

Mediator Guide to Online Mediation

Introduction

Set out below is a guide to conducting online mediations using a video conferencing service provider. Our experience at CEDR is that video conference mediations can be very successful by providing a more cost effective and environmentally friendly mechanism for dispute resolution.

In order to create an environment which is conducive to settlement it is important that the mediator think carefully about the process from the outset and that he or she is familiar with all the relevant equipment and functions. Lastly, if things don't work out as planned – always agree a Plan B (see further below).

Equipment

Having the right kit is key to conducting a successful online mediation. Mediations may be conducted simply by using Smart Phones when in a pinch. However, CEDR have found that online mediations work best when they are done using the proper equipment. There are certain requirements that are essential to any online mediation, whilst others may be seen as nice to have or enhancements.

1. Essential Equipment/Functions

- a. A laptop/tablet with a microphone and camera
- b. A strong secure internet connection
- c. A secure video conference service provider such as Zoom Pro, Webex, GoToMeeting, or Skype for Business, which has the following functions:
 - i. Waiting Room – holds all participants on their own separate lines until the mediator opens the call. Participants are not able to see or interact with the mediator, which ensures everyone is present at the time the call is opened. Please note that this function does not allow participants from the same party to speak to each other. Everyone is held on a separate line.
 - ii. Breakout rooms – the ability to allow each party to have their own separate virtual room where they may discuss matters with the mediator or amongst themselves confidentially.

2. Optional Equipment/Functions

- a. A separate microphone, possibly with headset. These tools may assist you with clarity and volume. Models such as the Platronics Blackwire 3200 are a reliable, cost effective option.
- b. A large or double screen, which will assist with viewing documents.
- c. A video conference service provider with screen share and a white board function can assist with discussions and make the mediation run more smoothly.
- d. A stylus that interacts with your laptop or tablet in order to use the white board function mentioned above.

Party Participation

Most video conference service providers, require the host or organiser to have a paid account. For example, the free version of Zoom does not satisfy security requirements and only allows meetings to last for a maximum of 40 minutes. Zoom Pro however, is secure, allows for up to 100 parties and enables the mediator to carry on a marathon meeting if necessary.

Typically, the attendees do not need to have a paid account and they can register and join the mediation for free. When working with a law firm or institutional client they may need administrator approval to download the necessary software and you should check this with each participant in advance.

As good practice, the mediator should check that these points in advance and request the parties to log-in and test that they can use the system. One way to do this is to hold the introductory and/or preparation calls using the videoconference.

Presentation

The Parties will be able to see you from the waist up and the background in your room. In order to showcase your professionalism please be mindful of:

1. Background – ensure it is neat, tidy and professional. If you are in a spare room ensure that the bed or clothing is not visible. Also, refrain from using an optional background available through the videoconferencing service provider. It may be tempting to conduct the mediation with the Tower Bridge in the background, but these backgrounds are meant to be used with a green screen and will become skewed if not applied properly.
2. Lighting – ensure that your surroundings are well lit. In particular, you do not want to have a bright light or window behind you. This will make you appear dark on the partys' computer screens and will make it difficult to see your face.
3. Framing yourself – be mindful of your distance from the screen and try not to sit too close or too far away. As a rule of thumb, your head should take up a maximum of 60-70% of the screen. Always sit with your shoulders back and chin-up.
4. Look at your audience – it will be tempting to look at yourself in the corner of the screen. Be mindful of this and try to look directly at your audience to ensure you are making the best use of eye contact.
5. Familiarise yourself with the technology

In order to install confidence in the parties, it is imperative that you are the expert in using the technology and that you are able to competently use the technology. Most of the major providers have fantastic users guides which you can watch online (e.g. Zoom <https://support.zoom.us/hc/en-us/articles/204772869-Zoom-Rooms-User-Guide>).

Process Design

As all mediators know, every mediation is different and it is very important to consider the process which will work best for the parties, taking into account their technical capabilities, available time, attention spans and environment. Sitting on a video conference for eight hours or more can be a challenging and draining experience for even the most focused and determined participant. Add to this, distractions, such as interruptions at home, emails and phone calls and loss of engagement from the participants is a much higher risk.

Our experience is that mediations lasting 3-4 hours, can typically carry on in the same manner (subject to the Ground Rules listed below), whether they are conducted in-person or as a video conference.

When approaching a case that would typically take place over a full day, try to think outside the one-day mediation model and consider the following:

Logistics

1. Are all parties joining the mediation in the same manner? It is best to conduct the mediation on an even footing where possible and we encourage parties to join in the same way (i.e. everyone joins by video conference or lawyers attend in person and the clients attend by video conference). Mediations may be conducted in other ways, but in our experience this approach is best practice.
2. Will each party's participants join separately or together (i.e. will each member of the party log-in from a different location or will they all be in one room together)?
3. Where will the participants join from – both in terms of location (are there different time zones involved) and environment (are they joining from a home office or are they dialling in from a room where another member of the household may walk-in such a bedroom or sitting room)?
4. Consider timing of sessions and breaks and keep the parties clearly informed on logistics. More rigour may be required than in mediations where all parties are available physically during the process.
 - a. Sessions
 - i. Keep plenary sessions to a maximum of 60 minutes
 - ii. Keep breakout sessions to a maximum of 30 minutes
 - b. Breaks
 - i. Schedule screen breaks for both yourself and the parties. You could have 15 minutes every two hours or build in an extra-long lunch break of say two hours. Encourage the parties to get away from their computer, get a change of scene or even some exercise.

Work in Advance of the All Party Mediation

This consideration is key and will have an impact on all other aspects of the mediation.

5. How much work can be done with the parties in advance of the mediation? The mediation starts from the moment the mediator makes contact. You may want to schedule several early calls with each of the parties to complete the exploration and

possibly the beginning of the bargaining stage before bringing everyone together. You may want to use the same communication system format for communications from the outset, to build trust, connectedness and regular practice experience with the communication system.

6. Consider splitting the mediation over several days. This will need to be agreed with the parties and a deadline will need to be set in order to ensure focus. For example, you may want to schedule the mediation to begin in the afternoon of day one lasting for 3-4 hours and then carry on with another 3-4-hour session on day two, aiming to finish at lunch on that day. When scheduling a cross-border mediations allow for international time zone considerations.
7. Check carefully on the likely environment the parties will be using for the video conference, so you can manage in advance questions of privacy, others present, possible interruptions or absences.
8. Consider carefully the information needed to negotiate. Parties will expect their opposing party to be in a position to more readily access information if they are attending remotely. Conversely also watch out for parties who try to access documents and focus on them, distracting everyone from what is important.
9. Consider using a tailored mediation agreement and process flow plan document so that parties are clear about logistics, privacy, how the day will work and conclude.

At the All Party Mediation

10. Set firm ground rules about how the day is going to work (see below):
11. Give the parties tasks to complete during the breakout sessions – but be sure to agree who can be involved outside the participants. This will keep them focused and guard against distractions or interruptions.
12. Give clear timing guidance to allow those not with you, to have a break from their screens.
13. Use a messaging function to manage expectations and alter agreed timings or process. Also use this function to allow parties to message you that they want to see you.

Settlement

14. Agree in advance how the settlement agreement will be drafted and executed. In particular parties should be aware of any formalities that are required by their organisation.

It is important to address these considerations up front with the parties and tailor the mediation process accordingly.

Ground Rules

In addition to the normal rules of mediation which you are familiar with, such as the provisions set out in the CEDR Model Mediation Code, there are online specific issues which you need to consider, as you will not have full visibility and control of the environment where the mediation is taking place.

1. Confidentiality
Reinforce the confidentiality provisions and the effect of without prejudice privilege.
2. Privacy
Ensure that the parties agree in the mediation agreement (and remind them on the day) that only individuals listed on the participant form may attend or be present in the rooms where each party member is joining.
3. Recording
Agree in writing (and remind the parties on the day) that recording is not permitted. Ensure that you have taken steps to prevent recording through the video conferencing software. As the Host or Organiser, you will most likely have ultimate control of this.
4. Planned or Possible Interruptions – Know in advance and discuss with the parties.
If a participant may have an interruption from another household member it is important to alert the other side to this possibility as unexpected interruptions can negatively impact the trust between the parties. For instance, if there are small children present in the house who may interrupt.
5. Joint meetings – Keep microphones on mute
This should be the default setting to avoid distraction from multiple background noise.
6. Actively manage communication-
Given the virtual setting the mediator will need to more clearly indicate whose opportunity it is to speak.
7. Use of Phones/Checking Emails
Parties will be receiving emails and communications on the device they use to log-in to the mediation. Agree ahead of time if participants should have email and messenger functions closed and off during the mediation.
8. Explain how the mediation will run
From timing and conclusion to how the waiting room and breakout functions work. Provide parties with a guide and discuss it with them and their advisors prior to the day.
9. Have a Plan B
Give the parties a clear process to follow if there is a technical issue that arises. In particular, please be clear with parties what steps to take should you lose your connection. This should include instructions on how to reconnect and a back-up telephone or chat function to communicate.

Professionalism

1. Mediators have many matters to juggle in a normal face-to-face mediation. Ensure you have practised sufficiently with the conferencing technology so that you can work with it in a relaxed way and stay focused on essential communications.
2. Encourage adoption of regular screen breaks for yourself and the parties, the equivalent of reflection time or walking between rooms.
3. Consider how you are going to access technical support or personal refreshments support during the day. Consider whether you need to alert the parties to any arrangements. It is important to be transparent with the parties if there are likely to be interruptions or others who may come across mediation communications.
4. The core of mediation practice involves connectedness and trust between a mediator and the parties – be alert to how best to develop this with virtual technology, including sharing in an open manner with the parties if you are experiencing difficulties with the technology or are testing ways of making the process most effective.

Conclusion

We at CEDR hope that you found this guide helpful. If you have any questions please contact CEDR by email at adr@cedr.com.

