

Best Practices for Remote Mediations

A. Introduction

1. These Best Practices are important considerations for Counsel and Mediators both before and during remote Mediations.
2. In deciding whether to proceed with a remote Mediation, Counsel should consider the circumstances of each case carefully. A remote Mediation may not be appropriate in every case.
3. Counsel does however have an obligation to move matters forward and shall consent to a remote Mediation unless to do so would result in significant unfairness, injustice, or prejudice.
4. Per the Superior Court of Justice *Consolidated Practice Direction* dated May 13, 2020, all counsel and parties are expected to cooperate and engage in every effort to resolve matters.¹ This includes attending a remote mediation – whether prescribed or not – where a mediator is willing to conduct the mediation remotely.

B. Neutrality of the Mediator Must be Maintained

5. The Mediator should host the remote Mediation and maintain control over the platform at all times.
6. In order to preserve the neutrality of the Mediator, the parties should enter a “virtual waiting room” each time they log on. Once all parties are logged on and in the waiting room, the Mediator may admit the parties into the Mediation.

C. The Mediation Agreement

7. The parties should sign a Mediation Agreement which permits them to participate in the remote Mediation and outlines the terms of proceeding.
8. Each Mediator will likely have his or her own preferred form of agreement. Counsel should request a copy of the Mediator’s form in advance of the Mediation to ensure they are agreeable to the terms.
9. The Mediation Agreement should indicate the Mediator will be the host of the Mediation and will maintain control of the platform at all times.

¹ <https://www.ontariocourts.ca/scj/notices-and-orders-covid-19/consolidated-notice/>

10. The Mediation agreement should also include the following:
 - a) The agreed upon secure online platform to be used for the Mediation and execution of documents;
 - b) How connectivity issues will be addressed, including a technology fail protocol;
 - c) All planned participants and how privacy will be maintained;
 - d) A commitment to an interruption free proceeding;
 - e) How caucuses will be facilitated and a caucus fail protocol;
 - f) A prohibition against video or audio recording of the mediation; and
 - g) Other rules regarding for example breaks, communication, using the mute function, and using the chat function.

11. Important considerations with respect to each of these matters are set out below.

a) Secure Platform For The Mediation & Execution of Documents

12. A secure online platform should be used for the remote Mediation. The Mediation Agreement should indicate the agreed upon secure online platform.
13. When scheduling the Mediation, Counsel should speak with the Mediator to determine the Mediator's preferred choice of platform (i.e., Zoom, WebEx, GotoMeeting, etc). Counsel should also research and obtain the most up to date data on the security of the platform to be used prior to agreeing to proceed. The security and confidentiality of the Mediation proceeding must be maintained at all times.
14. Counsel should also agree upon and use a secure online platform for the transmission and execution of documents (i.e., docusign.com or other comparable platform). In the event original signatures are required or preferred, copies for execution may be transmitted for printing and signing.
15. Prior to Mediation, Counsel and parties should download and familiarize themselves with the necessary hardware and software for the selected platform. The parties should prepare their computer, screens, microphone, camera and phone ahead of time by ensuring that they are functioning properly and are charged to capacity or plugged in. "Appendix B" to the Best Practices for Remote Hearings – Recommended Hardware and Software to run online events is a useful resource to review for this purpose.

b) Connectivity & Technology Fail Protocol

16. All parties will require a connection to the internet.

17. The parties should avoid using a public Wi-Fi connection because connection speeds are slow and security is unknown. If possible, the parties should use a hard-wired internet connection (Ethernet Connection) or a password protected private Wi-Fi connection. The parties should avoid using unsecured public Wi-Fi connections or Wi-Fi hotspots and should advise the other parties in advance of the Mediation should they not have access to a secure Wi-Fi connection.
18. A laptop/tablet with a camera and microphone are preferred for remote Mediations. Smartphones are not recommended.
19. All parties should join the Mediation 10-15 minutes prior to the start time to address any connectivity issues.
20. The parties should agree upon a technology fail protocol in the event the technology fails to operate properly or delays the Mediation. This should include ensuring the Mediator and counsel have telephone numbers for all parties involved in the Mediation and consideration of holding the Mediation by conference call if there is no other way to continue the Mediation remotely.

c) Ensuring Privacy is Maintained

21. The Mediation is a private proceeding. The Mediation Agreement should include an undertaking that Counsel will take all necessary steps to ensure the privacy and confidentiality of the proceeding. This includes, but is not limited to:
 - a) Determining where the client will be situated physically during the Mediation (i.e. the client's home or the lawyer's office).
 - b) Determining who, if anyone, will be present with the client during the Mediation.
22. At all times, the client should be in a private room where the client will not be overheard by others. All individuals in each virtual room should be identified at the onset of the Mediation.
23. Parties should check their physical settings and ensure that they are visible for the Mediation (i.e., light sources behind the party may cause a shadow). The camera should also be set up to provide a view of the entire room or permit an occasional scan of the room to ensure privacy of the proceeding.

d) An Interruption Free Proceeding

24. The Mediation Agreement should include an agreement that all parties take all reasonable precautions to ensure an interruption-free proceeding.
25. The parties should cooperate and make best efforts to ensure the Mediation is interruption free. This includes, but is not limited to, scheduling the Mediation at convenient times for all parties, making necessary arrangements where possible for child care, and removing animals from the room.

26. The parties should turn off all mobile devices, computers and tablets that are not being used during the remote Mediation. The parties should also disconnect any sound or notifications on their devices to minimize noise during the Mediation.
27. The parties should plan for and allow frequent breaks to address unanticipated and unpreventable interruptions. The parties should also cooperate with one another and maintain patience should interruptions occur.

e) How to Caucus - Private Meetings & Caucus Fail Protocol

28. At times, the Mediator may need to caucus with each party separately. The Mediation Agreement should include an agreed upon format for caucus, as well as a protocol in the event confidentiality of the caucus is breached.
29. The online platform should permit the mediator to “mute” one party while continuing to communicate with the other party for a caucus.
30. The Mediation should also offer a remote ‘breakout room’ which is not accessible to any other party to the Mediation. This can be offered through the agreed upon secure online platform. In the alternative, each party may secure a separate, online platform which the Mediator will have access to during caucus.
31. The parties should agree upon a caucus fail protocol. If a party, for whatever reason overhears the private caucus between the Mediator and any other party, the party should immediately end the remote Mediation session and contact the Mediator by telephone, email or text to advise of the failure.

f) Video and Audio Recordings Prohibited

32. Mediations are private, without prejudice settlement proceedings. The Mediation Agreement should prohibit video, audio, or any other recording of any part of the Mediation proceeding. This includes screenshots of the Mediation session.
33. The Mediation Agreement should also include an agreement that the Mediation will not be transmitted via live or deferred video or audio relay to any other person or party.
34. The Mediation Agreement should also require that any accidental recordings be destroyed immediately and not disseminated to others.
35. Counsel and the Mediator should advise and remind clients during the Mediation session that they are not to record any part of the Mediation by any means.

g) Other Rules regarding breaks, using the mute function, using the chat function

36. The Mediation Agreement should also address other matters including for example:
- a) An agreement regarding regular breaks throughout the Mediation. This will help ameliorate fatigue and reduce interruptions.
 - b) Instructions to mute devices and turn off video during breaks to maintain privacy.
 - c) Instructions to refrain from using the chat feature during the Mediation due to the risk of the message being viewed by all parties. Should Counsel need to communicate with their clients by text or similar means, they should use a separate secure communication platform such as WhatsApp.

D. Preparing the Client for the Remote Mediation

37. Counsel should ensure that the client has the appropriate technology and knowledge to mediate the matter remotely. This includes confirming that:
- a) the client's device (IPAD, laptop, computer or as a last resort, phone) is working properly and has the appropriate application installed;
 - b) the client's device has a working camera and microphone; and
 - c) the client has an appropriate space to conduct the Mediation either at the client's home or in a secure room at Counsel's office.
38. Counsel should arrange an alternative mode of communication with their client in the event the technology fails during the Mediation. The client's phone number and email should be accessible during the Mediation. The client should be advised to immediately contact their Counsel through this alternative mode should their equipment fail (i.e. sound is interrupted or stops working).
39. In advance of the Mediation, Counsel should prepare their client for the Mediation by using the same platform that will be used at the Mediation. This will provide the client with an opportunity to become comfortable with the platform. In addition, it will allow Counsel to ensure that their client has appropriate technology and internet capacity to participate in the Mediation.
40. Counsel should ensure the client is aware of proper online platform etiquette, particularly for successful communication during openings and caucuses. This includes advising the client only one person should speak at a time and to be wary that there may be a delay with sound or video.
41. Counsel should also discuss an appropriate dress code with their clients. This includes ensuring clients are dressed from the waist down.

E. Matters to Address During the Mediation Session

42. The Mediator should set and remind the parties of the ground rules for the Mediation during his or her opening statement. This includes but is not limited to:
 - a) The requirement that only one person speak at a time;
 - b) how to address each other;
 - c) how the parties should make it known they wish to speak;
 - d) the importance of privacy of the Mediation; and
 - e) the prohibition on audio and video recording.
43. To ensure the success of a remote Mediation, Counsel and all parties should be mindful of the following:
 - a) **Their background:** The parties should choose a solid neutral wall and remove any distracting clutter and personal items. Similarly, any privileged or confidential material should be removed from camera view.
 - b) **Their positioning in front of the camera:** The parties should sit close to the camera. The camera should be positioned at eye level to enable a clear view of the parties face.
 - c) **Their attire:** The parties should ensure they are fully dressed and their attire is appropriate for Mediation. They should avoid wearing bright colours or patterns that cause distracting effects on screen.
 - d) **Their visibility:** The parties should ensure their lighting does not cause shadows or limit visibility on screen.
 - e) **Their gestures:** The parties should avoid using hand gestures or non-verbal cues that may not be captured on camera.
44. The parties should look directly at their webcam when speaking, not the screen.
45. The parties should use headphones with a microphone for clear communication and to reduce background noise. The parties should speak directly into their microphone and ensure they are not muted before speaking. A regular speaking voice should be used as the online forum can amplify or exaggerate sounds.
46. The parties should ensure that only one person speaks at a time. The parties should be mindful of any lag or latency in the audio to ensure that a party is done speaking before the next party begins.
47. The parties should use the mute option on their microphone when not speaking.

48. For additional useful tips to ensure a successful remote Mediation, the parties should refer to “Appendix A” to the Best Practices for Remote Hearings – On-Screen Tips for Counsel, Parties and Witnesses. Counsel should consider sharing this document with their clients prior to Mediation.