

Online Mediation

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Appendix A - Choosing an Online Videoconferencing Platform for Security and Confidentiality

The following guidelines for online video mediation are divided into two sections: first, practices that should be mandatory for a safe and confidential online session, and secondly recommended practices that the mediator and the parties should consider, depending on the circumstances of the specific session. Following that, specific recommended settings for Zoom and Webex, two of the most popular platforms, are included.

Every platform available has a combination of effective security and confidentiality measures, along with risks and technological weaknesses. Just as in an in-person mediation, parties should assess the security and confidentiality of platform just as they would the physical location. While there is no location or platform that is perfect, there are platforms, with the proper protocols in place, that mitigate any risk to an acceptable level.

Mandatory Practices for Every Platform

- Revised Agreement to Mediate that specifically addresses online processes and issues (see Appendix B - *Key Provisions for Online Mediation Agreements*);
- Participant letter and checklist detailing all technology and other practices and requirements needed (see Appendix C - *Model Participant Preparation Letter for Online Mediation*);
- Adherence to minimum security protocols for online video mediation applicable to the platform you choose;
- Pre-meeting online session to test and address technical issues prior to the actual session;
- Secondary contact information for all parties available to the mediator to help manage technical issues during the session;
- Agreed processes for securely sharing documents during the session. There are numerous options from cloud locations to secure email to various screen-sharing options which should be explored and decided prior to the session;
- Agreed processes for securely signing settlement documents during the session;
- Discussion with all parties on the benefits and risks of online mediation and the platform being used;
- Clear and unequivocal informed consent from all parties to proceed with the online session.

Recommended Best Practices

- Establish a back-up process in the event of technology issues. This could include:
 - Conference call facilities booked and ready, if needed;
 - Secondary video meeting technology booked and ready, if needed;
 - Exchange of cellphone or other telephone numbers that allow texts and calls among participants and mediator.

Telephone Conferences

It should be noted that with mediation, if it is to be conducted by conference call alone, telephone conferencing systems have security considerations that should be addressed, such as over-hearing speakerphones and the unencrypted nature of many audio channels.

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1. Zoom - Best Practices

Zoom is currently the most common platform for online mediation and has been used for online arbitration as well. The ADR Institute of Ontario (ADRIO) does not endorse or recommend any particular platform. The ADR Institute of Canada (ADRIC) has a preferred pricing arrangement with Zoom for the benefit of its members and their clients, should they choose that platform, but both ADRIO and ADRIC recommend the parties, with the support of the neutral, choose the platform that best meets their needs.

Since Zoom is currently the platform of choice for many mediators, below are some best practices for working with Zoom.

Security and Confidentiality Settings

In the host account on Zoom (the mediator's account), the following settings in the Settings Menu should be established:

Recording:

- All settings should be disabled so that neither local nor cloud recording features are enabled. In addition, the host should understand exactly when and how recordings may be engaged and by whom, and what indicators appear so that this may be monitored. If you see a "record" icon in your Zoom menu during a session, the record feature may not have been disabled.

Meeting:

- **Password:** Always require a password when scheduling new meetings - Set to On
- **Chat:** Prevent participants from saving chat dialogue - Set to On
- **Auto Saving Chats:** Set to Off
- **Sounds:** Play sound when participants join or leave - Set to On
- **Telephone:** In Telephone Settings, mask the showing of each participant's phone number to other participants.

When Scheduling a Meeting:

- **Meeting ID:** Generate Automatically: Set to have a meeting ID generated automatically for each session. Do not use a Personal Meeting ID for a session.
- **Audio:** Select Computer Audio. Telephone should not be selected unless it is established in advance that one or more parties will need to access the mediation using a telephone.
- **Waiting Room:** Enable Waiting Room
- **Joining the meeting before Host:** Do not allow participants to join before the host.

Other Settings to Consider

Many settings in Zoom should be established on a meeting by meeting basis by the neutral depending on the mediation agreement.

Under the **Security button**, the following should be considered:

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- **Locking the meeting:** Once all participants have joined, consider “locking” the meeting. This prevents anyone else from joining. Should a party get disconnected, be familiar with how to unlock meetings during a session to allow them back in.
- **Waiting room:** A waiting room is a good feature to use. It prevents parties from interacting prior to the neutral joining the meeting, and it enables the neutral to vet who is in the waiting room before letting them into the meeting.
- **Screen Sharing:** Parties should decide how they want to share documents during the session. If parties agree to use the Zoom screen sharing option, this should be enabled.
- **Chat:** The host has multiple options to allow chatting privately between any individual participants, only with all participants publicly, or only with the host. For mediation, chatting privately may be useful.
- **Participants renaming themselves.** First, parties should be asked to use their name and role as their screen name during the session. The host should restrict parties’ ability to rename themselves during the session.

Under the **Participants button**, the following settings are recommended, but can be varied depending on the session:

- Mute Participants on Entry - Enable this
- Allow Participants to Unmute Themselves - Enable this
- Play enter/exit chime - Enable this
- Breakout rooms: The host should maintain control on the breakout rooms, if they are being used, as follows:
 - Move all participants into breakout rooms automatically - Enable this
 - Allow participants to return to main meeting at any time - Disable this, to prevent any party appearing in the main room.
 - Close automatically - Disable this

With the Security and Confidentiality settings above, Zoom has established a platform that can meet these needs of parties in most mediation settings.

Zoom is also actively improving security features on an ongoing basis, recently allowing meeting hosts to restrict the geographical location of servers that a specific Zoom meeting is routed through, to prevent Zoom traffic from being routed out of North America or other specific jurisdictions. As all platforms are regularly updating their offerings, consult with each platform for specifics.

It should be noted that the Ontario Bar Association is actively recommending and supporting Zoom-based mediation and arbitration processes provided the appropriate security and confidentiality settings are employed.

Please look at the Zoom blog for its security updates: <https://blog.zoom.us/wordpress/>

2. Webex by Cisco - Best Practices

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Webex by Cisco is generally considered to have stronger security and encryption standards than Zoom and other platforms. It should be noted, however, that as recently as January 2020, security issues were identified in Webex that Cisco has since rectified. As with all platforms, parties should research the security and confidentiality standards in place to ensure they meet the needs of the specific session to be conducted online.

The most significant challenge with Webex is that it currently does not have a breakout room function to allow a single session to accommodate a mediation. This may be less of an issue for arbitration, though a separate room for counsel and the arbitrator to confer may be needed. There are, however, some workarounds that have been used by neutrals to address this.

Controlling Access:

- **Registration:** When creating a meeting room, activate the requirement for registration to ensure that only allowed participants can connect and that they each must register so everyone knows at all times who else is connected.
- **Password:** Always require a password when scheduling new meetings and do not send the password with the link to the meeting; just provide it to the allowed participants in a separate correspondence.
- **New Meeting Room for Each Session:** Create a new meeting link for each session. Avoid at all costs keeping the same meeting link for sessions involving different clients.

Controlling Parties' Interaction:

- **Chat:** For mediation, chatting privately may be useful.
- **Screen Sharing:** Parties should decide how they want to share documents during the session. In Webex, sharing can be restricted by document, by application, or by window, which reduces the risk of all participants inadvertently viewing private contents on the computer of the person sharing.
- **Attendee Privileges:** Webex allows the host to control other actions by the participants. In mediation, allowing others to annotate a document shared by another participant can be useful when jointly drafting a settlement. Other privileges, useful in other contexts, might be best to disable in mediation, such as controlling applications, web browser or desktop remotely, view any document or view any page.

Caucus and Joint Session:

One workaround to enable the use of Webex is to create two separate meeting rooms for a single mediation. For a two-party mediation the process can be structured this way:

- **Shuttle mediation format:** In the mediator's location, have one party connected to Webex on one computer in one room (a desktop, for example), and the other party connected to Webex on a second computer in a separate room (a laptop, for example). This would allow complete separation, both technologically and physically, between the parties in breakout rooms.

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- If a joint session is planned: The session can start with all parties on one computer in the same video session, then if a caucus is required the host can disconnect one party and invite them to connect to the other virtual meeting for caucus.

Recording:

- Webex allows the host of the meeting (the mediator) to initiate the recording of the session. It should be understood by all participants exactly when and how recordings may be engaged. While rare in mediation, recording in arbitration can be an affordable alternative to using court reporting services.

Additional Security:

- For additional security, some parties use Webex for the video channel, and connect audio through a conference call channel independent of Webex. This ensures that even if the video feed is compromised, it would be without audio, preserving confidentiality in this event.

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Appendix B - Key Provisions for Online Mediation Agreements

The ADR Institute of Ontario (ADRIO) has developed a checklist for lawyers and mediators to ensure that key considerations relating to online mediations can be addressed in the standard mediation agreement.

They include the following:

- The online video mediation must be attended only by way of a secure internet connection or telephone. Attendance at an open Wi-Fi location, like a coffee shop or library, should be prohibited.
- The mediation agreement should stipulate that video and audio communications and other online mediation information may not be viewed or overheard by anyone other than the parties and their legal counsel, unless permission has been granted by the parties and the mediator.
- Online videoconference passwords and meeting IDs must not be shared or disclosed, except with approved participants.
- The parties should agree not to seek production of any video, audio files, screen-shares, instant messages or chats, or any other data, which may be generated at or from the online mediation.
- The agreement must prohibit the recording or saving of any online mediation data on any device.
- Consider broadening the inadmissibility at trial of all online mediation data and communications.
- Consent and agree that the online mandatory mediation will satisfy the requirement under Rule 24.A with respect to attendance at and holding of a mandatory mediation.
- The mediation agreement should specify if there is any additional cost to utilize the online platform.
- Since the mediation agreement may be signed remotely, provide for a separate counterparts clause and allow for electronic or digital signatures. This applies to signing minutes of settlement as well.
- Specify that counsel has the authority to bind clients and approved parties attending the online mediation to the terms of the mediation agreement.
- Include a clause that parties have assessed the online mediation platform and have freely consented, indemnifying the mediator from any security or confidentiality breaches due to this choice.

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Appendix C - Model Participant Preparation Letter for Online Mediation

1. Your mediation sessions will be conducted over a secure online platform provided (*insert other name of software you are using.*)
2. Within your email invitation will be a link to download and install the software needed, which is free. This platform can be used on a cell phone, tablet, laptop or desktop computer. You will need to have a camera and a microphone, which cell phones, tablets and most laptops have. If your computer doesn't have a camera or microphone, they are available for purchase at most computer stores.
3. If you only have a landline or basic mobile phone, you can call in to the online session, using audio only. The meeting invitation will provide the call-in number and you will be asked to log in on your key pad with the meeting ID and Password.
4. You will receive a new invitation for each meeting that we have scheduled. This letter has instructions on how to join the meeting.
5. You will need a secure Wi-Fi or Ethernet (hard-wired) connection for your computer. A hard-wired connection is recommended, as it will provide the most reliable connection, but is not mandatory. You should NOT use a public access Wi-Fi connection, such as those available in coffee shops or other public spaces and businesses as they are not secure and your information may be at risk.
6. You will receive the Agreement to Mediate under separate email. If you are represented by counsel, they will sign this on your behalf. If you are not represented by counsel, please read the Agreement and confirm by return email that you agree to mediate under these terms.

Confidentiality and Privacy

7. Only the people who have signed/agreed to the terms of the Agreement to Mediate may be present during any online mediation session. You must confirm that you are alone in the room and that you and your device cannot be overheard or observed.
8. Absolute Prohibition on Participant Recording - You, or anyone on your behalf, may NOT audio or video record any mediation session or portion thereof. You further agree that you will not transmit a live or deferred video or audio recording of the online mediation sessions to third parties in any event or for any reason.
9. You acknowledge that you have considered and discussed the risks of using any electronic or online platform, and you have both informed yourself and agreed to accept any such risks.

Best Practices and Troubleshooting

10. Interruption Free Zone - In order to ensure that your mediation session is uninterrupted, please take all reasonable measures to ensure that you have arranged for a location that will be free of interruptions for the duration of the session.

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11. Logging On - You should log on to the platform no less than 5 minutes in advance of the scheduled start time so that any technology issues can be resolved, and your mediation session can start on time.
12. Technology Failure Protocol - Despite all best efforts, at times technology may not operate properly. If you are unable to join a scheduled mediation session or are dropped from the session for any reason, please immediately call your mediator at **XXX-XXX-XXXX** for assistance and direction on how to proceed.
13. Online Communication - Due to the nature of the online forum, it is especially important to allow each participant to finish their comment or statement before responding. Generally, there may be a lag time of about one second, so speaking a bit slower than normal and pausing briefly when finished helps facilitate effective communication.
14. Any documents arising from this process will be shared by (enter document process being used).
15. By agreeing to proceed with this mediation through the use of technology you agree to all of the above issues and processes and hereby release the mediator from any liability in the event of any inadvertent disclosure.

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