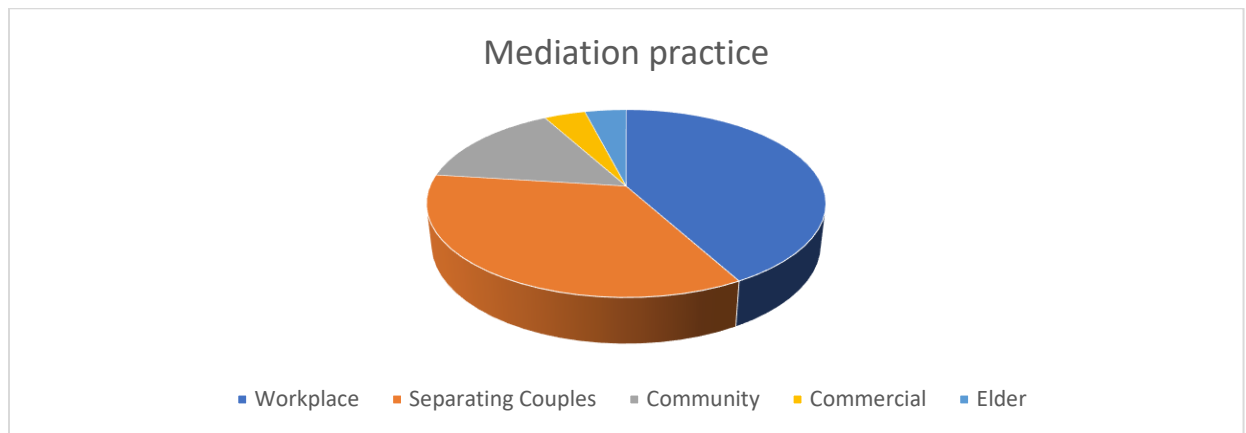
Figure 2: Areas of mediation practice of 13 mediators

Mediators participating in this research shared some feedback they had received from participants in relation to in-person and online mediation and two participants in mediation provided feedback to me by email in August 2020. All this feedback is included later in this article. This lends the profession some insight into the experience of those participating in mediation as well as mediators' reflections of participant experiences.

Questions asked of Mediators: I distributed an online survey to the mediators and I also had unstructured interviews with four of the 13 about their experience. These

deeper reflections from four mediators are integrated into the findings below. In developing the survey questions, I wanted to understand what the mediators' practice had been prior between February 2019 and February 2020 so as to have some contrast with their practice between March 2020 and March 2021.

It was also important to understand the technology they used in their practice both before and after March 2020 and how they managed signing of documents. Then mediators were asked about what they needed to be competent to mediate online. They were also asked to reflect on the learning they had acquired through mediating online. Their future facilitation of mediations was then explored. Table 1 details the questions asked.

Table 1: Questions to mediators

Practice	Technology	Online competences	Learning acquired	Into the future
How many mediations did you complete between February 2019 and February 2020?	Where you facilitate mediation online, what technology packages do you use?	What knowledge and skills have you needed to acquire to be competent to mediate online?	Please share any specific learning from mediating during the Covid-19 pandemic.	Post Covid-19 restrictions, how will you facilitate mediation sessions?
How were these completed: fully online, partly online, in person, by telephone, other	When you mediate by phone or online, how do you arrange for the signing of documents?		What feedback have you received from mediation participants as to what worked well for them?	
How many mediations did you complete between March 2020 and February 2021?			What feedback have you received from mediation participants as to what is problematic for them?	
How were these completed: fully online, partly online In person, by telephone other				
What is the usual number of participants in mediations you facilitate?				

Background and context to mediation practice in Ireland

Ireland has a history of mediation evolution during the 20th century. Practical peacebuilding and reconciliation in Ireland, north and south, has taken place since 1974. In 1986 the Family Mediation Service was established and became part of the Legal Aid Board in 2011. The first community mediation service was established in

southern Ireland in 1990 and community services have been established in Ireland with the support of Community Law and Mediation's service, founded in Dublin in 2004, to address the need for free mediation at community level.
The Travellers' Mediation Service (TMS) was founded in 2009 and the practice of commercial mediation in Ireland has grown since the early part of the 21st century and is often practiced by those with a legal background.

The Mediators' Institute of Ireland (MII) was established in 1992 as the professional association of mediators on the island of Ireland and it acts as a self-regulating body for the profession. Members of the MII have, since 2011, had the option to apply to join the International Mediation Institute (IMI).

Higher education has also played a key role in the evolution of mediation practice in Ireland since (Kenny, 2018; 2020).

In-person mediation
From February 2019 to February 2020, practice varied for the mediators in this study from three mediations to 48 mediations. The overall number of mediations undertaken by all 13 mediators was 177. Usual practice during this time was for mediation to take place in-person (92%), with 23% using technology primarily for pre-meetings and 8% using the phone for the same purpose. No mediator indicated that they had any experience of conducting a whole mediation process online.

Telephone mediation
Various ADR agencies in Ireland have adopted telephone mediation as a first step in their conflict resolution process. These include: the Residential Tenancies Board

(RTB) established in 2004 for tenants and landlords in dispute; the Financial Services and Pensions Ombudsman (FSPO) established in 2017 — previously Financial Services Ombudsman from late 1990s — for citizens in dispute with financial services organisations; and the Workplace Relations Commission (WRC) established in 2015 to address disputes arising between employers and employees.

Online mediation

The ODR message was seen to be gaining traction in Europe in 2008 when the European Mediation Conference was held in Belfast and included, for the first time, a workshop on online mediation (Wahab et al, 2021:480). He has gone on to work in technology, law and dispute resolution (www.odrzoom.com). In conjunction with the MII, Paul Pierse set up a mediator sharing and learning group (where practicing mediators come together to share their experience and learn with colleagues) using Zoom in 2016. Prior to March 2020, out of a total of 31 MII-registered sharing and learning groups, four took place online while the others involved mediators meeting up together in-person.

There has been no research conducted in Ireland that looks specifically at the use of technology across the whole area of mediation prior to March 2020. The experience of the 13 mediators in this study, however, gives some insights into the role of the 'fourth party' before the Covid-19 pandemic lockdown from March 2020. There are a very few examples of technology being used outside e-commerce and this was usually where one or more parties were in Ireland and others in another part of the world. The technology platform used was Skype.

So, before March 2020, it is apparent that mediators in Ireland could have been 'exposed' to ODR from 2008 and/or 2015, and some had taken to using technology for meeting with other mediators online from 2016. The two individuals who were promoting the 'fourth party' from 2015 are passionate about using technology in dispute resolution and had both been instrumental in introducing this option to mediators in Ireland.

What is also apparent is that the development of ODR referred to earlier (Wahab et al, 2021:480) was developing along a separate path to other mediator practice in the period from 2008 to 2015, and perhaps up to March 2020. The 'fourth party' was potentially viewed as more relevant to dispute resolution in e-commerce and less relevant to other areas of mediation. Within ADR agencies, telephone mediation was a more normal early resolution option than face-to-face mediation or technology. We can conclude then that the norm for mediators, working outside ADR agencies in Ireland up to March 2020 was to conduct mediation in person with participants even though there was some knowledge of ODR and technology (both Skype and Zoom).

The Mediators' experience from March 2020 to March 2021
The recent experience of those who participated in this research is explored under four themes: transition, practice, challenges and solutions, and feedback from participants.

Transition
From April 2020, a number of webinars were offered — mainly by mediators of commercial issues in the UK and Ireland — which shared experience in using Zoom

technology for mediation. Between March and May 2020, Simon Boheme provided support to around 12 MII members (of over 1,000 mediators supported internationally) on using Zoom and ensuring privacy. Some mediators also availed of coaching from him on technology integration more generally into their processes. He wrote about privacy issues which were a major concern in mid-2020 (Boheme, 2020). He will also be speaking at the 20th International Online Dispute Resolution Forum, which was due to take place in University College Dublin in 2020 but has now been re-scheduled for December 2021.

Paul Pierse was involved with setting up an online team of Covid-19 mediators for the MII to facilitate the resolution of 'lockdown' conflicts although this was not accessed by the public. He has also been involved in pilot technology projects within one ADR agency. From March 2020, all MII training programmes had the option of delivering online, and all 31 sharing and learning groups moved online — predominantly using Zoom.

The familiarity that mediators already had with the technology and their access to support, both in Ireland and the US, meant that they were able to relatively quickly assure the quality of their mediation process and meet some of the very real challenges with more ease than might have been a reality for those less familiar with the technology or without those supports in their professional network.

Practice
From March 2020 to March 2021, practice varied for this group from one mediation to 40 mediations. The overall number of mediations undertaken was 165, which was a small drop in overall mediations from the 177 between 2019 and 2020. Most

mediations concluded during the overall timeframe of the study involved two parties (85%), with the remaining mediations involving up to six parties. Some mediators chose to defer mediations initially but moved online as the Covid-19 lockdown continued. Some mediators moved online quite quickly to continue mediations already begun face-to-face.

Due to the Covid-19 restrictions, the option of in-person mediation was not available in the early stages and, even when there were various 'exits' from lockdown in summer 2020 and approaching Christmas 2020, parts of mediations remained online (pre-meetings), with a few joint meetings taking place in-person.

For a small number of the mediators, the choice made was to only conduct joint sessions in-person with the agreement of the participants. This was based on the situational factor of people being in the workplace (essential workers) and ensuring the relationship was restored between them.

As shown in Figure 3, in-person pre-meetings dropped to zero and in-person joint meetings dropped to 5% from 92% pre March 2020. Use of the telephone increased significantly from 8% pre March 2020 to 60% for pre-meetings and 20% of joint meetings with participants. Use of online mediation increased from 23% percent to 40% for pre-meetings, and up to 75% for joint meetings.   The most usual on-line platform used by these mediators was Zoom or Zoom Pro (83%). A small number used Microsoft Teams or Cisco.

Figure 3: Mediation from March 2020
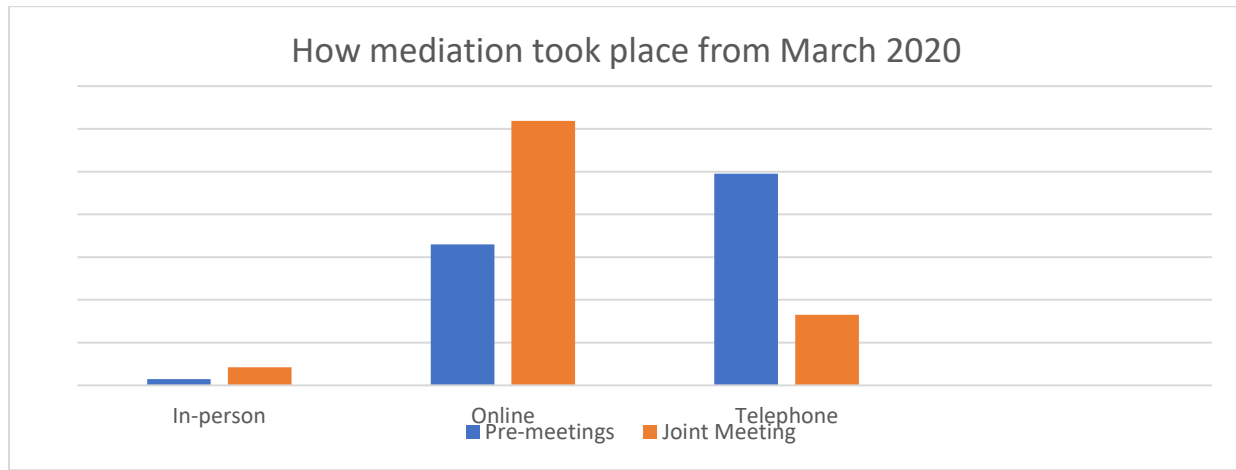
Challenges and Solutions

A significant learning from this research is identifying the challenges faced by the mediators and finding out how they addressed these. The four main challenges identified are: familiarity with technology for mediators; familiarity with technology for mediation participants; power balancing and maintaining confidentiality. Mediators also shared how they developed their competence. Table 2 sets out the challenges and solutions found in relation to mediators' familiarity with technology.

Table 2: Challenge 1: Familiarity with the technology for mediators

	Challenge	Solutions
a)	A lack of access to good quality broadband in their local area.	This was the hardest to address. This was the reason why some mediators did not mediate online.
b)	Discomfort with technology and moving from in-person to online mediation.	Those who overcame their initial discomfort had attended training sessions and had individual coaching.
c)	Managing specific tools such as waiting rooms, breakout rooms, whiteboard, and sharing documents took time or required support to integrate these into practice.	Attending training workshops and coaching sessions which helped in understanding all aspects of technology such as Zoom. Practice with colleagues to become comfortable with online facilities and settings. Comparing experiences with colleagues about the tools and techniques to use online.

d)	Signing of documents which were part of the mediation process, e.g. Agreement to Mediate and Mediation Settlements.	Using the post; email attaching document for digital signature or sign and scan; use of Adobe Acrobat pdf; or packages such as PDF Sign, Digisign or Docusign. If printing or scanning were problematic responding to the mediator stating "I confirm that I have read and agree to all the terms and conditions contained in the Agreement to Mediate."

Mediators found they needed to make more time to ensure participants in mediation were familiar with the technology as well as the mediation process itself. Table 3 sets out the elements in this challenge and solutions found by the mediators in this study.

Table 3: Challenge 2: Access to and familiarity with technology for mediation participants

	Challenge	Solutions
a)	A lack of access to good quality broadband.	This was difficult for mediators to address. Some people decided to wait for mediation until such time as they could meet in-person.
b)	Discomfort with technology.	Taking time to check with people in the initial conversation — which was often by telephone — how familiar they were with technology. This meant taking more time to encourage people to try the technology and doing practice sessions before a joint meeting. Participants need to be 'walked through' the technology platform to be used and introduced to the online mediation environment, including waiting rooms and breakout rooms. Developing an Instruction sheet for those unfamiliar with using Zoom or other technology helped.

Mediators identified that one area where they would usually have significant control during an in-person mediation session is the balancing of power between the participants. Table 4 sets out some challenges that arose and solutions found by the research participants.

Table 4: Challenge 3: Power balancing

	Challenge	Solutions

a)	During in-person mediation, the mediator controls the environment participants meet in. Online, participants might be in kitchens, back gardens, bedrooms, etc. Judgments that a party might make of another could impact the relationship after mediation.	Based on observations during online pre-meetings with individuals, talk through with people what they wished to be reveal of themselves and their background. It is suggested that it is helpful to encourage neutral and safe backgrounds. Talk with people about any potential distractions that could arise and how to best minimise or manage these.
b)	Impact on communication of where participants position the screen.	Consider with individual participants the visual frame — so they can be heard and their face clearly seen.
c)	The limits to participants' attention span in online sessions.	Design joint sessions that are shorter so that people are not too tired to make an informed decision.
d)	Hidden emotion may be harder to pick up, in terms of 'what's not being said', when only seeing the face and shoulders of participants.	Verbally conveying empathy and supportive energy to participants in private sessions and when they are together. Slow things down to avoid speaking over people or people speaking over one another.

Mediators found that confidentiality was harder to manage when mediation takes place online. Table 5 sets out the elements in this challenge and solutions found by the mediators in this study.

Table 5: Challenge 4: Confidentiality

	Challenge	Solutions
a)	Privacy and confidentiality being compromised in joint sessions. Mediators experienced situations such as family members passing behind a participant. Participants may not consider that there are others present within hearing or sight when the joint session takes place.	Talking through the options available for each participant to ensure privacy for the meeting. Talking with participants about the importance of no one else listening in — intentionally or inadvertently. Asking for assurances from each participant that this would not happen. Participants opted to sit in their car or arranged to have a room in their home to themselves for the times scheduled.
b)	Managing access to the joint session and privacy of the process.	Set up the online waiting room and participants are invited in by the mediator as the host. When all those who are present arrive, the mediator protects the online meeting room so that nobody else can get as far as the waiting room.
c)	Recording the joint session either on devices or by making notes that could not be 'taken away' by the mediator at the end of the joint session.	Talk through with participants the reality that sessions might be recorded and seek their assurances not to do this. Ask participants to destroy any notes at the end of a joint session.

Feedback from mediation participants

To better understand the impact of the move to online mediation, mediators shared feedback from participants who experienced in-person mediation prior to March 2020 and those who experienced online or telephone mediation from March 2020 to March 2021. The feedback from two participants in a specific mediation process are also included below. The feedback was primarily found to relate to process, safety, emotional heat and the benefits and challenges of meeting in person.

Mediation process

For many mediators in this study, there was a sense of having no real choice other than to mediate online or by phone due to Covid-19. For participants who provided feedback to mediators there was no difference between in-person and online mediation in terms of the process. Most participants felt the mediation was "better than expected" and "It wouldn't have been possible to get everything sorted like this any other way." Feedback to the mediator was that they were seen as supportive and neutral. Participants felt heard and supported in having difficult conversations directly with the other person(s) because time was set aside, there was useful listening and the issues were actually dealt with.

Some heard that participants had low expectations of what could be achieved online and yet had found mediation helpful. A comment from one participant in a mediation which moved from in-person to online was:

> *The fact that we were used to the mediation process in person probably made the online mediation easier and I would view is as a useful alternative not just with current restrictions but even to be considered when distance to travel or*

other factors make meeting in person difficult. On the whole I found it a positive experience to close out some outstanding matters and reach a final agreement; in a time when social distancing is our new normal its [sic] probably 90% as effective as meeting in person.

Safety

Generally the feedback for both in-person and online mediation was that mediation felt safe and structured.

Emotional heat

Feedback that mediators received from participants was that online mediation was 'convenient' - people could be in their own space, they did not have to travel, and it felt less emotional because they 'did not have to sit in the same room as the other person'. In some instances, the feedback from participants was that it felt safer for them because of their specific issues. Mediators – particularly those working with separating couples – felt that some of the 'heat' was taken out of exchanges because people were not in the same room with the other person – and this was supported by one participant in mediation.

> *These sessions were moved to online due to Covid 19 and our last session was conducted via a zoom call. Being able to sit in comfort of the very familiar setting of home, with a cup of tea and not having to make a long journey whilst still having [the mediators] present was an easier one for me. The 'distance' the screen afforded seemed to help with the anxiety that I experienced in the lead up to and the aftermath of sessions. When the meeting concluded I was also able to put on my runners and get straight out for a walk. The mediation process can be a difficult journey and this final meeting was felt to be less burdensome due to the online experience, thank you [mediators].*

Benefits and challenges of meeting in-person

For mediators who conducted joint sessions in-person between March 2020 and March 2021, the feedback was that the participants felt that being in the room together was more personal and they preferred meeting that way. The mediators felt they were better able to build a sense of trust and safety, and that they and the other participant(s) could see one another's body language. This was supported by feedback from one participant in a mediation:

> *Similar to how I find phone calls better than texts and FaceTime better than a phone call, sitting in the same room as someone is better than online. I think this is especially true when dealing with difficulties around communication and relationships.*

However, meeting in-person can be problematic for some participants in mediation and this was reflected by one participant:

> *One of the things that I found most difficult, was having to meet in person with the individual who I was engaged in the mediation process with and who was a family member. For lots of reasons this was confronting and uncomfortable. [The mediators] were very mindful to set these meetings up in as supportive and comfortable way as possible.*

So overall what we see is that mediation continued to take place during Covid-19. The mediation process had to be adapted to use telephone or computer technology as well as arranging for documents to be signed remotely or through technology. The mediators sharing their experience in this study adapted to the more remote space of telephone and technology. For both mediators and participants, online mediation appeared less emotional and safer, but it also made it more difficult to engage with those shared elements of communication such as body language or the visual representation of shared information for informed decision-making.

Lessons for future practice

The lessons learned have value for mediators more generally as we move out of a time of Covid restrictions reflects similar lesson from other countries (Creo, 2020; Sturrock, 2020). Most of the mediators believed that they would continue to use some hybrid of in-person, telephone and online communication for mediation. In line with the literature on ODR, designing the mediation process to integrate technology to meet the needs of participants will increase satisfaction and comfort with both technology and the mediator using it (Ebner, 2021b:417). Some mediators will do all pre-meetings by phone or online and have a flexible client-led approach to joint meetings. Others stated a preference for in-person mediation, particularly for joint sessions and they are most likely to use a blended model. One mediator preferred pre-meetings to be in person.

While some were happy to continue to mediate online or by telephone wherever possible, others stated a preference to prioritise in-person mediation in cases where there is a "significant interpersonal dimension to the conflict". It is important to note that clients may have specific preferences too.

> *Two family cases are due to start in-person early July (2021) and both have chosen to hold off even doing initial one-on-one meetings until the restrictions permit in-person sessions.*

A question raised during the conversation between the US and Irish dispute resolvers was "What kind of competitive edge do mediators want to have?" The option to use technology to a high standard was viewed by both individuals as important. For the mediators in this study, they identified that competence in mediating online required

competence with the technology, in adapting their process and in working with people.

Competence with the technology

Working effectively with the 'fourth party' requires that mediators and participants have high quality internet, fully charged devices and proficiency with the technology (Leone, 2020). Mediators need to be able to: set up meetings; share the screen; manage breakout rooms; manage data; amend spreadsheets and record agreements. It also necessitates their being be able to sign documents using digital signature software. This requires mediators to attend training workshops about mediating remotely as well as knowing, in detail, how to work with technology platforms. This needs to be supported through practice and comparing experiences with colleagues.

Competence in adapting the mediation process

In addition to the competence that mediators need to acquire to mediate effectively online, there is a need to recognise that there are design issues to be taken into account. Mediators can develop a protocol for working with their clients online. They also need to consider whether their hard copy agreement to mediate is fit for purpose in a digital space (First, 2018).

In order to design a mediation process which can take place effectively online, mediators need to revise their pre-mediation or pre-meeting phase. It is also important to talk through with each party issues which could impact perceptions and power balance. Talking about confidentiality requires mediators to consider how different this situation is to in-person mediation and to discuss with participants how best to ensure that their privacy is respected.

Competence in working with people online

On a more human level, mediators need to be conscious of other 'human' factors that can have an impact. There are factors such as attention span and the possible impact that 'Zoom fatigue' can have on participants' energy levels (Spicer, 2020) — all considerations that we have learned about during Covid-19. This along with the reality that 80% of body language is not seen. More attention needs to be paid to building rapport and creating a safe space to talk about the difficult issues (Ebner & Thompson, 2014; Ebner, 2021c). Mediators also need to adapt patterns of behaviour, such as managing their communication through gaze or eye contact which needs to be supplemented with more oral cues in this two-dimensional environment (Irvine, 2020).

So, mediation training providers in Ireland and the MII need to consider the competence implications of online mediation. There are technology, design and communication skills to be developed (https://icodr.org). This is evidenced by the supports put in place to mediators in Ireland and internationally by their professional bodies; the webinars, blogs and podcasts that proliferated during 2020 particularly; and the launch of an online mediation specialism by the International Mediation Institute (IMI) in June 2020.

Future research

There is certainly value in exploring how mediation practice develops as society begins to open up again after the Covid-19 pandemic. Better understanding of how the 'fourth party' is best integrated into mediator training, mediation practice and feedback on the mediation experience from participants is needed. It would be useful to add the experience of mediators practicing inside ADR agencies. It would

also be important to better understand how telephone, online and in-person engagement impacts the mediation experience for participants and mediators so that mediators can make informed decisions with participants about what best suits specific issues and situations.

Strengths and limitations to the research

Those who participated in this research were very open in sharing their experience. The challenges raised by adapting mediation in a crisis and the learning shared by mediators, as well as the feedback on participant experiences, are strengths of this research.

This is a small-scale study undertaken with a convenience sample. It is more a beginning in terms of understanding and setting down a foundation for understanding the challenges and benefits of the 'fourth party' and its impact in mediation beyond e-commerce.

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