

ADOPTED

by the board of NGO “NAMU”
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RECOMMENDATIONS
for mediators on preparing and conducting online mediation
(as revised by Working Group “ODR in Ukraine” NGO “NAMU” 02.11.2021)

These recommendations are made by the professional community of mediators in response to the challenges which arise in the daily practice of mediator with respect to new circumstances, diversity of life situations, lack of developed regulation at the legislative level, etc., and they are disseminated to provide basis for a safe professional mediation practice.

These recommendations contain best practices evolved in the professional community of mediators in Ukraine and abroad at the time of their formulation, and therefore there is a need for them to be revised and detailed subject to the emergence of other practices.

This version of recommendations was made by the members of **Working Group “ODR in Ukraine”** NGO “NAMU” in view of achievements of the law students at National University of Kyiv Mohyla Academy, opinions of the separate members of NAMU and achievements of meeting-discussion`s **“ODR: should be implemented or stopped”** participants.

Increase in the use of online communication tools, caused inter alia by COVID-19 pandemic and the necessity to comply with the quarantine rules, predetermines the need for mediators to take care of the possibility of providing services online in a qualitative and save manner for all participants of mediation, considering technical peculiarities and feasible challenges.

According to the survey by Northwestern University law professor Steven Goldberg, conducted among veteran mediators, **establishing rapport between mediator and parties to the mediation is more important to effective online mediation, than employing specific mediation techniques and tactics.**¹

Preparation process and conduction of online mediation by mediator, connected to the free use of technical aspects and possible technical support of mediation`s participants, are one of the key phases in the building trust of participants to the mediation in general.

1. GENERAL PROVISIONS

- 1.1. **Online mediation** – is a mean of resolving disputes with the help of third neutral party – mediator, which aimed at finding solutions that would reflect interests of both parties to the dispute, in a way of conducting negotiations in the online mode through the use of information and communication technologies (ICT) of remote synchronic (simultaneous) and/or asynchronous (consecutive) communication.
- 1.2. **Asynchronous communication** – usually, written communication via e-mail or in the chats, as well as exchange of audio and video messages (not in the real time mode).

¹ <https://www.pon.harvard.edu/daily/mediation/dispute-resolution-using-online-mediation/>

1.3. During preparation process and conduction of online mediation following **information and communication technologies (ICT)** are used:

1.3.1. **Synchronic (simultaneous) communication:**

- audio communication means (telephony, audio conference through special applications);
- video communication (video chats, special means of video communication).

1.3.2. **Asynchronous (consecutive) communication:**

- audio communication means (exchange of audio messages in the chats);
- written communication (by an email, in the chats);
- video communication (exchange of video messages in the chats).

1.4. Online mediation **can be conducted in any case** by the choice of mediator or based on the request from the parties, where **it should be conducted in the following situations:**

- parties for any reason do not consider acceptable face-to-face communication within the same premises;
- whereabouts / residence of the parties and/or the mediator are geographically distant from each other, there are obstacles (physical, economic, time, epidemic, others) or danger on the way of parties and/or mediator to the meeting place.

1.5. **Potentiality of online mediation:**

- free choice of location by each party to the mediation;
- all participants may be in the place and environment the most comfortable and convenient for them;
- there is no use of resources (time, financial, physical) on the transfer to the agreed location, one for all parties, to conduct a face-to-face meeting;
- in the asynchronous communication there is more time for all participants of the process to formulate their questions and answers;
- in the synchronic communication mediator uses technical instruments to control the communication process online, in particular, interruption of destructive communication of the parties;
- physical distance between parties may constitute an additional security factor during mediation, and facilitate dispute resolution;
- parties can additionally in a confidential or public manner indicate their state and/or request by writing in the chat personally to the mediator;
- there is an additional mean of nonverbal communication by use of symbols, pins, emojis, “reactions”;
- the faces of all participants of mediation are under the view of mediator.

1.6. **Challenges of online mediation:**

- high dependence of the quality of communication on the technical skills of participants of mediation, sound quality and possibilities of technical means of communication, lighting quality;
- difficulty in determining the one comfortable application of communication for all participants;
- peculiarities of mediator`s work with the emotions (difficulty in adequate interpretation of psychological and emotional state of the parties, their support in sensitive communication, impossibility to influence parties in the heat of passion in a real time);
- peculiarities of mediator`s work with the content of negotiations (difficulty in adequate interpretation of the real sense of text provided during the asynchronous communication; spelling and punctuation mistakes in the text);
- additional pressure in communication leads to its deceleration due to the technical obstacles and the need of numerous interrogations and clarifications;

- online communication requires increased use of psychological, intellectual, and physical resources of participants concerned;
- there is an increased risk of violating the principle of confidentiality (disclosure of information through negligence or intentional actions of participants of the process or unlawful actions of third parties, unsuccessful choice of communication`s location);
- there is an increased risk of wrongful interpretation of parties` actions and/or events connected to the technical aspects of communication.

1.7. There is a need of special attention to be paid to the coordination with the parties of methods of concluding an agreement on mediation and recording the results of a meeting and/or mediation:

- online (via special applications for document signing);
- by post (paper printing in the amount necessary for all parties of the process, forwarding to post offices of the parties and their hand-writing signing);
- combined (forwarding of agreement via email or chats for further signing by the participants, exchange of scans or photo of signed documents).

1.8. After the completion of mediation a need in the coordination of communication channels and frequency of further communication may occur, in particular, but not limited to, for inspecting of the implementation of agreements between the parties (on their demand).

2. SPECIAL PROVISIONS ON PREPARING AND CONDUCTING OF MEDIATION

2.1. In the light of the abovementioned advantages and challenges, the preparation process of online mediation, besides ordinary actions of mediator, includes:

- identification in the text of agreement on mediation of the signing method, the fact of mediation conduction in the online mode, the agreed platform / application, which would be used for communication between participants of mediation;
- coordination with the parties of list of programmes and software applications, which would be used;
- clarification of technical equipment and technical skills of the parties, providing advice on use of online instruments during mediation;
- on demand, providing of the abovementioned actions / measures with every participant of mediation (in particular, with the third parties);
- warnings about the peculiarities of the pace of work online: deceleration, questions about sound quality, interruptions for technical reasons, need of a conference restart or re-entering, repetition of questions and answers;
- additional clarification to the parties of the need to make by themselves safe environment for the time of meeting (that nothing distracts, no one listens);
- agreement on inadmissibility by participants of mediation to combine video or audio conference with other domestic and/or business affairs, trips and other activities;
- agreement on communication with video cameras turned on or off;
- drawing participants' attention to their placement considering indoor light source and placement of their face on the video;
- prediction and agreement on the alternative means of communication in the event of poor Internet quality;
- agreement on a prompt cause identification of participant exit out of conference (accident, intentional exit);
- agreement on possibility of online means of communication`s technical instruments` use by mediator, in particular, interruption of destructive communication of the parties;

- other specific agreements between participants of mediation process, which would facilitate online communication in the light of special need of the said participants.

2.2. In the light of the abovementioned advantages and challenges, the preparation process of online mediation, besides ordinary actions of mediator, includes:

- constant technical assistance and verbalization of the processes, which are conducted through synchronic or asynchronous communication (naming of actions: “I am demonstrating the screen, searching for a document, uploading document, I did receive your message, I will be able to answer on this or that day” etc.);
- coordination of time for a meeting, in particular, creation of all needed links for an identified entry of parties;
- use of cloud services (Google doc, Google sheets, etc.), online services for joint discussion facilitation (Jamboard, Miro, etc.) for visualization. Mediators is recommended to organise an access to such documents and services taking into account confidentiality requirements, to have separate conversation with the participants of mediation concerning access mode and the use of data, notes, etc.;
- possibility to change video conference in the format of separate rooms (caucuses) based on the decision of mediator or on the demand of a party / parties;
- mediators` reaction on the participants` distraction during the meetings (combination video or audio conference with other domestic and/or business affairs, trips and other activities, etc.);
- prompt cause identification of participant exit out of conference (accident, technical obstacles, intentional exit);
- recalling agreements on confidentiality challenges and rules for its ensuring:
 - not to make video and/or audio records in the programmes/applications where video or audio conference is taking place;
 - participants should reaffirm (aloud) and make commitment to each other that there is no screen record or any other record by means of voice recorder;
 - participants should reaffirm (aloud) and make commitment to each other that in the premises, from which they enter to video or audio conference, there is no other persons not determined beforehand;
 - to reassure that all participants acknowledge that they cannot send links with access to video or audio conference and/or documents to other persons without such coordination with mediator and other participants;
 - provision of agreed access mode to cloud documents and writing communication;
- taking into consideration the deficit of nonverbal communication and the need in additional verbal clarifications of reactions and/or state of mediation`s participants;
- fulfilment of other specific agreements between participants of mediation process.

3. ADDITIONAL MATERIALS

3.1. Some recommendations and standards of international mediators community can be found at the following links:

- International Mediation Institute (IMI) – <https://imimediation.org/about/who-are-imi/>
- National Centre for Technology and Dispute Resolution (NCTDR) – <https://odr.info/standards/> and <https://odr.info/ethics-and-odr/>
- International Council for Online Dispute Resolution (ICODR) – <https://icodr.org/standards/>
- Global platform Mediate.com – <https://www.mediate.com/articles/OnlineMediationPrimaryRecommendations.cfm>
- Center for Effective Dispute Resolution (CEDR) – <https://www.cedr.com/commercial/telephone-and-online-mediations/>

- The ODR page of the European Commission – <https://ec.europa.eu/consumers/odr/main/?event=main.home2.show>
- United Nations Commission on International Trade Law, UNCITRAL – https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/v1700382_english_technical_notes_on_odr.pdf

3.2. More information on the process of online dispute resolutions in society`s digitalization, in particular regarding online mediation, can be find on the Facebook pages of "[ODR in Ukraine](#)" and [NAMU](#).