# E-MEDIATION

# ELECTRONIC  MEDIATION WITH MEDIAR ONLINE SPAIN.

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## Abstract
One of the fields in which conflict mediation is developing is on the Internet, it's look to become in one tool designed to solve conflicts with independently of their origins, whether it is on Internet activities or not. Legal framework in Spain allows us to clearly differentiate the Electronic Mediation from other online dispute resolution methods.  This article reviews the state of art to account of what electronic mediation meant.

**Keywords**
Electronic mediation. E-Mediation. Mediation on-line. Mediation by electronic means. ODR.

## Resumen

Uno de los ámbitos en los que la mediación de conflictos se esta desarrollando es Internet, buscando convertirse en una herramienta apta para la resolución de conflictos independientemente de que éstos reconozcan o no su origen en actividades desarrolladas en Internet. El marco jurídico en España permite diferenciar con claridad a la Mediación Electrónica de otras formas de resolución de disputas on-line. El objetivo de este artículo es realizar una revisión del estado de la cuestión que dé cuenta de que se entiende por mediación electrónica.

**Palabras clave**
Mediación electrónica. Mediación on-line. Mediación por medios electrónicos. ODR.

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## Introduction
What e-Mediation means?

When in 2008 I read the Directive 2008/52/CE of the European Parliament and of the Council of 21 May 2008 on certain aspects of mediation in civil and commercial matters, (Directive, 2008) intends to encourage amicable dispute resolution through the mediation and highly recommends this process to cross-border disputes in civil and commercial matters, then I saw it clear: we can mediate on-line.

I start to study how mediate on-line, and what I found was nothing… yes, nothing.
All the platforms, books, articles, etc., talked about "on-line dispute resolution" (ODR) or "blind negotiation", but no-one talked about e-mediation, and the obvious question was, why, don´t they see any difference?, are both of them the same skills?

I´d looked at many articles and some books too and I notice that: there is not an unique definition for mediation:  each country, state, town-hall, company, teacher, and of course, each mediator has his own, and as if we are talking about an "open concept", all of them are valid.

Mediators go beyond theories and models to apply to each case they have, it's like a collection-in-progress of techniques, tools, knowledge and approaches used by mediators in order to become more and more "effective".

Actually we've got a lot of "models": evaluative, facilitative, transformative, narrative. Even I have my own model: I've named it Appreciative Mediation.

So, Mediation is very flexible, but there must be a border somewhere. Can it be the same border between Negotiation and Mediation? And if there is a border, should it be the same or apply for the e-Mediation?

The answer is not easy, because as we can see it depends on: a) concept of mediation, and b) law and regulation acts of mediations.

In Spain we've Law 5/2012, of July 6, on Mediation in Civil and Commercial Matters (the "Mediation Act"), which was published in the Official Gazette of the Spanish State on July 7, 2012 and entered into force on July 27, 2012. (Spain, 2012) and the Royal Decree 980/2013, of December 13, for develop certain aspects of Law 5/2012, of July 6, mediation in civil and commercial matters (the "Regulation Act") (Spain, 2013) and according to this acts, mediation process must be (Conforti, 2014, 24):

- willfulness and free disposition (art. 6).
- equality of the parties and impartiality of the mediator (art.7).
- neutrality (art. 8).
- confidentiality (art.9).
- good faith, respect and cooperation (art.10).
- guarantee the identity of the participants (art. 24.1).

In addition to that, mediator must to be sensible to the mediation characteristics:

- Interaction between client and mediator (on caucus, for example) or between parts and mediator (joint session) must be in the synchronic way to be considered interaction.
- Mediator must apply all the mediation's techniques, I mean, deal with emotions, empowerment, recognize the key to transformation in conflict, future focus, reframe, summarize-review, allow narratives, talk about feelings, responsibility, do appreciate questions, identify unmet need behind the no, give homework for the next session, help the parties to see and reach their own boundaries, descale high emotions in search of calm and respect, validate them, redirect the dialogue, etc.
- Mediator must see the parties; the visual contact with them will allow him to read body language such as reactions, predisposition to cooperate, low or high interest, etc. And the most important thing: mediators can certify identities of parts, through themselves.

As a first conclusion I will said that **"e-Mediation is the result of enforcement of the sum of the mediation laws and the characteristics of the mediation processes"**

As a more technical definition I will use this one: **"e-Mediation is a process done partially or totally by electronic means, in a more or less simple way, in which always the parties' identity must be guarantee as well as the principles and characteristics of the mediation process, which always will be carried out by a mediator as a trained neutral third party to help the parties to reach the agreement."** (Conforti, 2014, 22-24 and 62-63).


## Legal and non legal difficulties
And the solutions I found to each-one.

Of all the legal requirements; "confidentiality" and the "identity of parties guarantee" were the two of them that called my attention, because according to the law, the mediator is the responsible for this, so I ask myself: how will I do that?

1. Regarding "confidentiality" a question appeared: is valid a clause that the parties authorize me to transfer information to a third party?
   I suspect not and to be honest, I'm not interested at all to go into court to get the answer, so I saw it clear: as a mediator I must keep all the information with me all the time.

2. Regarding "guarantee the identity of the participants" the first question was: an Electronic ID[2] should be a solution?
   We all know a person who has lost his credit card and has had a big problem because "he has made a lot of purchases, or had withdrawn money from an automatic bank cashier, etc", but he hasn't.
   I bet we can say with a high degree of certainty, that a person with an electronic ID of other can do a lot of things trough the net. Electronic ID certifies that the person connected has that ID, but does not guarantee the identity of the person.

3. The second question was: a Skype[3] videoconference should be the solution?
   Well, all the free videoconferences in public environments do not guarantee privacy or

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[2]   It is also important to stop here and think that when the identity certification with a electronic ID is achieved, the identity with an electronic ID, is technologically achieved, then we would have to work to unify standards of electronic ID in whole Europe. All this has been originates in the European Directive 2008/52/EC. (Conforti, 2014, 43).

[3]   Skype is an application to do free videoconference for public use through the Internet. It is trademark with © of Skype SL.

confidentiality of communications[4], in fact they auto-exclude their own responsibility for the service provided: you can confirm this by reading the terms of use or contracts conditions of this free services (Skype, 2014, 12), but also there is another problem: according to he law , the sessions must be registered by e-mediator in order to be used later on for audit if it is necessary (Spain 2012, arts. 2.5 and 24).

Now about the principles and characteristics of the mediation processes, we have:

• Regarding "interaction" the question was: if mediation is a "face-to-face meeting between parties", have we the technical ability to do it synchronized? Or will mediators give up doing in that way? The answer was clear once: yes, we can have face-to-face synchronized meditation sessions.

• Regarding "the mediation skills" the question was: with which platform the mediator can apply all their techniques with? I mean, to deal with emotions, read the body language, etc.

To summarize the four big challenges or difficulties I would say that they are:

1) the Confidentiality (art. 9 of the Law 5/2012)
2) the Guarantee of the participants identity (art. 24.1 of the Law 5/2012).
   The importance of these first two aspects in on-line mediation is huge due to the possible criminal offenses: arts. 197.5 and 199 of the penal code regarding confidentiality (secrets disclosure) and art. 401 of the same Law regarding identity impersonation (civil status usurpation),
3) the Interaction (synchronous)
4) the Mediation Techniques and Skills (deal with emotions)
   The importance of these last two aspects in on-line mediation is huge because if these aspects are not satisfied we will be doing something else but not e-mediation.

## The solutions I found to each-one

I must confess that, for many years (6 years in fact) I could not corroborate this right, because no one was talking about e-mediation.

When I read Professor Ethan Katsh «This book is, I believe, the first one on focus specifically on e-mediation» (Conforti, 2014, 6) I felt comforted as if the moment has arrived.

As Professor Ethan Katsh said «Much of the writing on ODR from the United States neglects these topics, in both offline and online mediation in the U.S. are informal and less subject to data protection and other types of European-based directives.» (Conforti, 2014, 6).

I was on the right way, so how can I take advantage of my knowledge and experience (since 2009 I've been the director of Communitarian Mediation Service at Alicante Town-hall, so I can say I've a lot of experience in mediation) to design and develop an e-mediation system for dealing with disputes through the Internet like I do in my daily work?

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[4]   Also I must call readers attention to the fact that all the communications through United States Servers are scanned by different agency of US government agencies. President Obama and the National Security Agency U.S. have recognized that access to Google, Facebook and Skype (between others). (The Washington Post, 2013) (The Guardian, 2014).

We can divide an e-mediation process in two parts:

(A) The first one consisting by the apply, invitation letter, caucus session act, initial joined mediation session act, final joined mediation session act, I mean "the papers".
For this stage I imagine a desktop software to manage electric files, so all the information will be handled, saved and kept by e-mediator, in that way the privacy and confidentiality can be guarantee by e-mediator.
In this point it does not make sense any sense to discuss the synchronism and asynchronism, because all the information will be all the time on e-mediator hands or at he computer (to be more specific).

(B) The second one, is the mediation sessions with parties. This part is a little bit more complicated because the application must take care of privacy and confidentiality; it also must guarantee the parties identity and allow e-mediator to apply their techniques.
The unique technology system that allows us to avoid phishing and the identity of the parties, in a simple way for all users, is private and secure video conference that is developed under "https" protocols.

Eureka, the solution is here: **a desktop software plus certain type of "https" video-conference system !**

**And I did it**. I imagined and designed an e-mediation system for dealing with disputes trough Internet with the sensitive to both the novel capabilities of the tools employed and to the legal consequences of employing these tools.

And that was what I did. **Mediar OnLine ([www.mediaronline.com](http://www.mediaronline.com)): the unique hybrid software for e-Mediation.**

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