

CMC Guidance – Online & Remote Mediation



This guidance borrows heavily from CEDR’s guidance for mediators working remotely, published in 2016ⁱ. The CMC is grateful to CEDR for allowing it to use that document as the basis for this guidance and to repeat much of that guidance. The CMC will review and update this guidance from time to time. Mediators should check civilmediation.org for the latest version.

This Guidance is for mediators carrying out mediation remotely, whether by video or voice-only connections. It is not intended to supersede anything in a mediator’s Code of Practice, which mediators must continue to adhere to whilst carrying out remote mediation.

Prior to the Mediation

1. Security and Data Protection

Mediators should ensure e-mail addresses and any file sharing facilities used are secure and that they have adequate data protection procedures and privacy notices in place. This should include an appropriate policy for deleting files and removing confidential information about the parties on their system after a specified length of time.

The ICO website has information about data protection including for small businesses:

<https://ico.org.uk/for-organisations/business/>

2. Choosing and setting up the platform to use

Just as you would choose and set up a mediation room carefully, you should choose the platform from which you conduct remote mediation carefully.

Whichever technology you choose, make sure you know how to use it. Make use of free trials and online tutorials for the platforms you are trying out, and have test runs with the technology to make sure it works and that you know how to use it. You should only use technology that you are comfortable in using, but this can come through practise and testing.

The CMC cannot recommend using any particular platform to work from. Our mediators have told us they have used Zoom, Skype, Microsoft Teams, Facetime and WhatsApp to make video calls – there are of course many other platforms available, often with a variety of packages and prices on each.

Mediators should consider what facilities they will require while mediating remotely when choosing a platform to work on.

Considerations when choosing a platform/devices to use include:

- The stability of the internet/telephone connection both for the mediator and participants;
- Whether you will need to be able to speak to individuals on their own at any point, as well as collectively, and how you will manage this. Some video conferencing facilities allow you to put individuals in to ‘rooms’ of their own, invite participants to join at different points during the call etc, whereas others do not;
- How confidentiality can best be maintained, for example whether you can control who can record conversations;
- Whether to use video conferencing or a voice-only connection. Video conferencing is more stilted than real-life and the mediator should be aware that parties can feel under scrutiny; At the same time, video conferencing can be a benefit to parties, to see that the other side are real people.
- Whether the mediator will need access to a computer/device in addition to one that is being used to connect to the meeting. For example, mediators may want to take notes or type up an agreement – is a separate computer required, or is it preferable to be done on the same computer as a video conference so your screen can be shared?

It is possible to combine methods of working – for example having telephone calls individually with participants before a plenary session via video conference.

3. Control of the system

It is far better that the mediator is in charge of the technology system. If the technology is provided by others, the mediation should ensure that they have control of how the meeting will be set up, that meetings remain private, and confidential and have agreements in place to reflect this.

4. Participants' use of the technology

Mediators should send details about how the mediation will be conducted to participants in advance of the mediation, checking the participants know how to use it and are comfortable with this. If the parties are not, the mediator should devise an alternative method. This should include determining whether parties will be using video conferencing or voice-only connections – the mediator should make a pro-active decision about this, rather than letting parties decide on the day how they feel.

5. Impact on relationship with participants

The mediator should be aware of the effect of technology on process and relationship. When using online technology, rapport takes longer to gain and can disappear more quickly.

It is important to have both pre-mediation and early rapport building sessions as much as is possible. The mediator should make the same or more effort as for an 'in person' mediation to speak to the parties beforehand and discuss the case with them privately.

6. Signature

There will need to be a way for parties to give their signature remotely and it needs to be agreed in advance if it needs electronic verification or similar.

7. Backup

It is absolutely critical to have a backup option in case the preferred technology does not work (e.g. we will have a conference call by telephone). This should be explained to participant and reflected in the mediation agreement.

8. Agreement to Mediate

The Agreement to Mediate should reflect the remote nature of the mediation. It is important to incorporate terms to protect the confidentiality of the process, and so mediators should consider introducing terms such as

- a. The mediator and participants will not create any electronic video or audio recording of the mediation;
- b. The mediator and participants will not make or allow any live or deferred video or audio relay of the mediation to others;
- c. Only the participants to the mediation, the mediator and anybody agreed in advance (e.g. participants' lawyers) will be present in the room used by each participant during any mediation session.

During the Mediation

9. Starting the mediation

The mediator and the parties need to be clear when the mediation has begun and what communications are confidential and without prejudice. This should be expressly stated at the top of emails and the beginning of mediation meetings, telephone calls etc. The mediator should ask each person present in the mediation to confirm they understand the confidentiality requirements and will adhere to them.

10. Confidentiality and privacy

Confidentiality and privacy can be less clear in an online context and so the mediator may need to be more forthright about confirming ground rules at the start of the session. The mediator needs to feel confident that parties are not having private conversations with individuals who are not formally part of the mediation, making extensive notes or transcripts and that the mediation is not being recorded.

11. Engagement

The mediator needs to check that people are engaged as it is easier to become distracted if communicating remotely. This is especially the case if the party has not left the office and may have other work to look at. When leaving parties for an extended

period of time, the mediator should therefore either set a necessary task for the party that is relevant to the mediation or be clear that there is a break and that the parties can do something else. Leaving parties to their own devices for long times online is likely to lead to disengagement.

12. Using backup options

If the technology fails, remember you have an alternative method agreed. Do not delay for a long period to allow for technology to be fixed but use the alternative method.

13. Concluding the session or the mediation

There needs to be a clear final statement by the mediator informing the parties when the mediation has finished and that the confidentiality and without prejudice provisions in regard to future correspondence are ending. Any future discussions need to be then organised within the context of a new mediation day.

Following the Mediation

14. Communication

Any communications after the mediation should have a clear purpose and either be in a bargaining or concluding phase or arranging a future mediation day. Any discussion about exploring issues or raising new points should take place in an extended mediation process, not by post-mediation correspondence. Ensure any correspondence continues to be appropriately marked if it is private and confidential or not. A good rule of thumb is to assume that any communication might be used by any party inappropriately. If something is extremely confidential or difficult to explain by email, speak to the party directly instead.

CMC

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ⁱ CEDR Advice on Mediators working with Technology,
<https://mk0cedrxdkly80r1e6.kinstacdn.com/app/uploads/2020/02/Advice-for-Mediators-on-working-with-technology.pdf>