

# Mediating from a Distance

Suggested Practice Guidelines for Family Mediators



June 2010

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## Suggested Practice Guidelines for Family Mediators

These guidelines were prepared by Susanna Jani, Project Coordinator, for the *Distance Mediation Project*, with the assistance of Colleen Getz of C.A. Walker & Associates.

They are based, in part, on what many experts in the field of on-line dispute resolution have generously shared in many excellent publications.

They also represent many of the observations, conversations, and ruminations of the *Distance Mediation Project* team, which include (in alphabetical order):

John Campbell  
Jane Henderson, Q.C.  
Laura Luz  
Carole McKnight  
Ayne Meiklem  
Wendy Morash  
Bobbi Noble  
Eugene Raponi  
Colleen Shaw  
Ronald Smith  
Ben Ziegler

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British Columbia Mediator Roster Society, Victoria, B.C.

E-mail: [mediators@mediator-roster.bc.ca](mailto:mediators@mediator-roster.bc.ca) Website: [www.mediator-roster.bc.ca](http://www.mediator-roster.bc.ca)

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# 1 Introduction

*The Distance Mediation Project was a pilot project that operated in British Columbia, Canada, from May 2009 to February 2010. Through this project, people in small, sometimes remote communities around the province were provided with access to qualified family mediators — with the help of information and communication technologies (ICTs). These suggested practice guidelines document the practical lessons learned by the project team over the course of the project.*



## Background to the Guidelines

These guidelines are drawn from the observations and experiences of mediators during the B.C. Mediator Roster Society's<sup>1</sup> *Distance Mediation Project*.<sup>2</sup> Although this was a small project — with 31 family mediations initiated, and 23 ultimately concluded — the project team learned a significant amount from the cases, research, and role plays in which they took part. These suggested guidelines are a compilation of the knowledge the team acquired during the pilot period.

The guidelines are derived from a variety of sources: some address the project team's experiences, others are based on research, and some are their untested hypotheses. They are not meant to be exhaustive, and represent merely the team's limited "toe dip" of experience. They reflect the team's views in general — although not every view was shared by every team member. The guidelines are, therefore, intended as preliminary suggestions only — the team's "best guesses" in many cases.

While these guidelines paint the relevant topics with a broad brush, mediators considering whether or not to incorporate information and communication technologies into their family mediation practice may nevertheless find them to be a useful starting point. They have been prepared, largely, for mediators who are already skilled in traditional, face-to-face family mediation, and are looking for ways to provide their services to people who are either too distant or otherwise unable to physically access those services.

The guidelines are meant to be used as an *addition* to the mediator's classic toolbox, not as a replacement. The fundamental skills and knowledge required to mediate face-to-face also apply at a distance.

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1 During the project, the B.C. Mediator Roster Society joined with the Dispute Resolution Innovation Society to form a new organization, Mediate B.C. Society.

2 For more information about this project, see Colleen Getz, *Evaluation of the Distance Mediation Project: Report on Phase II of the Technology-Assisted Family Mediation Project*. Victoria, British Columbia Mediator Roster Society, May 2010. [www.mediator-roster.bc.ca](http://www.mediator-roster.bc.ca)

## Using these Guidelines

The term "ICT" is used to refer to "information and communication technologies" throughout these guidelines. These technologies can be any of a range of electronic communication tools — including regular landline and cell phones, teleconferencing, videoconferencing, e-mail, text messaging, custom text-based applications, and web conferencing. Most of the guidelines speak of these ICTs in general terms, rather than identifying specific types. This has been done on the assumption that the reader is familiar with the basic features of various ICTs — for example, which are text or audio-based — and that it is not necessary to identify how every guideline applies to each ICT.

Another term used throughout the guidelines is the term "distance mediation". This term refers to any mediation using information and communication technologies, and in which one or both parties are not present in the same room as the mediator.

As you read the guidelines, you will notice they make reference only to parties, and not to any other participants in the mediation process. While some parties had legal representation in the cases completed in the *Distance Mediation Project*, counsel did not participate in any of the project's mediations. Therefore, it is left up to the reader to determine how the guidelines apply in cases where counsel or some other support person participates in the distance mediation process.

Of course, to be useful, the guidelines had to have a frame of reference beyond the limited experience of the *Distance Mediation Project*. As well as the project team's experiences and observations, the guidelines incorporate some of the findings of other experts in this field. Many of these experts and their contributions are profiled in the project's Phase I report, titled *Closing the Distance with Technology*<sup>3</sup>. In the guidelines, some of these

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3 Colleen Getz. *Closing the Distance with Technology: Report on Phase I of the Technology-Assisted Family Mediation Project*. Victoria: British Columbia Mediator Roster Society, December 2007. [www.mediator-roster.bc.ca/public/pdf/Closing\\_Distance.pdf](http://www.mediator-roster.bc.ca/public/pdf/Closing_Distance.pdf)



experts are referenced either in footnotes associated with specific topics, or in the bibliography at the end. The bibliography, in fact, may serve as a suggested reading list for anyone wanting to learn more about distance mediation and other applications of on-line dispute resolution.

Finally, these guidelines need to be considered in their entirety. While they have been divided into separate sections, the divisions are for the purposes of readability only. The material is cumulative, with the information in each section building on the foundation of the one before it. It is intended, for example, that section 2, *Before Using ICTs for Family Mediation*, be read before section 7, *Preparing for the Distance Mediation*. For readers who do not do this, however, key points or themes — such as the importance of being fully knowledgeable about an ICT's capabilities — are repeated in the relevant sections.

## The Future of these Guidelines

The project team's greatest wish for these guidelines will have been realized if they generate more discussion and further study. Distance mediation — particularly in a family mediation setting — is still in its infancy, and much remains to be learned about the subject. There are important areas about which the *Distance Mediation Project* did not gather enough experience. There is more to learn, for instance, about how to accommodate cultural differences or people with disabilities when using a distance mediation process.

As experience grows, these guidelines will no doubt be expanded upon. Two topics thought to be important by the project team, but which were not sufficiently well developed to provide as guidelines, include: ethical issues and rules of etiquette specific to using ICTs in distance mediation. It is hoped that further exploration of these — and other important topics relating to distance mediation — will form the basis of a new and revised set of guidelines in the future.

## 2 Before Using ICTs for Family Mediation

*Incorporating a distance mediation process into your mediation practice involves much more than just acquiring the necessary equipment. Once you have chosen the communication medium you will use, you need to assess how it will impact the mediation process. There are, as well, many challenges that are best met by practicing with an application or platform before you put it into use. It is a matter of being both reflective and prepared before you embark on using ICTs in family mediation.*



## Considerations When Selecting ICTs

First of all, *a word of caution* — using an ICT adds another dimension to the dynamics in mediation. In the project team’s view, distance mediation is best suited to practitioners who are already familiar with the mediation process. An ease or familiarity with the family mediation process as it applies in a traditional, face-to-face setting will make it easier to adapt to the idiosyncrasies of using an ICT in the process.

That said, there are a number of factors to consider once you have decided to use ICTs in your mediation practice. While there are few ICTs dedicated specifically to family mediation, there are many — including a range of web-based meeting platforms — which are potentially suitable to use. It is important to thoroughly research and test the different ICT options before deciding which of them are best suited to your practice.

Compare the ICT options carefully and consider how their features may impact mediation — for example, an ICT that allows for video transmission of only the individual who is speaking presents very differently from one which allows multiple parties to simultaneously transmit their video.

Specifically, consider the following when selecting ICTs to use for mediation:

### ICT FEATURES

- What are the ICT’s overall capabilities, limitations, and “feel” for mediation purposes?
- Are you satisfied with its security, confidentiality and privacy of information features? How secure is the information when using the ICT? How much information on your computer can parties see if you are sharing your desktop during web conferencing? How easily can parties record or copy communications?
- How much will using the ICT cost? How will you manage its cost?
- How would you rate the quality of information transmission — text, voice, and/or video?

- Is it reliable? How likely is it to perform as expected?
- Is the ICT user-friendly?
- What type and amount of training is required to use it?
- What level and type of technical support is provided for the ICT? How accessible is the support?
- What is the appeal of the ICT, or how is it accepted by the public in general?
- What are the computer hardware or system requirements? Are parties likely to have computers which meet these requirements?
- What are the bandwidth requirements? (Some geographically isolated locations may not have access to high-speed Internet.)
- How compatible is the ICT with a back-up option? If the ICT fails, does it allow for a suitable back-up plan?

### IMPACT ON THE MEDIATION PROCESS

- At what stage of the mediation process will the ICT be used? (Consider that some ICTs may be better suited to certain stages of mediation than others.)
- What is the ICT’s potential to affect the mediation process, or how can it be used to affect it? For example, does it “... distance parties psychologically, ... bring the parties together, speed the process up, or slow the process down”<sup>4</sup>?
- Does the ICT offer mechanisms through which the mediator can control the mediation process? For example, does it allow the mediator to “... filter out cues that detract from the mediation or add cues incrementally as needed to facilitate mediation”<sup>5</sup>? If text-based, does it allow for the

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4 Llewellyn Joseph Gibbons; Robin M. Kennedy; and Jon Michael Gibbs. “Cyber-Mediation: Computer-Mediated Communications Medium Massaging the Message”, *New Mexico Law Review*. 32 N.M.L. Rev. 27, Winter 2002, p. 8.

5 Ibid.

mediator to vet party comments, or to control the flow of those comments?

- What types of visual information, if any, are transmitted by the ICT, and are they a positive addition to the mediation environment? For example, if the parties do not want to see one another, the visual component of a videoconferencing platform may not be a helpful addition to the mediation process.
- To what degree might the ICT deliver miscues? For example, videoconferencing may deliver miscues or misinformation because of the inability to make true eye contact — potentially resulting in trust issues. Decide whether the benefits of using the ICT are sufficient to outweigh these possible miscues, or whether the accuracy of the cues is more important.<sup>6</sup>
- What “4th party”<sup>7</sup> elements (i.e., presence, structure and information environment) does the ICT bring to the mediation? Do these elements contribute in a positive way to resolving a dispute?<sup>8</sup>

## Practice, Practice, Practice ...

Be prepared to spend time practicing to become completely competent using the ICT you have selected. A considerable amount of time is required to become sufficiently skilled and comfortable with many of them. As a mediator, you *must* be thoroughly familiar with your own equipment and any ICTs being used so you can use them effortlessly, as well as support the parties in their ICT use.

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6 Ibid, p.7.

7 Ethan Katsh and Janet Rifkin first used the term “4th party” in their book *Online Dispute Resolution: Resolving Disputes in Cyberspace* (San Francisco: Jossey-Bass, 2001) to describe the “presence” of technology, and the value it adds to the process that is more than can be achieved by the mediator and the parties alone.

8 Susan Summers Raines and Melissa Conley Tyler. *From e-bay to Eternity: Advances in Online Dispute Resolution*. Melbourne: Melbourne Law School, University of Melbourne, January 2007. Legal Studies Research Paper No. 200, p. 7. [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=955968](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=955968)

Ideally, for web-based platforms, include practice time with someone who uses a different computer system; for example, if you are a PC user, practice with a Mac user. It can also be helpful to set up a second computer to proxy as the party’s computer. Practicing from the parties’ perspective can be helpful, especially if you are able to do this in a role play scenario.

Take care to become familiar with *all* of an ICT’s features, particularly as they relate to confidentiality and security of information. For example, some web conferencing platforms potentially allow participants to record meetings. Other platforms that feature desktop sharing have the capacity to breach confidentiality when instant messages or e-mail notifications appear on the mediator’s desktop. As a mediator, it is critical to understand such features and to know how to manage them.

In researching web-based options, take advantage of opportunities to try platforms at no charge. Many on-line meeting platforms, for example, have a free trial period. This can also be a useful opportunity to gauge the level and type of technical support available for the ICT.

Take advantage of any instructor-led tutorials on how to use an ICT’s features. Tutorials are available with a number of web conferencing platforms, and often allow for participants to ask “how to” questions.

## Be Prepared

Once you have chosen an ICT, and have practiced with it, there are a few additional steps to take before you begin working with it in mediation.

First of all, have the basics in place before you begin. For computer-related ICTs, a current, well-secured system is critical. The ability to scan documents and convert them into a pdf format is a “must” in distance mediation.

Ensure your equipment is of a high caliber. For web-based media, invest in a good quality headset, microphone and webcam. For telephone-based mediums, consider the clarity of sound, particularly if you intend to use a speaker phone. The fidelity of

speaker phones can be poor and is often inconsistent — it is preferable to use a quality headset and microphone.

Thoroughly familiarize yourself with the best practices and etiquette in using the various ICT options. There is a growing body of excellent information — covering everything from “netiquette” to videoconferencing best practices — on the Internet.<sup>9</sup> Many web-based platforms also provide best practice information specific to their use.

## Other Tips and Traps

It is essential to be reflective and honest with yourself about your own strengths and weaknesses, personal style, and skill in using ICTs. Distance mediation may magnify strengths or weaknesses, and certain personal styles may not work well with specific ICTs. Some mediators, for example, may find entirely text-based ICTs to be limiting in terms of establishing a presence or professional image. Audio or video-based ICTs also have their advantages

and disadvantages. Tape or video yourself, or get critical feedback from a peer, before launching in. No matter how perfect an ICT may seem for mediation, refrain from using it if it is not a good fit for you.

Depending on the circumstances, it may be important to research and become familiar with the services and resources available in other communities. Knowing where to refer parties who live in a distant community can be critical, particularly when a safety or legal issue arises.

Expect to take extra time and effort to build your distance mediation practice. Establishing your reputation from a distance may be more difficult, particularly in small communities where information about services may be conveyed primarily by word-of-mouth.

Lastly, don't give up the familiar items in your mediator's toolbox. While the ICT environment offers unique challenges, you will still need all your traditional mediation tools. You may, in fact, find them to be even *more* important than they are in face-to-face mediation.

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<sup>9</sup> A few websites with information of this kind are listed in the bibliography at the end of these guidelines.

### 3 Determining Whether ICT Use is Appropriate

*Having decided to incorporate a distance mediation process into your practice, it becomes an option you can use — one of the tools in your mediator’s toolbox — when people seek your assistance in helping them resolve a family dispute. Distance mediation is not necessarily the right thing for all parties, however. The first matter to canvass with someone whose circumstances appear to fit with a distance mediation process is, then, whether or not ICT use is actually appropriate for them.*



Clear criteria should be established in advance for deciding when ICT use is, or is not, appropriate in any specific case. These criteria should be incorporated into a mediator's screening process.

The following criteria — partially adapted from a list prepared by Susan Summers Raines in *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*<sup>10</sup> — were used by the Distance Mediation Project team for determining whether ICT use is appropriate in specific cases:

- The parties have access to at least one type of suitable ICT.
- All parties agree on the use of ICTs.
- The capacity of the parties extends to using ICTs.
- Any difference in the parties' ICT capacities can be effectively managed.
- It is unlikely that using ICTs in mediation will negatively impact the continuing relationship.
- ICT use does not pose a high risk in terms of the parties' safety or confidentiality of information.
- If necessary, a safety plan can be developed from a distance.
- The use of ICTs offers a benefit in resolving the dispute.
- The use of ICTs will not be a hindrance in resolving the dispute.
- The parties have good language skills and do not require a language interpreter.

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<sup>10</sup> Susan Summers Raines, *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*. Kennesaw State University, 2004, pp.1-2.

There are some additional criteria identified by Susan Summers Raines which the *Distance Mediation Project* did not consider because of the project's context. These include:

- Disputants are geographically distant from each other and/or from the neutral and travel for a traditional mediation is not possible or is cost prohibitive.
- Jurisdictional issues make it unclear as to which jurisdiction should prevail and/or would make enforcement of a court decision difficult.
- None of the parties are seeking to set judicial precedent or to clarify existing laws. ...
- Scheduling difficulties make it impossible for the parties to attend a traditional mediation session.

It should be stressed that, for some parties who are in crisis, adding a technological element into the mediation process — particularly an ICT which requires them to learn something new — may simply be too much. It is important to remember that there are cases where it can help not to have the added complexity of technology.

## 4 Determining the Appropriate ICT(s) to Use

*In determining which ICT(s) are best to use, there are many factors that go into a decision about what broad technology category and, from there, what application or platform to select. On the other hand, the field is often quickly narrowed by the circumstances of one party or the other. In the end, it will likely be the preferences of the person who has the most limited access to, or ability in using, an ICT which will dictate the road ahead.*





Clear criteria should be established by a mediator for deciding what factors to consider in determining the appropriate ICT(s) to use in a specific case. These criteria should be incorporated into a mediator's usual screening process.

In addition to the considerations outlined under section 2, *Before Using ICTs for Family Mediation*, the following factors were used by the project team to determine which ICT(s) are appropriate in specific cases:

- **Party preference:** Which ICT is preferred by the parties? The preference of the participant with the most limited ICT access or skills should be considered carefully as it may well be the deciding factor.
- **ICT availability, accessibility, and reliability:** Are the hardware and software readily available, accessible, and reliable for all the participants? Does bandwidth pose an issue — is high-speed Internet available to them?
- **Cost:** Is the cost of using the ICT reasonable, for both the parties and the mediator?
- **Comfort/capacity levels:** Do the participants exhibit an appropriate level of comfort or capacity in using the specific ICT? Determine how familiar they are with the ICT — if they aren't, what type and amount of training or practice will be required? How computer literate are they generally? Do they have typing skills? Do they have a disability which makes the ICT difficult for them to use?
- **Literacy:** Is the parties' level of literacy suitable for the ICT? Text-based ICTs, for example, are not a good fit for parties who have difficulty reading or writing.
- **Communication styles:** Are the parties' communication and presentation styles suitable for the ICT? Are they more comfortable expressing themselves verbally, or in writing?
- **Compatibility with backup:** Is the ICT compatible with a comfortable and suitable backup plan? If the ICT fails, does it allow for a backup plan which is appropriate for the parties' circumstances?
- **Security, confidentiality and privacy of information:** Can you be assured that the security, confidentiality and privacy of information will not be compromised? Under the parties' specific circumstances, how secure will the discussions or information be when using the ICT?
- **Dispute context:** Is the context of the dispute consistent with the ICT's features? For instance, if the relationship between the parties is such that hostility is triggered by certain gestures or other body language, it may be preferable to avoid using video-enabled ICTs so that they do not see each other.
- **Dispute type:** Does the type of dispute lend itself to a particular application or ICT environment? For example, a property matter or similar issue for which there is likely to be financial and other documentation will require an ability to exchange or view that documentation. Certain ICTs — such as web conferencing platforms — are particularly useful in this regard. Many of these platforms allow files to be transmitted instantaneously to the computers of everyone in attendance. These platforms also typically allow for all of the participants to simultaneously view the same document and to work on or edit it jointly.

## 5 Managing Confidentiality and Security of Information

*Confidentiality and security issues are a particular concern in distance mediation. The risks are much greater than those faced in traditional mediation, as it is much easier to accidentally — or even intentionally — disclose information to a very wide audience when using ICTs. Confidentiality and security are not fully within the control of the mediator, and speaking a word in confidence during mediation is not confined within the four walls of the meeting room as it is in traditional mediation. Steps can, however, be taken to manage these risks.*



Mediators should be aware that managing risks relating to the confidentiality and security of information may be more difficult when using ICTs. There are multiple management “layers” that should be attended to, and the project team strongly recommends that the assistance of an ICT expert be obtained by mediators when it comes to dealing with any areas of technical uncertainty.

Managing risks relating to confidentiality and security of information include:

### SECURING THE MEDIATOR’S COMPUTER SYSTEMS<sup>11</sup>

- Develop protocols for storing, backing-up, and deleting your computer records.
- Ensure your computer’s firewalls are appropriately configured.
- Ensure your computer systems are, at all times, protected from viruses and other similar threats to the integrity and safety of information.

### MANAGING RISKS RELATING TO ICTS

- Become knowledgeable and stay abreast of current developments in technology-related security.
- Research the ICT carefully to ensure its security features are sufficient for purposes of mediation. Not all ICTs have adequate security features — free or lower cost ICTs are often insufficient in this regard.
- In looking at security features for web-based ICTs such as meeting platforms, consider the importance of up-to-date industry or government-standard data encryption, authentication, password security and meeting

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<sup>11</sup> *Dispute Resolution and Information Technology Principles for Good Practice*. Draft paper. National Alternative Dispute Resolution Advisory Council, Government of Australia, March 2002. [www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/%28960DF944D2AF105D4B7573C11018CFB4%29~Principles+on+Technology+and+ADR.doc.pdf/\\$file/Principles+on+Technology+and+ADR.doc.pdf](http://www.nadrac.gov.au/www/nadrac/rwpattach.nsf/VAP/%28960DF944D2AF105D4B7573C11018CFB4%29~Principles+on+Technology+and+ADR.doc.pdf/$file/Principles+on+Technology+and+ADR.doc.pdf)

privacy.<sup>12</sup> Web-based meeting platforms should also provide strong access control for the mediator, a visible list of participants and attendee authentication measures, such as meeting passwords. It is essential to avoid platforms in which any information about the mediation might be made public.

### MINIMIZING RISKS RELATING TO PARTIES’ PARTICIPATION IN DISTANCE MEDIATION

- Add clauses pertaining to confidentiality and security of information, as relates to using ICTs, in your Agreement to Mediate document.
- Discuss, in very specific terms, the confidentiality provisions in the Agreement to Mediate with the parties. For example, emphasize that disclosure of information learned in mediation includes not disclosing contents of e-mails or posting what happened at mediation onto a social networking site. In some cases, it may be appropriate to ask parties how much of their story is already on social networking sites.
- Caution the parties about the inherent confidentiality risks in the use of ICT-facilitated mediation. You may wish to explore how well they understand confidentiality of information in general.
- Pay particular attention to the fact that some parties may be tempted to record — and later “use” — discussions held in mediation. If appropriate, discuss this issue with parties and take precautions. For example, if using a web-based platform which allows meeting details to be recorded, ensure that parties are blocked from accessing this feature.
- Educate parties to not copy or forward text-based messages or attachments without the writer’s permission. Make it your practice to do the same.
- Always ensure e-mail recipients are who you intend them to be. Be extremely careful about

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<sup>12</sup> During the pilot period, the *Distance Mediation Project* looked for minimum security features to include SSL to begin the session and AES 128 to encrypt data for the remainder of the session.

differentiating between the “reply all” and “reply” feature, and double-check all e-mail recipient names before sending the message, particularly when using the automatic name completion feature. Coach parties to do this also.

- If the ICT has a chat or instant messaging function, ensure participants understand its use — that is, that they understand how to chat with, or send the message to, the intended recipient(s) only.
- Ensure parties — and children, if they are to be involved — have separate e-mail addresses and independent, private access to a computer.
- Warn, and regularly remind, parties about not using the phone or audio-visual ICTs in places where others may overhear.
- Require parties to inform the mediator and the other party if there is any other person in the room with them, or within hearing distance, when using ICTs with an audio element. Always ask if anyone else is in the room with distant parties before proceeding.
- When teleconferencing, once all of the required participants are present, lock the teleconference to prevent any further callers from joining. Ask the parties to confirm their identity.
- Exercise extreme caution if the mute feature of a teleconferencing or web conferencing platform is to be used for privacy purposes. If you use the mute button in order to pursue a private, confidential conversation with one party (for example, with a party who is attending in person), make absolutely certain that the mute function has been enabled. If any doubt whatsoever exists, do not proceed with the conversation or, if the party is attending in person, proceed with the conversation in a separate room.
- If using a web-based platform that allows desktop sharing, clean your desktop and turn off all instant notifications in advance of the mediation. Having icons, shortcuts to documents,

instant messages, and e-mail notifications visible to parties can create serious confidentiality issues.

- Educate parties about the fact that microphones and speakers do not differentiate between relevant and irrelevant sounds. They will pick up and transmit any conversation — including side conversations — taking place near them.<sup>13</sup>
- If using multi-point conferencing, educate parties to mute their audio by default and to un-mute only when they want to speak. This can be especially important with voice-activated systems in which video is automatically transmitted along with audio.<sup>14</sup>

### PROTECTING THE INTEGRITY OF DOCUMENTS

- Be aware that maintaining the integrity of written materials — including agreements and Memoranda of Understanding — can be more difficult from a distance.
- Use a “draft” watermark on all, except final, documents.
- If you use editing features such as “track changes” or “insert comments” when drafting, ensure you fully understand — and implement — removal of these edits in the final document. Similarly, before sending such a marked-up draft, consider whether the recipient is, in fact, intended to see the changes or comments.
- Whenever possible, convert documents into read-only pdfs before providing them to the parties.
- Always be alert to the ease with which e-mail or other text-based ICT communications can be copied, modified or forwarded. Use the most secure option available to you, and compose and transmit written materials with extra caution.

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13 Videoconferencing Cookbook: Best Practices and Etiquette Video Development Initiative (ViDe), 2004-6, Updated March 2005. [www.vide.net/cookbook/cookbook.en/list\\_page.php?topic=6&url=etiquette.html&level=1&sequence](http://www.vide.net/cookbook/cookbook.en/list_page.php?topic=6&url=etiquette.html&level=1&sequence)

14 Ibid.

## 6 The Agreement to Mediate

*The Agreement to Mediate is a useful instrument, both for explaining to the parties how mediation will be impacted by distance mediation, and for obtaining their commitment to any requirements that the use of ICTs imposes on the process. The Agreement to Mediate document you normally use, however, will likely need to be adapted to suit this purpose. A few additions to the document will address most of the special circumstances that arise in distance mediation.*



There are several unique aspects to distance family mediation which are not contemplated in the usual Agreement to Mediate document. Mediators should carefully consider how distance mediation is different from traditional, face-to-face mediation, and review and modify their Agreement to Mediate accordingly.

For example, if parties are to pay for ICT-related costs — such as teleconferencing costs — it is important to be clear about what those costs will be. It is also important to determine in advance how the Agreement to Mediate will be signed by distant parties and yourself as mediator. Similarly, when and how the Agreement to Mediate will be reviewed should be considered, as your practice may well be different when mediating from a distance.

The italicized clauses below were included in the *Distance Mediation Project's* Agreement to Mediate document, to address the special nature of distance mediations:

### **LOCATION OF THE MEDIATION**

*The parties and/or the Mediator are at a distance from each other and intend to mediate from different locations.*

### **USE OF ICTS TO COMMUNICATE AND MEDIATE**

*The Mediator will rely primarily upon information and communication technologies to communicate with the parties and their counsel, and to conduct the mediation.*

### **CONFIDENTIALITY**

*Each party agrees to inform the Mediator and other party if there is any other person in the room with them, or within hearing distance when using any information and communication technology to participate in mediation. Where it is agreed that another person will be privy to the mediation process in this manner, that person is bound by the confidentiality provisions of this agreement as if he or she were a party.*

*Each party recognizes that, given the use of information and communication technology, it is not possible to ensure that all communications will be confidential. Each party commits to minimizing the chance of inappropriate disclosures, and the consequences of any such disclosures should they occur.*

### **COST OF MEDIATION**

*Any other costs, including disbursement costs and costs incurred to use information and communication technologies to participate in the mediation, will be paid by the parties.*

### **COUNTERPARTS**

*This Agreement may be entered into by each party signing a separate copy and delivering it to the other party and the Mediator by fax, scanned e-mail attachment, or other means.*

## 7 Preparing for the Distance Mediation

*Good preparation plays a part in any successful mediation — it plays an even greater part in distance mediation. Even if the parties are very familiar with the ICT(s) you are using — and especially if they are not — the technology creates a dynamic that will require you to employ some different approaches than you may be used to in traditional family mediation. Doing some preparatory groundwork with the parties will lay a strong foundation for any upcoming pre-mediation and mediation sessions.*



As with traditional, face-to-face mediation work, preparing for a distance mediation is critical. Thinking ahead about the factors that can make using ICTs in mediation more effective is time well spent.

The *Distance Mediation Project* team identified the following factors as being important when preparing for a distance mediation:

### TAKE TIME TO BUILD TRUST AND RAPPORT

Building trust and rapport with parties may be more difficult when conducting mediations from a distance. It is therefore important to find ways to get to know the parties — and for them to get to know you — and to convey a professional presence in working with them.

When using text-based mediums, create opportunities to develop trust and rapport by making direct contact by telephone or videoconferencing beforehand. Consider, if feasible, the possible value in meeting with the parties in person before beginning mediation.

Also, develop trust by carefully addressing issues of confidentiality. For example, "... clarify in detail how confidentiality is maintained both on the platform you use and in the procedures you adopt. You should never assume that the confidentiality of the system is always trusted by all parties at all times. Constant repetition and confirmation of the privacy of each discussion is important to reassure the parties."<sup>15</sup>

### FIND WAYS TO "CLOSE THE DISTANCE"

Plan ahead for ways to overcome the potentially impersonal or stilted nature of communicating through ICTs. These may include exchanging pictures; sending a personal video-mail introducing yourself; referring parties to your website (be sure to post a photo of yourself); describing the room in which you will be working; and using a webcam. As mentioned earlier, if using text-based ICTs, speak to the parties

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<sup>15</sup> Graham Ross. *Building Trust Online: How to Adapt Mediation and Negotiation Techniques to the Virtual Environment*. Unpublished paper, Distance Learning Course on Online Dispute Resolution, 2009. [www.themediationroom.com](http://www.themediationroom.com)

by phone first. Put yourself in the shoes of the distant parties, and ask yourself: What can't they see or hear?

### KNOW THE PARTIES' CAPABILITIES

Determine whether there are any party literacy or language issues, or mental health issues, that may create challenges in using the ICT or lead to miscommunication. Be prepared to get additional clarity about these issues; for example, if the mediation will be text-based, speak with the party by phone ahead of time.

The parties must also be familiar with any ICT being used. Think about whether there would be a benefit in providing participants with basic information about the ICT in advance, to familiarize them with how it works and what they can expect. For some parties, written instructions may "get in the way"; for others, it may be helpful to have steps laid out in detail.

### DO A TEST RUN

In some circumstances you may wish to do a test run using the ICT with parties before the mediation. Ensure the parties understand that the time set aside for the test run is being used for trying out the ICT only, not for entering into a discussion about the dispute. Cover the mechanics of how the ICT works and explain any limitations of the ICT that might become apparent during mediation, such as time lags or distorted sound. Encourage the parties to do an ICT rehearsal with others, or use the ICT in pre-mediation to give parties practice before the joint session.

### CLARIFY THE NATURE OF THE PROCESS

There may be a greater tendency for the parties to be confused about the nature or scope of the mediation process when using ICTs. Ensure that the parties understand the process in advance, and clarify how it differs from arbitration if necessary.



## SEND DOCUMENTS AND OTHER RELEVANT INFORMATION IN ADVANCE

Consider how documents and information will be provided to, or exchanged by, the parties. Sending out documents or information in advance of the mediation can be very helpful. It gives participants time to review and absorb information, prepare questions, make notes on a hard copy, and otherwise prepare themselves for the upcoming mediation session.

## HAVE A BACKUP PLAN

It is not uncommon for ICTs to fail to perform as expected. *Always* have a well-developed backup plan in case the ICT fails or the parties are unable to access or use it. For example, if you are web conferencing, get backup telephone numbers from parties — that is, obtain the numbers at which the parties can be reached should the platform prove to be problematic.

Ensure all participants know and are comfortable with the backup plan. It should be as specific as possible — for example, stipulate that the participants resort to the backup plan after three failed attempts with the ICT. If possible, identify the backup plan jointly with the parties.

## COMPENSATE FOR MISSING CUES

The absence of visual or audio cues presents special challenges for both the mediator and the parties. Plan ahead and be ready to employ techniques that will help minimize these. For example, when using text-only ICTs, think about how you will check in with parties to ensure they have not withdrawn in some way from the mediation process.

Be aware that the absence of cues may make assessing party deception more complicated and that, because of this, trust issues may also develop more easily between parties. It is difficult, for example, to confirm the identity, integrity and “truthfulness” of text-based messages. Even with video-enabled ICTs, it is difficult to gauge a party’s sincerity. Create strategies ahead of time to compensate for missing cues. Using a combination of ICTs — such as the telephone and a web-based

option to combine audio with video and text — is one possible strategy.

## BE FLEXIBLE IN YOUR METHODS

Be prepared to modify the mediation process to take advantage of the ICT’s strengths, or to minimize its weaknesses. For instance, if it seems difficult to sustain the interest of parties using a particular platform, plan on ways to expedite the process in order to get to the issues quickly.

Allow yourself to think “outside the box” about how you can utilize ICTs. Pre-mediation time can, for example, be saved by posting a video on YouTube which explains the mediation process, the role of the mediator and what is expected of the parties.

## TAKE THE 4TH PARTY ADVANTAGE

The use of an ICT can change the dynamics, add structure, or alter the tone of discussion in mediation. Plan ways to take advantage of these “4th party”<sup>16</sup> elements. For example, the telephone and some other ICTs have been found to tone down or dampen the high emotions that frequently emerge during family mediation sessions. This “4th party” benefit may be very useful in managing the discussion around some family issues.

## WORK TO CREATE A PROFESSIONAL PRESENCE

While somewhat more challenging than in face-to-face mediations, it is equally important to convey a professional presence to parties in distance mediations. Possible strategies include:

- “Under-promise and over-deliver” when making and keeping commitments.<sup>17</sup>
- Be extra cautious in sending any written communications. Proof the material at least once, and ensure it goes to the right party.

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<sup>16</sup> See description of the term “4th party” in section 2, *Before Using ICTs for Family Mediation*.

<sup>17</sup> Graham Ross. Distance Learning Course on Online Dispute Resolution, The Mediation Room, 2009. [www.themediationroom.com](http://www.themediationroom.com)

- Establish your credentials with the parties before you start. Make available a web page with information about your background, qualifications and services as a mediator.<sup>18</sup>
- When using video-based ICTs, consider how the parties will see you. Ensure the lighting is correct and you are framed suitably in the video pane. If using a videoconferencing platform with a self-view pane, check your appearance before parties enter the platform. Adjust the webcam to maximize the impression of eye contact, and maintain this position. Looking elsewhere or multi-tasking may create the impression of not looking into the parties' eyes.<sup>19</sup>
- Remember, when using video-enabled media, that the ICT is not a privacy shield. Your presentation and things that detract from it — such as unprofessional clothing or a messy office — may well be visible to parties, and matter as much as if they were in the room with you.
- Consider how ICT rules of etiquette apply to you as the mediator, and plan for ways to implement them. For example, determine how you can minimize potential disturbances which might occur in your office during the mediation session.

- While noted elsewhere in these guidelines, it bears repeating that the mediator should be fully competent in using the ICT, as well as be able to provide basic troubleshooting assistance to the parties.

### **BE AWARE OF TIME MANAGEMENT CHALLENGES**

Although distance mediations do not necessarily take longer than face-to-face ones, time management may be more difficult. It may be more important to be very clear with the parties about expectations, to monitor the time that is being taken, to refocus the parties, and to assist them in making their responses as efficient as possible.

Alert the parties to time management issues in advance. You, yourself, should expect — and be prepared to accommodate — time-consuming technological glitches.

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<sup>18</sup> Ibid.

<sup>19</sup> Videoconferencing Cookbook: Best Practices and Etiquette, op. cit.

## 8 Screening for Safety and Assessing Capacity and Readiness to Mediate

*Screening for safety and assessing the parties' capacity and readiness to mediate is just as important in distance mediation as it is in traditional mediation. There are, however, some considerations that may require you to make some changes to the screening and assessment tools you usually use. At the intake/pre-mediation stage, an oral screening tool is helpful, and can be readily adapted to distance mediation conditions. During and after mediation, some additional "active listening" and follow up steps are recommended.*



While there is some suggestion in the literature that using ICTs to mediate reduces physical dangers, the *Distance Mediation Project* team strongly recommends that mediators be no less rigorous when screening for safety from a distance than they would be in face-to-face mediation. The team recommends similar rigour in assessing the parties' capacity and readiness to mediate.<sup>20</sup>

It is critical to have a well-developed, easily implemented plan for screening and assessment from a distance. You must also have a clear strategy, in advance, for how mediation will be ended if necessary. It is important to know an ICT's capabilities in these respects. For example, if you are teleconferencing, you should know whether the system will allow you, as the mediator, to end the call for everyone when you hang up, or whether the parties will remain on the line with each other.

Make no assumptions about the safety of participants. While distance may mitigate immediate safety concerns, do not assume that the parties' safety — or the mediator's — is guaranteed because of distance. You should be particularly alert to concerns relating to party safety when the parties are distant only from you, the mediator, and not from each other.

Safety and capacity considerations when using ICTs were identified by the *Distance Mediation Project* team for each of the intake/pre-mediation, mediation, and post-mediation stages of the process, as set out below.

## Considerations for Intake/ Pre-mediation

As in traditional mediation, a very thorough safety check should be conducted during intake or pre-mediation, as part of the assessment about whether or not it is appropriate to proceed with mediation.

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20 Information about screening for safety in face-to-face mediation can be found in: *Safety Screening in Family Mediation*. Victoria: British Columbia Mediator Roster Society, January 2008. [http://www.mediator-roster.bc.ca/public/pdf/Screening\\_Family\\_Paper.pdf](http://www.mediator-roster.bc.ca/public/pdf/Screening_Family_Paper.pdf)

The use of a detailed oral screening tool is suitable when using ICTs. Possible ICT-related questions to incorporate in your screening tool include:

- Do the parties have any safety concerns that are, or might be, either mitigated or exacerbated by ICTs?
- Are there any restraining orders restricting contact? Would communication using ICTs violate a "no direct or indirect contact" order?
- Do either of the parties have an unlisted phone number? Do they have a confidential address?
- Do the parties have each other's e-mail addresses? If not, are they aware that the e-mail communications in mediation might disclose their e-mail addresses?
- If sharing a computer with the other party, can the parties keep e-mails separate?
- Who else has access to the parties' computer(s)? Do they have a way of keeping information secure?
- Has any form of cyber-harassment — such as intimidation by e-mail or phone — occurred?
- What is the parties' comfort level with the ICT proposed for mediation, and how do they see it in terms of safety?
- If one party is more technologically adept than the other, is this an intimidating factor?
- Why might the other party want to mediate using ICTs? Does one party see an ICT being used by the other as creating an unsafe dynamic or situation?
- Of the issues the party has identified for mediation, are there any they do not want to discuss using ICTs?

Other safety and capacity issues that should be addressed when mediating from a distance include the following:

- **The presence of children:** As safety concerns extend to the children as well, discuss with the parties the issue of the children being present in the home during the mediation. If at all possible,

children should not be present. They may hear the mediation dialogue, and there may be physical safety issues if they are left unattended during mediation.

The presence of children immediately after the mediation may also be of concern. For example, if the party experiences heightened emotions afterwards, there may be a potential safety risk to the children. Ask if there is a place for the party to “decompress” before seeing the children.

- **Conveying discomfort or difficulty:** Ask the parties to let you know if they are uncomfortable during mediation, or having difficulty following or understanding the conversation. Discuss how they will do this. Consider whether the ICT to be used will allow parties to send private messages to the mediator when they are uncomfortable or unclear.
- **Support persons:** Explore the role of support people — such as legal counsel — who might be in the room with the party. Ask directly and early in the process whether these support people will be present and what role they will have.
- **Party proximity and mediator distance:** If the parties are going to be in the same room together, and the mediator elsewhere, ask how this is going to impact them and how the parties feel about the mediator being at a distance.
- **Identify triggers and communication issues:** Be very transparent in asking parties to identify what their individual “triggers” are, in terms of their interactions with each other, and whether there are any triggers which relate specifically to using ICTs. Certain terms used in e-mails, for example, may provoke strong emotions. Explore with parties what happens when they are triggered.

Ask how the parties communicate using ICTs. If suitable, discuss the risk of using social network sites to share their stories, cyber-harassment or possible inappropriate behavior, such as posting unflattering pictures on social networking sites when angry.

- **Substance use or mental health issues:** If asking questions about drug and alcohol use or mental health issues, be alert to answers which may give a tip that these could be a particular challenge when mediating using ICTs.
- **Motivation and commitment:** Explore the parties’ motivation and commitment to the process. How committed are they? What reasons do they have for wanting to participate in distance mediation? If appropriate, ask them to share this information with each other. Be aware that parties may be less committed if the process is not taking place face-to-face.
- **Post-mediation impact:** Consider whether the ICT has the potential for a post-mediation impact for the party. What is the safety risk? Ask the party what is in place, or what could be put in place for them, so they can feel comfortable after the mediation.
- **The importance of confidentiality:** Remember that confidentiality and safety are closely linked. As the potential for diminished confidentiality exists with the use of ICTs, you may need to draw the parties’ attention to the reference about confidentiality of communications in the Agreement to Mediate.

## Considerations for the Mediation Session

At the beginning of the mediation session, remind the parties about any ground rules you have established, and that you will end the mediation if circumstances warrant. If using an audio or video-based ICT, be sure to ask whether there is someone in the room with the parties.

During the distance mediation session, be extra vigilant about observing the discussion. Clarify the reason for any prolonged silences — it could be because of fear, confusion or a build-up of anger. Remind the parties to tell you if they are feeling uncomfortable or finding the discussion unclear in any way, and how they are to do this. Continually, throughout the session, monitor the impact using

the ICT is having on the parties' behavior and how this may be affecting their safety.

It is essential you remain alert to the fact that it is more difficult to gauge the level of safety concern when you cannot see the parties' body language.

## Considerations for Post Mediation

After the distance mediation session concludes, consider making a quick check-in phone call — with both parties, to ensure a balanced approach.

To identify any possible safety issues, you may wish to ask questions such as: How did you feel after the mediation? Were you able to “decompress” after the session? How was it when your children came in the room after the mediation? If there was a plan for post mediation, ask the party if it has taken place.

Issues relating to capacity and readiness to mediate which may have arisen during the session can be handled with a similar, individual check-in phone call. Sharing with the parties a written summary of what was discussed in the session may also be helpful.

## 9 Conducting the Pre-Mediation Session

*In distance mediation, laying a solid foundation at the pre-mediation stage is probably the most important work you can do to make the process a success. Although some of the steps to take at this stage have already been discussed in earlier sections, the basic ground rules and “do’s and don’ts” in pre-mediation are worth repeating. Some of these steps involve simple courtesies, others are important for establishing the right climate for a productive discussion, and still others are the key to communicating properly in an on-line environment. All are part of setting the right tone for an upcoming mediation session.*



In addition to many of the considerations addressed in previous sections — in particular, *Preparing for the Distance Mediation* and *Screening for Safety and Assessing Capacity and Readiness to Mediate* — mediators should consider the following when conducting the pre-mediation session from a distance:

- It is especially helpful in distance mediation to let parties know how long the mediation will likely take, and how long individual sessions will last.
- Set clear ground rules for the mediation at this point, including the rules relating specifically to ICT use. Examples of possible topics include:

**Promptness:** The importance of “arriving” on time should be impressed upon parties, particularly since accessing the ICT — for example, the teleconference or web-based platform — may take them longer than they expect.

**Response times:** Addressing the length of time parties will have to respond, and in what way, is critical with written communications. It is particularly important in asynchronous media such as e-mail. Time lags can make it very difficult for the mediator to build on any progress being made, and to sustain the interest of the parties.

**Limiting messages:** In his paper, *Building Trust Online*<sup>21</sup>, Graham Ross also recommends controlling the number of messages in asynchronous text-based conversations. He suggests establishing a rule that, unless something important has been overlooked, parties should not post a message except in direct response to one from the mediator.

**Basic rules of “conversation”:** Do not assume parties understand the basic rules of conversation, especially as they relate to using ICTs. For example, coach parties to indicate in written communications whether a response is expected or not. Explain how turn-taking

will take place in synchronous media, such as teleconferencing or web conferencing. This is particularly important with audio-based ICTs which capture and transmit the voice of only one speaker at a time. With such ICTs, the words of one party may be completely lost when the other party “talks over” them.

**Etiquette:** Similarly, do not assume parties understand the basic rules of etiquette when using ICTs. Educating parties about basic etiquette and best practices in using the ICTs selected for the mediation is time well invested. This might, for instance, include a conversation about the need to announce when they arrive on the teleconference line. Given how some ICTs seem to encourage a sense of anonymity, it may also be helpful to point out to parties that the same general rules of etiquette apply as when interacting with a person face-to-face.

**Noise management:** Parties should be made aware that background noise can be extremely distracting and can seriously disrupt the flow of discussions when using audio-based ICTs. Just one participant’s background noise can seriously affect the sound for everyone — especially in the case of web conferencing platforms. Ideally, all participants should meet from a completely quiet location. Educating the parties about using the ICT’s mute feature can also be a helpful strategy for minimizing noise.

**Multi-tasking:** Multi-tasking appears to be a major, overwhelming temptation when using certain ICTs — teleconferencing and web conferencing platforms, in particular. It is important to discuss with parties the problems — such as background noise and disjointed discussions — which are created by working on side-activities during mediation.

- You may be tempted to skip the questions you normally ask during pre-mediation — for example, what stage of litigation the parties are at. Your usual questions are still just as important to ask, even though you are mediating from a distance.

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<sup>21</sup> Graham Ross, *Building Trust Online: How to Adapt Mediation and Negotiation Techniques to the Virtual Environment*, op cit.



- While understanding that some parties may have someone in the home who they use as technical support, it is important to reinforce the confidentiality of mediation, and to explain to parties the need to disclose when other people are in the room or are within hearing range.
- Confirm you know where and how to connect with the parties for the joint session. As discussed previously (see *Preparing for the Distance Mediation*), this should include obtaining alternate possible contact information.
- In some cases, a party who lives in the same jurisdiction as the mediator may wish to attend the mediation in person. It is vital that this be discussed with the distant party, and that the agreement of this party be obtained prior to the mediation.
- In situations where one party will be attending the mediation in person, it may be helpful to discuss with the distant party how they can most effectively participate, as well as how the mediator can ensure there will be a sense of balance. It may also be helpful to prepare the party attending the mediation in person as to how they can support the participation of the distant party.
- Explore with the parties their relative adeptness at using the ICTs, and ask how any differences might impact the mediation.

- Discuss how parties will advise the mediator if they are experiencing “technology fatigue”.
- Ask the parties about any concerns they may have specific to the use of ICTs, and identify ways to manage these concerns. It may be appropriate, at the beginning of the mediation session, to summarize the concerns and mitigation strategies.
- Discuss what the absence of body language in the mediation may mean for the parties, and for the mediator.
- Carefully monitor your own level of engagement during the pre-mediation session. There is a real danger of attention drift — which may appear as a lack of interest to the parties — when using some ICTs to communicate.

Be particularly vigilant about applying the “no multi-tasking” ground rule to yourself; it is a pitfall which is also much easier for the mediator to fall into than when mediating face-to-face.

Overall, be prepared to spend more time in pre-mediation discussions with parties than you would in face-to-face mediation. Laying solid groundwork in pre-mediation can be very helpful in making the joint distance mediation session a productive one.

## 10 Managing the Mediation Session

*After all the preparation, the time comes when the parties come together for a mediation session. Many of the steps taken at earlier stages of the distance mediation are, once again, applicable at this stage. As well as the general rules of thumb for the joint session, you will want to be mindful of how the absence of body language impacts your management of the session. Additionally, managing emotions and power differences, caucusing, dealing with perceptions of bias, and confidentiality are all areas you will find to be worthy of extra attention.*



## The Joint Session in General

Many of the issues which are encountered in the individual, pre-mediation meeting also present themselves when conducting the joint distance mediation session. The following are some of the key considerations at this stage of the process:

- **Check your ICT:** Before the session, check to be certain your equipment and any ICT you are going to use are functioning as expected. In the case of web-based platforms — many of which are frequently upgraded or changed — it is critical to ensure you are familiar with the most recent version available. It is also helpful to check with the parties that they are using the same version as you are.
- **Do the preliminaries:** It may be tempting to skip your usual preliminary steps because you are not in the same room with the parties. While there is a need to be more succinct in your presentation, these steps are just as important as they are in traditional, face-to-face mediation. For example, it is equally important at this introductory stage to communicate clearly the objectives of the session. Similarly, it is important to remind parties of the ground rules established in pre-mediation. Given the extremely distracting nature of background noise when using audio-based ICTs, rules relating to noise management may be particularly important to review at this time.

Ask if anyone else is in the room or within hearing distance, and remind parties of other important confidentiality provisions in the Agreement to Mediate.

At the beginning of a synchronous, audio or video-based joint session, find out if there are any particular time constraints for the parties, such as someone having to leave early. Adjust the session accordingly.

- **Use your mediator's toolbox:** The classic mediator's tools will likely be your most useful ones during joint sessions also. Some of these tools are, however, more difficult to use in distance mediation. For example, it is more

difficult to ensure someone feels acknowledged from a distance, and this may require extra effort on your part. When using entirely audio-based media, it may be more challenging to “hear” — literally and figuratively — what parties are saying. It is essential in this regard to fully understand any audio-related idiosyncracies or limitations of the ICT, as well as your own listening capabilities when using it.

Consider how some mediator's tools could be modified at this time. For example, to help summarize, it may be useful to take notes of your understanding of the discussions held during a teleconference mediation and e-mail them to the parties later.

- **Be courteous:** Similarly, the rules of courtesy that apply in face-to-face mediation are also applicable in distance mediation. It is critical, for example, for the mediator to be respectful of the parties' time, and to arrive early in teleconferencing or web conferencing sessions to greet them. (An early arrival also provides time to pretest your own equipment and the platform. It is especially helpful to have someone familiar with the platform arrive early also, to make sure everything is working correctly before the mediation.)
- **Observe yourself:** Make an extra effort to observe your personal presentation during the joint session. It is important — and also more difficult in distance mediation — to present yourself as ready and engaged, and you may need to convey your level of engagement by being more animated or dynamic. In teleconferencing, for example, be sure to vary your voice so as to avoid sounding disinterested or only partially present.

Keep a careful eye on your own attention level. To avoid “mediator drift-off”, it may help to remain engaged by taking notes. As in pre-mediations, resist the urge to multi-task. Not only can the sounds associated with your keyboarding and paper-rustling be magnified through audio-based ICTs but, with some web-based platforms,

your “discrete” checking of e-mails or reply to instant messages may also be visible to all of the participants on the platform.

- **Monitor parties’ attention:** Regularly and actively confirm that the parties are mentally present, engaged and understanding the discussions. If a party seems to be “drifting off”, solicit input, make queries, and summarize more often. Use the party’s name in order to get their attention. If using a web conferencing platform that provides control privileges to the participants, consider giving control to the drifting party. (Be prepared, however, to manage the risk involved in doing this!) Be alert to the possibility that parties may be experiencing “technology fatigue”.

If one of the parties is attending in person and the other from a distance, describe the room and what is occurring — or is about to occur — in the session. This will help engage the distant party, and allow him/her to participate more fully. Don’t be afraid to provide detail — “I’ve got a paper in front of me; I know you don’t have one” or “Mr. K. is indicating he needs to take a break”.

- **Expect a familiarization period:** For parties who have little or no previous experience with the ICT, it may take several sessions to develop a comfort and familiarity with its features. It may, for example, be distracting — even disconcerting — for parties when they first see themselves in the self-view pane of a videoconferencing platform. Recognizing and openly addressing the fact that familiarization with an ICT is a process which takes time can be a helpful strategy for the mediator.
- **Do sound and screen checks:** With audio-based ICTs, periodically check that the parties can hear each other, and that you can hear them. Remind the parties to speak clearly, slow down or to not “talk over” each other, if necessary. If you are using a web conferencing platform, check that the parties can see the screen or document you are expecting them to see.

- **Watch for alternate personas:** Be aware that the parties may present a particular persona when using specific ICTs. For example, in teleconference mediations during the *Distance Mediation Project*, some parties seemed especially inclined to present their “business persona”. Expecting this phenomenon can be useful in managing the dynamics of the joint mediation session.
- **Use document templates:** As in traditional mediation, it can be helpful to use a template of an agreement or Memorandum of Understanding (MOU) as a framework for the discussion. Building on the draft agreement or MOU is helpful, as it allows the parties to see the progress they make from one session to another. It also gives them an opportunity to fine-tune their agreement, and gives focus to the discussions.
- **Employ multi-media approaches:** It can be difficult to communicate complex information through solely text-based ICTs. Consider conveying the information through a combination of media, including a telephone call. Also, be alert to whether the ICT is hindering the discussions. If you find yourself, or any of the parties, repeating themselves in order to communicate, consider using another ICT.
- **Continuously screen for safety and capacity:** Remaining vigilant about possible safety and capacity issues is of primary importance throughout the joint mediation session. Considerations relating to this can be found under section 8, *Screening for Safety and Assessing Capacity and Readiness to Mediate*.
- **Properly conclude the session:** As with face-to-face mediations, offer an opportunity for final or closing comments at the conclusion of the session. Unless you and the parties agree that continuing would be beneficial, end the session promptly at the planned time.

## The Absence of Body Language

While some parties may find the absence of each other's body language to be a benefit in family mediation, for the mediator this can be an area of particular challenge. Without visual cues, for example, it is more difficult to gauge emotions and the parties' commitment levels — and even to detect signs of a personality disorder in a party.

Not only do the parties not provide cues through their body language, but the mediator cannot provide cues to the parties either. Some of the traditional interventions used by mediators — such as placing a hand on the table — are not available using ICTs. Deeply ingrained communication tools, such as looking at a party to convey who you are speaking to, are also not available in using some ICTs. When using audio-based mediums, for example, the parties may have difficulty discerning who you are speaking to unless you use their names.

Some of the strategies suggested elsewhere in these guidelines — such as making frequent queries, checking in with individual parties after sessions, caucusing, and openly discussing the challenges involved in mediating without visual cues — are useful in compensating for the absence of body language.

It is always helpful to use the range of senses that are available to you — such as speaking and “hearing” — to their fullest.

## Managing Emotions and Power Differences

The absence of visual or audio cues — or, limitations around detecting them — are of particular importance when it comes to managing emotions and power differences. In this regard, distance mediation requires more vigilance and skill on the part of the mediator than does face-to-face mediation. At the same time, however, your usual mediator's tools, with some modifications, may still prove to be your most useful ones:

- **Ask questions:** Be aware that it is more difficult to assess emotions and the weight being placed on specific issues without visual or audio cues. Similarly, you may find it difficult to predict how a party will conduct themselves in a different medium. It can be very helpful in this regard to make more of an effort to ask questions of the parties.

- **Check in regularly:** Keeping emotions at a manageable level can be challenging in distance mediation, making it particularly important to check in with parties regularly.

When communicating with parties, focus on asking them what they “think”, rather than what they “feel”. Remember to remain an observer — for example, by indicating when you notice that one party is talking more.

- **Be prepared to caucus:** It may be helpful to seek opportunities to assess emotions and manage power differences by caucusing more frequently than in traditional mediation.

Caucusing can be a particularly helpful option when teleconferencing. Make sure one party hangs up and the teleconference is locked before starting the caucus process with the other. There is a danger that the waiting or non-caucusing party will perceive this as a form of favouritism. Avoid this by letting that party know that you will also call them for a caucus at a suitable time. If possible, plan ahead of time and arrange with both parties to spend equal time caucusing with them.

- **Listen, acknowledge, reframe and reflect:** While it is more difficult for a mediator to de-escalate a situation with high emotions from a distance, many of the interventions are not much different from those taken in face-to-face mediation. As when meeting in person, a professional, calm presence on the part of the mediator *can* have a calming effect on the parties. By carefully listening for the party's tone — whether written or spoken — their emotion or anger may be assessed, reframed and then

reflected back to them. It is just as important to acknowledge a party's feelings from a distance, regardless of their conduct.

- **Watch for triggers:** As noted earlier (see *Screening for Safety and Assessing Capacity and Readiness to Mediate*), ask each party in pre-mediation to identify their personal triggers. Remain alert to these during the joint session.
- **Set clear ground rules:** Also noted earlier was the importance of setting clear ground rules about communication and conduct — such as turn-taking and courtesy — and reviewing these ground rules when needed. While ground rules, in general, are useful when it comes to managing emotions and power differences, it may be especially helpful to ask the parties to agree ahead of time that, if they choose to leave the session or disengage, they will let the other participants know beforehand.
- **Educate parties about communication:** Ground rules about communication may not suffice, and it may be helpful to explicitly educate parties in this regard. Parties may, for example, simply be oblivious as to how they sound. If using text-based ICTs, coach these parties to reframe their comments using more neutral language. They may need to be reminded that, without body language, it can be difficult to interpret intent and that more words may be required to say the same thing.
- **Model effective communication:** As a mediator, role model effective communication whenever possible. For instance, if a session has been emotionally difficult, be transparent with the parties to let them know that you will be checking in to discuss what happened. In using text-based ICTs where messages and responses are heightening emotions, break the cycle by making a telephone call to the parties.
- **Monitor your voice:** The mediator's own tone of voice is a particularly important management tool when using audio-based ICTs. Tape your voice to experience how it really sounds. Pay attention to your tone throughout the mediation.

Using your voice to speak louder or sound more stern may exacerbate a situation and escalate the parties' emotions.

- **Create special strategies for high-conflict cases:** Consider using text-based mediums, such as e-mail, with high-conflict couples. Text may be an effective means of communicating for such couples because, with mediator assistance, it can take emotion out of the discussion. Consider imposing a caucus-style format on e-mail mediations, or vetting e-mails between the parties. Treat this vetting as a coaching or teaching tool — by helping them to communicate with each other — rather than as a form of monitoring.
- **Be ready to end mediation:** As discussed under section 8, have a predetermined plan for ending the mediation if necessary — and ensure the parties know this plan. It is important you know how to manage the ICT effectively in this event. For example, if web conferencing, you will want to end the session in a way that does not allow the parties to remain alone with each other on the platform.

The *Distance Mediation Project* team's experience was that it is easy — and perhaps tempting — for the parties to carry on, on their own, between distance mediation sessions in a way which escalates emotions. Parties may, for instance, send inflammatory e-mails to each other outside of a session and out of the mediator's control. It may be helpful to establish, in advance, a ground rule in which all "in-between-mediation" communications between the parties go through the mediator, or in which communication outside mediation is prohibited altogether.

## Caucusing

While it offers the same benefits as in face-to-face mediation work, caucusing from a distance comes with its own challenges.

As discussed earlier, frequent caucusing may be helpful in managing emotions and power

differences. In general, however, discretion should be exercised concerning the number or frequency of caucus sessions. It may be difficult to get the non-caucusing party to return if they leave the session.

As well, it is important to ask that the parties leave, or wait on the line or platform, for only a reasonable length of time. Consideration of the parties' time is an important courtesy; it is also important in terms of managing costs. Each minute that a party waits on the line or platform may well add to the cost of the mediation.

When using a web-based platform with break-out or caucus capabilities, be absolutely certain you understand how to use this function, and that conversations in a caucus meeting are, in fact, completely private. Similarly, when using any audio ICT that relies on muting lines, be certain that caucus conversations cannot be overheard by others.

## Dealing with Perceptions of Bias

Party perceptions of mediator bias in distance mediation appear to be no less common than in face-to-face mediations.

It is critical to ensure there is balance in your communications with the parties. For example, in e-mail communications, do not pay more attention to one party's messages than the other's. In teleconference sessions, avoid getting into two-way conversations with the "chattier" party.

It may, of course, happen that the different response style of one of the parties results in spending more time communicating with one party than another — which can create a perception of bias. Such perceptions of bias may be particularly

challenging to deal with in situations where one party is attending the mediation in person with the mediator, while the other party is at a distance. In these circumstances, the party attending may well be perceived as having an advantage. It is important for the mediator to acknowledge this perception, and take clear steps to manage it. If videoconferencing, for example, consider carefully where you are looking — balance looking at the party in attendance with looking at the webcam when you speak with the distant party.

Generally speaking, in teleconference and web conference sessions, the greater the number of participants, the more directive the mediator may need to be to prevent a small number of participants from dominating the discussion. It is important for the mediator to be very transparent about time spent with each party in these sessions. Because it can be more difficult to balance time, and to communicate to a "quieter" person that you want to include them, it can be helpful to acknowledge this openly. If a party becomes concerned about an imbalance, ask how they would like to see the perceived bias dealt with.

## Confidentiality

In the project team's view, the importance of carefully managing risks relating to the confidentiality and security of information in distance mediation cannot be overstated.

Section 5 of these guidelines explores some of the key considerations relating to managing confidentiality and security during the joint mediation sessions.

# 11 Dealing with Agreements and Memoranda of Understanding

*When mediation concludes, and the Memorandum of Understanding or formal agreement is being finalized, the distance between the parties can sometimes interfere with a full understanding of these documents. In some cases, it is the particular idiosyncrasies of the ICT(s) used that contrives to create this interference. A few precautions can decrease the likelihood of a misunderstanding, and increase the likelihood that the parties will comply with the agreement they have crafted in mediation.*





As with many aspects of distance mediation, the absence of visual cues — or, at times, audio cues — may create particular challenges for the mediator when dealing with formal agreements or Memoranda of Understanding (MOU). It may be especially difficult for the mediator to gauge the commitment of the parties to the agreement or the MOU. Some of the mediations conducted under the *Distance Mediation Project* suggested that the more cues available to the mediator, the greater the chance that s/he could assist the parties to develop an agreement or plan with which they will comply.

Other considerations when dealing with agreements and MOUs in distance mediation include the following:

- From a distance, it may be more difficult to assess the parties' understanding of the agreement they have made. Take the extra steps necessary to ensure they fully understand the agreement by, for example, making a check-in phone call with both parties. This also provides an opportunity to make sure the document accurately represents the parties' agreement.
- It is important to confirm that the parties understand the nature of the document they have received at the end of the mediation — whether a MOU or a formal agreement. Be clear, and reflect in the document whether the parties can rely on the document or whether more needs to be done in order to formalize it. It may be helpful to provide parties with a written explanation about their document.

In the *Distance Mediation Project*, for instance, some parties appeared to have particular difficulty understanding the difference between a formal agreement and a MOU. For these parties, a brief electronic information sheet was developed which explained the difference between these two documents. The information sheet also advised parties of their various options, in terms of where and how they could formalize their MOU.

- When distant from the parties, the mediator may need to be more cognizant of monitoring the process involved in formalizing a MOU. If it is appropriate in the circumstances, consider adding a clause regarding when and/or where the parties will formalize it.
- Consider ahead of time — and ensure the parties understand — how the agreement or MOU will be signed.
- Avoid the temptation to rely on verbal agreements. In particular, when using audio-based ICTs for mediating, it is critical there be written follow-up by the mediator.
- Certain ICTs are particularly helpful, in terms of supporting the review of agreements, MOUs and other documents. For example, web conferencing platforms which allow all of the participants to simultaneously view the same document can be very useful in facilitating further discussion of a MOU.
- The formal agreement or MOU should be protected so it cannot be modified in any way. The project team strongly recommends converting these documents into read-only pdfs. To further protect and clarify the intended use of draft agreements or MOUs, you may also want to make it your practice to mark these documents with a "draft" watermark.

It should be noted that the experiences of the mediators in the *Distance Mediation Project* were largely limited to dealing with MOUs. In fact, only in two of the project's cases did the mediators prepare a formal agreement. The project team also recognizes that there is considerable variation in mediators' individual practice when it comes to dealing with agreements and MOUs, and that these guidelines do not sufficiently reflect these variations. It is suggested that the reader bear these limitations in mind when considering the guidelines in this section.

## 12 A Few Final Thoughts

This brief foray into the practice of distance mediation may leave you feeling that there is still a long way to go when it comes to learning about how best to use ICTs in family mediation. Don't let this deter you from making a start, and beginning to familiarize yourself with as many mediation-friendly ICTs as possible. Given current trends around the world, the project team believes that distance family mediations are inevitable.

A good start is to find others who are interested in distance mediation. Having colleagues that share your enthusiasm, and with whom you can problem solve as issues present themselves, will be invaluable. Find ways to exchange information, and attend forums and conferences on on-line dispute resolution. Above all, continue to learn and contribute to this growing field.

Finally, don't be afraid to be creative. Distance mediation in a family setting is still a relatively unexplored area, but it holds a great deal of potential. Stay abreast of the latest trends, and consider how you might use them in your practice. As one of the *Distance Mediation Project* team members put it: "It's a matter of getting on the train — and the train is already leaving the station".

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