



Online Mediation now and into the future

White paper: trends and attitudes towards online mediation



Resolution
Institute

June 2021

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Background

About the survey

In late November 2020, a survey was sent to current Resolution Institute members asking how they had incorporated online platforms into their mediation businesses.

The purpose of the survey was to gain a deeper understanding of the membership and insight into recent trends in mediation practice, both in terms of their nature and longevity.

There were 137 responses from members across Australia and Aotearoa New Zealand. These responses represented a wide variety of specialties in mediation as well as a range of experience levels reflecting the diverse nature of Resolution Institute's membership.

By leveraging this data, Resolution Institute can make informed decisions for the benefit of all members.



Mediations [...] were often utilised to fill the gap. This was especially the case for mediations performed online, which allowed communication without having to gather in one spot and travel long distances.

The context

At the time of the survey, both nations had been locked down for approximately eight months and had begun to re-open in the lead up to Christmas. However, this survey was conducted before news of the vaccine rollout was announced. It would be fair to say that the outlook of both countries at the time of the survey was that the worst of the lockdowns were behind them and that there was a level of optimism about reduced restrictions and social distancing measures being eased.

The lockdowns and restrictions enforced across both countries made both in-person meetings and travel extremely difficult, especially across state borders in Australia. Additionally, many courts closed their doors during the worst parts of the pandemic, creating even longer backlogs in the judicial system. As a result, mediations, among other dispute resolution methods, were often utilised to fill the gap. This was especially the case for mediations performed online, which allowed communication without having to gather in one spot and travel long distances.

Respondent profile

- The 137 respondents represented a wide variety of subdisciplines and specialties, as displayed in Figure 1. There was no limit as to the number of subspecialties that respondents could choose.
- 'Commercial' (63), 'Workplace' (59) and 'Family' (55) mediation specialisations were the most chosen subspecialties.
- The broad spectrum of speciality reflects the diverse skillset and practice areas of the broader Resolution Institute membership.

Figure 1: Mediation speciality

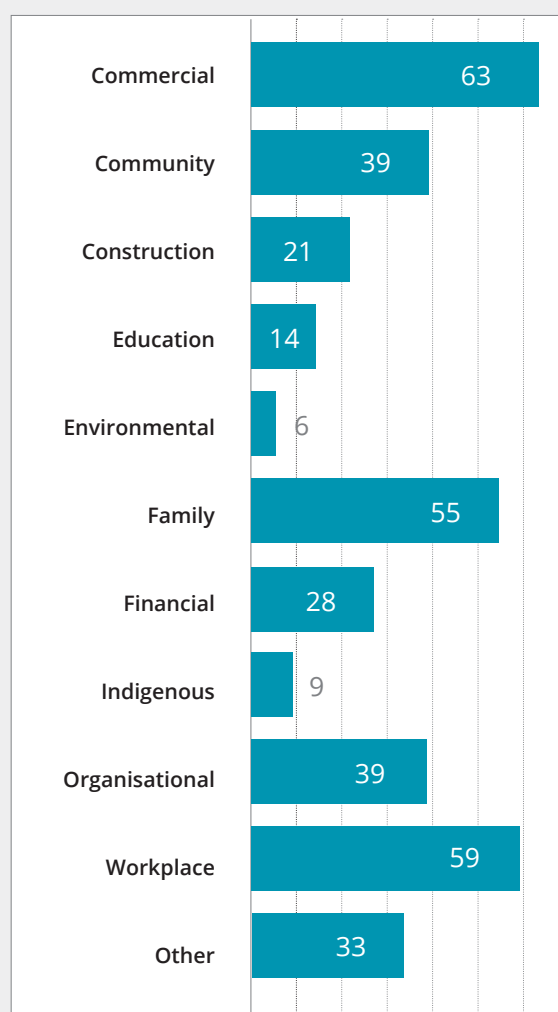
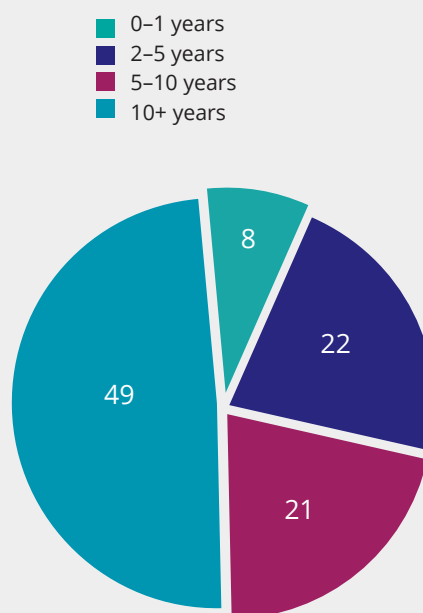


Figure 2: Years of practice

How many years have you been practicing?



Survey results

Online mediation trends

One of the key reasons for conducting this survey was to measure online mediation trends as a direct response to COVID-19, and the attitudes of practitioners related to online dispute resolution generally.

Unsurprisingly in the current environment, out of the 137 respondents, 118 (87.4%) were either currently using online mediation or were planning on implementing it in the near future.

This number has clearly been affected by the pandemic with only 15, or 14.2% of respondents stating that they regularly used online mediation prior to March 2020. This question was used as an approximation of the impact of the coronavirus, as lockdowns first began to be implemented around the beginning of March in each country.

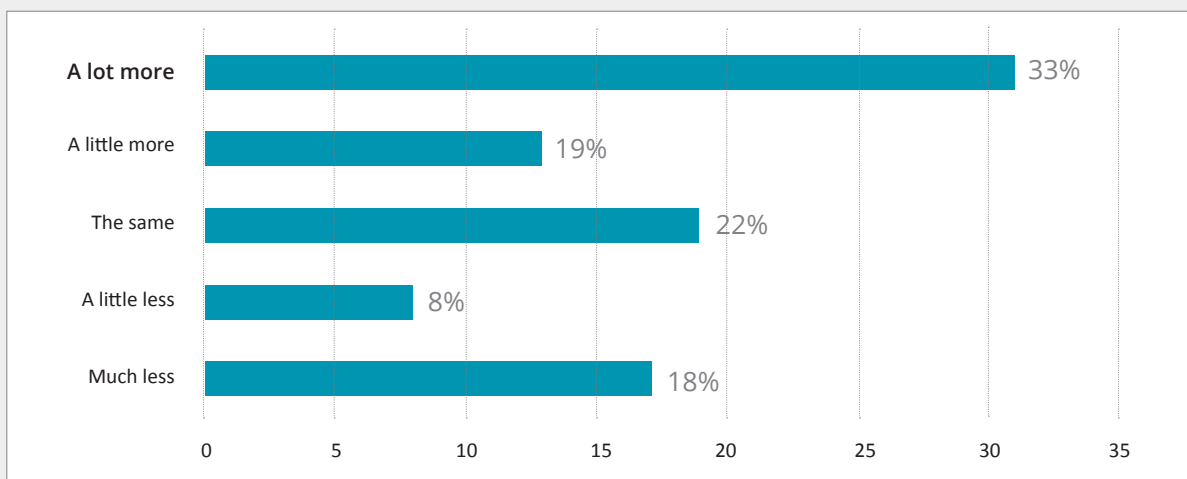
During 2020 there was a 626.7% increase in usage of online technology — a dramatic figure even in the context of the pandemic.

More specifically, the first lockdowns in New Zealand were announced on 14 March 2020 and the nation was in complete isolation by 25 March. Similarly, the Australian government began to close 'non-essential services' on 21 March 2020. The difference between the 'before COVID-19' and 'after COVID-19' results translate to a 626.7% increase in usage of online technology through the course of 2020, a dramatic figure even when put in the context of the unprecedented lockdowns.

Further, the 74% of respondents who stated that they used online mediation also said that they would continue using it at either the same rate or more after the COVID-19 pandemic. Many respondents (32.6%) even stated that they would use online mediation 'a lot more' post COVID-19, as can be seen in Figure 3.

Figure 3: Online mediation post COVID-19

Post COVID-19, do you intend to continue using online mediation?



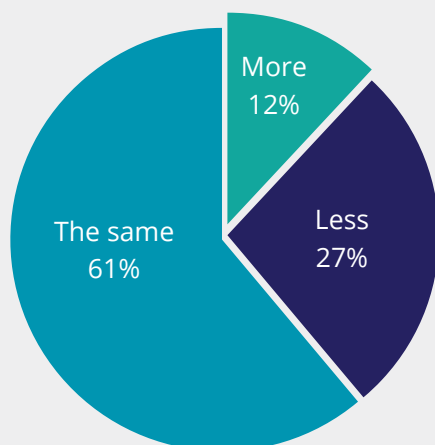
Online mediation enhances the efficiency of the process but diminishes (its) effectiveness.'

(Survey respondent)

The idea of increased usage of online mediation post COVID-19 was also a sentiment held only by Australians, with no New Zealand respondents stating that they would use more online mediation post COVID-19. This response is interesting as it is the only significant divergence in the data between Australian and New Zealand members.

Figure 4: Settlements – online mediation

In your practice, how often are online mediations settled as compared to face to face mediations?



A shift to online mediation

There is no doubt that online mediation represents a significant shift in how mediations are conducted. While 60% of respondents stated that online mediations were settled at the same rate as in-person ones (see Figure 4), in their professional experience, there was almost unanimous agreement that, on balance, online mediations diminished the process of mediation.

This stands in stark contrast to the previous data-point, indicating that mediators intended to continue using online mediation once the COVID-19 pandemic was over.

This tension was most succinctly resolved by one respondent, who stated:

'Online mediation enhances the efficiency of the process but diminishes (its) effectiveness.'

It remains to be seen whether this decreased effectiveness is a result of the novelty of online mediation, the new skills required, or whether the issues are more deeply rooted.

Benefits of online mediation

When citing the positive aspects of online mediation, a majority of respondents identified the increased safety of not having both parties in the same room.

Heightened public consciousness surrounding potential transmission of diseases

Although unsurprising that this would be in the forefront of public consciousness during a pandemic, this sentiment will probably prove durable, even after the pandemic has passed. There will doubtlessly be heightened public consciousness surrounding potential transmission of other diseases for many years even after the vaccine has been rolled out.

Physical safety of parties

In addition, the physical safety of parties, or the perceived lack thereof, is another potential roadblock that could be cleared. This may be especially relevant in the area of family law where emotions are often elevated and domestic violence victims may not wish to be physically close to their abusers.

Lower logistical barrier, time and cost savings

Another commonly cited benefit of online mediation was the lower logistical barrier and lower cost. By having an online space in which the parties can meet, there is no need to factor in the travel time and room rental costs to the running of a mediation. This means that getting the parties to communicate is far more convenient, especially in interstate mediations in Australia, where an in-person meeting could mean a three-hour long flight both ways.

This may also give some insight into why Australian mediators were much more willing to use mediation more post pandemic than their New Zealand counterparts. Indeed, much of the feedback submitted on this subject focused on allowing the parties to remain in their 'comfort zone' while mediating and that much more latitude could be given to pre-mediation conferences if neither party had to travel.

Combining online pre-mediation with in-person mediation

This sentiment also dominated questions about combining future online and in-person mediations, with respondents very enthusiastic about the prospect of having greater latitude for an online pre-mediation conference and an in-person mediation. By having an online pre-mediation conference, which usually takes place separately between the mediator and each of the disputing parties, a mediator can capitalise on the time and cost-saving benefits of online mediation in a lower stress environment. The lower stress and stakes of pre-mediation means that having to pick up on subtle body language cues is less important, one of the most commonly cited drawbacks of online mediation. This idea has been included as a potential strategy later in this white paper.

Challenges of online mediation

Perhaps the most noteworthy aspect of the survey results was uncovered when respondents were asked if, in their opinion, online mediation bolstered or diminished the overall process of mediation. The fact that practitioners overwhelmingly responded that they thought that online mediation diminished the process at least to some extent seems to contradict the aforementioned desire to continue with or even augment their use of online mediation after the pandemic.

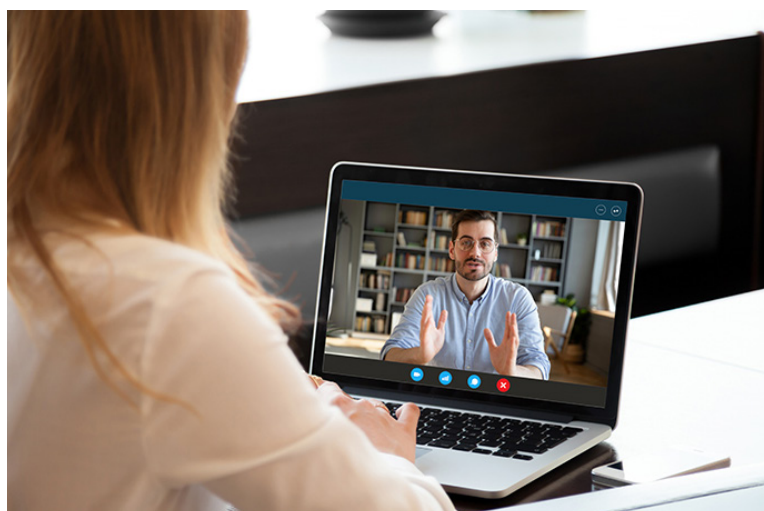
The most common critique of online mediation was that it lacked the 'human touch' of in-person mediation. This sentiment was shared both by those who refused to mediate online, either now or in.

This is unsurprising, given that mediation is a discipline that is so deeply rooted in managing emotional responses often communicated non-verbally in ways that cannot be captured by a webcam. Indeed, much thought and scholarly attention in this discipline has been paid to the effect that the layout of the mediation space, for example the placement of chairs and the shape of the table, has on the dynamics of the mediation itself. None of this can be controlled in an online setting, although many respondents noted that having each party in their own 'territory' or comfort zone, while mediating, much of this issue was mitigated.

More difficult to overcome, however, was the common refrain that it is a lot easier to 'hang up' a call online than it was to storm out of a room, thus making it more difficult to manage emotionally charged issues as often occurs in family mediation, for example.

Nonetheless, online mediations also provide their own set of body language cues that mediators may learn and utilise in mediations, including eye contact, slouching and how close to their camera a person is sitting. Mediators can also be encouraged to use their hands more to help with engagement and keeping the eyes of disputing parties on the screen.

It seems, however, that mediators, at least in Australia, are willing on balance to adapt to many of the challenges posed by this shift in the way that mediation is done in the future, either because they believe that the convenience and efficiency afforded outweighs the costs, or that potential parties to mediation are more likely to mediate if they know it will be done online.



Use of technology

Technology issues

The abovementioned drawbacks of online mediation provide great opportunity for maintaining or increasing current infrastructure and training for how to adapt to the more 'online' and socially distanced world that we may find ourselves in post-pandemic.

One of the more prominent complaints regarding online mediation in the survey was regarding technical issues. Complaints cited included slow and glitchy internet connections which disrupted the flow of mediation or cumbersome and unintuitive online mediation technology.

While little can be done on an individual basis to improve the former of these issues, much can be done regarding the technical proficiency.

The most obvious of these is training and education, with specialised courses for teaching mediators how to set up and run online mediations, as well as mitigating some of the drawbacks associated with a lack of 'human touch' mentioned earlier by providing training experiences online to deal with the emotional and relationship elements of mediating online.

The second of these is more user-friendly and mediation-specific software which would streamline the process and give mediators tools specifically designed for mediation (and other forms of dispute resolution) instead of having to create workarounds with existing systems.

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Technological platforms

The responses given for the technological platforms used for mediation add yet another interesting twist to the original dataset. As can be seen in Figure 5, 70% of respondents stated that they primarily used Zoom, a generic video conferencing service. This number towers over that of more specialised companies, such as MODRON and Immediation, which only garnered 3% between them, as displayed in Figure 5.

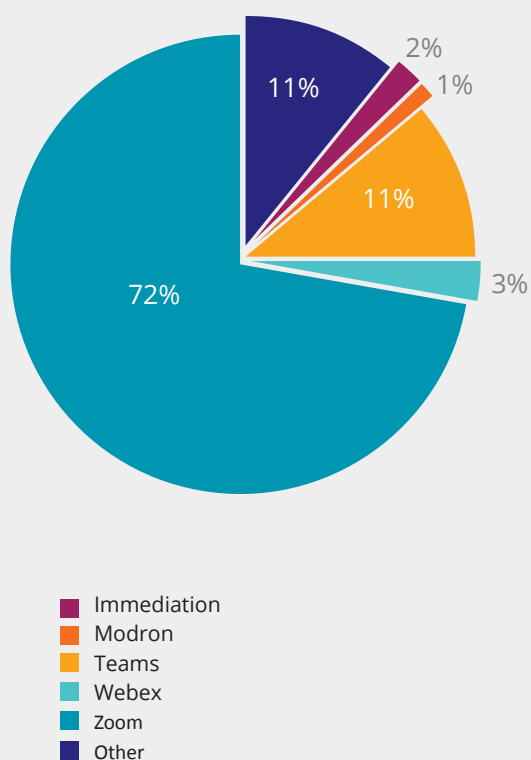
There are three likely explanations for this outcomes:

1. Mediators simply have not heard of these platforms.
2. Mediators are not aware of the additional features in such platforms.
3. Mediators have heard of these platforms but have chosen not to use them because they do not believe that the additional functions within the platforms are worth the additional effort and cost.

The third of these explanations is far more likely, given the fact that the mediation world is closely knit and membership organisations such as Resolution Institute have provided information about various platforms, as well as discounted access as part of their membership to their members through the COVID-19 period.

Figure 5: Online platform usage

What online platform do you use?



Far more likely is that, as one mediator put it:

"Much of the same work of a mediation can be done by having both a Zoom and a DocuSign account, two programs which are useful in their own right outside of mediation, leaving little benefit for a program which specialises only in mediation technology."

It should be noted that this survey took place after news that Zoom was compromised and cybersecurity issues were being raised, which may also speak to a sense of inertia amongst mediators not wanting to change platforms, due to any inconvenience and re-education that is required.

The path forward

There are three conclusions that can be drawn from the above data, collected from a representative portion of our members:

1. Online mediation has increased greatly in popularity over the course of the pandemic and its prevalence looks set to continue even after the restrictions of COVID.
2. Despite there being widespread perception that online mediation reduces its quality, many members believed that external factors, such as convenience, safety and decreased cost make it a sustainable option moving forward.
3. The vast bulk of online mediation is taking place on generalised video-conferencing platforms, rather than the specialised online mediation programs currently available on the market.

Resolution Institute recommendations →

Recommendations

Resolution Institute suggests the following:

1. Promote use of online mediation

There should be greater effort to promote online mediation as an equally valid method of mediation

By removing the stigma of online mediation as a 'compromise' or 'substitute' for 'regular' mediation, participants will be more likely to take the process more seriously. Further, the removal of stigma may entice people who would otherwise have rejected mediation due to logistical difficulties to accept online mediation as the path to resolving their disputes.

2. Online pre-mediation as default

Pre-mediation conferences and/or intake sessions could be held online as a default state of affairs

Not only would this import many of the natural benefits of online mediation, such as lower costs and less travel time, but could also happen in an environment that is less emotionally charged than a live mediation.

3. Training

More training programs designed to improve the quality of, and make mediators more comfortable with, online mediation

Resolution Institute offers online courses that give participants experience in running mediations online, covering not only technology options, but also the 'soft skills' required for managing online disputes. More information at resolution.institute/events/category/mediation-australia

Resolution Institute also runs the only internationally recognised online dispute resolution practitioner's accreditation in Australia. This first-of-its-kind online dispute resolution (ODR) certification programme offers hybrid, self-paced experiential learning (live/recorded content) online over a three-month continuous learning journey. It includes ODR training and provides learning opportunities, tools, and techniques to apply skills in a variety of settings within any ODR platform. More information on this program can be found at resolution.institute/events/event/odr-prac-cert-29-jul

4. Expand technological platforms

Collaborate with specialised online mediation platforms to improve uptake

Further investigation as to why specialised online mediation platforms do not seem to have gained a foothold in the market and work with such providers to overcome these issues for the benefit of the dispute resolution community.

About Resolution Institute

Resolution Institute Resolution Institute is the peak membership organisation of dispute resolution professionals within Australia and Aotearoa New Zealand. Resolution Institute members engage in mediation, adjudication, arbitration, expert determination, facilitation, conflict coaching, conciliation and restorative justice and has a membership base of over 3,000 professionals, across a diverse range of industry sectors, including building and construction, finance, commercial, community, technology, mining, local government, insurance, environmental and family.

Resolution Institute is committed to promoting and supporting the use of dispute resolution through education, training, and accreditation of professionals, to contribute to the provision of quality dispute resolution services.



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