

An Introduction to Remote Mediation

There is a pressing need to adopt new ways to resolve difficulties and disagreements which are part of the ups and downs of organisational and business life which we have been used to mediating in face-to-face meetings. Much business life now uses remote communications away from our offices and mediation has similar potential to be organised online. We have attempted to answer some commonly asked questions about remote mediation in the following two pages and provide an overview of the mediation process at page 3. If you wish to know how remote mediation might work for a disagreement you are involved in do get in touch with Robin Burley (robin@eskhill.com) or Lindsay Burley (lindsay@eskhill.com) or 0131 271 4000 for a without obligation discussion.

What is Remote Mediation?

1. Mediation is a creative way to resolve disputes by a third side, the Mediator, assisting people to negotiate a settlement for themselves.
2. Remote mediation is where the participants are unable, or do not wish, to meet in person but wish to conduct their negotiation from different locations. This may be because of time or location constraints and at this time of a pandemic it is especially relevant to enable disputes to be resolved without the risk to participants' health.
3. Remote mediation can be carried out by telephone or video conferencing. There are many video platforms which work across the Internet which can be used such as Skype, Facetime, Microsoft Teams, GoToMeeting and Zoom.
4. Our preference is to use Zoom as we find it is both a more stable platform with broadband services which are weak and it has facilities such as the waiting room, breakout rooms, whiteboard and screen sharing which enable the mediator to virtually replicate the physical set-up in meetings rooms we usually use for mediation.
5. The Mediator is the host when using Zoom and has the full Zoom Pro software which gives them full access to controls which are needed to manage the meeting. Other participants can join a Zoom session by telephone, smart phone, tablet or computer running IOS or Windows.
6. The mediator sends each participant joining instructions which contain a web URL, a meeting ID and a password. For anyone joining by telephone there is also a telephone number to dial and a password for entry. Clicking on the URL will take a participant to the Zoom meeting on their web browser but it is best if participants download the Zoom App and then they can enter the meeting by ID and Password.
7. The Zoom App is free for people joining a mediation where the mediator is hosting the meeting using Zoom Pro. It can be obtained at: <https://zoom.us/support/download> and it is also available from Apple and Android App Stores.
8. For a Zoom video mediation it is best to be connected to a good broadband signal by Wifi but as Zoom is a relatively stable platform at low bandwidths it can be accessed using a smart phone's Sim card phone signal. If the video signal becomes unstable it is possible to continue by switching off the video and continuing using sound only.
9. Prior to the Zoom mediation meetings participants can test their equipment, connection, sound and video at the link: <https://zoom.us/test>.

What do I need to mediate remotely?

5. Participants can join a remote mediation by telephone, smart phone, tablet, laptop or desk computer. Most platforms for video conferencing, including Zoom, will operate on Apple or Android operating systems.

Do I need experience of using Zoom?

- 11.** Eskhill mediators are experienced in remote mediation and it is important to us that parties are comfortable using the technology. We believe that participants will get the best outcome for their mediation if they are at ease with the system and Zoom platform. To assist, we make a special point of providing whatever training and familiarisation participants feel they need.
- 12.** During the preliminary conversations with both parties about a mediation we will establish whether there is a willingness to proceed with remote mediation and whether we can assist by providing training and familiarisation with the Zoom video conferencing platform. We can provide an online session with participants tailored to their level of experience with Zoom. This is an additional service which we offer which is at no additional cost to the parties and is distinct from the time we spend with them in pre-mediation conversations and the mediation day.

What are the special Zoom features?

- 13.** **Waiting Room:** After entering your joining information you will enter the Zoom waiting room where you will not see anyone else but the mediator-host will know you are there. The mediator will be able to let you into a joint session room to meet all the participants or invite you into one of the breakout rooms – see below.
- 14.** **Breakout Rooms:** These virtual rooms are the way we arrange private meetings with the parties and their advisors in a Zoom mediation. During the mediation the parties and the mediator can move between the joint session room and the private session rooms in the same flexible way as in a physical mediation.
- 15.** **Whiteboard:** During a conventional mediation the mediator may use a flipchat to record points in the discussion. Using Zoom we can use a virtual whiteboard in the same way which helps to provide a focus for the dialogue.
- 16.** **Screen Share:** Quite often during a mediation we have a need to look at documents that are tabled by one or other of the parties and their advisers. We can do the same thing in a remote mediation by using the Screen Share facility. Anything that can be seen on one of the participants screens can be put into screen share so it can be seen by

the other participants. We can also use this facility to draw up and revise a settlement agreement.

- 17.** **Record meeting:** By default, we switch off the ability of parties to make a recording of the meeting. But there are points such as when a settlement is reached that the parties may wish to make a record of their agreement to the resolution of the dispute and, if the parties agree, the mediator can switch on the record meeting facility to make a record of the settlement.

Can I trust it to be Secure and Confidential?

- 18.** As in conventional mediations both parties and the mediator, and any other person involved in the mediation, enter into an agreement to mediate which includes a confidentiality clause.
- 19.** The confidentiality agreement requires all persons involved to observe the confidentiality of the whole process of the mediation including the written papers and oral communications.
- 20.** We use a version of our standard Agreement to Mediate which has been amended to suit the circumstances of remote mediations. It is available as a model agreement on request.
- 21.** Only people named in the agreement to mediate can attend the mediation and all participants confirm that they will not permit anyone else to listen in.
- 22.** Recording the mediation is not permitted unless all the parties and the mediator agree to a record being made which may be useful such as at the point of agreeing to the settlement.
- 23.** The confidentiality of mediation can only be set aside with the specific agreement of the parties; if required at law; or, if non-disclosure may lead to significant harm to a person's life or safety.
- 24.** Within the mediation, the mediator will keep confidential information given by one party unless express permission is granted for some or all of that information to be disclosed to another party.
- 25.** The Zoom platform is encrypted and further information on its security and privacy settings are available on the Zoom website.

What happens in a Remote Mediation?

Once the parties have decided in principle that they wish to resolve their dispute by remote mediation they will the mediation will follow a very similar course to conventional face-to-face mediations.

There will usually be a need for a pre-mediation meeting in addition to any meetings described earlier which may be arranged familiarize the participants about the use of Zoom. The pre-mediation meeting(s) may consider a number of procedural matters including:

- the timetable and use of the Zoom platform;
- a draft of the agreement to mediate
- representation at the mediation day
- the preparation of case summary documents
- the procedure on the mediation day
- the appointment of an assistant or co-mediator.

The mediator will organise the exchange of case documents that summarise the matter and the issues at dispute as seen by each party, if required. The mediator will seek to agree a format and style for these documents with the two parties. These documents will then be prepared by the parties and their advisors and be sent to the mediator in order that they can be circulated to the parties in good time for the mediation day.

The mediation day will normally be scheduled for a full day and will be chaired by the mediator who determines the procedure. It should be borne in mind that mediating by video conference can be personally demanding and the mediator will discuss with the parties ways to ensure that the mediation day is organized in sessions with breaks.

On the mediation day there may be initial meetings between the mediator and each party in their private rooms using the breakout rooms described at 14 above. These private meetings will normally be followed by a joint meeting at which the mediator will clarify the process and each party will make a presentation of their case to the other party and the mediator. This will be followed by dialogue chaired by the mediator.

After joint dialogue, and at the request of either party or the mediator, there may be private meetings between the mediator and each party to explore the issues and identify options for moving forward. The mediator will not discuss anything from a private party meeting with the other party unless authorised to do so by first party.

As the mediation progresses the private meetings may be followed by joint meetings. The mediator may hold meetings with any combination of the parties and their advisors as he/she considers may assist the negotiation to move forward.

The parties will be free to withdraw from the mediation at any time after informing the mediator and if this happens the mediation will terminate.

The mediation may be adjourned by agreement between the parties to be resumed at another time either using remote mediation or, if circumstances allow, in a face-to-face session.

Other than by reaching a settlement or by a party withdrawing, the mediation may be terminated by the mediator if he/she considers the mediation is unlikely to reach a settlement or another substantive matter is discovered such as a conflict of interest becomes known.

If a settlement is reached a settlement agreement will need to be drawn up and executed by the parties. This records the parties' agreement in their terms and the mediator may be involved in assisting them in drafting the document. Where the parties have legal advisers involved in the mediation, the settlement agreement will normally be drafted by the legal advisers. The settlement agreement can be drawn up during the remote mediation using the share screen facility in Zoom and the mediator will be able to assist in coordinating this process.

If a settlement is not reached on the mediation day the mediator may continue to liaise with the parties if they wish and it is quite common for mediations that do not reach settlement on the day to settle within a few days.