SECOND EDITION

MEDIATING FROM A
DISTANCE

SUGGESTED PRACTICE GUIDELINES FOR FAMILY MEDIATORS

MediateBC

Dispute Resolution & Design

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Contents

Introduction

Background to these Guidelines

These guidelines are a result of the work done by Mediate BC Society's *Distance Family Mediation Project* on the topic of how to conduct family mediation from a distance, using technology. This Project was undertaken in three phases, which spanned the course of six years from 2007 to 2012. The first of these involved research into the implications of using information and communication technologies in family mediation. In the second phase, the results of the research were applied through the provision of family mediation services to people in small, sometimes remote communities in British Columbia, with the help of information and communication technologies. Lastly, the third phase expanded on this work by offering family mediation services to people in all parts of British Columbia, with a focus on using web conferencing technology.[1]

In order to reflect the Project team's experiences with web conferencing, the guidelines published at the conclusion of the second phase have been revised and expanded. This second edition of the guidelines is a compilation of the knowledge the team acquired during all three phases of the Project. They are derived from a variety of sources: some address the team's experiences, others are based on research, and some are their untested hypotheses. The guidelines are not meant to be exhaustive, and represent merely the team's limited "toe dip" of experience. They reflect the Project team's views in general — although not every view was shared by every team member. The guidelines are, therefore, intended as suggestions only, and are the team's "best guesses" in many cases.

These guidelines paint the relevant topics with a broad brush. Nevertheless, it is hoped that mediators considering whether or not to incorporate the use of information and communication technologies into their family mediation practice will find them to be a useful starting point. They have been prepared primarily for mediators who are looking for ways to provide their services to people who are either too distant or otherwise unable to physically access those services — or to people who, quite simply, prefer to take advantage of some of the benefits of mediating using technology.

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1 The following reports describe the findings of the *Distance Family Mediation Project's* three phases:

Colleen Getz. *Closing the Distance with Technology: Report on Phase 1 of the Technology-Assisted Family Mediation Project*. Victoria: British Columbia Mediator Roster Society, December 2007. http://mediatebc.com/PDFs/1-2-Mediation-Services/Closing_Distance.aspx

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. http://mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Mediation-Project---Evaluation-Report.aspx

Cathy Tait. *Evaluation of the Distance Family Mediation Project: Report on Phase III of the Technology-Assisted Family Mediation Project*. Vancouver: Mediate BC Society. Anticipated publication date: Winter 2012.

It should be noted that this document is not meant to be a "how to mediate" guide. It has been written for family mediators who are already experienced in traditional, face-to-face family mediation. The fundamental skills and knowledge required to mediate effectively, safely and competently in face-to-face situations also apply at a distance, when using technology. These guidelines, then, are intended to be used as an *addition* to the mediator's classic toolbox.

Using these Guidelines

"Technology"

The term "technology" 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, email, text messaging, custom text-based applications, and video or web conferencing. Sometimes the term "platform" or "application" is used to refer to a particular piece of computer software or web conferencing technology. Most of the guidelines speak of these technologies 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 technologies — for example, which are text or audio-based — and that it is not necessary to identify how every guideline applies to each technology.

"Synchronous and Asynchronous"

The terms "synchronous" and "asynchronous" are also used in these guidelines in referring to technologies. Synchronous technologies are those that enable people to communicate in real-time — or at the same time — while they are in different places. Video and web conferencing are examples of this type of technology. Asynchronous technologies allow communication over a period of time — in consecutive time — while people are in different places. Email and discussion boards are examples of asynchronous technology.

"Videoconferencing and Web Conferencing"

The lines between "videoconferencing" and "web conferencing" have become increasingly blurred and the two terms are often used interchangeably. Originally, videoconferencing referred to technology involving the use of an audio signal and live video streaming, and generally required equipment (much like television equipment) which was devoted specifically to this purpose. Today, videoconferencing also refers to the exchange of live video and audio feed over the Internet, using computers. Web conferencing, which can be accessed by anyone with computer equipment and Internet access, traditionally did not provide live video feed. Developments in technology, however, have resulted in web conferencing often including both live video and audio. Web conferencing platforms typically involve the connection of multiple participants to a

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WHAT'S THAT WEBCAM ICON?

At various points throughout the guidelines, you'll see a webcam icon in the margin beside a paragraph or bulleted point in the text. This is our way of highlighting for the reader those situations that are either uniquely related to the use of video or web conferencing technology, or are particularly applicable to that type of technology.

virtual room or space, where data — such as documents, spreadsheets, presentations, or video clips — can be shared or exchanged. Of special importance to family mediators, web conferencing platforms may also offer a range of tools to control a meeting. These guidelines largely reflect the Project team's experience with web conferencing technology.

"Distance Mediation"

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.

"Technology-Assisted Mediation"

The guidelines focus on the use of technologies that support or *assist* the mediator and parties in bridging the distance between them. They refer to situations in which the mediator, parties and mediation process drive the use of the technology, rather than the technology directing or dictating the process. While the *Distance Family Mediation Project* team did test some applications in which the technology itself prescribes the process steps, they did not use any of these applications in the Project's mediations. These guidelines, therefore, primarily contemplate conducting what is sometimes referred to as "technology-assisted" mediation.

Other Usage Tips

As you read the guidelines, you will notice they make reference to parties, and not to any other participants in the mediation process. While the Project's experiences strongly suggest these guidelines could apply equally well to distance mediations involving more than two parties, other individuals did not participate in the Project's mediations. Therefore, it is left it up to the reader to determine how the guidelines apply in cases where counsel or other support persons participate in the distance mediation process.

To be useful, the guidelines have a frame of reference beyond the limited experience of the *Distance Family 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*. In the guidelines, some of these experts are referenced either in footnotes associated with specific topics or in the bibliography at the end. The bibliography, in fact, serves as a suggested reading list for anyone wanting to learn more about distance mediation and other applications of technology-assisted or online dispute resolution.

Finally, these guidelines should 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 Technology in 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 the capabilities of a particular technology — 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 with which the *Distance Family Mediation Project* did not gain enough experience. There is more to learn, for instance, about how to accommodate cultural differences and people with disabilities when using a distance mediation process.

It is hoped that further explorations of the myriad of important topics relating to distance mediation will build on and improve these guidelines, and that they will help bring the benefits of distance mediation to families and practitioners alike.

Before Using Technology for Family Mediation

First of all, *a word of caution* — using technology adds another dimension to the dynamics in mediation, as well as another layer of management for the mediator. In the *Distance Family Mediation Project* team's view, distance mediation is best suited to practitioners who are already well trained and experienced with the mediation process. An ease 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 technology in the process.

Incorporating a distance mediation process into your mediation practice involves much more than just acquiring equipment. In addition to choosing technologies to use, there are many challenges — some of which can best be met by practicing with the applications or platforms before you put them into use. It is important to be both prepared and reflective before embarking on distance mediation.

Considerations When Selecting Technologies to Use in Your Practice

There are a number of factors to consider once you have decided to use technology to conduct mediations. While there are few technologies 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 these different technology options before deciding which of them are best suited to your practice, as well as to remain abreast of the ongoing developments in technology.

Expect to use a variety of technologies in your distance mediation practice. The same technology will not suit every party or every case, or even every communication within a case. The *Distance Family Mediation Project*, for example, used a "multi-tool" approach to distance mediation, with multiple technologies typically used in the course of each mediation case. No matter how ideal a technology seems to be for family mediation, it is important to be familiar with and prepared to use others. At the very least, it is essential to have mastery of a backup technology, in the event the primary technology fails during mediation.

Compare the technology options carefully and consider how their features may impact mediation — for example, a platform 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. Ask other distance mediators about their experiences with these various features.

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

Technology features

- What are the technology's overall capabilities, limitations, and "feel" for mediation purposes?

- Are you satisfied with its security, confidentiality and privacy of information features? How secure are information, video and audio transmissions when using the technology? How easily can parties record or copy communications? How much information on your computer can parties see if you are sharing your desktop during web conferencing?

- Does the technology give the mediator adequate control over its features? Are the controls sufficiently robust for family mediation purposes, particularly as relates to potential safety issues? For example, if text-based, does it allow for the mediator to vet party comments or to control the flow of those comments? Can the mediator end mediation in a way that ends it for everyone, or can the parties continue on their own on the platform — potentially escalating the conflict — if the mediator leaves?

- 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 technology user-friendly? Does it require training before you use it? Before the parties use it? It is important that you feel you can master the technology. If it seems overwhelming in its complexity or loaded with too many features, it will not be an asset in mediation for either you or the parties.

- What type and amount of training is required to use the technology? How available is this training? What format does it come in — instructor-led, online tutorial, or instructional videos? Is there a cost?

- What level and type of technical or client support is provided for the technology?

SOME ADDITIONAL THOUGHTS ON VIDEO AND WEB CONFERENCING. . .

The third phase of the *Distance Family Mediation Project* hosted a blog exploring a range of topics relating to distance mediation. Some blog posts that were particularly relevant to investigating the suitability of video or web conferencing platforms for a mediation practice can be found in Appendix B of these guidelines. They include:

"I listen better when I can talk" (and other disadvantages of videoconferencing in distance mediation)

Whoa. . .! Is that a Margarita you're drinking? (and 5 other advantages of videoconferencing in distance mediation)

Picking from the peck of platforms (videoconferencing platforms, that is)

How accessible is the support? Is it "live", in a searchable knowledge base or in a Frequently Asked Question format? Is the support geographically limited or world-wide? Is it available 24/7? What is the quality of the support — are responses to questions dealt with expertly, promptly and courteously? Is there a cost involved in accessing the support?

■ What is the appeal of the technology, or how is it accepted by the public in general? What is its reputation with users?

■ What are the computer hardware or system requirements? Is the technology compatible with a range of computer systems? Are there any compatibility issues with your own computer system? Are parties likely to have computers which meet the technology's requirements?

■ What are the bandwidth requirements? Consider that some geographically isolated locations may not have access to high-speed Internet.

■ Is the technology regularly upgraded? Does it have a reputation for keeping up with technological advances?

■ Does the technology have features that make it useful for your particular type of practice? For example, in the *Distance Family Mediation Project*, the mediators — all busy practitioners — found it helpful to use a platform that sent them meeting reminders which were synchronized with their online calendars. Consider, however, that each added feature tends to create further complexity. Think about whether you really need the feature.

■ Is the technology versatile? Could it be used for different communication purposes or at different stages of mediation? Would it be suitable as a backup technology, should your chosen or first-choice technology option fail?

■ How much will using the technology cost? How will you manage or recover its cost?

Impact on the mediation process

■ What is the technology'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" [2]?

■ Does the technology 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" [3]?

■ What types of visual information, if any, are transmitted by the technology, 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 web or videoconferencing platform may not be a helpful addition to the mediation process.

■ To what degree might the technology deliver miscues? For example, the video

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2 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.

3 Ibid.

feature of a platform 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 technology are sufficient to outweigh these possible miscues, or whether the accuracy of the cues is more important.

■ What "4th party"[4] elements (i.e., presence, structure and information environment) does the technology bring to the mediation? Do these elements contribute in a positive way to resolving a dispute?[5] Might they be barriers to participation for some parties?

■ At what stage of the mediation process will the technology be used? Some technologies may be better suited than others to certain stages of mediation or be more proportional to the task at hand. For example, a phone call or an email would be more suitable than web conferencing for the purpose of confirming a meeting appointment.

■ Will the technology work well with the other technologies you are contemplating using, in terms of supporting the parties to reach consensus? Where would it fit within the layers of technology you plan on using?

Practice, Practice, Practice. . .

There is, simply put, no substitute for practice. Be prepared to spend time practicing to become completely competent using the technologies 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 technologies being used so you can use them effortlessly, as well as support the parties in their technology use. Without this level of familiarity, there is a good chance the technology will "get in the way" for both you and the parties.

It was the Project team's experience that practicing with peers — whether or not they have any experience in the use of the technology — is invaluable, particularly when they are organized into a "community of learners". 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 practice with a partner from the parties' perspective, especially if you are able to do this in a role play scenario. In the absence of a practice partner, however, you can set up a second computer to proxy as the party's computer so you can try out a platform's features and see what the parties will see during a mediation session.

Take care to become familiar with *all* of a technology's features, particularly as they relate to the confidentiality and security of information. For example, some web conferencing platforms allow participants to record meetings, potentially compromising the privacy of mediation discussions. Other platforms that feature desktop sharing have the capacity to breach confidentiality when instant messages or email notifications appear on the mediator's desktop. As a mediator, it is essential to understand such features and to create solid strategies for managing or controlling them, before embarking on distance media-

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4 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.

5 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

tion work. Take time to experiment with the technology's features — and to think about how they might be used most appropriately and productively.

In researching web-based options, take advantage of opportunities to try platforms at no charge. Many online 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 and training available for the technology.

As well, take advantage of any instructor-led tutorials on how to use a technology's features. Tutorials are available with a number of web conferencing platforms, and these often permit participants to ask "how to" questions.

Be Prepared

Once you have chosen the technologies, and have practiced with them, there are several more steps to take before embarking on your distance mediation practice.

First of all, have the basics in place. For example, in using computer-related technologies, a current, well-secured system is critical, as is a trustworthy and skilled IT or computer resource person you can call on for help. The ability to scan documents and convert them into a portable document format (pdf) is also a "must" in distance mediation.

Ensure your equipment is of a high caliber. For web-based applications involving video and audio feed, invest in a good quality headset, microphone and webcam. For telephone-based applications, 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 technology options. You will need this information for yourself, as well as to convey to the parties to some extent. There is a growing body of excellent information covering everything from "netiquette" to videoconferencing best practices on the Internet.[6] Many web-based platforms also provide best practice information specific to their use. Carefully consider what it may mean to mix technologies — to use a variety of technologies over the course of a case. Different best practices and etiquette may apply when using such a "multi-tool" approach.

MORE THAN THE SUM OF THE PARTS

Distance mediation is much more than just the sum of the parts — more than just technology added to mediation. It has a character all its own, requiring special techniques and management of effects brought about because of distance and the use of technology to bridge that distance. We encourage the reader to review these guidelines in their entirety as part of preparing for these aspects of practicing distance family mediation.

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6 A few websites with information of this kind are listed in the bibliography at the end of these guidelines.

A Few 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 technology. Distance mediation may magnify strengths or weaknesses, and certain personal styles may not work well with specific technologies. Some mediators, for example, may find entirely text-based technologies to be limiting in terms of establishing their presence or professional image. Audio or video-based technologies also have their advantages and disadvantages. Tape or video yourself, or get feedback from a peer, before launching in. Some web conferencing platforms have a recording feature which can be used for learning purposes. Watch yourself critically: How might you appear to the parties? Do you give the impression of making eye contact or are you looking off to the side? Do you create distractions by gesturing excessively with your hands? No matter how perfect a technology may seem for mediation, refrain from using it if it is not a good fit for you or if you have not yet fully mastered it.

Expect to invest extra time and effort in your distance mediation practice. It can, for example, 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(ies) may be challenging but it is imperative, particularly when a safety or legal issue arises. Similarly, familiarizing yourself with the parties' local culture may be essential. The availability of technology-related services in the parties' community(ies) may also be important information to research; for example, some web-based applications require high speed Internet — a service that may not be accessible to the parties.

Building your distance mediation practice will likely also require extra time and effort on your part. 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. It can be helpful to introduce yourself to professionals — such as lawyers and therapists — who serve the families living in these communities.

Plan to develop strategies and protocols for dealing with the special issues and scenarios that are unique to distance mediation. If possible, connect with other, experienced distance mediators who will help you anticipate and work through the challenges inherent to this type of practice. For example, how will you manage cases where one party wishes to attend mediation in person while the other party is at a distance? How much time will you spend on teaching parties to use the technology? How much of a trouble-shooting role will you play in helping clients solve any problems they may have with the technology? Is verifying the identity of parties important to you? If it is, what steps will you take to confirm that distant parties are who they say they are?

Consider that using technology in mediation does not need to be a case of "all or nothing". The *Distance Family Mediation Project* team found a blended approach to be useful — one that incorporates face-to-face meetings into distance mediation, and vice versa, depending on the circumstances.

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

Assessing the Suitability of Cases for Distance Mediation

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 to resolve a family dispute. Distance mediation is not necessarily the right thing for all parties, however. The first matter to canvass with people whose circumstances appear to fit with a distance mediation process is, then, whether or not technology use is actually appropriate for them.

Clear criteria should be established in advance for deciding when technology use is, or is not, appropriate in any specific case[7]. These criteria should be incorporated into a mediator's screening process. The following check list — 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*[8] — was used by the *Distance Family Mediation Project* team for assessing whether distance mediation is suitable in specific cases. The team determined that, with only a couple of exceptions, most of the circumstances in this list are required or must be present before a distance mediation process is used:

Required

■ The parties have access to at least one type of suitable technology.

■ All parties agree on the use of technology for the mediation.

■ The capacity of the parties extends to using technology.

■ Any difference in the parties' capacities using technology can be effectively managed.

■ It is unlikely that using technology for the mediation will negatively impact the continuing relationship.

■ Technology 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 for the party/ies from a distance.

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7 It is recognized that the word "case" does not adequately describe the unique dispute, personalities, histories, capacities, skills and other elements that combine to make up parties' particular situations. The word is used throughout these guidelines solely to keep verbiage to a minimum.

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

- The use of technology will not be a hindrance in resolving the dispute.
- The use of technology is neutral or offers a benefit in resolving the dispute.

Optional

- The parties are geographically distant from each other and/or from the mediator, and travel for a traditional mediation is not possible or is cost prohibitive.
- Scheduling difficulties make it impossible for the parties to attend a traditional mediation session.
- The parties have good language skills and do not require a language interpreter.

Additional Considerations

Mediators should remain alert to the fact that assessing for the suitability of distance mediation is an *ongoing* process. Information may come to light, or developments may occur, over the course of a distance mediation which may change a mediator's assessment of the suitability of a case. One party may, for example, relocate in a way that allows for the mediation to be concluded in more productive face-to-face sessions. Parties, after experiencing some distance mediation sessions, may feel that technology use is negatively impacting their discussions. Similarly, it may become apparent over the course of a traditional, in-person mediation — or during a shuttle mediation — that distance mediation would be more suitable.

In assessing cases for suitability, it may be useful for mediators to explore — and, if possible, to monitor — the parties' motivation for participating in distance mediation. This may be particularly important where the need for parties to meet using technology is not clearly dictated by the circumstances — for example, in cases where geographic distance does not separate the parties. The *Distance Family Mediation Project* team found that party motivation can profoundly impact the distance mediation process and the party's commitment to the process. A case, for instance, where a party's participation appears to be motivated by a desire to protract negotiations through their use of technology may well not be suitable for distance mediation.

There are other limits to using technology to conduct mediation which should be kept in mind when assessing cases. Some scenarios may be more effectively and efficiently managed in person. Cases involving multiple participants or copious documentation — lengthy reports and statements, for example — may be difficult to mediate using technology. Mediations requiring significant amounts of caucus time may also be better conducted face-to-face, as it can be difficult to caucus in a fluid way when using technology. As well, there are some cases where the parties need a sense of closure, or the nature of the issues requiring resolution is such that more personal contact would be beneficial. For mediation to be successful in these cases, it may be helpful — possibly even necessary — for parties to meet in person.

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

Matching the Technologies to the Case

There are many factors that go into the decision about which technologies[9] are best to use in a specific case and during the various stages of the mediation process. On the other hand, the decision is often quickly narrowed by the circumstances of one party or the other. In the end, it is usually the preferences of the person who has the most limited access to, or ability in using, a technology which dictates the road that is taken.

Clear criteria should be established by a mediator, for the purpose of gathering information from the parties in a dispute, to help in determining the appropriate technologies to use. These should be incorporated into a mediator's usual screening process. In addition to the considerations outlined under section 2, *Before Using Technology for Family Mediation*, the following criteria were used by the *Distance Family Mediation Project* team:

- **Party preference:** What technologies are preferred by the parties? The preference of the participant with the most limited technology access or skills should be considered carefully as it may well be the deciding factor.

- **Availability, accessibility, and reliability:** What technologies use hardware and software that are available, accessible, and reliable for all the participants? Does bandwidth pose an issue — is high-speed Internet required by the technology and do the parties have access to it?

- **Comfort/capacity levels:** What technologies are within the participants' comfort and capacity levels? How computer literate are the parties generally? Do they have typing skills? Do they have a disability which makes certain technologies particularly suitable for them? If considering a technology that is unfamiliar to the parties, what type and amount of training or practice will be required? Does the technology have any features that are likely to create discomfort for either party? Remember that technology can get in the way of discussions if any of the participants are uncomfortable using it, or it becomes the focus of attention. For example, if one of the parties is very self-conscious about their appearance, it is preferable to avoid a technology that centres on using video.

- **Language literacy:** What technologies are most suitable for the parties' level of literacy? Text-based technologies, for example, are not a good fit for parties who need assistance with reading or writing.

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9 The plural form, "technologies", is used here as it is assumed that, in most cases, more than one technology will be employed over the course of a mediation.

- **Communication styles:** What technologies best fit the parties' communication and presentation styles? Are they more adept at expressing themselves verbally or in writing? Do they tend to prefer formality and structure, or are they more comfortable with informality and spontaneity in their communications?

- **Security, confidentiality and privacy of information:** Under the parties' specific circumstances, what technologies are best for securing the confidentiality and privacy of the discussions and the information being transmitted?

- **Cost:** What technologies are most reasonably priced, for both the parties and the mediator? If cost is a concern for the parties, can the cost of using the technology be determined in advance?

- **Dispute context:** Do the technologies' features fit the context of the dispute? For instance, if the relationship between the parties is such that hostility is triggered by certain gestures or other body language, as is sometimes the case in recent separations, it may be preferable to use text-based or audio-only technologies so that they do not see each other. If parties are in vastly different time zones, asynchronous technologies that allow them to participate in mediation at reasonable hours may be most suitable.

- **Dispute type:** Does the particular application or technology environment lend itself to the type of dispute? 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 technologies — 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.

- **Dispute complexity:** What technologies would be the most helpful, given the complexity of the dispute? As disputes become more complex, a mediator — and the parties — may need more tools, or simply more interactive ones. A one-dimensional technology such as email may not, for example, be suitable when the dispute has multiple issues or there are many parties involved. Consider also that, in order to have access to the most effective tools, a combination of technologies may well be needed, particularly in highly complex disputes.[10]

- **Stage in the mediation process/communication needs:** What technology is most suited to the specific stage in the mediation process? Which is most in proportion to the communication needs or best suited to the task at hand? For example, if simple, brief communications with the parties are required, a technology to which they have easy access and which allows for spontaneous, quick transmission of information (such as telephone or instant messaging) may be more helpful at moving discussions forward than would a more formal, highly structured technology.

- **Mediator concerns:** What technologies would be most effective at helping address or manage any concerns you may have about the case? If, for instance, you are anticipating there may be a high level of emotion in the discussions, and you

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10 A discussion paper by Colleen Getz, inspired by the Project team's discussions about the relationship between dispute complexity and technological interactivity, can be found in Appendix C of these guidelines.

feel it would be particularly helpful for you to see the parties' body language, a video-enabled technology may be most suitable for the case. If you are concerned that one of the parties may be inclined to continually rethink decisions or to "flame" the other party, an asynchronous, text-based technology may not be the best choice.

FACTORING IN THE TECHNOLOGY FACTORS

Understanding some of the ins and outs of a dispute, and anticipating how they might play out in mediation, is at the heart of how mediators plan their approach to a particular mediation. If you're new to distance mediation, however, you may be surprised at how technology adds an extra dimension to the mix.

Information and communication technologies come with their own inherent advantages and disadvantages. This makes the process of choosing the right technologies for each case that much more complex, as each technology must be weighed in the context of the situation at hand. This is one of the reasons why being fully familiar with the technologies under consideration is so important for the distance mediator.
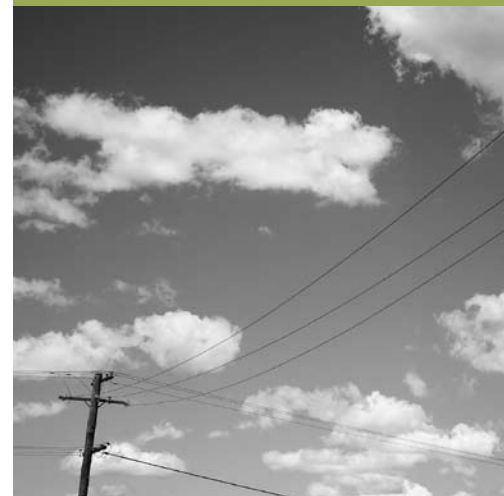
Managing Confidentiality and Security of Information

Confidentiality and security of information are a particular concern in distance mediation.[11] The risks are greater than those faced in traditional mediation, as discussions are not confined within the four walls of the meeting room and it is easier to inadvertently — or even intentionally — disclose information.

Managing the risks relating to the confidentiality and security of information is also, generally speaking, more difficult than in traditional, face-to-face mediation. In addition to the inherent complexities that are involved in managing these risks, the breakneck speed with which today's information and communication technologies are changing makes this aspect of distance mediation particularly challenging.

Given the nature of technology, there is no iron-clad method of protecting confidentiality in distance mediation — that is, it is not possible for the mediator to ensure that all communications will be confidential or to completely control where or how some of the parties' personal information may be collected, stored or accessed. Risk management is, nonetheless, absolutely essential.

Taking the view that it is a mediator's duty to make every effort reasonably possible to protect client privacy and confidentiality of information, the *Distance Family Mediation Project* made security a priority when selecting the technologies to use in delivering its distance mediation services. The Project also explored a range of other strategies intended to minimize the risks relating to confidentiality and security of information. These strategies included the following:

General risk management

- Become knowledgeable and stay abreast of current developments in technology-related security. Adopt a "life-long learner" attitude about best practices in managing confidentiality of information and personal privacy risks.

- Obtain the assistance of a technology expert when it comes to dealing with any

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11 This section touches on only some of the many issues involved in managing confidentiality and security of information when using technology. The *Distance Family Mediation Project* team had no specific expertise in this area, and a full, technical exploration of this complex topic is beyond the scope of these guidelines. Readers are advised to do their own due diligence to investigate how best to manage the risks relating to confidentiality and security of information in distance mediation.

areas of technical uncertainty. Ideally, such an expert would be available on call, for emergencies.

■ Educate your employees about confidentiality and security of information as it relates to their use of technology, and set clear practice standards for them.

■ When selecting technologies to use in your practice, research them carefully to ensure their security features are sufficient for mediation purposes. Include the following questions in your research: How easily can data, video and audio transmissions be accessed by external parties? How easily can parties record, copy or forward discussions? How robust are the controls? Be aware that not all technologies have adequate security features; for example, free or low cost technologies are often insufficient in this regard. Refrain from using new, leading edge technologies that have not yet established themselves as being secure.

■ In looking at security features for web-based technologies, consider the importance of up-to-date industry or government standard data encryption, authentication, password security and meeting privacy.[12] Web conferencing technology, for example, should provide strong access control for the mediator, a visible list of participants and high level attendee authentication measures, such as "strong" meeting passwords. It is imperative to avoid platforms in which any information about the mediation might be made public.

Securing information on the mediator's computer or other device

■ Develop protocols for securely storing and regularly backing up information on your computer or other device.

■ Configure your computer's firewalls, software and network settings to minimize risks.

CONNECTING WITH OTHERS ABOUT CONFIDENTIALITY AND SECURITY OF INFORMATION

Know the applicable code of conduct, as it relates to confidentiality and the protection of client information. Discuss distance mediation security issues with the organization with which you are affiliated. If it does not have specific requirements relating to the use of technology, ask for recommendations.

Connect with other distance mediation practitioners to find out what they are doing.

Research how other fields are managing confidentiality and security in the context of technology use. A considerable amount of valuable material has been produced on this topic by various groups.

Ensure you understand the privacy laws and any other applicable legislation in your jurisdiction, as well as how they apply to your distance mediation practice.

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12 The *Distance Family 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.

- Ensure your computer systems are at all times protected from viruses, worms, Trojans and other threats to the integrity and safety of information.

- Password protect your computer and turn it off when it is not in use.

- Encrypt personal information that is stored on vulnerable devices, such as laptop computers or USB drives.

- Ensure that remote access to data on an office computer, organizational network or through a web-based service (also called "the cloud"), is permitted only by way of a secure website or by using a "strong" password.

- Take precautions to minimize the chance of theft or loss, particularly when using mobile computing devices.

- Delete data using methods appropriate to the level of sensitivity of the information. Before disposing of your computer or device, ensure data on it are purged or the medium storing the data is destroyed.

- Avoid using publicly-available computers and "Wi-Fi hotspots" or public wireless systems for transmitting or accessing confidential information. Be sure you understand how to work securely on your own wireless network.

Minimizing risks relating to parties' participation in distance mediation

- Advise the parties about the confidentiality risks inherent in the use of technology-facilitated mediation, as well as how you manage these risks. You may wish to explore how well the parties understand confidentiality of information in general.

  It is not uncommon for clients to underestimate the importance of confidentiality and, sometimes, to express indifference about potential privacy issues. It was the *Distance Family Mediation Project's* philosophy that, when it comes to privacy," it doesn't matter until it matters, and then it matters a lot"; accordingly, the Project team always made it their practice to take whatever steps they could to minimize the risks — even when encountering this attitude with parties.

- Add clauses pertaining to confidentiality and security of information, as it relates to using technology, in your Agreement to Mediate document. The clauses used by the Project in its Agreement to Mediate can be found in section 6 of these guidelines.

- 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 emails 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.

- Require parties to agree not to have another person in the room or within hearing distance when participating in the mediation, unless permission has been obtained from the mediator and the other party. Always ask if anyone else is in the room with distant parties before proceeding. This may be particularly important to do in cases where parties have someone in the home that they use for technical support. It is also essential that parties understand the need to take precautions to prevent their children from overhearing the discussions.

- If using a text-based, asynchronous technology such as email, cell phone texts or an online mediation platform, educate parties about how to prevent their mediation-related communications from being accessed by their children. It may be important, in cases where there are "tech savvy" children, to advise parties to password protect or otherwise secure their computer systems or other devices.

- Ensure the parties — and children, if they are to be involved — have separate email addresses and independent, private access to a computer.

- Pay particular attention to the fact that some parties may be tempted to record, and later "use", discussions held during distance mediation. If appropriate, discuss this issue with the parties and take precautions. While it may not be possible to prevent a determined party from recording discussions, there are strategies for minimizing the chance of this occurring. For example, if using a web conferencing platform that allows meetings to be recorded, ensure that parties are blocked from accessing this feature. It is crucial that parties understand the risk of children getting access to a recording.

- 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 email recipients are who you intend them to be. Be extremely careful about differentiating between the "reply all" and "reply" feature, and double-check all email recipient names before sending the message, particularly when using the automatic name completion feature. Coach parties to do this also.

- If the technology 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.

- 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 when using the mute feature of a teleconferencing or web conferencing platform. 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, in fact, 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.

- 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 taking place near them — including side conversations during mediation. Make it your practice to ask parties to mute their audio by default and to unmute only when they want to be heard. This can be especially important with voice-activated systems in which video is automatically transmitted along with audio.

- When 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 email notifications visible to parties can create serious confidentiality issues.

Protecting the integrity of documents

- Be alert to the fact 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 how to use these features — including how to effectively remove all of the markups in the final document. Similarly, before sending a marked-up draft, consider whether the recipient is, in fact, intended to see the changes or comments.

- Convert documents into read-only pdfs before providing them to the parties unless they are intended to be working documents.

- Communications by email and many other text-based technologies can easily be copied, modified or forwarded. Use the most secure communication option available to you, and compose and transmit written materials with extra caution.

Other benefits

Actively taking steps to minimize risks relating to the confidentiality and security of information — and communicating these steps clearly to the parties — may have benefits that go beyond protecting the privacy of parties. By being proactive in this way, you may well increase the parties' confidence in the distance mediation process. This, in turn, may encourage them to be more open and to engage more fully in the mediation process.

KNOW THE "LINGO"

Understanding common technology-related terminology is an important part of practicing distance mediation. Some of the terms you should know include:

Encryption: the conversion of data or information into a code

TLS (Transport Layer Security and, previously, SSL or Secure Sockets Layer): layering or multiple use of security procedures that include encryption, cryptography, and message authentication

https (Hypertext Transfer Protocol Secure): a communications protocol that applies TLS/SSL to regular Internet communications

VPN (Virtual Private Network): a technology which provides remote access security by routing or separating the remote user's communications away from others on the Internet or other network

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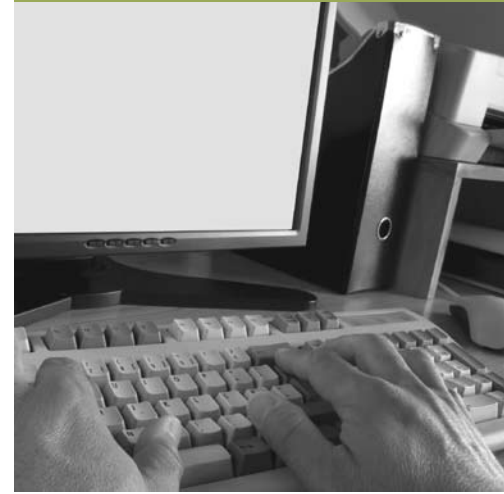
The Agreement to Mediate

The Agreement to Mediate is an essential instrument, both for explaining to the parties how mediation will be impacted by distance and technology use, and for obtaining their commitment to any requirements that the use of technology imposes on the process. As there are several unique aspects to distance family mediation which are not contemplated in the usual Agreement to Mediate, the document you normally use will likely need to be adapted to suit this purpose.

Consider carefully how distance mediation is different from traditional, face-to-face mediation, and review and modify your Agreement to Mediate accordingly. For example, if parties are to pay for technology-related costs — such as teleconferencing costs — it is important the document clearly reflect this. 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 Family Mediation Project's* Agreement to Mediate document, to address the special nature of distance mediations. The complete version of the document used by the Project in its third phase has been provided in Appendix A of these guidelines.

Location of the mediation

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

Without prejudice communications and inadmissibility

iii) Without limiting the generality of the foregoing, no party will disclose or attempt to compel disclosure of:

> *d) any notes, e-mails or any other communications made by a party or the Mediator during the mediation process.*

The use of information and communication technologies

i) The Mediator and the parties will rely primarily upon information and communication technologies to communicate with the parties and their counsel, and to conduct or participate in the mediation.

Confidentiality of information

i) Each party agrees not to have another person in the room or within hearing distance when using any information and communication technology to participate in the mediation.

ii) In particular, each party agrees none of their children will be present or within hearing distance, unless that child will be participating in some way in the mediation, and this has been expressly agreed upon by the parties beforehand.

iii) If either party wishes to have another person in the room, they will obtain permission of the Mediator and the other party prior to the mediation session beginning.

iv) Where all the parties agree that the other person will be privy to the mediation process, that person must sign the Agreement to Mediate and is bound by the terms of agreement.

v) Each party recognizes that, given the use of information and communication technology, it is not possible to ensure that all communications will be confidential.

vi) Each party commits to minimizing the chance of inappropriate disclosures, including protecting access to any e-mails, notes or other information relating to the mediation which may be stored in their computers or elsewhere, and to minimizing the consequences of any such disclosures should they occur.

vii) Each party understands that, given the use of information and communication technology, it is not possible to completely control where or how some personal information may be collected, stored or accessed.

viii) By signing this Agreement, each party specifically agrees to the Mediator using information and communication technologies in the context of the mediation, and releases the Mediator from any liability in the event of any inadvertent disclosure.

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.

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.

[The clause immediately above was included only in the second phase of the *Distance Family Mediation Project*, as parties were not expected to cover the costs incurred in using the technologies during the third phase.]
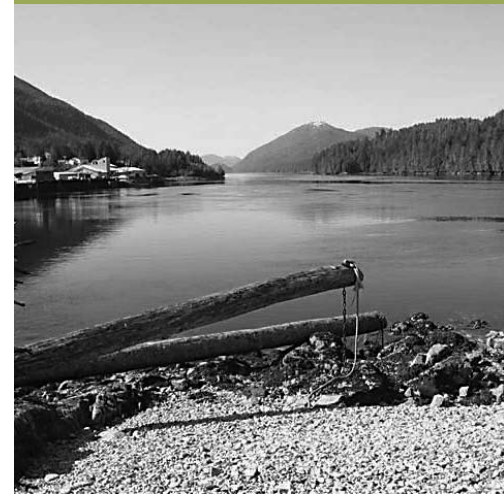
Preparing for the Distance Mediation

Good preparation plays an important part in any successful mediation; it plays an even greater part in distance mediation. Even if the parties are very familiar with the technologies you are using — and especially if they are not — technology creates a dynamic that will require you to employ some different approaches than you may be used to in traditional family mediation.

Thinking ahead about the factors that can make using technology in mediation more effective, and doing some preparatory groundwork with the parties, will lay a strong foundation for any upcoming pre-mediation and mediation sessions. The *Distance Family Mediation Project* team identified the following factors as being especially important:

Take time to build trust and rapport

Building trust and rapport with parties may be more difficult when conducting mediations from a distance. The lack of personal connection can impact the process negatively in a number of ways — it can, for example, result in the parties being less committed to the process. It is therefore important to find ways to get to know the parties, for them to get to know you, and for you to convey a professional presence in working with them.

While your own personality and preferences will ultimately dictate how you build trust and rapport, the following strategies were among those found to be helpful by the Project team:

■ Consider how to "close the distance". Plan ahead for ways to overcome the potentially impersonal or stilted nature of communicating through technology. 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 (show clients the room you are in by swinging your webcam around). Put yourself in the shoes of the distant parties, and ask yourself: What can't they see or hear?

■ If you will be using text-based technologies, make direct contact by telephone or videoconference beforehand. Consider, if feasible, the possible value in meeting with the parties in person before beginning a distance mediation.

■ Plan on ways to build the parties' confidence in you, and the distance mediation process. For example, when using audio-enabled technology, use a soft voice and calm, relaxed manner. Regardless of the technology you are using, carefully address 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."[13]

■ Set the right tone or "mood". If videoconferencing, for example, the background the parties will see in your office — including the colours — may affect how they will feel about you, and the mediation.

■ Work to create a professional presence. (You can find details on this later in this section.)

As during the other stages of mediation, it is important when doing the preparatory groundwork with parties to use active listening skills best suited to the technology. For instance, if using a webcam, make eye contact and nod to let the parties know you are paying attention. Sit close enough to the screen that your face can be seen clearly — too far away may create the impression you are uninterested.

Explore the parties' capabilities

Determine whether there are any party literacy or language issues, or other challenges, that may complicate technology use 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. Plan on making any accommodations that are necessary to support a person to participate more fully in the mediation. For example, if a party is hearing, sight, or mobility impaired, use a technology that suits that person's capabilities, or can be adjusted to address those capabilities.

The parties must also be comfortable with any technologies being used. Think about whether there would be a benefit in providing participants with basic information about those technologies in advance, to familiarize them with how they work 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.

Help parties prepare for the use of technology

In some circumstances you may wish to do a brief test run using a technology, one-on-one with the parties, before the mediation. This is particularly helpful when using web-based technologies with first-time users. A test run will allow you to determine whether there are any specific issues in using a technology, and to confirm that parties have access to the necessary hardware and software. Time spent on an advance test run can save valuable joint session time from being spent on one party's technological issues. If the test run is being used only for trying out the technology, ensure the parties understand that this is not the time to enter into any discussions about the dispute.

It may be helpful, when working with first-time users, to employ familiar technologies as part of an easing-in process. In the *Distance Family Mediation Project*, for example, the mediators assisted some parties in accessing the web conferencing platform by meeting with them on the telephone and then verbally "walking" them onto the platform. The mediators remained on the telephone with these parties until they had their audio and video transmitting. This was sometimes done even after first-time use, rather than waiting for parties to access the web conferencing platform on their own. It was a comfort

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13 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

for some parties to have the mediator present during this process. A further benefit was that, if the platform failed to work, mediation could continue by telephone without interruption.

During the test run, provide a tour of any unfamiliar technologies which will be used in the mediation. Cover the mechanics of how the technology works — the features that will be used and how the parties can use them — as well as any limitations of the technology that might become apparent during mediation. For example, if using an audio-based technology, ensure parties understand how to use the microphone and the mute function. Explain possible issues to expect, such as time lags and distorted sound.

It may be helpful, during the test run, to discuss basic etiquette, conversation rules and best practices relating to using the technology. This may also be a suitable time to raise ground rules for the pre-mediation session. For example, if the session is to be held by videoconference, you may wish to discuss the need to have a quiet, private and distraction-free area. If there will be children in the home, it is essential that parties arrange for child care — for the safety of the children as well as to ensure they cannot hear or see the discussions.

Use the technology in pre-mediation to give parties additional practice time with it before the joint session. If appropriate, encourage the parties to do a technology rehearsal with others also.

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 technology to fail to perform as expected. *Always* have a well-developed backup plan in case the technology fails or the parties, or you, are unable to access or use it. For example, if you are web conferencing, get backup telephone numbers for the parties — that is, obtain the numbers at which the parties can be reached should the platform prove to be problematic. Be sure to provide parties with your alternate contact information also.

The backup plan should be as specific as possible; for example, with synchronous technologies you might stipulate that the participants resort to the backup plan after three failed attempts with the technology. The plan should also include what will be done if only one of the parties has difficulty accessing the technology, or is limited to only partial use of its features. If using a videoconferencing platform, for instance, the backup plan could include changing to teleconference if one of the parties is unable to transmit their video while the other party is able to do so.

Set a positive tone around the need for a backup plan. Normalize technology glitches by acknowledging that technology isn't perfect and by being transparent about the purpose of the backup plan.

Ensure all participants know and are comfortable with the backup plan. If feasible, identify the plan jointly with them.

Compensate for missing cues

The absence of visual or audio cues presents special challenges for both the mediator and the parties. Their absence may, for example, make assessing deceit more complicated. Because of this, trust issues may also develop more easily. It is difficult, for instance, to confirm the identity, integrity and "truthfulness" of text-based messages. Even with video-enabled technologies, it can be difficult to gauge a party's sincerity or commitment to the process.

Create strategies ahead of time to compensate for missing cues. Using a combination of technologies — such as the telephone and a web-based option to combine audio with video and text — is one possible strategy. For example, when using web conferencing technology, consider whether it would be appropriate for you to use the private text chat function to find out from the parties what is going on for them, should this question arise for you during mediation.

Be flexible in your methods

Be prepared to modify the mediation process to take advantage of a technology's strengths, or to minimize its weaknesses. For instance, if it seems possible that it may be 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 creatively about how you can utilize technology. Pre-mediation time can, for example, be saved by posting on the Internet a video explaining the mediation process, the role of the mediator and what is expected of the parties.

Take the 4th party advantage

The use of technology can change the dynamics, add structure, or alter the tone of discussion in mediation. Plan ways to take advantage of these "4th party"[14] elements. For example, the Project team found that parties' focus on each other was often reduced when a document was "shared", so they could see it, on the web conferencing platform. This 4th party benefit, then, may be very useful in managing the discussion around some difficult 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. A few possible strategies include:

- "Under-promise and over-deliver" when making and keeping commitments.[15]

- 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.[16]

- Consider how rules of etiquette and best practices pertaining to technology apply to you as the mediator, and plan for ways to implement them. For example,

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14 See description of the term "4th party" in section 2, *Before Using Technology for Family Mediation*.

15 Material adapted from: Graham Ross. Distance Learning Course on Online Dispute Resolution, The Mediation Room, 2009. www.themediationroom.com

16 Ibid.

determine how you can minimize potential disturbances and distractions which might occur in your office during the mediation session. When using synchronous technologies, always make it your practice to arrive early for meetings with the parties. This will give you time to do your own technology test, prepare the meeting room if web conferencing, as well as allow you to greet parties as soon as they arrive on the platform.

- When using video-enabled media, remember that the technology is not a privacy shield. Your presentation and things that detract from it — such as unprofessional clothing, eating while you are conducting the mediation, or a messy office — may well be visible, and matter as much as if the parties were in the room with you.

- In using synchronous technologies provide the parties with meeting reminders that confirm both the date and time of the mediation sessions. As mentioned above, ensure the parties know how to reach you, and you know how to reach them, in the event of a technology failure.

- Be extra cautious about sending any written communications to the parties, including emails. Proof the material at least once, and double-check the message is addressed to the right party before sending it.

- While noted elsewhere in these guidelines, it bears repeating that the mediator must be fully competent in using the technology, as well as be able to provide practical instructions for using the technology and basic troubleshooting assistance to the parties.

Be aware of time management challenges

It was the *Distance Family Mediation Project* team's experience that time management may be more difficult in distance mediation. It is important to be very clear with the parties about expectations, to monitor the time being taken, to refocus the parties, and to assist them in making their responses as efficient as possible. If using a text-based application, for instance, ensure communications indicate whether a response to a message is expected, as well as the deadline for that response. Follow up with parties immediately if responses appear to be going off-track, and check in with parties regarding unexpected silences.

An added challenge for time management is that parties may feel less pressure to resolve issues when the mediation is from a distance. Some members of the Project team found that parties seemed inclined to have more sessions, and to have longer periods between the sessions, than in face-to-face mediation. Because of this, it is helpful for the mediator to have a well-developed strategy for maintaining momentum and building on progress made in mediation sessions.

As a mediator, you should expect — and be prepared to accommodate — technology glitches and the other time-consuming issues that can arise in distance mediation. In particular, expect that your efficiency may be negatively impacted. When using web conferencing technology, for example, you may find it is not unusual to spend unproductive computer time waiting for parties to access the platform.

Anticipating these types of challenges and planning on how to deal with them, in advance, are an essential part of preparing for the distance mediation.
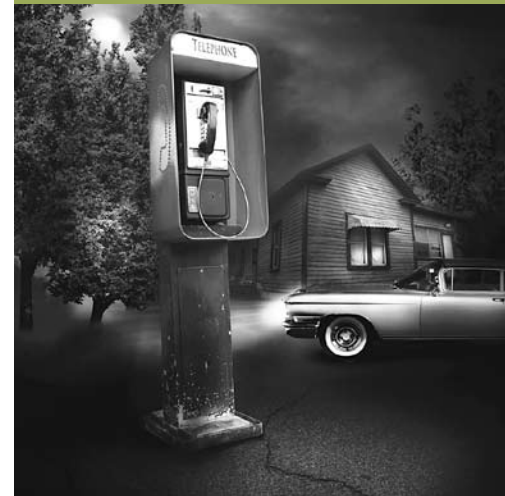
Screening for Safety and Assessing Capacity and Readiness to Mediate

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, a variety of considerations that will most likely require you to make some changes to the screening and assessment process and the tools you usually use.

While there is some suggestion in the literature that using technology to mediate reduces physical dangers, there is also some suggestion that distance mediation might create a false sense of security. The *Distance Family 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.[17] The team also recommends similar rigour in assessing the parties' capacity and readiness to mediate, or in determining how best to facilitate their "mediation competencies".[18]

Family violence is not the only consideration in screening; nevertheless, it is a major focus in distance mediation, just as it is in face-to-face mediation. In British Columbia, for example, the new *Family Law Act* requires *all* family dispute resolution professionals to screen for family violence.

Mediators should remain alert to the fact that there are many types of violence — it may not be only physical in nature[19] — and that assessment should not be limited to the parties' safety. Their children's physical, psychological and emotional safety are also crucial to consider. Additionally, mediators should be mindful of the fact that distance may not prove to be a barrier to someone who is determined to use violence. Because of the coercive nature of violence, an obligation also remains on the distance mediator to deter-

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17 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.mediatebc. com/PDFs/1-23-Resources-(For-Mediators)/Screening_Family_Paper.aspx. Subsequent to the publication of this paper, which references a number of key resources, an influential report was released by Nancy Ver Stegh and Clare Dalton, *Report from the Wingspread Conference on Domestic Violence and Family Courts* (2007).

18 While these guidelines refer to mediators as "assessing party capacity and readiness to mediate", the Project team recognizes that this is an evolving area. See, for example, Susan H. Crawford, et al., "From determining capacity to facilitating competencies: A new mediation framework", *Conflict Resolution Quarterly*. Vol. 20, Issue 4, 2003, pp. 385-401.

19 The Wingspread Conference on Domestic Violence and Family Courts led to the creation of the Domestic Violence and Family Court Project, which focused on the important issue of differentiation in domestic violence: http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ ViewCommittee/CommitteeID/14/mid/495

mine whether the parties can participate in the mediation process fully and voluntarily.

It is essential 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 a technology's capabilities in these respects. For example, if you are teleconferencing or web conferencing, you should know how you, as the mediator, can end the session for everyone when you leave it, so that the parties will not be able to continue communicating with each other by that medium after you have left.

Ideally, when selecting the technologies to use in your distance mediation practice, you will have considered their features from a safety perspective, as well as their advantages and disadvantages. For instance, using the telephone may help "dampen down" emotions and keep the parties' tone more business-like during mediation. In contrast, using video-enabled technologies that allow the parties to see each other may heighten or trigger emotions.

Make no assumptions about the safety of participants or their children. While distance may mitigate — or appear to mitigate — the immediate physical safety concerns, never assume that the parties' safety, their children's, or the mediator's, is guaranteed because of distance. You should take particular care about safety concerns when the parties are distant only from you, the mediator, and not from each other. It is critical that you know where to refer parties in the event a safety issue arises over the course of the mediation.

WHAT IS FAMILY VIOLENCE?

While there are many definitions of family violence, British Columbia's new *Family Law Act** defines it as including:

(a) physical abuse of a family member, including forced confinement or deprivation of the necessities of life, but not including the use of reasonable force to protect oneself or others from harm,

(b) sexual abuse of a family member,

(c) attempts to physically or sexually abuse a family member,

(d) psychological or emotional abuse of a family member, including

   (i) intimidation, harassment, coercion or threats, including threats respecting other persons, pets or property,

   (ii) unreasonable restrictions on, or prevention of, a family member's financial or personal autonomy,

   (iii) stalking or following of the family member, and

   (iv) intentional damage to property, and

(e) in the case of a child, direct or indirect exposure to family violence

*Part 1, Section 1, *Family Law Act*

Refrain from relying on the results of your initial assessment, and continue assessing for safety and capacity issues throughout the distance mediation. This is, again, especially vital in cases where the parties are near each other while the mediator is at a distance.

Safety and capacity considerations when using technologies were identified by the *Distance Family 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. Be aware that, for a variety of reasons, people may be reluctant to report family violence. Sometimes cultural factors can magnify the tendency not to disclose abuse to strangers.

The use of a detailed oral screening tool is suitable when using technology. Possible technology-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 technology use?

- Are there any restraining orders or protection orders restricting contact? Would communication using technology 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 email or other web addresses? If not, are they aware that the email or web conferencing communications in mediation might disclose their electronic addresses?

- If sharing a computer with the other party, can the parties keep emails separate and private?

- 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 social media, email or phone — occurred?

- What is the parties' comfort level with the technologies proposed for mediation, and how do they see those technologies 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 technology? Does one party see a technology being used by the other as creating an unsafe dynamic or situation? Will it be used to intimidate or to inappropriately maintain contact?

- Of the issues the party has identified for mediation, are there any they do not want to discuss using technology?

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

- **The presence of children:** 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 in the home. They may hear or see 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. Suggest the party arrange for there to be a place to "decompress" after mediation sessions, before interacting with 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 technology to be used will allow parties to send private messages to the mediator under these circumstances.

If you are using a web conferencing platform with a text chat function, take care to lay the ground rules for its use before you begin mediation. Ensure the platform you are using allows the mediator to prevent private chats between the parties and that you know how to use this control feature. If the platform does not give you this type of control, be aware that there is a possibility that one party could use the chat function as a way of intimidating the other party during mediation. Consider also how you will manage communication from parties by this means for reasons other than discomfort or difficulty.

■ 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 located near to each other during the mediation — whether in the same town, the same block, or on the same property — and the mediator elsewhere, ask how this is going to impact them. Ask also how they feel about the mediator being at a distance while they are in proximity to each other.

WHERE ARE THE CHILDREN DURING THE DISTANCE MEDIATION PROCESS?

The convenience of mediating from home may lead parties into thinking that child care arrangements are less important, or that they can be managed more simply, than if the mediation sessions were held at the mediator's office.

In fact, considerations such as ensuring that the children are out of hearing distance, or providing parties with time to decompress before returning to the children, can increase the importance of — and potentially complicate — the arrangements that need to be made for the children.

A *Distance Family Mediation Project* blog post that addresses this issue has been reprinted in Appendix B.

■ **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 technology. Certain terms used in emails or text messages, for example, may provoke strong emotions. Explore with parties what happens when they are triggered.

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

■ **Substance use or mental health issues:** If screening for 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 technology.

■ **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 technology could be used by either party to create a safety concern for the other party after the mediation. What is the safety risk? Ask the parties what is in place, or what could be put in place for them, so they can feel comfortable after the mediation.

■ **Resources for parties:** It is imperative that you be aware of both safety and legal resources that are available in the communities where the parties reside. At a minimum, the mediator should know what emergency resources and court services are available. As parties themselves may be familiar with their local resources, it may be helpful to explore their knowledge in this regard.

■ **The importance of confidentiality:** Remember that confidentiality and safety are closely linked. Since the potential for diminished confidentiality exists with the use of technology, you may need to draw the parties' attention to the reference about confidentiality of communications in the Agreement to Mediate.[20]

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. Be sure to ask whether there is anyone else in the room with the parties.

Many of the techniques for assessing safety and capacity to mediate are the same as in traditional mediation. The signs to watch for are also similar — for example, a party suddenly changing their position on an issue. It is, however, important that you remain aware that it is more difficult to gauge the level of safety concern when you cannot fully see the parties' body language. This difficulty may be compounded by the fact that it can be harder for the mediator to build rapport and trust with parties when at a distance. There is, as well, a danger that the technology may create the impression that more cues

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20 Additionally, it is important to consider confidentiality and security of information when both selecting and using technologies in distance mediation. The reader is referred to the previous sections which covered these topics, *Before Using Technology for Family Mediation* and *Managing Confidentiality and Security of Information*.

are available than is actually the case. In the Project team's experience, it was not unusual for the technology — especially video-enabled technologies — to become "invisible" and for it to seem, to the mediator, as if s/he was meeting in person with the parties. It is important to be conscious of this phenomenon.

If you are using a video-based technology, be extra vigilant about observing the discussion during the mediation session. When using audio or text-based technologies, draw on the senses available to you. 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 technology use is having on the parties' behavior and how this may be affecting their safety.

Considerations for Post Mediation

After the distance mediation session concludes, consider whether you should follow up with the parties. If you decide to do this, be sure to let the parties know in advance — and to explain the purpose of your follow-up. If a quick check-in phone call seems appropriate for the circumstances, do so with both parties to ensure a balanced approach. As separate meetings with parties can become problematic, however, don't allow yourself to be drawn into a conversation that might appear to undermine your neutrality as a mediator.

To identify any possible safety issues, you may wish to ask questions such as: Were you able to make decisions freely during the mediation? How did you feel after the mediation? Were you able to "decompress" after the session? How was it when you saw your children after the mediation? Do you have any current safety concerns? If the parties were in proximity to each other during the mediation, ask if this factor created any concerns. If there was a plan for post mediation, ask the parties if the plan has been followed.

Issues relating to capacity and readiness to mediate which may have arisen during the session can be identified through similar follow-up communications. Sharing with the parties a written summary of what was discussed in the session may also be helpful.

At all times, during and after a distance mediation session, take threats seriously. If you have had to end the session prematurely, talk about next steps with both parties.

Other Considerations

Readers are encouraged to do their own investigations about how best to screen for safety, and capacity and readiness to mediate, when practicing distance mediation — and to stay abreast of research and developments[21] in this new and growing area. At a minimum, the Project team suggests you should:

■   Be thoroughly familiar with the applicable code of conduct regarding requirements for screening for safety and capacity and readiness to mediate.

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21 Readers are encouraged to remain current with the research on screening generally. For instance, knowledge about differentiation in domestic violence continues to develop. As well, besides questions relating to the frequency, severity, and type of violence, it is now recommended that parties be asked about decision making within the family, and about child protection, mental health and substance use issues. A good resource for current information is the Association of Family and Conciliation Courts: http://www. afccnet.org/

■ Discuss with the organization with which you are affiliated safety and capacity screening issues relating to distance mediation. If its code of conduct does not have specific requirements relating to the use of technology, ask for recommendations.

■ Connect regularly with other distance mediation practitioners to find out how they screen and deal with safety and capacity issues.

■ Research how other fields are addressing safety and capacity concerns in the context of technology use. Be sure, however, to adapt any tools borrowed from another field, as many tools used to screen for violence are for purposes other than mediation — for instance, for hospital screening or research — and may not be applicable to mediation.

■ Ensure you understand any applicable legislation in your jurisdiction, as well as how it applies to your distance mediation practice. For example, as noted previously, in British Columbia the new *Family Law Act* requires all family dispute resolution professionals to screen for family violence.
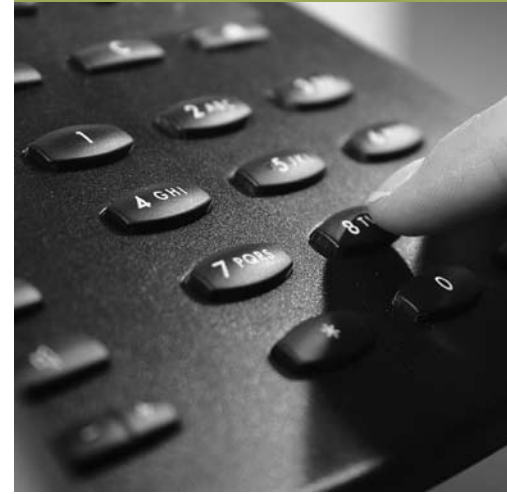
Conducting the Pre-Mediation Session

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 — in particular, *Preparing for the Distance Mediation* and *Screening for Safety and Assessing Capacity and Readiness to Mediate* — the basic ground rules and "dos 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 online environment. All are part of setting the right tone for an upcoming mediation session, and for positioning the process for success.

Mediators should consider the following, in particular, when conducting the pre-mediation sessions with parties:

■ It is especially helpful in distance mediation to let parties know how long the mediation will likely take, and — if using a synchronous technology — how long individual sessions will last. It was the *Distance Family Mediation Project* team's experience that the ideal length for distance mediation sessions is shorter than for those held face-to-face by the typical private practice mediator. The length of time for sessions conducted via web conference seemed best limited to two hours and, by teleconference, to one-and-a-half hours.

■ Set clear ground rules for the mediation at this point — or review any rules established during the preparatory stage — including the rules relating specifically to technology use. Examples of possible topics include:

Managing confidentiality and security: Once again, stress the need to participate in mediation in a private setting. For instance, if the technology is audio or video-enabled, and the children are to be nearby, discuss the need for child care to ensure the safety of the children as well as to prevent them from overhearing or seeing the discussions. Other important issues to discuss with the parties can be found in the section, *Managing Confidentiality and Security of Information*.

Promptness: The importance of "arriving" on time should be impressed upon parties, particularly since accessing the technology — for example, the teleconference or web-based platform — may take them longer than they expect. If appropriate, ask parties to arrive early so that any technical problems can be worked out in advance of the meeting time.

General process rules: Emphasize that the general process rules set for the distance mediation apply at all times, and using all technologies. For example, it was the

Project team's experience that it can be particularly tempting for parties to send private emails to the mediator between mediation sessions. As the rule had been established by the Project that the mediator could disclose to any party information provided by the other party, parties were reminded on these occasions that "secret" communications could not take place.

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 email. Time lags, when using any type of technology, can make it very difficult for the mediator to build on progress being made and to sustain the interest of the parties.

Mediator controlling the process: Establish rules that will help you remain in control of the mediation process. For example, in his paper, *Building Trust Online*[22], Graham Ross 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 technology. For instance, 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 technologies which capture and transmit the voice of only one speaker at a time. With such technologies, the words of one party may be completely lost when the other party "talks over" them. Discuss with parties how they should interrupt if they cannot see or hear you, or the other party, properly.

Etiquette: Similarly, do not assume parties understand the basic rules of etiquette when using technology. Educating parties about basic etiquette and best practices in using the different technologies 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 technologies 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. Remind parties they should speak in a normal voice when using an audio-enabled technology — that there is no need to shout. If video-enabled technology is to be used, coach parties how to face the camera and make eye contact during the mediation.

Noise management: Parties should be made aware of the importance of meeting in a quiet place. Background noise can be extremely distracting and can seriously disrupt the flow of discussions when using audio-based technologies. Just one participant's background noise can seriously affect the sound for everyone. At a minimum, the mediator and parties should ensure their telephones' ringers have been turned off. Not only is the noise created by telephones particularly disturbing, but the temptation to respond to calls can be overwhelming for some individuals.

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22 Graham Ross, *Building Trust Online: How to Adapt Mediation and Negotiation Techniques to the Virtual Environment*, op cit.

Many audio-based technologies have a feature that allows participants to mute their sound. Educating the parties about how and when to use this mute feature can be a useful strategy for minimizing noise. In addition to helping eliminate background noise, proper use of the mute feature can also reduce "echo" — a highly distracting problem that arises with some web conferencing platforms when a headset is not used by one of the participants.

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

Other distractions: Unlike traditional mediations, which typically take place in a controlled office setting, parties in distance mediation are often participating from their home or, possibly, from their work place. It is essential that parties arrange to have their environment free of distractions, such as other people wandering by, during the mediation. In addition to issues relating to confidentiality, noise and multi-tasking — addressed above — distractions can result in less than full and meaningful participation in the mediation by both parties.

- It may be tempting to bypass or skim over the questions you normally ask during pre-mediation — for example, inquiring about the current stage of the parties' litigation. It is still just as important to ask your usual questions, even though you are mediating from a distance.

- Likewise, be sure to convey the information you usually provide to parties, including information about the mediation process. If you have not already done so, explain the process clearly including how you will handle caucusing, concerns around bias and how mediation will be ended if required. In the Project team's experience, it was extremely helpful to be ultra-transparent when having this discussion with parties at a distance.

- Confirm you know where and how to connect with the parties for the joint session. As discussed in *Preparing for the Distance Mediation*, this should include obtaining alternate possible contact information. Be sure to review the backup plan — what will be done in the event the technology fails — with the parties.

- 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 is essential to discuss with parties how the mediator will ensure a balanced approach will be maintained during joint sessions. It may also be helpful to discuss with the distant party how they can most effectively participate, and to prepare the party attending the mediation in person as to how they can support the participation of the distant party.

- Discuss what the absence of body language in the mediation may mean for the parties, and for the mediator. If one of the parties is to be present, in person, with the mediator while the other party participates from a distance, discuss how the difference in reading of body language will be managed. A similar discussion should take place in other "uneven" situations — for example, if one of the parties will be attending distance mediation while in the same room as their lawyer, and the other party is participating on their own.

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- If parties appear anxious about the mediation, suggest they bring something familiar with them to the session, like a picture or favorite pair of slippers.

- Explore with the parties' their relative adeptness at using technology, and ask how any differences might impact the mediation.

- Discuss how parties will advise the mediator if they are experiencing technology fatigue during the mediation session.

- Ask the parties about concerns they may have specific to the use of technology, 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.

- Carefully monitor your own level of engagement during the pre-mediation session. There is a real danger of attention drift when using some technologies to communicate.

  Be particularly vigilant about applying the "staying on-task" ground rule to yourself. Attending to unrelated tasks — responding to emails when mediating via web conference, for example — is a pitfall which is also much easier for the mediator to fall into in distance mediation than when mediating face-to-face. The problems created by straying off-task are many, ranging from background noise (the sounds caused by side activities, such as keyboarding and paper-rustling, are typically amplified through audio-based technologies) to breaches of confidentiality (with some web-based platforms that allow for desktop sharing, your "discreet" replies to instant messages may be visible to all of the participants on the platform).

- Continue working to build rapport with the parties. Find ways to create common ground and to personalize your interactions. If using a video-based technology, for instance, acknowledge the environment the party is sitting in, if appropriate. Share something about yourself also. In addition to building a connection with the parties, it will magnify your presence — making it easier for you to remain in control of the mediation process from a distance.

Overall, be prepared to spend more time in pre-mediation discussions with parties than you would in face-to-face mediation. Laying solid groundwork at this time will go a long way toward making the joint distance mediation session a productive one.

> **"Take the time it takes so it takes less time."**
>
> **PAT PARELLI**

Managing the Mediation Session

After all the preparation, the time comes when the parties come together for the mediation session. Many of the steps taken during the earlier stages of the distance mediation are applicable here again. In addition to the general rules of thumb for the joint session, you will want to be mindful of how the inability to use all your senses, and the absence of body language with some technologies, impact your management of the session. Managing emotions and power differences, caucusing, dealing with perceptions of bias, and confidentiality are other areas worthy of extra attention.

The Joint Session in General

As many of the issues encountered in the individual, pre-mediation meeting also present themselves when conducting the joint distance mediation session, the reader is encouraged to review the guidelines in the previous section, *Conducting the Pre-Mediation Session*. The following are some additional considerations at this stage of the process:

■ **Check your technology:** Before the session, check to be certain your equipment and any technologies 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 essential that you be familiar with the most recent version available. Depending on the technology you are using, it may also be helpful to check with the parties that they are using the same version as you are.

If you are web conferencing, the platform may provide you — the "host" for the meeting — with control over who can use its features. Take the time to review the control settings to ensure the features are working as expected, and that you have assigned privileges to the participants appropriately. For example, if the platform allows you to assign recording privileges for the meeting participants, check that these privileges have not been provided to the parties.

■ **Do sound and screen checks:** With audio-enabled technologies, confirm that the parties can hear each other, and that you can hear them, at the time they join the session. Continue to monitor sound during the session. If you are using a web conferencing platform, check that the parties can see the screen or document you are expecting them to see.

■ **Do the preliminaries:** It may be tempting to skip the 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. It is, for instance, equally important at this introductory stage to clearly communicate what the objectives are for the session.

If you have not already done so, review the Agreement to Mediate document to ensure the parties understand the mediation process, the parameters of technology use, and the other provisions in the document. In particular, remind parties of the confidentiality provisions in the Agreement to Mediate.

Also remind parties of the ground rules established in pre-mediation or during the preparatory stage. Given the extremely distracting nature of background noise when using audio-enabled technologies, it may be particularly important to review rules relating to noise management. Similarly, remind parties of basic etiquette and best practices in using the technology, if appropriate. For example, when web conferencing, it may be helpful to remind parties to speak clearly, slow down or to not "talk over" each other.

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.

Always ask if anyone else is in the room or within hearing distance before beginning a session.

- **Expect a familiarization period:** For parties who have little or no previous experience with the technology, 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 a technology is a process which takes time can be a useful strategy for the mediator.

  In the same vein, it can be helpful to maintain a positive tone around the technology, including about any glitches that are experienced. As mentioned in *Preparing for the Distance Mediation*, being open about the imperfections of technology and reminding parties about the availability of a backup plan in the event of difficulties can help increase parties' comfort level during the familiarization period.

- **Use your mediator's toolbox:** The classic mediator's tools and strategies will likely be your most useful ones during distance joint sessions as well. For the *Distance Family Mediation Project* team, some of these tools and strategies were, in fact, even more useful in distance mediation than in traditional mediation. The team found, for instance, that it is much easier to encourage parties to focus on a document — rather than on each other — when web conferencing than when they are face-to-face in the same room. The web conferencing environment may also make it easier for the mediator to observe the parties' reactions while they are reviewing documents.

  On the other hand, some of the classic mediator's tools are more challenging 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 harder to "hear" — literally and figuratively — what parties are saying, and for parties to feel that they are being heard. It is essential in this regard to fully understand any audio-related idiosyncrasies or limitations of the technology, as well as your own "listening" capabilities when using it.

  Consider how some mediator's tools could be modified, and what new or different tools and strategies would be useful for you, when mediating with technologies. For example, to help summarize, it may be useful to take notes of your understand-

ing of the discussions held during a teleconference mediation and email them to the parties later.

- **Be courteous:** The rules of courtesy that apply in face-to-face mediation are also applicable in distance mediation. It is essential, for example, for the mediator to be respectful of the parties' time, and to arrive early to greet them, particularly when using synchronous technologies such as teleconferencing or web conferencing. (An early arrival, as discussed elsewhere, also provides time to check whether your own equipment and the platform are functioning as expected.)

- **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 take notes (however, let the parties know if you do this, so they are not left with the impression you are engaged in another task). As in pre-mediations, be sure to stay on-task at all times. Remove temptations to multi-task, if possible. For instance, if web conferencing, close all open documents and applications — including email — on your computer, except for the ones you will be using during the mediation.

  When using video-enabled technology, remember that parties can see you at all times during the session. Remain aware of your physical presentation and, if possible, monitor yourself in the self-view panel. Ask yourself: Am I still framed properly in the video pane? Has the lighting changed? Watch your own body language: Am I conveying the message I intend to send by my posture and the direction of my gaze?

- **Monitor the 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.

  Should one of the parties be 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 to engage the distant party, and allow him or her to participate more fully. Don't be afraid to provide detail: for example, "I've got a paper in front of me; I know you don't have one" or "It's a bit too bright in here, so I'm going to get up and close the blinds".

HOW'S YOUR ON-SCREEN PRESENCE?

We don't often get the opportunity to see ourselves as we work. Distance mediation by video or web conference offers mediators a rare opportunity to do this.

Are you satisfied with how you look on-screen? For a short checklist to help you present your best on-screen self, see Appendix D.

As in traditional mediation, remember to take breaks if parties appear to be drifting, tired or if the session is long. Be especially alert to the possibility that parties may be experiencing technology fatigue. Using technology for long periods of time can be mentally — and physically — very tiring, and may negatively impact both concentration and active participation in the process.

■ **Watch for alternate personas:** Be aware that the parties may present a particular persona when using specific technologies. For example, in teleconference mediations during the *Distance Family Mediation Project*, some parties seemed especially inclined to present their "business persona" — that is, they were more formal and perhaps less emotional than they might have been if meeting in person. Expecting this phenomenon, so you can make the most of its advantages or minimize its disadvantages, 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 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.

■ **Make the most of the technologies' strengths:** In addition to being fully competent in using the technologies you've chosen, make sure you take advantage of their strengths. If using a multi-featured technology, for example, employ these features in a variety of ways to enrich the mediation process. For example, if mediating with a web conferencing technology that has whiteboard capability, consider using this feature not only for note-taking, but also to display the meeting agenda, to post a picture of the children, to share a calendar and to view the draft Memorandum of Understanding.

To avoid getting "stuck" on using a particular technology, make it your practice to continually assess the efficiency or value of the technology being used. Watch for cues that suggest the technology is hindering the discussions. If you find that you, or any of the parties, are repeating yourselves in order to communicate, consider using another technology. As it can be difficult to convey complex information using only one technology, consider whether it would be more helpful to use a "multi-tool" approach — a combination of technologies for conducting the joint sessions.

■ **Retain control over the mediation process:** It is typically more difficult to maintain control over the mediation process from a distance, in part because many of the traditional interventions used by mediators in face-to-face mediations are not available. In distance mediation, remaining in control of the technology itself is critical to retaining control over the process. For instance, when web conferencing, it is important to ensure you, as mediator, are in control of the platform's various features. Resist the temptation to allow parties to write on the whiteboard or edit the documents; engage them in ways that do not involve them directly working with information on the platform.

■ **Remember to use your backup plan:** In the Project team's experience, it is easy to forget to implement the backup plan when the technology fails. This seems especially true when the primary technology being used has been performing flawlessly. Needless to say, it is essential to remember in the event of technology failure to use the backup plan discussed with parties during the preparatory or pre-mediation stage.

- ■ **Continuously screen for safety and capacity:** The need to constantly monitor for possible safety and capacity concerns is ongoing at all stages of the mediation process, including the joint mediation session. See section 8, *Screening for Safety and Assessing Capacity and Readiness to Mediate*, for an exploration of issues connected with this topic.

- ■ **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.

- ■ **Follow up:** Be diligent about following up with the parties over the course of the mediation, and highlighting different progress milestones as they are reached. In an email or other document, confirm any areas of agreement or detail the steps the parties indicated they would take towards resolving their differences. If you are using an Agreement or MOU as a document template, sharing a draft that shows the changes made during a session can provide helpful feedback.

The Absence of Body Language

While some parties may find the absence of each other's body language to be a benefit of distance mediation, for the mediator this can be an area of particular challenge. Without visual cues — when using text-based technologies, for example — it is more difficult to gauge emotions, parties' engagement in the process, commitment to resolving the issues and, even, to detect signs of a mental state that could diminish a party's capacity to mediate.

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 technology. Deeply ingrained communication strategies, such as looking at a party to convey who you are speaking to, are also not always available. With entirely audio-based technologies, for instance, 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 (also discussed below) — are useful in compensating for the absence of body language. It is, as well, always helpful to use the range of senses that are available to you — such as speaking and "hearing" — to their fullest.

As discussed in *Screening for Safety and Assessing Capacity and Readiness to Mediate*, mediators should be watchful of a phenomenon in which the technology becomes "invisible" over the course of the mediation. This phenomenon — which seems particularly prevalent when using video-enabled technology — can leave the mediator with the impression that s/he is meeting in-person with the parties and that more cues, including those relating to body language, are available than is actually the case.

Managing Emotions and Power Differences

The absence of visual or audio cues — or limitations around accurately detecting them — is 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

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of the mediator than does face-to-face mediation. At the same time, however, the usual mediator's tools, with some modifications, may still prove to be the most useful ones:

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

■ **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. As in traditional mediation, 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.

■ **Listen, acknowledge, reframe and reflect:** While it is more difficult for a mediator to de-escalate a situation with high emotions from a distance, some of the intervention options are similar to 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.

■ **Be prepared to caucus:** It may be helpful to seek opportunities to assess emotions and manage power differences by caucusing. The reader is referred to the following subsection, "Caucusing", for some guidelines specific to distance mediation.

■ **Watch for triggers:** As noted earlier (see section 8, *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.

■ **Watch for expressions of discomfort or difficulty:** Also noted in section 8 is the need to discuss with parties how they will let you know if they are uncomfortable during mediation or having difficulty following or understanding the conversation. Be sure to watch for these agreed-upon communications, in addition to other expressions of discomfort or difficulty.

■ **Review ground rules:** Review the ground rules about communication and conduct — such as turn-taking and courtesy — which you have established. 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 not do so without letting the other participants know first.

■ **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 simply be oblivious as to how their tone, manner and language use impact the other party. If using text-based technology, for example, coach these individuals to reframe their comments using more neutral language, to avoid writing words in all capitals, and to be cautious about repeating punctuation to emphasize points. 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. 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 technologies 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 technologies. Pay attention to your tone throughout the mediation. Speaking too quickly, or using your voice to speak louder or more sternly, may exacerbate a situation and escalate the parties' emotions.

- **Create special strategies for high-conflict cases:** Consider using text-based mediums, such as email, with high-conflict couples. Text may be an effective means of communicating for such couples because, with mediator assistance, the parties may be able to express their emotions in a more constructive manner than when speaking. Consider imposing a caucus-style format on email mediations, or vetting emails 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 in section 8, have a predetermined plan for ending the mediation if necessary — and ensure the parties are aware of this plan. It is essential you know how to manage the technology effectively in a situation like this. For example, if web conferencing, it is imperative that you end the session in a way that does not allow the parties to remain alone with each other on the platform after you have left.

In the *Distance Family Mediation Project,* the team's experience was that it is particularly 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 emails 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.

A NOTE ABOUT COMMUNICATION

Even for the best writers, it's not easy to communicate effectively in writing without the reader sometimes misinterpreting either the meaning or the tone of the text.

Oral communication also has its limitations, especially under the emotionally-charged circumstances in which some people find themselves in family mediation.

Two *Distance Family Mediation Project* blog posts addressing this issue have been reprinted in Appendix B:

How Good Emailing Can Improve a Bad Relationship

When it ain't easy to say the right thing: How distance mediators help

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. They may, however, be more difficult to manage and it is well worth the mediator taking the time to implement strategies that demonstrate or convey his or her impartiality.

It is critical to ensure there is balance in your communications with the parties. For example, in text-based communications, do not pay more attention to one party's messages than the other's. In teleconference sessions, avoid getting into a discussion with one party while waiting for the other to join the call; similarly, avoid two-way conversations with the "chattier" party during the session. Of course, it may happen that the different response style of one of the parties results in spending more time communicating with one party than the other — which in itself can create a perception of bias.

Particularly challenging to deal with are 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 in person may well appear to have an advantage. It is important for the mediator to openly acknowledge this perception, and take clear steps to manage it. If videoconferencing, pay close attention to where you are looking during the session — balance looking at the party in attendance with looking at the webcam when you speak with the distant party. Consider having the party who is attending in person come into your office *after* you and the distant party have connected. The distant party will be less likely to feel at a disadvantage, or to think that the mediator has spent more time with the other party.

Even when both parties are participating in mediation from a distance, a perception of bias can be created if one party appears to be spending time alone with the mediator. This can occur, for example, with synchronous technologies when one party arrives late to the session because of technology problems. In the Project team's experience, an apparent imbalance can occur even when one party experiences difficulty with a single aspect of the technology while the other does not — for instance, if one party is unable to transmit their video while the mediator and other party are transmitting theirs. In such cases, it may be helpful to quickly change to the backup technology so that both parties are again on an equal footing.

IF ONE PERSON IS ATTENDING IN PERSON AND THE OTHER FROM A DISTANCE, USING THE TELEPHONE

"I send an email to all of the parties confirming they are comfortable with one party being present in my office, and the other phoning in by telephone. I assure the parties that in the general session I will not be in the mediation room unless both parties are present, in person and by telephone.

[During the session] I ensure that the telephone is on speaker phone, so everyone hears what is being said, and that the volume is correct so there are no lost sentences."

A MEDIATOR WITH THE *DISTANCE FAMILY MEDIATION PROJECT*

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 them 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 when 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.

Again, it is a helpful strategy to provide to the parties, in writing, the ground rules the mediator will adhere to when conducting the distance mediation.

Caucusing

While it offers the same benefits as in face-to-face mediation work, caucusing from a distance comes with its own unique challenges. Even when a caucusing function is built into the technology, it is often more difficult to manage than in traditional mediation.

Because the logistics can be complex, it is best not to rely on spontaneous caucusing. Determine in advance how caucus sessions will be conducted, and clearly explain the purpose of caucusing and related protocols to the parties. Providing this information to them in writing — for example, in an email — may be especially helpful. It is important, in the event caucusing is required, that the mediator be precise in following the protocols that were established. As noted above, because of the potential for perceived bias, adhering to the protocols is particularly important when one party is attending the mediation in person and the other is at a distance.

In general, discretion should be exercised concerning the number or frequency of caucus sessions, as well as their length. Issues that are especially problematic when caucusing from a distance include:

- **Attention drift:** When caucusing using synchronous technologies, such as teleconference or web conference, ask that the parties leave or wait on the line or platform for only a reasonable length of time, and as infrequently as possible. There is a risk that the non-caucusing party's attention may drift, and it may be difficult to get him or her to return if s/he leaves the session.

- **Cost:** Depending on the technology being used, caucusing may come at a significant financial cost to the parties, and the mediator. For example, each minute that a party waits on the teleconference line may add to the cost of the mediation. It is important that this be considered, and drawn to the parties' attention, when planning the caucus procedures. Consideration of the parties' expenditure of time when caucusing is an important courtesy as well.

- **Confidentiality:** Of particular concern in distance mediation is how to protect confidentiality during caucusing — specifically, how to ensure that the non-caucusing party cannot hear or see discussions involving the caucusing party.

  Be absolutely certain you understand how to use the technology in this regard, and that you confirm the technology is functioning as expected. When using a web-based platform with break-out or caucus capabilities, for example, be sure you are fully competent in using this feature and that conversations in the break-out "room" are, in fact, completely private. Similarly, when using an audio-based technology that relies on muting lines, be certain that you understand how to use this feature and that caucus conversations are not being overheard by others. If

you are teleconferencing and your caucusing protocol is for the non-caucusing party to leave the line, ascertain whether the party has hung up and the teleconference is locked before starting the caucus process with the other party. It is equally imperative, when one party is attending the mediation in person and the other is at a distance, that the mediator ensure the present party is unable to hear or see the private conversation with the distant party — and vice versa.

- **Process logistics:** It can be especially difficult to caucus in a fluid way when teleconferencing and using video or web conferencing technologies without break-out capabilities. While there are a variety of solutions to this problem, in the *Distance Family Mediation Project* team's experience, a good option is to ask the non-caucusing party to return to the session at a fixed time. In doing this, it is important to make sure the party does, in fact, understand the need to remain available and knows how to check back in. Another option, when teleconferencing, is to leave the non-caucusing party on the line and call the caucusing party on a separate line. This option is more expensive, but ensures that you do not lose the non-caucusing party and, also, that the party you are caucusing with is completely separated from the other party.

- **Perceptions of bias:** There is a danger, even more than in face-to-face mediation, that the waiting or non-caucusing party will perceive the mediator spending time with the other party to be a form of favouritism. As indicated, planning and communicating caucus protocols ahead of time — and implementing them precisely, if a need for caucusing arises — can help avoid this perception. The plan should include spending equal time caucusing with both parties. Should a caucus be required during a session, be sure to remind both parties of the protocols.

In the Project team's experience, caucusing using technology adds a layer of complexity to the mediation process. For this reason alone, it may be best to avoid conducting caucus sessions unless they are clearly necessary.

Confidentiality

It is critical to carefully manage the risks relating to the confidentiality and security of information in distance mediation. These risks appear at every stage of the distance mediation process. The reader is encouraged to review section 5 of these guidelines, which explores some of the key considerations as they apply to conducting the joint mediation sessions.

Dealing with Agreements and Memoranda of Understanding

When mediation concludes, and the Agreement or Memorandum of Understanding (MOU) 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 technologies being used that contrive to create this interference. This section explores a few precautions that can decrease the likelihood of a misunderstanding, and increase the likelihood that the parties will comply with the agreement they have crafted in mediation.

The inability to use all your senses — that is, the absence of visual cues, audio cues, or sometimes both — may create particular challenges for the mediator when dealing with Agreements or MOUs, as it does with so many other aspects of distance mediation. It may be especially difficult for the mediator to gauge the commitment of the parties to the terms laid out in these final documents.

Some of the mediations conducted under the *Distance Family Mediation Project* suggested that the more cues accessible to the mediator, the greater the chance that s/he can assist the parties to develop an agreement or plan with which they will be satisfied and 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 any agreement they have made. Take extra steps to confirm they understand the terms of their agreement. This could be done, for example, by making a check-in videoconference or phone call with each of the parties.

- As in traditional mediation, it is important to confirm with the parties that they understand the nature of the document they have received at the end of the mediation — whether it is, or is not, a legally binding document. This should also be reflected clearly on the face of the document.

- When distant from the parties, the mediator may need to be more cognizant of monitoring or assisting with the process involved in finalizing the resolution. In the *Distance Family Mediation Project*, some parties appeared to have particular difficulty understanding this process. It may be helpful to follow up with parties to provide clarification regarding the steps required, as well as some support. Parties in remote areas without lawyers may, for example, require assistance in obtaining independent legal advice. If it is appropriate for the circumstances, consider

adding a clause in the Agreement or MOU regarding when or where the parties will finalize the terms of consensus.

■ It is important that there be written follow-up by the mediator as the mediation progresses. Sharing the draft Agreement or MOU which shows the changes made during a session will highlight — and help build on — the parties' progress as different milestones are reached. It can also act as a helpful reminder to parties the steps they indicated they would take towards resolving their differences.

■ Certain technologies are especially helpful when reviewing Agreements, MOUs and other documents. For example, web conferencing platforms that allow all of the participants to simultaneously view the same document can be very useful in facilitating further discussion of its contents.

■ Consider ahead of time — and ensure the parties understand — how the document will be signed. Similarly, if verifying the identity of the parties is a concern for you, consider in advance what steps you will take to confirm the parties are who they say they are.

■ The integrity of documents, such as an Agreement or MOU, should be protected so it cannot be modified in any way. This is particularly important when allowing these documents to be signed in counterpart. The Project team strongly recommends converting these documents into read-only pdfs. To further protect and clarify the intended use of documents still in a draft form, you may also want to make it your practice to mark them with a "draft" watermark.

It is recognized that considerable variation exists in mediators' individual practice — and in the terminology used — when it comes to the documents and processes that deal with finalizing resolutions. These guidelines do not reflect these variations specifically, nor are they intended to provide direction on the drafting of such documents or on how agreements are to be finalized. Rather, their purpose is simply to capture highlights of the Project team's thinking, based on their distance mediation experiences. It is suggested that the reader bear these limitations in mind when considering the guidelines in this section.

"AGREEMENT" AND "MEMORANDUM OF UNDERSTANDING (MOU)": A NOTE ON OUR TERMINOLOGY

At the end of mediation, the parties' agreement about how they will resolve some or all of the issues is usually recorded in a document drafted by the mediator. This document may or may not be legally binding.

Our use of the term "Agreement" in this section refers to a legally binding document which reflects the terms of the parties' agreement. "Memorandum of Understanding (MOU)" is used to refer to a document that describes the plan that the parties have agreed to in mediation, but is not legally binding. In our definition, an MOU is a framework from which the more detailed, legally binding Agreement will be developed.

A Few Final Thoughts

This foray into the practice of distance mediation may leave you feeling that there is still a long way to go when it comes to knowing how best to use technology in family mediation. Don't let this deter you from making a start. Distance mediation in a family setting may still be a relatively new area, but it holds a great deal of promise.

A good start is to begin familiarizing yourself with as many mediation-friendly technologies as possible. Connect with others who are interested in distance family 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 stay abreast of current trends, by attending some of the wonderful forums and conferences on online dispute resolution that are available today. Be creative and contribute your ideas to this fascinating, developing field.

Above all, explore in the spirit of experimentation. We, the *Distance Family Mediation Project* team, believe that you — like us — will not be disappointed.

> "We always overestimate the change that will occur in the next two years and underestimate the change that will occur in the next ten. Don't let yourself be lulled into inaction."
>
> **BILL GATES**

Bibliography

Conley Tyler, Melissa and McPherson, Mark. "Online Dispute Resolution and Family Disputes", Journal of Family Studies. Vol. 12, No. 2, 2006. University of Melbourne Legal Studies Research Paper No. 297. http://ssrn.com/abstract=1032743

Crawford, Susan H; Dabney, Lewis; Filner, Judith M.; and Maida, Peter R. "From determining capacity to facilitating competencies: A new mediation framework", Conflict Resolution Quarterly. Vol. 20, Issue 4, June 2003, pp. 385 – 401. http://onlinelibrary.wiley.com/doi/10.1002/crq.33/abstract

"Domestic Violence and Family Court Project", Association of Family and Conciliation Courts. Center for Excellence in Family Court Practice, Association of Family and Conciliation Courts, 2012. http://www.afccnet.org/ResourceCenter/CenterforExcellenceinFamilyCourtPractice/ctl/ViewCommittee/CommitteeID/14/mid/495

Dispute Resolution and Information Technology Principles for Good Practice. Draft paper. National Alternative Dispute Resolution Advisory Council, Government of Australia, March 2002.

"E-mail Netiquette", *Yale University Library*. Yale University, copyright 2007. http://www.library.yale.edu/training/netiquette/

Getz, Colleen. *Closing the Distance with Technology: Report on Phase 1 of the Technology-Assisted Family Mediation Project*. Victoria, British Columbia: Mediator Roster Society, December 2007. http://mediatebc.com/PDFs/1-2-Mediation-Services/Closing_Distance.aspx

Getz, Colleen. *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. http://mediatebc.com/PDFs/1-2-Mediation-Services/Distance-Mediation-Project---Evaluation-Report.aspx

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

Guidelines for Practising Ethically with New Information Technologies (Information to Supplement the Code of Professional Conduct). September 2008. Canadian Bar Association. http://www.cba.org/CBA/activities/pdf/guidelines-eng.pdf

Helie, John and Melamed, James C. "Email Management and Etiquette". *Mediate.com*. Resourceful Internet Solutions Inc. http://www.mediate.com/articles/email.cfm

Hoffman, David A. "Communicating Collaboratively in Cyberspace: What Couples Counselors Can Teach Dispute Resolvers About Email". *Mediate.com*. Resourceful Internet Solutions Inc., November 2007. http://www.mediate.com/articles/hoffmanD2.cfm

Katsh, Ethan and Rifkin, Janet. *Online Dispute Resolution: Resolving Disputes in Cyberspace*. San Francisco: Jossey-Bass, 2001.

Kelly, Joan B. and Johnson, Michael P. "Differentiation Among Types of Intimate Partner Violence: Research Update and Implications for Interventions", *Family Court Review*. Association of Family and Conciliation Courts, Vol. 46, No. 3., July 2008.

Melamed, James C. "We are All Online Mediators". Mediate.com. Resourceful Internet Solutions Inc., October 2009. http://www.mediate.com/articles/we_are_all_online_Mediators.cfm (Numerous other articles pertaining to technology use in mediation, by this author, at Oregon Mediation Centre: http://www.internetmediator.com/pg229.cfm)

Ross, Graham. *Building Trust Online: How to Adapt Mediation and Negotiation Techniques to the Virtual Environment*. The Mediation Room, 2009. http://www.themediationroom.com. Unpublished paper presented at: Distance Learning Course on Online Dispute Resolution, The Mediation Room (2009); ADR/ODR workshop, Universitat Oberta de Catalunya, Barcelona (2009); the 9th International Forum on ODR, Buenos Aires (2010); and the BILETA (British and Irish Law, Education and Technology Association) Conference, Law Faculty of the University of Vienna, Vienna (2010).

Ross, Graham. Distance Learning Course on Online Dispute Resolution, The Mediation Room, 2009. http://www.themediationroom.com

Safety Screening in Family Mediation. Victoria: British Columbia Mediator Roster Society, January 2008. http://www.mediatebc.com/PDFs/1-23-Resources-(For-Mediators)/Screening_Family_Paper.aspx

Skyring, Carol. *Videoconference Tips: Good Camera Shots*. LearnTel, Australia. http://www.slideshare.net/learntel/videoconference-tips-camera-shots-3733519

Summers Raines, Susan. *The Practice of Mediation Online: Techniques to Use or Avoid when Mediating in Cyberspace*. Kennesaw State University, 2004.

Summers Raines, Susan and Conley Tyler, Melissa. *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

Tait, Cathy. *Evaluation of the Distance Family Mediation Project: Report on Phase III of the Technology-Assisted Family Mediation Project*. Vancouver, British Columbia: Mediate BC Society. Anticipated publication date: Winter 2012.

Ver Stegh, Nancy and Dalton, Clare. *Report from the Wingspread Conference on Domestic Violence and Family Courts*. 2007.

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

"Videoconferencing Tips for Success". *Northwestern University Information Technology*. Evanston, Illinois. Updated November 2011. http://www.it.northwestern.edu/videoconferencing/tips.html

Zelinka, Anne. "27 Tips for Teleconferencing", *WebWorkerDaily*. The GiGaOM Network, 28 January 2007. http://webworkerdaily.com/2007/01/28/27-tips-for-teleconferencing/

Agreement to Mediate for the *Distance Family Mediation Project*

The Distance Family Mediation Project

Agreement to Mediate

BETWEEN:

_____

(Name of Party)

AND:

_____

(Name of Party)

AND:

_____

(the "Mediator")

Because:

i) The parties wish to settle matters in dispute between them without an adversarial process. The parties, their lawyers and the Mediator will make a serious attempt, in mediation, to resolve all issues fairly.

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

The Parties Agree:

1. Process

i) _____ will be the Mediator.

ii) The Mediator will act as an impartial facilitator to assist the parties in a negotiation aimed at the resolution of issues between them. All parties will work with the Mediator to isolate points of agreement and disagreement, to identify their interests and to explore solutions.

iii) The parties understand that the Mediator may have separate meetings with each of them and/or with their lawyers at any time during the mediation.

2. Disclosure of Information

i) The parties acknowledge that full disclosure of all relevant information is essential to the mediation process, and they agree to fully, completely and honestly disclose all relevant information to each other and to the Mediator.

ii) The parties understand that any agreement arising out of mediation may be set aside if full and frank disclosure has not been made.

3. During the Mediation Process

i) The parties agree that they will not, without first obtaining the written consent of the other party and advising the Mediator:

    a) make any change to the residence or lifestyle of the child(ren) during the mediation process; or
    b) dispose or diminish any asset in which the other party has an interest or may have an interest.

4. Confidentiality of Information Disclosed to the Mediator

i) It is agreed that the Mediator may disclose to any party any information provided by the other party which the Mediator believes to be relevant to the issues being mediated.

ii) The Mediator will treat as confidential all information supplied to, obtained by, or which comes to the knowledge of the Mediator as a result of his or her participation in mediation, except:

    a) as required by law, including reporting a child in need of protection as defined by the *Child, Family and Community Service Act*;
    b) when the information discloses an actual or potential threat to human life or safety;
    c) with the written consent of all participants;
    d) for research, statistical, accreditation or educational purposes, provided

the information does not directly or indirectly disclose the identity of any participant; or

e) for any certificate or report that the Mediator is required to prepare.

5. Without Prejudice Communications and Inadmissibility

i) All communications between the parties and with the Mediator are part of an effort to settle issues and are conducted on a without prejudice basis.

ii) All communications occurring in the context of the mediation are confidential and are inadmissible in any legal proceeding. No party will subpoena the Mediator to give evidence. Nor will any party seek to introduce into evidence, or compel the Mediator to produce, any records, documents or notes made or held by the Mediator and arising out of or related to the mediation.

iii) Without limiting the generality of the foregoing, no party will disclose or attempt to compel disclosure of:

a) any views expressed or suggestions made by another party in respect of the possible settlement of the dispute;
b) any admissions made by a party in the course of the mediation;
c) the fact that another party had indicated a willingness to accept a proposal made by any party to the mediation; or
d) any notes, e-mails or any other communications made by a party or the Mediator during the mediation process.

6. The Use of Information and Communication Technologies

i) The Mediator and the parties will rely primarily upon information and communication technologies to communicate with the parties and their counsel, and to conduct or participate in the mediation.

ii) The Mediator, Mediate BC Society and the Distance Family Mediation Project do not endorse any of the information and communication technology products or services used to conduct the mediation. Because the Mediator is "testing" the use of information and communication technologies under the auspices of the Distance Family Mediation Project, there may be process issues and disruptions. The Mediator and the parties will make efforts to minimize the impact of any such disruptions on the mediation process.

7. Confidentiality of Information

i) Each party agrees not to have another person in the room or within hearing distance when using any information and communication technology to participate in the mediation.

ii) In particular, each party agrees none of their children will be present or within hearing distance, unless that child will be participating in some way in the mediation, and this has been expressly agreed upon by the parties beforehand.

iii) If either party wishes to have another person in the room, they will obtain permission of the Mediator and the other party prior to the mediation session beginning.

iv) Where all the parties agree that the other person will be privy to the mediation process, that person must sign the Agreement to Mediate and is bound by the terms of agreement,

v) Each party recognizes that, given the use of information and communication technology, it is not possible to ensure that all communications will be confidential.

vi) Each party commits to minimizing the chance of inappropriate disclosures, including protecting access to any e-mails, notes or other information relating to the mediation which may be stored in their computers or elsewhere, and to minimizing the consequences of any such disclosures should they occur.

vii) Each party understands that, given the use of information and communication technology, it is not possible to completely control where or how some personal information may be collected, stored or accessed.

viii) By signing this Agreement, each party specifically agrees to the Mediator using information and communication technologies in the context of the mediation, and releases the Mediator from any liability in the event of any inadvertent disclosure.

8. Reaching a Resolution

i) Where a resolution of some or all of the issues is reached, the Mediator, the parties or their counsel will reduce the terms of consensus to writing as soon as possible, by way of an agreement, a memorandum of understanding or in a court order.

9. Independent Legal Advice

i) The Mediator does not act as legal counsel for any party during the mediation. Each party is encouraged to obtain independent legal advice to ensure that legal rights, legal obligations and the consequences of any potential resolution are fully understood.

ii) Each party will be responsible for the costs of obtaining his or her own independent legal advice.

10. Ending the Mediation

i) Participation in mediation is voluntary. A party or the Mediator may end mediation at any time.

ii) The Mediator will communicate promptly to the parties that the mediation has ended.

11. Mediation Fees

i) The cost of the Mediator will be shared by the parties, and will be paid directly to the Mediator as follows:

   a) For the first ten (10) hours of mediation (including pre-mediation), the fee will be $_____ per hour plus HST, shared equally between the parties.

   b) If the mediation has not resolved within the first ten (10) hours, and the parties choose to continue mediating, the fee will be $_____ per hour plus HST, shared equally between the parties.

ii)   All other costs, including disbursement costs, will be shared equally by the parties and paid directly to the Mediator.

iii) If either party is unable to attend a mediation session, that party will notify the Mediator and the other party at least _____ before the scheduled mediation session. If the cancelling party fails to give proper notice of cancellation, that party will pay the Mediator $ _____ for the missed mediation session.

iv) The parties will be required to provide the Mediator a retainer of $_____ for fees and costs.

12. Participation in Evaluation

i) The parties agree that they will participate in the Distance Family Mediation Project's evaluation by completing and submitting the Project's evaluation survey.

ii) The Mediator will supply the parties' names and contact information to the Project Evaluator so that the parties may be contacted to participate in the evaluation survey.

iii) The parties understand that the information being collected for the Project is solely for research purposes, and that none of the information in the evaluation report will directly or indirectly disclose the identity of any participant.

13. Counterparts

i) 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.

Dated and signed by:

_____ (**Party**)

_____ (Address)

_____, 2011 (Date) at_____ (Location)

_____ (Name of Counsel _[if applicable]_ or Witness)

_____ (Signature of Counsel _[if applicable]_ or Witness)

_____, 2011 (Date) at_____ (Location)

_____ (**Party**)

_____ (Address)

_____, 2011 (Date) at_____ (Location)

_____ (Name of Counsel _[if applicable]_ or Witness)

_____ (Signature of Counsel _[if applicable]_ or Witness)

_____, 2011 (Date) at_____ (Location)

_____ (**Mediator**)

_____ (Address)

_____, 2011 (Date) at_____ (Location)

_____ (Name of Participant)

_____ (Signature of Participant)

_____, 2011 (Date) at_____ (Location)

_____ (Name of Participant)

_____ (Signature of Participant)

_____, 2011 (Date) at_____ (Location)

Selected Posts from the *Distance Family Mediation Project's* Blog

How Good Emailing Can Improve a Bad Relationship

May 8, 2012 by Jane Henderson, Q. C. (Introduction by Susanna Jani)

Today, you are in for a real treat. Jane Henderson, Q.C., our perennially popular blogger and member of our distance mediation team, is back with another of her signature frank, but light-hearted, posts. I hope you are settled into a comfortable chair because this is one you'll want to read to the end!

So, you have finally got a settlement and a parenting plan that you can live with. It was a long and difficult battle but it is over and time to move forward. Your Family Law Professionals have suggested that since you and your Ex are unable to communicate in person without it degenerating into a shouting match, and you can't talk on the phone without someone slamming the receiver down, you should limit your communication to email. Or perhaps you live in different communities and have settled using distance mediation, so email is the best method of communicating.

Jane Henderson, Q.C.

Email seems like a perfect solution. It is written — so no shouting. It is a record — so everyone should be respectful. Writing gives one time to think about what one wants to say — so no emotional outbursts. It is right there in black and white — so no misunderstandings.

Well, maybe. If, like most of us, you have ever been on the receiving end of an email which you thought was aggressive, or have been surprised that an email which you sent offended the recipient in some way, or was completely misunderstood, then you will appreciate that communicating by email in a positive way is as much a skill as any other kind of productive communication. You likely also know that, if you and the recipient have a history of misunderstandings and antagonism, bad emails can make a bad situation even worse.

The good news is that it is not difficult to communicate productively with email if you follow a few simple rules. Even better, improved communication will likely improve your relationship. These are my Top 10 Rules for doing that:

1. Be clear in your own mind about what you want to accomplish before you send the email (e.g., You would like him/her to keep the kids an extra day. . .).

2. Be direct but polite; don't try to be tricky.

3. Start with a salutation. It doesn't have to be formal: "Hi" and your Ex's name is fine.

4. End with a closing: "Thanks for considering this" and your name.

5. Don't use capitals except for proper nouns and the first letter of the first word in a sentence. CAPITALIZED WORDS IN EMAILS ARE EASILY INTERPRETED AS SHOUTING.

6. Similarly, don't use multiple exclamation points!!!!! (unless you are conveying something the recipient will think is good news too) or question marks????? Both come across as being aggressive.

7. Stick to the necessary facts and your real question. Don't use email to deliver a lecture, commentary, advice or instruction — unless the instruction has been specifically requested.

8. If a request is made of you in an email and you are saying "No", you don't have to give excuses, lengthy reasons, or say why you think the request is out of line. It is enough to say "I am sorry but I can't help you out this time" — always accompanied by a salutation and civil closing.

9. If a time limit for the response is needed, put it in your email, but don't ask or expect that it be immediate. Give at least 24 hours; the longer the time you can give, the better. (And don't follow up with capitalized exclamatory requests for a response. You know s/he is going to get great satisfaction in hitting the "Delete" button.)

10. Don't send or reply to emails in haste, unless it is a legitimate emergency — that is, someone's health or life is in immediate danger. Take as much time as possible before you hit the "Send" button. If there is the remotest possibility that you have not said what you want to say in a civil and respectful tone, send it to yourself first. Look at it the next day and make sure it says exactly what you want in a civil and respectful way.

Here are some examples of what I am talking about:

Let's say you would like your Ex to take the kids this weekend because you have plans that don't include them.

You could send this email:

> Since you are always nagging me to be flexible, I am willing to trade my weekend with the kids this week for your weekend next week. But don't drag this out. I need to know now.

Followed up a couple of hours later by:

> So do you want the kids or not??????

The reply might come back as:

> Of course I want the kids. I ALWAYS want the kids. They come FIRST in my life, not like in some people's. But I have a life too and I am not your babysitter. You are supposed to be responsible for them this weekend and, besides, we have plans for next weekend. So I guess you will just have to put them first and be a responsible parent for a change.

You may now feel entitled to respond:

> Well FINE!!! Just don't expect me to be flexible when you want to make a change!!!

And so, the toxic cycle continues. Neither of you is going to feel very good about it and neither of you got what you want. Your Ex would have been happy to have the kids but didn't want to swap weekends, so ended up without them. You are either going to have to pay a babysitter or miss your event because you asked to swap weekends instead of asking for what you really wanted, which was to have the kids go to the Ex. The tone of the emails makes any sort of discussion about options or alternatives pretty difficult.

On the other hand, you might try sending this email:

> Hi Robin: Something has come up this weekend and I am wondering if there is any chance you could take the kids? I would like to swap weekends, but if that doesn't work for you, it would still be a big help to me if you could take them this weekend. I would be glad to do the same for you another time. Could you please let me know by Wednesday? If I don't hear from you by Wednesday, I will assume that doesn't work for you and make other plans. Thanks, Tony

Then Robin is more likely to respond:

> Hi Tony: I am happy to have the kids this weekend, though sorry that the swap won't work for me. I

> expect I will need to ask you to take one of my weekends later this fall. Let me know when you will drop them off. Cheers, Robin

Or Robin's response might be:

> Hi Tony: Sorry I can't help you out this weekend, but would be happy to do it another time. Cheers, Robin

The point is that what Tony really wanted was for Robin to take the kids this weekend. If they could do a swap, that would be a bonus. By asking in a direct, yet respectful, way Robin is more likely to agree; even if s/he doesn't, the door is left open for it to happen another time. Neither person needs to feel that they have "lost" anything, and neither is left feeling angry or attacked. More importantly, they have had a civil, respectful exchange — the first step to a civil, respectful relationship.

In some cases, a respectful request will still result in an aggressive or hostile response. Even if this happens, don't succumb to the temptation to reply in the same way. One of you may have to be the first to break the toxic cycle, so let it be you. It is hard to maintain hostility if it is not reciprocated.

The moral of this story is:

Don't underestimate the power of email communication, for bad and for good. Use it wisely and you will improve communication *and* your relationship.

"I listen better when I can talk" (and other disadvantages of videoconferencing in distance mediation)

September 26, 2011 by Susanna Jani

In a recent post, I explored some of the advantages of using computer-based videoconferencing platforms to conduct family mediations from a distance. In spite of our preference for these platforms, our distance mediation team recognizes that they also come with a number of disadvantages. Some of these are inherent to the technology itself, while others are a function of the fact that when it comes to selecting a technology for mediation purposes – family mediations in particular – one size simply does not fit all.

Here are some of disadvantages we have discovered:

1. The technology's flaws can get in the way of communications: As our mediation team member, Eugene Raponi Q.C., once wisely observed, "I listen better when I can talk". His comment came on the heels of a team videoconference meeting during which he was effectively muted for over an hour because of an audio glitch. Indeed, videoconferencing technology may have come a long way in the last few years but it is far from flawless. Disruptions in audio, data and video transmission – experienced as "freezes", Picasso-like pixilation, delays, dropping of words and complete cut-outs – still happen. Not only are these disruptions annoying, they are quite distracting and can seriously interfere with, and even halt, the flow of communications. In some of the more remote areas of British Columbia, where high-speed Internet is not available, videoconferencing platforms may perform so poorly that using them for mediation is not a reasonable option.

2. Visual cues may not be helpful for some clients: While more limited than in face-to-face mediation, a range of visual cues – including body language – is available in videoconferencing. Clients' body language provides useful information for the mediator but may not necessarily be helpful for the clients themselves. In fact, in an earlier phase of our service, our distance mediation team found that there were advantages to some clients not seeing each others' body language. During this phase, telephone was the primary medium we used to conduct family mediations. Our team found that one of the benefits of using telephone was that it eliminated the types of visual cues that act as emotional "triggers" for some ex-spouses.

3. Clients aren't separated: Our team believes that, where children are involved or a long-term relationship is important for other reasons, it is usually valuable for ex-spouses to attend mediation together. It may, however, be helpful for clients to not interact real-time or directly with each other in some cases – for example, where emotions are still too raw for constructive communications. In such cases videoconferencing, which emulates the synchronous, direct-contact style of in-person mediation, may not be the best choice for distance mediation.

4. Participants have to be in the same place at the same time: If you've ever tried scheduling a meeting with people in different parts of the globe, you may be wondering about the feasibility of using a technology like videoconferencing which requires everyone to attend mediation at the same time, dressed in something other than their pyjamas. Even without the time differences that come with geographic distance, clients' work shifts, availability of child care and other commitments can make the use of any technology requiring synchronous participation in mediation unrealistic. In these situations, it may be preferable to use technologies such as text-based mediation platforms or e-mail, which allow clients to "log on to mediation" at a time that is workable for them.

5. Verbal communication isn't for everyone: Videoconferencing clearly favors the spoken communication style, making it less than ideal for verbally not-so-nimble clients and for those most comfortable expressing themselves in writing – as well as for clients with certain disabilities. Some clients may also need, or wish, to have time to rein in their emotions, to reflect or to frame their words with extra care. The asynchronous, text-based technologies may well allow these clients to participate in mediation more fully than videoconferencing would.

6. The children may be nearby: Managing the presence of children when parents are mediating from their home may be particularly challenging with videoconferencing. With both audio and video being transmitted, the risk exists that any children who are nearby may observe or overhear the discussions, in spite of a mediator's or clients' precautions in this regard. While risks also exist when using text-based technologies for mediation, these may be somewhat easier to prevent. For a more detailed exploration of this topic, check out our earlier posting, *Where are the children during the distance mediation process?* by Laura Luz.

7. Intuitive? Well,. . .: If you are anything like me, you may find that the number of bells and whistles that come with many of today's technologies is plain scary. One glance at how much needs figuring out and

you can almost smell your time going up in smoke. Computer-based videoconferencing platforms are no exception to this. While many of their features are fairly intuitive (well, they are sometimes and according to some people), the platforms do require time, patience, perseverance and a range of practice opportunities to master. In our experience, the time commitment involved in becoming competent using these platforms can be substantial, especially for the "mature" mediator who has come to computers later in life.

You may have your own views about this brave new world of using videoconference or other communication technologies for distance mediations. Have you experienced any advantages or disadvantages in using specific technologies, as a mediator or as a client? I hope you'll help us continue to learn by letting us know.

Photo credit: "i know it hurts to feel so all alone" by Ashley Rose (CC license)

Picking from the peck of platforms (videoconferencing platforms, that is)

April 2, 2012 by Susanna Jani

It's no wonder we get so many questions from mediators about what we looked for when picking a videoconferencing platform to use for our distance mediation service. The panoply of platforms that is available these days is positively dizzying. Add to that the highly sensitive and confidential sessions that are intrinsic to mediation, and you have a choice that can be both difficult and intimidating to make.

What features make a videoconferencing platform suitable for mediation? Every mediator's area of practice, client group, personal style and comfort with technology is, of course, different which makes this question an impossible one to answer definitively. In spite of this, our research and experiences with distance mediation have led us to conclude that certain features are well worth insisting on when picking from the peck of videoconferencing platforms (sorry, folks – I can't help myself) that are out there. Here are six of those features:

1. Strong security frameworks: In selecting our videoconferencing platform we looked for clearly described security features, acceptable to both government and corporations. We got professional technical advice about security, and took that advice – the minimum acceptable security framework should include SSL to begin the session and AES 128 to encrypt data for the remainder of the session. In addition to this, we asked ourselves two key questions when reviewing the different platforms: How easily can data, video and audio transmissions be accessed by external parties? How easily can parties record or copy discussions? We conducted our investigations fully understanding that there are no guarantees when using any information and communication technology – that it is not possible for a mediator to ensure that all communications will be confidential or to completely control where or how some personal information may be collected, stored or accessed. At the same time, as we believe it is a mediator's duty to make every effort reasonably possible to protect client privacy and confidentiality of information, we made security a priority in our selection. We felt strongly enough about this that we were willing to sacrifice some user-friendliness in order to get security frameworks we had confidence in.

2. Robust host controls: Given the special nature of family mediation, we wanted a platform that provides the mediator with maximum control over mediation-relevant conference features. For example, because

of possible safety issues relating to domestic violence, we rejected any platform where parties are able to continue discussions after the mediator ends the mediation session and disconnects. For similar reasons, we eliminated platforms that do not allow the mediator to control whether parties can send each other private text chats. We did not accept platforms that pose other obvious risks; for example, we avoided ones that do not give the mediator complete control over how his/her desktop can be seen by parties during file sharing, to lower the chance of parties seeing confidential documents and automatic e-mail notifications on the mediator's computer.

3. **Compatibility with a range of systems:** We found, despite some advertising claims, that not all of the videoconferencing platforms work equally well on PCs, Macs, smartphones or tablets. We also found a difference in how well platforms are able to accommodate hardware accoutrements such as webcams and headsets. Considering the smorgasbord of systems parties (and mediators) come with, we felt that broad system and hardware compatibility is essential. How did we go about testing platforms for this? We routinely met on different platforms, using our own particular computer systems and hardware. We also, shamelessly and relentlessly, invited friends and colleagues to join us on the platforms so we could check out how well various system configurations work.

4. **Quality video and audio:** In our experience, it is the video and audio capabilities that make videoconferencing a superior choice for distance family mediation. However, we also found that if the quality of either of these is compromised, it actually impacts communications negatively. Accordingly, we tested platforms with an eye to examining the quality of their video and audio – including sharpness of picture, clarity of sound, and consistency and reliability of both. As part of our analysis of quality, we considered the sophistication of video and audio related features. For example, we looked at how many individuals can send their video simultaneously, how large the video panes are, whether the audio is voice activated, and how easy it is to do on-the-spot troubleshooting if either video or audio malfunctions.

5. **Document and program sharing:** The benefits of being able to share documents and software programs with parties during mediation became evident to us very quickly. Because of this, we looked for a platform with a versatile, easy-to-use whiteboard and file sharing capabilities. For the latter, we wanted the mediator to have the ability to display documents to parties, as well as to create and edit various types of documents, live-time, while meeting with parties. We also considered whether the platform allows the mediator to share web-based content. While we did not see this feature as being of critical importance for mediation work, we did feel it is potentially quite useful as it gives the mediator the option of pulling up information posted on the Internet – Federal Child Support Tables, being an example – to show to parties at the very time the topic arises during mediation.

6. **Support 24/7:** The availability of training in how to use the platform, as well as ongoing technical support, were key features we looked for in making our selection. It is here, in our view, that some of the platforms shine. The best offer tutorials (self-learning videos and courses), instructor-led webinars, step-by-step written guides, searchable knowledge bases, 24-hour turnaround e-mail responses to questions, and 24/7 live technical support for meetings (yes, real people to answer your toll-free call). The tone and quality of the support is something we also considered. We wanted a platform that was backed by easily understood information and courteous, helpful and articulate service staff. Why did we put such an emphasis on support? No matter how easy it is to use a platform, it seemed virtually guaranteed that at some point in time someone participating in a distance mediation would need assistance. As we are not communication technology experts, and neither are the vast majority of parties using our mediation service, we felt it was essential to have immediate access to quality technical support, whenever and wherever we needed it.

So . . . you may by now have started wondering whether I've forgotten the one feature that every review of videoconferencing products seems to highlight: **Cost.** My omission is, in fact, deliberate but not because we ignored cost when making our selection. Rather, we discovered that in the context of our desire

to provide professional, high quality family mediation services, the cost of the platform was not a primary consideration – at least, not when compared to security, host controls, system compatibility, support and the other features listed above. Sadly, it seems that when it comes to picking a videoconferencing platform, the old adage – *"you get what you pay for"* – applies just as much as it does elsewhere in life.

Photo credit: "Barrell of marbles" by DCMatt (CC license)

When it ain't easy to say the right thing: How distance mediators help

February 27, 2012 by Susanna Jani

"The difference between the right word and the almost right word
is the difference between lightning and a lightning bug."
(Mark Twain)

I wish I'd seen that quote years ago, when I was in the midst of my own separation.In hindsight, I can say without hesitation that many of the discussions I had with my ex about how to reorganize our lives went sideways for no other reason than that I didn't understand how important my choice of words actually was.I also didn't fully grasp how difficult it can be to say the "right thing".This isn't just because I was young (which I was) – it really is difficult to remain on an even plane and to contemplate the impact of words in the emotionally charged atmosphere that accompanies a marital break-up.

This is where a family mediator could have been really helpful for me.

Let me pause here, just in case you are becoming suspicious that this is about to turn into a sales pitch. It is not.Mediators are, simply put, in the business of helping people communicate with each other in a positive way.It is their stock and trade, and what they are trained to do.For many of them, it is a professional and personal passion, and they take great pride in their skills at creating an atmosphere that lets people resolve their issues productively and in a civilized manner.Traditionally, family mediators have done this when meeting with clients in person – together with them in the same room.But how do they do this when they are at distance from the clients and using technology to meet?

To get the answer to this, I went to our distance mediation team members and asked them how they help family clients communicate with each other.I found their comments so interesting, I decided to post them "uncut" – exactly as I received them. Here they are:

> 1) All my distance mediations to date have been much more respectful than face to face mediations. Because of the technology, especially with videoconferencing technology, parents are not talking over one another, as the platform really determines that parents need to wait to be heard.Additionally body language doesn't seem to be as much a trigger because they aren't in the same room.

That said, I use the same techniques I do in person. Clarifying communication guidelines before beginning the mediation, getting buy-in from clients and then referring back to guidelines if clients begin to deviate.I try to keep the process as simple as possible, as the issues are usually far from it!!

2) I have had similar experiences [as the mediator above]. In talking to my distance mediation clients individually they say they simply could not be in the same room due to the emotional stress. They find the videoconferencing format is working well for them because they are able to see the person, but be distant. When things get too emotional, they can save face by asking for the meeting to end. I find that I am using the written materials they have provided to help focus on the issues and move forward. Other than that, mediation is much the same and, as a mediator, I forget the technology and it seems a natural process.

3) My experience has been the same. I tell my distance clients the same thing as most of my regular clients, especially the very fraught ones; that is:Try to distance themselves, step back and observe, or think about it being over and resolved, or think of it as a difficult discussion with an acquaintance one must continue to work with (sort of the opposite of being 'in the moment'). The technology does seem to help create a sense of distance, which then helps to keep things cool.

4) Likewise – in our individual pre-mediation sessions I discuss what each party feels their personal "triggers" are in communicating with the other parent. This gives me the information I need to identify it when it is occurring. When someone is triggered, they won't be able to actually "hear" what the other is saying . . .so knowing these triggers gives me the cue for extra clarification when they are in play.

As it is important that our joint session remain "respectful" – when I am going over that part at the outset of the mediation – I take a few minutes for all three of us to define what that means to each of us. For some it may be a tone/volume/ language-use, and with that understood for each we can all consciously make an effort to avoid what each has identified as disrespectful. I also explain the human tendency to feel under attack when someone starts a sentence with "YOU" and encourage the parties to avoid that trap.

Referring specifically to the "distance", or use of technology experience, I find that checking in more frequently with the parties with respect to "how we are doing" and "how is this feeling for each of you" is necessary due to the absence of the more subtle cues I may be able to detect in person.

It is so true that frequently it is not "what" is said. . .but "how" it is said that can make or break productive communication!!

5) The strategies in distance mediation are essentially the same [as for in-person mediation]. For example, I emphasize the importance of listening to each other in the mediation process so that clients can gain some understanding of the issues, and also explain that listening does not mean agreeing.

In distance mediation, I spend more time in pre-mediation with parties discussing the environment in which they are going to be in when they are mediating. Is it free of distractions? Is it comfortable?Is there going to be anyone else there?The physical space (environment) can impact their communication with the other party if they have challenges focusing on the conversation.

Very interesting, don't you think?

If you mediate from a distance, using technology, I'd love to hear what you have to say about this. How do you help your clients communicate with each other?

Photo credit:"Sideways Spark" by thefost (CC license)

Whoa. . .! Is that a Margarita you're drinking? (and 5 other advantages of video-conferencing in distance mediation)

September 6, 2011 by Susanna Jani

A growing number of mediators have, of late, been asking me what type of communication technology our service uses to conduct distance family mediations – and why.

Being a fan of circumlocution, I always point out first that safety considerations and client preference, comfort level and accessibility to technology are the key cornerstones of our distance mediation service. If safety concerns dictate, or clients wish to use – or only have access to – phone, e-mail, a dedicated online mediation platform or other technology, our distance mediators will work with these.

Custom tailoring aside, however, our service has been leaning towards the use of computer-based videoconferencing platforms to conduct mediations. Most of our mediation team members have expressed a liking for these platforms, particularly the ones that have multipoint video (where more than one person can be seen on-screen at any given time), document sharing and editing, and text chat capabilities. Their reasons boil down to one basic point:Compared to other technologies, it is videoconferencing which most closely emulates the advantages that accompany "real life", face-to-face mediation.

Here are six of the ways it does this:

1. Videoconferencing makes a range of cues available: Of all the "distance" technologies available, videoconferencing platforms seem to have the potential of giving the mediator the greatest range of cues, including visual, verbal and text-based ones. Its visual cues seem most valued by the mediators on our team. The ability to read *and convey* body language is more limited than in face-to-face mediation but is still a strong suit of videoconferencing. Being able to see the clients' eyes, the expressions on their faces, how they are using their hands, the glass one of them may be drinking out of (whoa. . .what is that stuff being imbibed?):these all assist the mediator in reading the clients in a way that simply can't be done with voice or text alone. Combine these visual cues with the verbal ones received via the audio of these platforms, and you have what some mediators on our team have described as "feeling like you are in the same room together".

2. The mediator can share and edit documents real time: Many of today's videoconferencing platforms allow the mediator to "pull up" a document on their own computer which they can then show to clients on the computers they are sitting in front of. The Agreement to Mediate, for instance, can be shared real time this way, allowing clients to follow along and see the clauses being explained by the mediator. Particularly valued by our team is the ability to do work jointly with the clients, during the mediation session itself, whether it is editing of documents or using specialized software they have on their computers. For example, *DIVORCEmate* can be shared with clients so that they can see, on their own computer screens, the mediator entering data into the program's information fields. Not only is this an efficient use of the mediator's time, but it also makes the exchange of information more meaningful, engages the clients

directly in the process and encourages them to work together. As a bonus, the ability to work on documents during the mediation session gives clients a tangible focus for their discussions – one which is outside of themselves.

3. Clients can communicate immediately and privately with the mediator: The text chat that typically accompanies computer-based videoconferencing platforms can often be set to specify or limit the recipients of the text messages. For example, the mediator can set the chat so that clients can send messages to him/her only. This is a particularly helpful feature in cases where the mediator is concerned about maintaining a safe and respectful environment. By limiting the chat this way, clients can privately – and immediately – let the mediator know if they are feeling uncomfortable, unsafe, if they feel rushed or don't want to say something in front of the other client. One of our team members has pointed out that, "Clients know when a shot is being taken at them by their ex-spouse, which a mediator might miss because s/he is not privy to the subtle messages between them. The ability for clients to text the mediator privately, to say there is an unhealthy communication taking place, makes the chat an excellent tool."

4. Clients are not separated: Our team believes that in cases where a long-term relationship between the clients is important – for instance, when children are involved – it is usually valuable for the clients to attend mediation together. Unlike some asynchronous, text-based technologies in which clients may never interact real-time or directly with each other, videoconferencing brings them together with one another, albeit from a distance. This allows the mediator to help clients learn how to communicate more effectively and, hopefully, to develop the type of healthy relationship which will most benefit the children.

5. The mediator doesn't do all "the work": With some of the asynchronous, text-based technologies where clients do not have direct contact with one another, their communications flow entirely through the mediator who then also acts as the carrier (and sometimes reframer) of information. The result is, in essence, a shuttle process in which the mediator may do much of "the work". Because videoconferencing is real time, with clients attending the mediation together, it allows them to articulate and personally convey their own thoughts, wishes, concerns and information. Clients, by engaging in the process directly – by doing the work required to craft their agreement themselves – potentially have more ownership over the final outcome of the mediation, improving the odds of compliance and durability of the agreement.

6. It suits the verbal communication style: Allowing for verbal expression is another area where videoconferencing shines. The complex background, emotions, finances, children's needs and other details that characterize many family split-ups can be difficult for some clients to describe using text, even when education or inclination is not usually an impediment for them. For these clients – as well as for those who are most comfortable and naturally adept at expressing themselves verbally – videoconferencing, with its ever-improving audio capabilities, can be particularly suitable.

Like most things in life, of course, nothing is perfect, including the use of videoconferencing for mediation. The wonderful advantages these platforms bring to some situations are clearly disadvantages in others. Videoconferencing also comes with its own inherent disadvantages, compared to other technology options.

If you keep an eye out, you'll see one of my upcoming postings where I'll give the rundown on some of the cons of using videoconferencing to conduct mediations from a distance.

Photo credit:"Fake margaritas" by WordRidden (CC license)

Where are the children during the distance mediation process?

July 6, 2011 by Laura Luz (Introduction by Susanna Jani)

Today's posting comes from Laura Luz, mediator, educator and one of the Distance Family Mediation's team members. Laura is also a Legal Information Counsellor with BC Families in Transition in Victoria.* She and other counsellors at the centre provide various types of assistance to British Columbian families who are separating or going through divorce.

Laura's posting originates from a visit I recently had with her and some of her counsellor colleagues at the centre. During our conversation about the distance mediation process, one of the counsellors posed the question, "Where are the children during this process?" – that is, how is the presence of the children managed when parents are mediating from their home? A rather interesting discussion ensued, some of which Laura has captured in her posting, along with her own thoughts on this topic:

While discussing the concept of distance mediation, we – the Legal Information Counsellors at the BC Families in Transition – readily recognized the innovation of bringing mediation to all persons who desired this process. Yet we also became aware that children could easily "slip through the cracks" in distance mediation. Parents who are separating may consider it quite a convenience to participate in mediation right from their very homes, yet the responsibility to keep the children away from the close proximity of such an emotional and at times chaotic process becomes even more of a vigilant responsibility. Let's explore some relevant aspects.

Laura Luz

Time factors

As a mediator, most of my cases have been face-to-face with parties. This requires that parties drive to and from my office, giving them some "before and after" transition time that acts as a buffer to integrate parties back into routines. In the distance mediation process, transition time may be eliminated – at least for the parent who has children in their home. What are the implications of having transition time eliminated? I remember reading an article about trauma. Vietnam veterans, because of expanding technology, returned home almost instantaneously. Without the time to process between the two worlds, adjustment was challenging. Spouses, children and close friends were observers and sometimes recipients of intense behaviors.

Separation within families is always traumatic. Within traditional mediation, the travel to and from mediation allows for thoughtful processing and preparation before entering back into their children's world. Should the mediation session provoke anger, loss, abandonment or sadness, the traveling time can allow a plan to emerge that includes self-care, such as stopping at a friends house for support, going for a walk, or doing errands to allow some time to pass. As mediators, this will be a key area to explore with all families that are requesting mediation using technology in their own homes.

Child care options

Examining further, when the mediation is as close as one's home, it may become a temptation for a parent to save on babysitting costs. This may be especially prevalent when there are older children who can

supervise the younger ones. The parent might think "they won't hear anything while they are playing outside or in the other room". Yet, we all know that emotionally charged energy is ever-pervasive and that children are sensors and absorbers of such energy – not to mention their natural curiosity. Children will make excuses to enter the space where a parent is, should they suspect something significantly emotional is occurring, so interruptions of the process are inevitable unless careful preparation is made for appropriate child care.

The optimal situation is for children to be away from the vicinity of the mediation, but that is not always possible to arrange with work schedules and early bed times of younger children. As a certified mediator, I am committed to considering "first" the child's emotional, psychological and physical well-being, so it is my responsibility to sort out all the possibilities with the parent who must plan for the children during mediations. For example, last year during a distance mediation, I prepared a mother who had three pre-school children. Even though she had another individual come in to assist while her children were sleeping, they still woke up, and called for "mama". Another session required adjournment and rescheduling to another week because the babysitter fell through at the last moment. Distance mediation doesn't guarantee that things will go more quickly just because it eliminates the travel time.

Safety concerns

Always a concern is the issue of safety of all family members during mediation. Safety is screened vigilantly within the frontloading of information through: 1) The initial phone contact, 2) the individual pre-mediation sessions and, 3) the personal judgment of the mediator who decides whether it is safe to mediate. When considering a distance component, I am even more conscious of my intuitive "gut feelings" around the topic of safety, including how it relates to the children.

It is always wise for a mediator to acquaint themselves with names, phone numbers and email addresses of community professionals within the communities of the children of both parties. This way, should a situation arise which may require pressing assistance, the mediator is able to make appropriate contacts with immediacy.

Communication

Another consideration is that distance mediation often includes written, asynchronistic communication such as emails, instant messaging or online platforms. If children are older, and "tech-savvy" (which many are today), the parents must keep their mediation related communications password protected and managed at all times. This also goes for cell-phone texts. In my experience, it is a common mistake to leave adult communication where children can view and take in information that they may not be mature enough to fully comprehend. It is crucial to protect the children's well-being by keeping the separation and divorce process away from them and to shield them from choosing sides between parents.

Sessions with children

I remember assisting a family where it became necessary to ask the parents if I could speak to their two daughters (who were pre-teens) to establish some clarity in my own mind. Both parents were happy with my suggestion. One parent dropped them off at my office, and the other parent picked them up after my information sessions with each daughter. What I gleaned from my conversations with the girls was vital information to assist the family to move forward. Both parents were surprised and relieved to understand their children's needs and desires through a community professional's words.

There may well come a time when a mediator has the need for clarity though a discussion with the children, should there be two vastly different perspectives being shared by the parents. An important question, and one yet to be fully answered, is what this would ideally look like in the distance forum. During these confidential conversations, the parent within the home will need to provide the children with privacy that will allow them to have a genuine and transparent discussion with the mediator. This

will require discipline and trust in the mediation process from the parent who will need to "not listen in" and, furthermore, refrain from asking pertinent questions of the child about "what was said".

Some common sense guidelines

My posting merely skims the topics I've introduced above. Entire articles could expand on any one topic, which no doubt will be explored by others in the future. Distance mediation is a pioneer endeavor wherein mediators are learning what the pros and cons are, along the way. Even so, for the purpose of this submission, I have included some common sense guidelines that I suggest for mediators who are looking to expand their practice into a distance mediation. Many of the following guidelines could be incorporated within the *Agreement to Mediate*, as the Distance Mediation Family Project itself has done:

1. Have each party agree to not have ANY other person within hearing distance when using ANY communication technology that enables participation in the distance mediation process.

2. Have each party agree that children, in particular, will not be present within hearing distance unless that child will be participating in some way that has been agreed upon by both parents and the mediator.

3. Have each party agree to protect all access to information regarding the mediation process, including emails, texts, instant messaging, voice-mails, and printed documents which have the adults' information. This means parents should have a separate, password-protected email situation.

4. Get in the habit of letting the two parents know that you will connect briefly with each of them separately via phone contact, subsequent to the end of all joint sessions. This will ease the transition back into their personal lives and, additionally, the mediator can make suggestions if they sense that there may be some unacknowledged emotional leakage that has resulted. Questions such as the following can be asked:

- *How do you feel after the mediation?*

- *What is your plan to help you "decompress" after the session?*

- *Have you sufficient time before the children return to you?*

- *Who can you call when you have a need to debrief something?*

Children are always the vulnerable ones when two parents separate. In keeping the children a priority, and considering all repercussions which may negatively impact them, we keep them central to all thoughts and actions. And keeping the children central ironically means keeping them distinctly AWAY from the distance mediation process. . .or any separation process, for that matter.

<p style="text-align:center">***</p>

My thanks go to Laura for her thoughts on this important topic. You can find some additional suggestions related to this matter in our Distance Mediation Project's Phase 2 publication, Mediating from a Distance: Suggested Practice Guidelines for Family Mediators.

*NOTE: Since the publication of this posting, Laura has departed from both the Distance Family Mediation team as well as BC Families in Transition, to pursue her interests in another field.

Family violence, assessment and distance mediation: How do they fit together?

November 25, 2011 by Carole McKnight (Introduction by Susanna Jani)

By now, you have likely heard about the introduction of the new Family Law Act in the B.C. legislature. You may even have read our recent post on this topic. You may also have heard that, under the new Act, family dispute resolution professionals – lawyers, mediators, parenting coordinators and family justice counsellors – will be required to assess for family violence.

If you are going through a separation or divorce, and are new to mediation, you may be asking yourself what this is all about. What is meant by "assessing" for family violence? Why is it important and how exactly does a mediator "assess"? And, how can a family mediator make an assessment if s/he is at a distance, meeting with you using technology?

In today's post, our distance mediation team member, Carole McKnight, shares some of her vast experience and knowledge about assessing in mediation, answering these questions and more:

Carole McKnight

"Tick tock, tick tock" goes the clock. Who has time for long conversations and in-your-face meetings these days? Your already fragmented life has become even more fractured since you split up. Just getting to work is enough to cope with each day, never mind the work itself and spending time with the kids afterwards. Things were pretty intense before you split, but you still need to work things out. You each live in different towns or cities, so it is not easy.

Distance mediation is a way of communicating with your partner from, yes, a distance. . .by phone or a computer-based technology. No travelling and no having to sit in the same room with that "problem person". There is just your ex, the mediator and you, each in the comfort of their own room and in front of a computer or on the phone.

Naturally, you are going to be cautious. We all know that e-mail messages can be poison if things aren't going well between you. What's to say bringing in a mediator won't make it worse? Besides, how can you be sure this will stay private? And what if a past incident of family violence has you wondering about safety? These are valid concerns that need to be considered before beginning mediation.

Here are five of the things I do when mediating from a distance. I suggest you consider these if you are thinking about trying distance mediation:

1. Change is in the wind: After 33 years we are getting a new *Family Law Act* in British Columbia! Under the new law, family mediators and others who offer dispute resolution services are going to be required to "assess" for family violence in every case. Most mediators – including myself – do this already, as it is part of our code of ethics. Family mediators who are certified with Family Mediation Canada or who are on the Mediate BC Family Roster have had training in how to assess for violence, as well as in the dynamics of abuse, family law and child development.

2. Spend time alone with the mediator first: I always start with individual meetings with each person. Using computer-based videoconferencing technology such as *Webex's Meeting Centre* or *GoToMeeting* is great because you can see the mediator and have a pretty good conversation. You can even share

documents and work on them together. "Hold on," you say, "I'm not too swift on techie stuff." Most of us aren't – including, possibly, the mediator – but it is actually pretty straightforward. We practice using the technology first, until people feel ok with it.

Because I will be meeting with each person at a distance, we arrange a time to chat when the children are being taken care of by someone else or are away at school. This is so there are no interruptions or little ears listening.

After the separate meetings with each of you to assess the situation, we decide either to go ahead with mediation or other ways to work out a solution.

3. Assessment: What exactly does "assessment" mean? Is it like an assessment on your house when you are putting it up for sale? Sort of. . .it means getting a Big Picture Look at your situation to make sure you are getting a safe and helpful service.

Don't get me wrong. This assessment is not to meant to pry into your life unnecessarily – it is to work with you to identify the best type of service in your situation.

I ask similar questions of everyone to get an idea of the issues that need to be dealt with. From talking to friends and relatives, you already know many families who are breaking up. It is not just the legal paper-work that needs doing. People often need to find out about personal or marriage counselling, helpful information for their children, how to work out finances or to find housing, or where to get drug or alcohol counselling. I will discuss with you services that are most appropriate, and these may or may not include mediation. I know the types of parenting arrangements that are most likely to work best depending on the level of conflict so as to keep everyone clear and safe.

Assessment also includes screening for family violence. This is done to check that there are no safety concerns that would make mediation unsuitable and to ensure no one is being forced to agree. You probably already know that violence takes many forms and it isn't just the physical damage that is hurtful. The words that couples use to each other in anger can be destructive, too. Over the years I have learned that people usually do not like to admit they have been abused. Often it is a deep, dark secret held between couples. However, straightforward questions can help the mediator gauge the level of propensity for further violence. I ask questions like: *What happens when you disagree with each other? or Are you afraid for your safety?* The questions are meant to get at the severity of the violence, how frequent it is, and the effect it has on family members.

There are certainly clear-cut cases where I do not believe distance mediation will work, such as:

• where someone is likely to experience harm, or there are ongoing threats

• where there is a history of non-compliance with the law

• where serious injuries resulted from the violence

• where one of the parties does not want to meet with the other

• where a pre-existing protection or restraining order prevents contact, and

• when an abuser does not accept any responsibility for the abuse.

There are other situations, where I *might* consider distance mediation, for example, if:

• the violence is in the past and counselling has been sought

• the incident was brought on in the heat of separation but there was no previous history and the injuries were not serious, and

- neither person is afraid of the other and wants to meet together with the mediator.

In addition to asking questions, I take other steps. For example, I always check if there are unlisted phone numbers or addresses that need to be protected. If need be, I will discuss a safety plan. If it is an emergency situation or there are immediate threats to harm another person, I will contact the police, because in these situations confidentiality cannot be maintained.

4. Setting up and managing the meetings: If everyone agrees to try distance mediation, advocates or lawyers may be part of the meetings. Everyone must state who else is in the room with them. You – and the others – will be asked to sign an *Agreement to Mediate* that makes clear the purpose and guidelines for the mediation. This includes rules about confidentiality and disclosure of information that is needed to deal with the issues.

Many clients feel comfortable being in separate rooms and approach the meetings like a business call. They find it is easier to manage their emotions from a distance. And, it helps if I am there to guide and manage the conversations so they get to where they need to go.

At the same time I am always aware that, in using distance mediation, there is a danger of being lulled into a false sense of safety. Vigilance, paying close attention and checking in with clients regularly is key to successful distance mediation.

5. Separate meetings from time to time: Separate meetings can take place after the joint meetings at the request of either client. I often follow up our meeting with a call or e-mail to each person to make sure the mediation is working for them, and to continue assessing the situation – including screening for family violence. I always strongly suggest that clients seek legal advice before they sign any agreement.

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The clock ticks on. . .so do new ways of doing things. I believe that making use of today's new technologies in distance mediation opens up more doors for those who are separating and need to work out parenting arrangements. In the hands of a trained and knowledgeable mediator this can be done safely and effectively.

The joy of mediating in my P.J.'s: Telephone-based mediation

November 2, 2011 by Ronald Smith Q.C. (Introduction by Susanna Jani)

Ronald Smith, Q.C.

If you've been following this blog, you likely know that our distance mediation service has been leaning towards the use of computer-based videoconferencing. You may also know that, when they are more suitable or preferred by clients, we use other types of technologies – including the telephone.

In today's post our distance mediation team member, the inimitable Ronald Smith, Q.C., describes his own experiences with using the telephone to conduct family mediations. He also shares some of the interesting (and surprising!) lessons he has learned about working with this communication medium:

Mediators tend to be touchy-feely people. We spend a lot of time worrying about the emotional climate in the room, power balancing, and, "Do the parties feel like they have been heard? I mean, *really* heard?"

We take courses, we learn communication skills, we learn how to get beyond deadlock. We have drilled into us that it is our responsibility – kind of like the playground supervisor at recess – to manage the emotional climate and the process in the mediation. We are, we are told, the skilled professionals whose job is not only to get the parties to 'yes', but to do so in a way that they will really believe in the 'yes' they achieve.

And of course, all that skill requires us to be present in the room where negotiations take place. If so much of human communication is non verbal, how can we monitor it if we are not there? If the emotional climate becomes stormy, how do we intervene if we are not present?

So if it is suggested, as Mediate BC Society had the audacity to suggest in the second phase of its *Distance Family Mediation Project* (i.e., the previous phase of our current distance mediation service), that we ought to be able to mediate family disputes at a distance – and even by phone – where no one is looking at anyone, our mediators' souls go into full rebellion. How can you communicate when you can't see the body language of the parties; indeed, when you can't see the parties and you don't even know where they are? They might well be sitting in their living room in their P.J.'s, or less! They may be making rude gestures, even towards the mediator. Suppose they are drinking a beer while they talk, or suppose they aren't even on different properties but just on different places on the same property. More important, how do we control who is in the room?

Well, we tried the experiment, and survived with our mediators' souls in tact. More important, clients surveyed were generally positive about the process, even when they did not achieve resolution.

What we did: The second phase of the *Distance Family Mediation Project* was designed to study whether technology-assisted mediation services could be offered safely and effectively to parties who would not otherwise have access to family mediators – specifically, to parties residing in rural, remote areas of British Columbia. While we had high hopes for developing a web-based delivery of services, in reality, most of the parties we served did not have access to high speed Internet, or were not comfortable enough with it to use it as a communication tool. So we ended up using telephone conference calling as our means of communication in most of the cases.

We still pre-screened for safety, and we laid down specific rules as to who could be present in the room while the call was taking place. We assured ourselves and the parties that they would be private and safe throughout our sessions.

We then met with both parties, wherever they were, by conference call. Often the parties were in different towns. On one occasion they were on the same matrimonial property, but one was in the cabin and the other in the house. In all the mediations I did, I never knew what the parties looked like. However, when I mentioned that, they were quick to tell me they knew what I looked like, as they had gone to my website and seen my photo!

Lessons learned: I learned some lessons in this phase of the Project about what may or may not be as important in my face-to-face mediations as I thought:

1. We have a much stronger presence than we might imagine with only our voice. It is important when we only have a telephone to be friendly, casual and animated. I spent much time asking about weather, fishing, hunting, and other topics that I felt the parties would consider relevant to their particular circumstances. It really helps to know something about the area. For example, in late summer on the Bulkley River, fishing is king.

2. Time goes much slower in a telephone mediation than in our office. I think that is because the parties don't have the feeling they are attending a court-like function, so they can take their time with the process. Often, if I had documents that only one of the parties had, I could email them to the other party, and call back when that was done. There was seldom a sense of losing the momentum in that situation.

3. Mediation sessions, because the parties saw this as more of a process than an event, were seldom more than two hours. The parties were fine with that, as they knew I would be back.

4. It was important to create a feedback loop. Immediately after a call, I would send an email to both parties outlining our progress, confirming the date of our next session, and confirming homework for our next session.

5. Now, here is the surprise: I discovered that I did not need to observe body language to control the climate on our calls. I think one of the reasons for that was that in a matrimonial dispute, if anyone is going to trigger off of body language, it is the parties. They know every roll of the eyes, crossing of arms, and shrugging of shoulders of their spouse. By telephone, they can't see each other, so they need to rely on tone of voice, just like the mediator.

6. The other interesting discovery was just how comfortable the parties were with this process. They are used to talking to each other on the phone, so this is nothing new to them. They are in their own homes, where they are comfortable. A mediator's office, no matter how hard we try to make it friendly, is a business office. And the fact that parties have to come downtown, to an office, makes the event discomforting and formal.

In the end, both the parties and I felt that much had been accomplished by the process.

So, mediators, welcome to the future. This is a large province. Geographically, most of our citizens do not have access to mediation services, although they would see the need just as city folks do. We are going to have to provide this service either by telephone or some other web-based medium.

And, isn't it great to know that it doesn't matter how we look when we engage in the process.

Do particular kinds of disputes lend themselves to particular kinds of technologies? A Discussion Paper

Colleen Getz, September 20, 2012

As a distance mediator, there seem to be so many factors to consider when looking for the right technology to use for a particular family dispute. Not the least of these is simply the technological capabilities of the parties themselves, and whether or not they have access to a technology or a mix of technologies that could best serve them in mediation. Surely there must be some broad rule of thumb — some way of slicing through the myriad of different features, permutations, and combinations — to help with the thinking around finding the right fit. The question arises: *do particular kinds of disputes lend themselves to particular kinds of technologies?*

In addressing this question, certain aspects of the nature of both technology and family disputes come to mind; specifically, technological interactivity and dispute complexity. Beginning with technological interactivity, this term is typically explained as the extent to which technology responds to a user's activity or task requirements. In distance family mediation, however, interactivity also refers to the extent to which a technology employs the senses — sight and hearing, especially.

Dispute difficulty or complexity is a term that frequently crops up in mediation literature, as both theorists and practitioners struggle with ways of understanding how complexity plays out in dispute resolution. For the purposes of this paper, the term dispute complexity can be described in connection with some of the factors that make dispute resolution more challenging, such as: the degree of conflict or enmity between the parties, the nature of the legal issues presented, the number of parties involved, and the character of the personal dynamics in the dispute.

During the *Distance Family Mediation Project*, the Project team observed that the presence of complicating factors, such as significant conflict between the parties or particularly challenging legal issues, seemed to result in a broader range of technological tools — as well as more interactive ones — being employed to manage the mediation. It appeared, therefore, as though dispute complexity and technological interactivity were dependent variables. In other words, generally speaking, the greater the complexity of the dispute, the more interactive the technology needed to be to fully address the needs of the parties and the mediator. [1]

This view of the relationship between technological interactivity and dispute complexity is, so far, a hypothesis only. The observations taken during the *Distance Family Mediation Project* cannot be said to be an empirical test of this idea. Rather, it is presented here as a broad-brush approach to answering the question of whether particular kinds of disputes lend themselves to particular kinds of technology. For the most part, the answer to this question would seem to be "yes" — the simpler the dispute, the less interactive the technology needs to be; and the more complex the dispute, the more interactive it needs to be.

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[1] The most interactive method was, conceivably, one that wasn't facilitated by any technological intermediary at all: the in-person meeting, with all participants physically present. In this setting, of course, the mediator could employ all five of the human senses — from seeing the faces and hearing the voices, to offering the comfort of a hot cup of tea — as well as invoking the power of electronics with a full suite of computer and other tools at the ready. This is not to say that face-to-face mediation is, ultimately, the best option in all complex disputes — only that it is different, and it is the right fit for some kinds of complex disputes. For other complex disputes, a technology-assisted or distance mediation is the right fit. Certainly, as was shown in the *Distance Family Mediation Project*, and as has been reported by other practitioners in the field, the "4th party" quality of technology [a term coined by Ethan Katsh and Janet Rifkin (2001)] often adds a constructive element to the mediation process that cannot be attained by the parties and the mediator on their own. This added dimension may be just the right piece of the puzzle for some complex disputes.

For illustration purposes, this dependent relationship between technological interactivity and dispute complexity can be charted on a graph (see below). For example, a dispute involving only a simple financial issue, with minimal conflict and perhaps no real relationship between the parties, would be near the lower left point on the graph below — indicating low complexity and a low level of interactivity required of the chosen technology. A complex family mediation, on the other hand — for example, a case in which there is high conflict between the parties, many legal issues, and the interests of children and other family members are involved — would be near the upper right point on the graph. A case like this would require a highly interactive technology or combination of technologies.

The Relationship Between
Technological Interactivity and Dispute Complexity
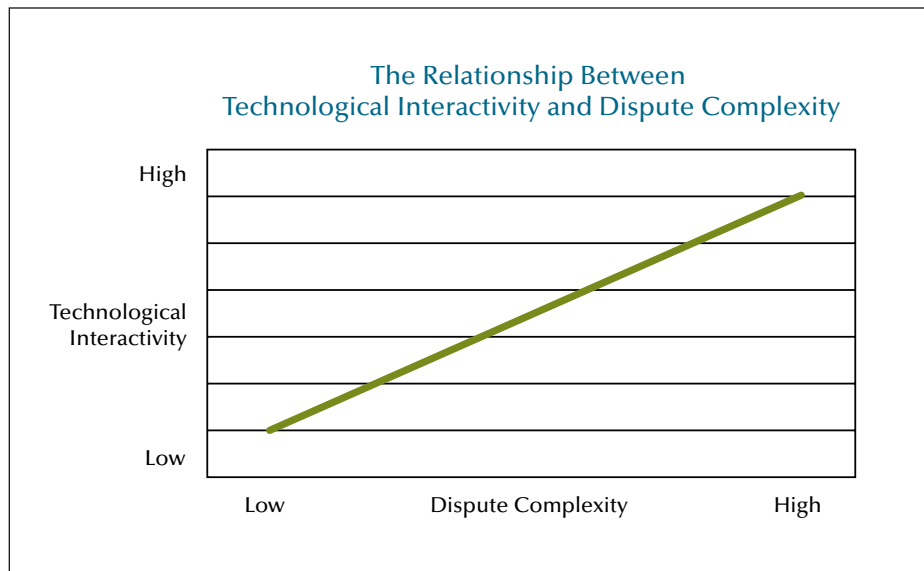
Of course, the relationship between technological interactivity and dispute complexity is not nearly so clear-cut as this. There is a nuanced, sometimes bumpy connection between the two. For example, there are times when it is helpful to reduce certain interactive features of a technology. This may be true of a situation in which the parties find physical gestures an unwelcome distraction. In a case like this, it may be better to conduct a mediation by teleconference rather than by video conference. If the parties' dispute is very complex, however, telephone communication alone may be insufficient. There may be a need to bring in other technologies — perhaps a text-based platform that allows collaborative editing of a document — to help accommodate the needs of the mediator and the parties as they work to resolve the dispute.

Even when meeting in person, it may be preferable to limit the level of interactivity occasionally — and in such instances, the mediator may decide to hold a caucus session or engage in shuttle mediation. This does not mean, however, that the relationship between technological interactivity and dispute complexity is sometimes an inverse one. Rather, it has to do with having access to the full range of interactive tools, to be turned off or on as circumstances warrant.

There are, of course, so many more questions to answer. Perhaps the association between technological interactivity and dispute complexity doesn't prove to be as strong when examining one level of complexity at a time. Is it true, for instance, that people who don't know each other well can negotiate more effectively in text? Is this, then, more to do with the nature of the relationship than it has with dispute complexity? What about dispute type (e.g., property, spousal support, child access), cultural differences, age and other demographic factors? Do they factor into how these two variables are associated?

Clearly, the connection between interactivity and complexity is not fully understood. Yet, during the *Distance Family Mediation Project,* the Project team experienced a need for some proportionality when using technology — some fit between the technology and the task at hand. A phone call or an email, for example, seemed appropriate for addressing small inquiries or setting appointment dates, while web conferencing was suitable for joint mediation sessions. Perhaps, then, it is "task complexity" as much as "dispute complexity" that is the important variable here.

Whatever the operative variables, the Project team's observations certainly are food for thought for those interested in gaining a clearer understanding of how best to fit technology to a dispute. At the very least, they provide a potentially useful launching point for mediators wishing to integrate technology into their mediation practice.

How's Your On-Screen Presence?
A Quick Check List for Video and Web Conferencing

In video and web conferencing, the physical environment that is projected electronically by the mediator is an integral part of setting the tone for the mediation. Improperly addressed or managed, it can be distracting, affect the mediator's presence and negatively impact the mediation generally. The following are some basic rules of thumb for managing this environment:

Lighting
- *Lighting is well-positioned.* The most flattering light is at face level and from the side.
- *Not too harsh, not too soft.* Lighting is not so bright as to cause glare, but not so soft as to cause shadows or to create a sense of darkness.

Background
- *The background is suitably professional in appearance.*
- *Any distracting clutter is out of viewing range.*

Clothing
- *Professional attire.* This includes clothing that is not visible to parties while you are seated. You may need to stand up!
- *No busy colours and patterns.*
- *The right glasses.* If you wear eye glasses, wear non-reflecting ones as they will interfere with eye contact.
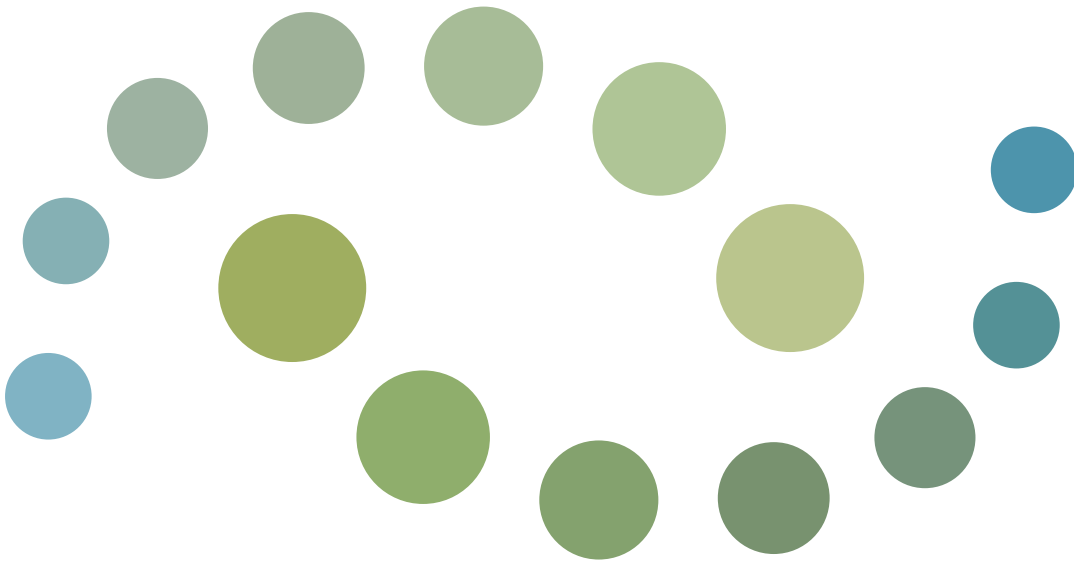
Position
- *On-screen positioning follows the rule of thirds:* Have your eyes about 1/3 down from the top of the screen, with your body centred.
- *Shoulders and torso show.* Your shoulders and your torso from the waist up, or less, should be showing.
- *Not too close, not too far.* Too close and your face will seem enormous; too far and you will seem disengaged.
- *Webcam is positioned away from lights/sunlight.*
- *Look and feel comfortable.* Make yourself comfortable, and relax. You may be in this position for some time.

Personal Presentation
- *Watch but don't stare.* Work to maintain appropriate eye contact. Just as it is in face-to-face mediation, it is fine look down at documents or periodically look away.
- *Calm movements.* Avoid large or jerky movements. They may use excessive bandwidth and create a blurring effect.
- *Remember, you can be seen and heard.* Avoid the same side-activities as in person, eating included!

Check and Check Again
- *Pre-mediation check.* If using a platform with a self-view video pane, check your appearance before parties enter the platform.
- *Ongoing checks.* Periodically, during mediation, check to make sure your on-screen presence is still at its best.